



# 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](mailto:siting.council@ct.gov)

[www.ct.gov/csc](http://www.ct.gov/csc)

### VIA ELECTRONIC MAIL

December 8, 2017

TO: Parties and Intervenors

FROM: Melanie A. Bachman *MAB*  
Executive Director

RE: **PETITION NO. 1313** - DWW Solar II, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 26.4 megawatt AC solar photovoltaic electric generating facility on approximately 289 acres comprised of 5 separate and abutting privately-owned parcels located generally west of Hopmeadow Street (US 202/CT 10), north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection to Eversource Energy's North Simsbury Substation west of Hopmeadow Street in Simsbury, Connecticut.

---

Pursuant to Section 16-50n(f) of the Connecticut General Statutes and Section 16-50j-26 of the Regulations of Connecticut State Agencies, at the conclusion of the evidentiary hearing session held on November 2, 2017, the Connecticut Siting Council (Council) closed the evidentiary record for this matter and established December 2, 2017 as the date by which briefs and proposed findings of fact may be submitted to the Council by parties and intervenors, as well as established December 2, 2017 as the date by which additional written limited appearance statements may be filed with the Council.

Also at the conclusion of the evidentiary hearing session held on November 2, 2017, the Council announced that no new information, no new evidence, no argument, -- and no reply briefs without permission -- will be considered by the Council.

On December 1, 2017, the Council received two filings from Flammini, et al, a Request for Administrative Notice and a Memorandum in Opposition to DWW's Petition for Declaratory Ruling.

At a public meeting held by the Council on December 7, 2017, the Council voted to deny Flammini, et al's December 1, 2017 Request for Administrative Notice on the basis that it was submitted 30 days after the close of the evidentiary record and requests administrative notice of items that are either already in the record or that are irrelevant to the record.

Furthermore, the Council rejected Flammini, et al's December 1, 2017 Memorandum in Opposition to DWW's Petition for Declaratory Ruling on the basis that it was submitted 30 days after the close of the evidentiary record and presents new information and argument in contravention of the Council's hearing procedure.

Enclosed is a copy of the staff report, dated December 7, 2017.

MAB/RDM/laf

Enclosure



CONNECTICUT SITING COUNCIL

Affirmative Action / Equal Opportunity Employer





# 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](mailto:siting.council@ct.gov)

[www.ct.gov/csc](http://www.ct.gov/csc)

DATE: December 7, 2017

TO: Council Members

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

RE: **PETITION NO. 1313** – DWW Solar II, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 26.4 megawatt AC solar photovoltaic electric generating facility on approximately 289 acres comprised of 5 separate and abutting privately-owned parcels located generally west of Hopmeadow Street (US 202/CT 10), north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection to Eversource Energy's North Simsbury Substation west of Hopmeadow Street in Simsbury, Connecticut. **Staff Report – Flammini, et al Request for Administrative Notice and Memorandum in Opposition to DWW's Petition for Declaratory Ruling.**

---

On December 1, 2017, Flammini, et al, a party to the above-referenced matter, submitted a Request for Administrative Notice and a Memorandum in Opposition to DWW's Petition for Declaratory Ruling (Memorandum). On December 4, 2017, DWW submitted Opposition to Flammini, et al's Request for Administrative Notice and Memorandum (Opposition).

The above-referenced petition for a declaratory ruling (petition) was submitted to the Council on June 29, 2017. On July 20, 2017, during a regular meeting, the Council exercised its discretion under Connecticut General Statutes (CGS) §4-176 and voted to hold a public hearing, consisting of an evidentiary session and a public comment session, in the Town of Simsbury on September 12, 2017. The Council also deemed the petition complete and approved a schedule for the proceedings. On July 28, 2017, pursuant to CGS §16-50m, the Council published legal notice of the date and time of the public hearing in the Hartford Courant.

On July 27, 2017, the Council notified parties and intervenors of the scheduling of a pre-hearing conference to discuss pre-hearing procedure, hearing procedure and post-hearing procedure. A copy of the Council's Administrative Notice List was attached to the pre-hearing conference memorandum. On August 3, 2017, the Council held a pre-hearing conference and discussed the requirements for pre-filed testimony, exhibit lists, administrative notice lists, expected witnesses, filing of pre-hearing interrogatories and the logistics of the September 12, 2017 site inspection.

