



# STATE OF CONNECTICUT

## CONNECTICUT SITING COUNCIL

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### VIA ELECTRONIC MAIL

September 5, 2017

TO: Parties and Intervenors

FROM: Melanie A. Bachman *NAB*  
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.

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During a public meeting of the Connecticut Siting Council (Council) held on August 31, 2017, the Council ruled on the following motions:

**1. DEEP Notice of Intent to be a Party, dated August 1, 2017**

Party status was granted with the condition that the ethical safeguards of separation of functions and responsibilities proffered by the DEEP Deputy Commissioners in the August 24, 2017 response to the Council's Request for Comments be implemented to establish a wall between the DEEP Commissioner and his designee on the Council acting as a member of the Council in this proceeding and the Deputy Commissioners and DEEP staff acting as a party to this proceeding, and that said ethical safeguards be affirmatively stated **in writing no later than September 7, 2017**, to assure the Council, the parties and the public that the DEEP Commissioner has not prejudged the adjudicative facts and law that are in dispute in this matter.

**2. DEEP Motion to be Placed on the Service List, dated August 10, 2017**

The motion was rendered moot on the basis that conditional party status was granted.

**3. Department of Agriculture Notice of Intent to be a Party, dated August 1, 2017**

Party status was granted.

**4. Department of Agriculture Motion to be Placed on the Service List, dated August 10, 2017**

The motion was rendered moot on the basis that party status was granted.

**5. Town of Simsbury Motion to Continue Hearing, dated July 28, 2017**

The motion was denied.

**6. Department of Agriculture Motion to Continue Hearing, dated August 10, 2017**

The motion was denied.

**7. Abutting Property Owners Flammini, et al Request for Party Status, dated August 28, 2017**

Party status was granted.

Enclosure



**STATE OF CONNECTICUT**  
***CONNECTICUT SITING COUNCIL***  
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DATE: August 25, 2017

TO: Robert Stein James J. Murphy, Jr.  
Daniel P. Lynch, Jr. Robert Silvestri  
Larry Levesque Michael Harder  
Dr. Michael W. Klemens

FROM: Melanie A. Bachman   
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 - DEEP Notice of Intent to be a Party.**

On June 29, 2017, DWW Solar II, LLC, pursuant to Conn. Gen. Stat. §4-176 and §16-50k(a), submitted a petition to the Connecticut Siting Council (Council) for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need (Certificate) is required for the proposed construction, maintenance and operation of a 26.4 megawatt (MW) solar photovoltaic electric generating facility located generally west of Hopmeadow Street, north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection in Simsbury, Connecticut. Petitions for declaratory rulings are defined under the Uniform Administrative Procedure Act (UAPA), which states, “any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability of specified circumstances of a provision of the general statutes, a regulation or a final decision on a matter within the jurisdiction of the agency.”<sup>22</sup>

As it applies to this matter, Section 16-50k(a) of the Public Utility Environmental Standards Act (PUESA), which governs the Council's jurisdiction and authority, states:

Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... (B) the construction or location... of any customer-side distributed resources project... or grid-side distributed resources project... with a capacity of not more than sixty-five megawatts, as long as such project meets air and

<sup>1</sup> The DEEP Commissioner's designee on the Council, Robert Hannon, is omitted as a recipient of this memo due to his appropriate recusal from the vote on this particular matter.

<sup>2</sup> Conn. Gen. Stat. §4-176(a) (2017).

water quality standards of the Department of Energy and Environmental Protection.<sup>3</sup>

Effective July 1, 2017, under Public Act 17-218, the Connecticut Legislature modified Section 16-50k to add the following language:

For a solar facility with a capacity of 2 or more MW, to be located on prime farmland or forest land, excluding any such facility that was selected by DEEP in any solicitation issued prior to July 1, 2017, the Council shall approve by declaratory ruling if the Department of Agriculture represents in writing that such project will not materially affect the status of such land as prime farmland or DEEP represents in writing that such project will not materially affect the status of such land as core forest.

