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October 20, 2017

VIA ELECTRONIC MAIL AND U.S. MAIL

Melanie Bachman
Executive Director/Staff Attorney
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Re: Petition of DWW Solar II, LLC for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for a 26.4 Megawatt AC Solar Photovoltaic Electric Generating Facility In Simsbury, Connecticut

Dear Ms. Bachman:

I am writing on behalf of my client, DWW Solar II, LLC, ("DWW") in connection with the above-referenced Petition. Enclosed with this letter is an original and 15 copies of DWW's Response to the Siting Council's October 17, 2017 Request for comments related to the testimony of George Logan.

Should you have any questions concerning this submittal, please contact me at your convenience. I certify that copies of this submittal have been made to all parties on the Petition's service list.

Sincerely,

Lee D. Hoffman

Enclosure

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

Petition of DWW Solar II, LLC for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for a 26.4 Megawatt AC Solar Photovoltaic Electric Generating Facility In Simsbury, Connecticut	**Petition No. 1313**
	October 20, 2017

DWW SOLAR II, LLC'S RESPONSE TO SITING COUNCIL'S OCTOBER 17, 2017 REQUEST FOR RESPONSE

The petitioner, DWW Solar II, LLC ("DWW") submits this response, pursuant to the request of the Siting Council in connection with the October 17, 2017 requests made by Michael Flammini, Laura Nigro, Linda Lough, Lisabeth Shlansky, Zhenkui Zhang, John Marktell, Rob Perissi, Christine Kilbourn-Jones and Ed Wrobel ("the Abutters" or "Flammini et al.") related to the testimony of George Logan. As is set forth in greater detail below, DWW respectfully moves that the Siting Council deny the Abutters' two requests and require the Abutters to properly follow the rules and orders the Siting Council requires of every party that participates in a Siting Council hearing. In this case, that would mean requiring the Abutters to answer the interrogatories that DWW served upon them, and making Mr. Logan available for further cross examination. In the alternative, DWW respectfully requests that the Siting Council dismiss the Abutters from this matter entirely, or at a minimum, excuse DWW from answering any interrogatories served upon DWW by the Abutters and disallowing the Abutters to cross examine DWW.

It has been nearly two months since the Abutters voluntarily moved to insert themselves into this Petition. DWW did not object to their inclusion as parties, however, DWW did expect that the Abutters would adhere to the requirements of hearing practice before the Siting Council.

Indeed, Chairman Stein echoed such an idea during the conclusion of the Abutters' cross examination by the Siting Council during the October 10, 2017 hearing: "Can you make it concise? Because we're trying to move this, and you came in late. I know you have a big group, but really, you, know, we all play by sort of the same rules and fairness." Transcript, Petition No. 1313, October 10, 2017, p. 328.

DWW applauds the Chairman's notion of fairness, however, DWW must respectfully submit that the Abutters do not want to play by the same set of rules as the other participants in this Petition. Nearly two months after the Abutters sought to participate as parties in this Petition, and more than a month after the Abutters proffered the testimony of Mr. Logan, and a week after the Council and other parties spent resources, preparation time, and valuable hearing time preparing for and conducting the cross examination of Mr. Logan, the Abutters wish to have Mr. Logan's testimony and exhibits stricken from the record. In addition, the Abutters are asking for permission to ignore the Siting Council's properly issued order with respect to DWW's Motion to Compel responses from the Abutters, particularly as it relates to Mr. Logan's testimony.

The stated reason for this desired non-compliance is that the Abutters lack the funds to respond DWW's interrogatories and also lack the funds to have Mr. Logan properly cross examined once the Council and the remaining parties have had a chance to review those interrogatory responses. The Abutters do not claim that the interrogatories are improper or objectionable, nor do they claim that Mr. Logan is unable to provide responses to the interrogatories. Instead, they claim that have chosen to spend their money elsewhere, so they lack the funds to properly comply with the rules and orders of the Siting Council. DWW notes that the Abutters have the funds to continue to propound discovery requests on DWW and

presumably to pay for counsel to cross examine DWW and its witnesses, therefore, the Abutters lack of action in this matter must be a conscious choice by the Abutters.

Putting aside whether the Council and the other parties can truly "unring the bell" of Mr. Logan's testimony, exhibits and cross examination, and putting aside the resources that have been expended by the Council and parties to analyze the proffered testimony and provide cross examination, the requests made by the Abutters are still fundamentally unfair. The Abutters are seeking to participate in offensive discovery (namely the proffering of interrogatories to DWW and cross examination of DWW's witnesses) and are willing to pay for such activities. However, by making these requests of the Siting Council, the Abutters are consciously choosing not to pay for defensive discovery – i.e., properly responding to the discovery served upon them by DWW. They are choosing not to pay to fully participate in this Petition, and not to respond to requests that are nearly a month old. Despite such claims of poverty, they have the ability to proffer new requests of their own and have every expectation that DWW will continue to pay its witnesses to provide responses to the Abutters' interrogatories.

DWW does not believe for a moment that it could excuse itself from complying with discovery requests by claiming that it no longer desired to pay relevant consultants to respond to those requests, and the Abutters have cited no relevant legal authority as to why they should be permitted to do so. Such an accommodation flies in the face of settled Connecticut jurisprudence that "discovery rules are designed to facilitate trial proceedings," so that a trial will be "more a fair contest with the basic issues and facts disclosed to the fullest [practicable] extent." *Vitone v. Waterbury Hospital,* 88 Conn.App. 347, 357 (2005).