On August 28, 2017, Flammini, et al requested party status in the proceeding, which was granted during a regular Council meeting held on August 31, 2017.<sup>1</sup> On September 6, 2017, the Council mailed notification to counsel for Flammini, et al that party status was granted and attached the Council's "*Information Guide to Party and Intervenor Status*," which provides detailed information and instructions relative to service requirements and the conduct of the proceedings, including, but not limited to, the pre-hearing conference, pre-filed

---

<sup>1</sup> Council Memorandum, dated September 5, 2017; On October 2, 2017, counsel for Flammini, et al submitted a request for party status on behalf of Christine Kilbourn-Jones, who was granted party status and grouped by the Council, pursuant to CGS §16-50n(c), with Flammini, et al. during the October 10, 2017 continued evidentiary hearing session.

testimony, pre-hearing interrogatories, administrative notice, experts and/or witnesses, cross examination, and post-hearing procedure.

On September 9 and September 11, 2017, Flammini, et al submitted pre-filed testimony. Also on September 11, 2017, Flammini, et al submitted a “Memorandum in Support of the Department of Agriculture’s (DOAg) August 23, 2017 Motion to Deny Declaratory Ruling” (DOAg Motion). During a regular meeting held on September 28, 2017, the Council denied DOAg’s Motion, as well as the supporting Motions to Deny Declaratory Ruling submitted by the Town of Simsbury (Town); Flammini, et al; and the Department of Energy and Environmental Protection (DEEP).

A deliberate schedule was developed for parties and intervenors to submit pre-filed testimony, exhibits and pre-hearing interrogatories in advance of each public hearing. The Council held an evidentiary hearing session and a public comment session in the Town of Simsbury on September 12, 2017. Continued evidentiary hearing sessions were held on October 10, 2017 and November 2, 2017. During the October 10, 2017 continued evidentiary hearing session, upon request, Flammini, et al were taken out of the order of appearances on the hearing program to accommodate counsel and witness scheduling conflicts.<sup>2</sup>

The evidentiary record for this matter closed at the conclusion of the continued evidentiary hearing session held on November 2, 2017. During the Chairman’s closing statement, it was announced that **no new information, no new evidence, no argument and no reply briefs** without permission will be considered by the Council.

**I. Flammini, et al’s December 1, 2017 Request for Administrative Notice was submitted 30 days after the close of the evidentiary record and requests administrative notice of items that are either already administratively noticed in the record or that are irrelevant to the record.**

On December 1, 2017, 30 days after the close of the evidentiary record for this proceeding, Flammini, et al submitted a Request for Administrative Notice of six items.<sup>3</sup> Requested Item No. 1 is the Council’s 2014/2015 Forecast of Electric Loads and Resources that is the Council’s Administrative Notice Item No. 49. Requested Item No. 2 is the DEEP’s 2014 Integrated Resources Plan that is the Council’s Administrative Notice Item No. 72. Requested Item No. 3 is the Tri-State RFP that is the Council’s Administrative Notice Item No. 38. Requested Item No. 4 is Public Act (PA) 05-1 and Requested Item No. 5 is a May 27, 2005 Office of Legislative Research Report on PA 05-1. PA 05-1 was codified at CGS §16-50k, the statute under which this petition was filed, in 2005. It’s already part of the record. Requested Item No. 6 is Council Docket No. 470, NTE Connecticut, LLC’s application for a certificate of environmental compatibility and public need (Application) for the construction, maintenance and operation of a 550-megawatt dual-fuel combined cycle electric generating facility and associated electrical interconnection switchyard located at 180 and 189 Lake Road in Killingly, Connecticut. The basis for this request appears to be an erroneous impression that DWW’s petition is an Application and the Council is required to find and determine a public benefit for the facility proposed by DWW in this *petition*. It does not.<sup>4</sup> Therefore, this item is irrelevant to the record and the five other items are already in the record.

