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May 11, 2016

VIA ELECTRONIC MAIL

Melanie A. Bachman
Acting Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Re: Petition 1224 – RES Americas, Inc. Petition for Declaratory Ruling for Solar Energy Project Located on Woods Hill Road, Pomfret, Connecticut

Dear Ms. Bachman:

I am writing to respond to the May 9, 2016 comments provided in the above-referenced Petition by the Connecticut Department of Agriculture. As is articulated in greater detail below, there appears to be a question as to the limits of the Siting Council’s jurisdiction to undertake what Department of Agriculture is requesting in its comments. The Petitioner will leave it to the Siting Council to determine whether it has such jurisdiction. If the Siting Council determines that it does indeed have such jurisdiction, however, there are several issues associated with the comments that the Petitioner wishes to bring to the Council’s attention. These issues are also discussed below.

As an initial matter, the Siting Council, as is the case with all administrative agencies in the state, is an agency of limited jurisdiction. Having the Council opine with respect to agricultural lands, as the Department is requesting, may go beyond the scope of the Council’s jurisdiction. The Connecticut Supreme Court recently ruled on the issue of the limits of agency jurisdiction in *Kleen Energy Systems, LLC v. Commissioner of Energy and Environmental Protection*, SC 19362 (Conn. 2015). In that decision, the Supreme Court noted, on p. 8 of 19 of the slip opinion, that: “Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely [on] the validity of statutes vesting them with power and they cannot confer jurisdiction [on] themselves.”

The Court went on to recognize “that [i]t is clear that an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner. . . . It cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power.” *Id.*, citing *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672, 685, 931 A.2d 159 (2007). (Internal quotation marks omitted.)

For purposes of the petition, the Siting Council would look to Conn. Gen. Stat. 16-50g *et seq.* to measure the scope of its jurisdiction. It is not clear to the Petitioner how determinations regarding agricultural land are within the Council's jurisdiction. If the Council finds that it does not have jurisdiction over this issue, then the prudent course would be to take no action, since any action that the Siting Council would take would be a nullity as articulated in the *Kleen* decision. If however, the Siting Council does determine that it has jurisdiction over the issue, this does not end the inquiry, since there are still several issues with the Department's comments that bear further review.

The first issue is that the Petitioner is not seeking any state monies through the Siting Council approval process, nor does the Siting Council convey funds to prospective applicants or petitioners. While the Department may well be correct about the disposition of state funds when farm lands are involved, there are no state funds involved in this Petition. As such, the Department's comments do not appear to apply to the Petitioner in this matter.

Secondly, the Department discusses what might happen if the property in question does not remain in agricultural use, but this discussion is speculation, not fact. The Department cannot say for certain what will happen with respect to the surrounding agricultural production, nor can the Department offer a basis to infringe on the landowners' property rights. While the Department is correct that the state has often limited development rights on agricultural land, the Department makes no assertion that the development rights to these parcels have been limited in some way. That is because, to the best of Petitioner's knowledge, these sites are unencumbered by such development restrictions. The properties could be sold for housing sites, allowed to lie fallow, or be used for any permitted development – including the development of solar power. The Department's desire for this land to be used for agriculture is not enough to warrant the encumbrance of the owners' property rights.

Thirdly, the Department cites no scientific basis for its conclusion that the development as proposed will have an adverse impact to the soil or land. Rather, the Department makes that conclusion, but does not provide any evidence to support it. The Petitioner, in contrast, has submitted a detailed petition that addresses this issue, along with other technical issues associated with this development. Despite extensive research on this issue by the Petitioner, the Petitioner has been unable to find any factual basis for the position that long-term dormancy under ground-mounted solar PV panels will have any negative effect on the arability of a parcel of farmland. If such materials existed, the Petitioner has no doubt that the Department would have already provided those materials to the Council.

Finally, the Petitioner would be remiss if it did not note that it would likely be far more environmentally harmful if the Petitioner found a site that required large scale clearing of wooded habitat, or some other wild landscape, rather than using land that has already been disturbed by agricultural uses as the site for this project. By proceeding in this fashion, the Petitioner anticipates that the impacts from its project will be far less than if it proceeds as the Department's comments suggest.

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Thank you for your attention to these issues. If there are any questions concerning the foregoing, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Lee D. Hoffman". The signature is written in a cursive style with a large, sweeping initial "L".

Lee D. Hoffman

cc: Robert Klee, Commissioner, Department of Energy and Environmental Protection