It bears repeating that the Abutters voluntarily sought to be part of this proceeding. They were not forced to do so. When the Siting Council issued its order granting party status to

Flammini et al. on September 6, 2017, it included the *Connecticut Siting Council Information Guide to Party and Intervenor Status* ("Guide") as part of that order. The Abutters made no objections to being bound by the Guide.

Section C of the Guide provides instructions as to how discovery is to be conducted: "The Council encourages parties and intervenors to file pre-hearing questions to the applicant *and other parties and intervenors* in the proceeding on any information in the record, including, but not limited to . . .pre-filed testimony of other parties and intervenors in the proceeding." Section C goes on to state that: "The applicant, *parties and intervenors* are *obligated* to respond to pre-hearing questions directed to them that are filed by the Council, *the applicant*, and any party in the proceeding in accordance with the schedule announced by the Council." Emphasis added.

The Abutters are obligated to respond these questions, not only by requirements of Section C, but also by the Siting Council's granting of DWW's Motion to Compel. The Abutters are affirmatively choosing not to do so. The Abutters could pay Mr. Logan's fees and have him complete the (now reduced) interrogatory responses and have him return for another round of cross examination. They refuse to do so. Such refusal to comply with discovery requirements, however, has the potential for severe consequences to litigants who refuse to follow the rules.

In *Millbrook Owners Association, Inc. v. Hamilton Standard*, 257 Conn. 1 (2001), the Connecticut Supreme Court looked at the inherent authority of a tribunal to dismiss an entire proceeding for abuses in the discovery process. The Court noted that if a party fails to comply with discovery obligations, the tribunal "has the inherent power to provide for the imposition of reasonable sanctions to compel the observance of its rules." *Id.* At 9, citing *Gionfrido v. Wharf Realty, Inc.,* 193 Conn. 28, 33 (1984). Actions by a tribunal in response to discovery abuses are

part of the inherent power of the tribunal. *Id.* As such, "as with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action." *Id.* at 15.

In the *Millbrook* case, a trial court dismissed a toxic tort case brought by a group of homeowners for the plaintiffs' failure to adhere to discovery requirements. Although the Supreme Court reversed the trial court's decision in *Millbrook*, the Supreme Court noted that dismissal of an action is warranted where the party's disobedience was "intentional, sufficient need for information sought is shown, and dispobendient party [is] not inclined to change position." *Id.* At 17. *See also, Fox v. First Bank,* 198 Conn. 34, 39 (1985); *Pavlinko v. Yale-New Haven Hospital,* 192 Conn. 138, 145 (1984).

The reason for the Court's dismissal in Millbrook was that the discovery order issued by the trial court was insufficiently clear so that the plaintiffs arguably did not know that dismissal of the entirety of their action was a possible outcome of their failure to follow the discovery rules. In reaching its decision, the *Millbrook* court established a three prong test to ascertain whether dismissal for abuse of discovery orders was appropriate: 1) the order to be complied with must be clear; 2) the order must be violated; and 3) the sanction must be proportional to the violation. *Id.* at 17-18.

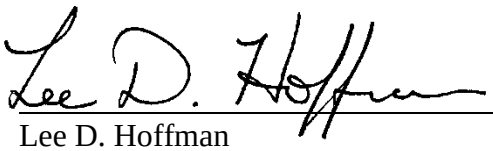
It cannot be argued that prong three of this test has already been met by the Abutters' actions. The Abutters will undoubtedly argue, as did the *Millbrook* plaintiffs, that they did not know that their willful refusal to comply with Siting Council orders could result in dismissal. That issue can be easily rectified by the Siting Council. All that would be required is a revised order by the Council stating that failure to comply with its order regarding DWW's Motion to Compel by a date certain will result in dismissal. The only remaining question, then, is whether

such a sanction would be "proportional" to the offense, which is a question that only the Council can answer.

Put simply, however, the Council has broad sanctioning authority available to it, and it should utilize that authority to make sure that all of the parties in this Petition are subject to the same set of rules. The interests of justice are not advanced if certain parties are permitted to participate freely as they like and are unburdened by the need to pay for their participation. In addition to being inherently unfair to all of the participants in this Petition, allowing such action will set a dangerous precedent for future Siting Council matters.

WHEREFORE, DWW respectfully moves that the Siting Council deny the Abutters' two requests and require the Abutters to provide full responses to the interrogatories served upon the Abutters and to make Mr. Logan available for further cross examination once those interrogatories are answered. In the alternative, DWW respectfully requests that the Siting Council dismiss the Abutters from this matter entirely, or at a minimum, excuse DWW from answering any interrogatories served upon DWW by the Abutters and disallowing the Abutters to cross examine DWW.

Respectfully Submitted,
DWW Solar II, LLC

By: 

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Certification

This is to certify that a copy of the foregoing has been mailed via U.S. Mail, first class postage prepaid, and/or electronically mailed on October 20, 2017 to all parties and intervenors of record, as well as all pending parties and intervenors as follows:

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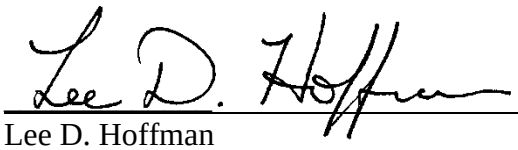

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