The purpose of administrative notice requirements is to allow parties “to prepare intelligently for the hearing.”<sup>5</sup> At the time Flammini, et al’s Request for Administrative Notice was filed, the hearings on this

---

<sup>2</sup> Council Memorandum, dated October 5, 2017; Flammini, et al October 4, 2017 e-mail correspondence.

<sup>3</sup> Noticeably absent from this Request for Administrative Notice is the 1999 DEP/DPH General Guidance on Development of Former Agricultural Properties that is referenced in the final paragraph of page 10 of the Flammini, et al Memorandum, dated December 1, 2017.

<sup>4</sup> Council Staff Report, dated September 29, 2017.

<sup>5</sup> *Grimes v. Conservation Commission*, 243 Conn. 266 (1997).

matter were closed. It should be noted that the Council's Administrative Notice List was available on July 27, 2017 and DWW and DOAg's Administrative Notice Lists were available on September 5, 2017.<sup>6</sup> The evidentiary record for this matter closed on November 2, 2017. Flammini, et al's December 1, 2017 Request for Administrative Notice was submitted 30 days after the close of the evidentiary record and requests administrative notice of items that are either already administratively noticed in the record or that are irrelevant to the record. Therefore, staff recommends Flammini, et al's December 1, 2017 Request for Administrative Notice be denied.

**II. Flammini, et al's December 1, 2017 Memorandum in Opposition to DWW's Petition for Declaratory Ruling was submitted 30 days after the close of the evidentiary record and presents new information and argument in contravention of the Council's hearing procedure.**

Also on December 1, 2017, 30 days after the close of the evidentiary record for this proceeding, Flammini, et al submitted a Memorandum in Opposition to DWW's Petition for Declaratory Ruling. The Memorandum indicates that Flammini, et al "hereby join [DOAg and the Town's] Memoranda in Opposition to DWW's Petition," but neither entity has filed any such memoranda. Although DWW refers to Flammini, et al's Memorandum as the "Abutters' December 1, 2017 Brief," it is completely unclear as to whether this Memorandum is intended to be a post-hearing brief or a renewed Motion to Deny the Petition or a renewed Memorandum in Support of a Motion to Deny Petition, but regardless of what it is entitled or with whom it joins, the substance of the document irrefutably refers to new information and new argument that are not part of the evidentiary record of this matter, which **closed on November 2, 2017**.

The Memorandum also seeks to introduce two new exhibits and advances four arguments:

**1. DWW failed to give notice to each person appearing of record as an abutting owner; this proceeding is therefore void.**

Through its Memorandum, Flammini, et al seeks to introduce two new exhibits into the evidentiary record for this matter that closed on November 2, 2017 - a copy of a warranty deed and a certified copy of a map.<sup>7</sup> The grantor in the warranty deed is Girard Brothers Corporation and the grantee is Sunlight Construction, Inc. On page 3 of the Memorandum in footnote 2, Flammini, et al indicates the documents were "recently discovered." It also argues that the documents would have been introduced as "rebuttal evidence" at the last hearing, but "the Council decided to abruptly end the hearing without giving the parties an opportunity to present rebuttal testimony." If the documents would have been introduced at the last hearing on November 2, 2017, the statement that they were "recently discovered" is a contradiction. If Flammini, et al did not avail itself of the opportunity to present rebuttal evidence at the last hearing, the statement that "the Council decided to abruptly end the hearing without giving the parties an opportunity to present rebuttal testimony" is a fabrication.

Regardless of the conveniently manufactured excuses, Flammini, et al "ask that these documents be marked and entered as Homeowner Parties Exhibits." However, none of the members of the grouped

---

<sup>6</sup> Council Pre-Hearing Conference Memo, dated July 27, 2017; DWW Administrative Notice List, dated September 5, 2017 (DWW requested administrative notice of one additional, relevant item on October 26, 2017); DOAg Administrative Notice List, dated September 5, 2017.

<sup>7</sup> On page 3 of the Memorandum, Flammini, et al states, "Attached hereto is (1) a **certified copy** of a warranty deed..." However, the submitted warranty deed, unlike the submitted map, does not contain a stamp from the Simsbury Town Clerk that the warranty deed is a true copy of the original.

party could be cross examined on these documents and neither the grantor nor the grantee that could be cross examined on these documents is a party.<sup>8</sup>

Flammini, et al, as well as the Town,<sup>9</sup> appear to believe that the failure of DWW to provide **notice of the filing of the petition** to an abutting property owner is a “jurisdictional defect.” However, notice of the filing of a petition to abutting property owners is a personal notice requirement. Personal notice requirements are procedural, not substantive, legal requirements.<sup>10</sup> The Connecticut Supreme Court held that a defect in personal notice does not deprive an agency of subject matter jurisdiction and the failure to give personal notice to a specific individual is not a jurisdictional defect.<sup>11</sup> Thus, Flammini, et al and the Town’s belief that the failure of DWW to provide notice of the filing of a petition to an abutting property owner constitutes a “jurisdictional defect” is erroneous.

On page 30 of its post-hearing brief, the Town concludes that “DWW failed to notify a property owner abutting the Project Site, which resulted in [in]adequate<sup>12</sup> notice of the hearing.” However, DWW is not responsible for publication of notice of the hearing and on page 4 of its post-hearing brief, the Town cites statutory and regulatory provisions that require the *Council* to provide notice of the petition rather than provisions that require *DWW* to provide notice of the petition. This seems to imply that the Council, rather than DWW, failed to notify an abutting property owner, which resulted in [in]adequate notice. To the contrary, on July 28, 2017, pursuant to CGS §16-50m, the Council published required legal notice of the date and time of the public hearing in the Hartford Courant.

According to the Connecticut Supreme Court, the only notice of constitutional dimension is the **notice of the hearing**, not the notice of the filing of the petition.<sup>13</sup> Furthermore, in *Town of Middlebury, et al v. Connecticut Siting Council*, the Court held that parties lack standing to assert that a non-party did not receive notice.<sup>14</sup> The Town and Flammini, et al have not shown how they believe to be prejudiced by lack of notice to Sunlight Construction, Inc. and having been properly served themselves, they do not have standing to raise a lack of notice to Sunlight Construction, Inc.<sup>15</sup> Therefore, consistent with the holding of the Court, regardless of whether or not DWW provided notice of the filing of the petition to Sunlight Construction, Inc.,<sup>16</sup> the Town and Flammini, et al’s argument that this proceeding is void because DWW failed to give notice to an abutting property owner is also erroneous.

## 2. DWW is not entitled to avail itself of this declaratory ruling procedure.

Through its Memorandum, it appears Flammini, et al seeks to re-submit its September 6, 2017 Memorandum in Support of DOAg’s Motion to Deny Declaratory Ruling, which was denied by the Council on September 28, 2017, with a new argument that CGS §16-243r expressly excludes grid-side distributed resources from the provisions of CGS §16-50k unless those projects “add electric capacity.”

<sup>8</sup> Neither the grantor nor the grantee in the submitted warranty deed is a member of the Flammini, et al party group. See Flammini, et al Request for Party Status, dated August 28, 2017.

<sup>9</sup> On page 4 of the Town’s post-hearing brief, citations are made to the statutory and regulatory provisions that require the **Council** to provide notice of the petition rather than provisions that require **DWW** to provide notice of the petition.

<sup>10</sup> *Mobley v. Metro Mobile CTS of Fairfield County, Inc.*, 216 Conn. 1 (1990).

<sup>11</sup> *Id.*; *Lauer v. Zoning Com'n of Town of Redding*, 220 Conn. 455 (1991); *Torrington v. Connecticut Siting Council*, 1991 Conn. Super. LEXIS 2084 (1991)

<sup>12</sup> The statement actually reads, “DWW failed to notify a property owner abutting the Project Site, which resulted in adequate notice of the hearing,” but given the context, it appears the Town meant to characterize it as “INadequate.”

<sup>13</sup> *Mobley*, *supra* note 10.

<sup>14</sup> *Town of Middlebury, et al v. Connecticut Siting Council*, 326 Conn. 40 (2017); *Torrington supra* note 11.

<sup>15</sup> *Id.*

<sup>16</sup> See Exhibit A to DWW’s December 4, 2017 Opposition.



Capacity resources can include traditional power generation, renewable generation, or demand-side resources, such as load management and energy efficiency measures. DWW's project is renewable generation.

The regional system operator, ISO-NE, acquires new sources of electric generating capacity for reliability through the Forward Capacity Market Auction (FCA). DWW's Power Purchase Agreement (PPA) requires DWW to be an ISO-NE market participant and to take all necessary and appropriate actions to qualify and participate in the FCA, and all commercially reasonable actions to be selected and compensated in every auction year for the duration of the project's PPA.<sup>17</sup> If approved, the facility proposed by DWW is designed to "add electric capacity." Therefore, DWW is entitled to avail itself of this declaratory ruling procedure.

**3. DWW is not entitled to Council approval of its project because it does not satisfy a public need nor does it constitute a public benefit within the meaning of CGS §16-50p.**

Through its Memorandum, Flammini, et al alleges that it would constitute an abuse of the Council's discretion to turn a blind eye to the lack of both a public need and public benefit of this project. Yet, throughout the proceedings, Flammini, et al consistently fails to recognize that this is not an Application for which the Council must find and determine a public need or a public benefit under CGS §16-50p. Furthermore, PA 05-1, codified at CGS §16-50k, the statute under which this petition was filed, established a rebuttable presumption that there is a public benefit for electric generating facilities selected in a request for proposals. DWW's proposed project was selected in the Tri-State RFP.

A public need is defined as "necessary for the reliability of the electric power supply of the state," and it applies to Applications for all jurisdictional facilities **except for an electric generating facility**.<sup>18</sup> For electric generating facilities, the Council must find and determine a public benefit, which is defined as "necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity."<sup>19</sup> As more fully described in Subsection 2 above, capacity resources that clear the ISO-NE FCA, a competitive market for electricity, are, by definition, needed for reliability.

**4. If the project is to be approved by the Council, it should require adherence to the 1999 DEEP/DPH Guidance on Development of Former Agricultural Properties.**

Finally, through its Memorandum, Flammini, et al introduces new information and requests that if the Council approves the project, it should require DWW to adhere to this new information - the 1999 DEEP/DPH Guidance on Development of Former Agricultural Properties. This guidance document is not in the record, although given the date of the publication, Flammini, et al could have introduced the document into the record while the record was open, but it did not. Instead, 30 days after the evidentiary record for this matter closed, buried in a Memorandum, Flammini, et al introduces the new information and states, "It would be prudent for the Council to insist that the Petitioner conduct its activities in strict conformity with the Guidance. This could be accomplished as part of the D&M planning activities." To the extent that the project is approved, and to the extent that DWW deems this guidance relevant, DWW could reference it in the D&M Plan.

---

<sup>17</sup> Council Administrative Notice Item No. 38 – Tri-State RFP, Appendix C.

<sup>18</sup> Conn. Gen. Stat. §16-50p(a)(3) (2017).

<sup>19</sup> Conn. Gen. Stat. §16-50p(c)(1) (2017).

Flammini, et al's December 1, 2017 Memorandum in Opposition to DWW's Petition for Declaratory Ruling was submitted 30 days after the close of the evidentiary record and presents new information and argument in contravention of the Council's hearing procedure. Therefore, staff recommends the Memorandum be rejected as it was submitted after the evidentiary record for this matter closed and the Memorandum contains new information and new argument.

### **Conclusion**

Staff recommends the Council deny Flammini, et al's December 1, 2017 Request for Administrative Notice on the basis that it was submitted 30 days after the close of the evidentiary record and requests administrative notice of items that are either already in the record or that are irrelevant to the record.

Staff recommends the Council reject Flammini, et al's December 1, 2017 Memorandum in Opposition to DWW's Petition for Declaratory Ruling on the basis that it was submitted 30 days after the close of the evidentiary record and presents new information and argument in contravention of the Council's hearing procedure.