The proposed project is a distributed resources project with a generating capacity of 26.4 MW and the petition for a declaratory ruling was received by the Council on June 29, 2017, prior to the effective date of Public Act 17-218. It was submitted under the 2015 New England Tri-State Clean Energy Request for Proposals (Tri-State RFP), but it was not selected by DEEP in this three-state solicitation; it was selected by Massachusetts and Rhode Island.<sup>4</sup>

On August 1, 2017, the Council received a Notice of Intent to Be a Party (Notice of Intent), pursuant to Conn. Gen. Stat. §16-50n(a)(2) and §16-50j(5) from Kirsten Rigney of the Bureau of Energy and Technology Policy at the Department of Energy and Environmental Protection (DEEP) informing the Council of DEEP Commissioner Robert Klee's (DEEP Commissioner) intent to participate as a party in the above-referenced proceeding and Attorney Rigney's intent to appear before the Council on behalf of the DEEP Commissioner. This is the first time the DEEP Commissioner has sought to participate as a party in a Council matter; the DEEP Commissioner's Notice of Intent has raised a significant legal issue for this Council, namely, may the DEEP Commissioner act as a party and also serve as a member of the Council in the same matter.<sup>5</sup>

On August 10, 2017, the Council issued a Request for Comments on the DEEP Notice of Intent from parties and intervenors to this proceeding seeking comments by August 24, 2017 on two issues: (1) whether DEEP has an automatic right to be a party in this proceeding because DEEP filed a Notice of Intent pursuant to Conn. Gen. Stat. §16-50n(a)(2); and (2) whether DEEP may participate both as a party and as a voting member of the Council in the same matter.

On August 21, 2017, the Town of Simsbury (Town) submitted a Response to the Council's Request for Comments regarding only the first issue, stating, "DEEP is a party to the above captioned matter because it filed a notice of intent...," but the Town did not address the second issue. On August 23, 2017, the Department of Agriculture submitted a response to the Request for Comments indicating its belief that DEEP's status as a party is non-discretionary to the Council and that DEEP may participate both as a party and as a voting member of the Council in this proceeding. On August 24, 2017, DEEP submitted a response from Deputy Commissioners Robert Kaliszewski, Susan Whalen and Mary Sotos, rather than the DEEP Commissioner, indicating that DEEP party status is by right

<sup>3</sup> Effective July 1, 2017, Conn. Gen. Stat. §16-50k was modified by Public Act 17-218.

<sup>4</sup> New England Tri-State Clean Energy RFP: Connecticut, Massachusetts and Rhode Island, November 12, 2015, available at <https://cleanenergyrfp.com/>

<sup>5</sup> Conn. Gen. Stat. §16-50j(b) provides "...the Council shall consist of: (1) The Commissioner of Energy and Environmental Protection, or his designee; (2) the Chairperson of the Public Utilities Regulatory Authority, or the Chairperson's designee; (3) one designee of the speaker of the House and one designee of the president pro tempore of the Senate; and (4) five members of the public, to be appointed by the Governor...." Attorney Robert Hannon has served as the DEEP Commissioner's designee on the Council since December 7, 2012.

and not subject to Council approval, and that DEEP may participate as both a party and as a member of the Council. Furthermore, the Deputy Commissioners indicate that “DEEP has and will resolve any perceived conflicts generated by its dual role through the implementation of appropriate ethical screens” and that “DEEP has established a wall between the Commissioner and his [designee] on the Council and the Deputy Commissioners and DEEP staff who will represent him as a party before the Council.” On August 24, 2017, the petitioner submitted a response indicating no objection to DEEP participating as both a party and a voting Council member, but respectfully requests DEEP and the Council develop a method whereby the agencies can assure the petitioner and the public that the standards for impartiality will be provided for in this Petition in order to adequately protect due process rights.

### **1. Whether DEEP’s Notice of Intent is non-discretionary to the Council.**

The legal analysis is straightforward regarding the DEEP Commissioner's statutory right to participate as a party in a declaratory ruling matter before the Council. Conn. Gen. Stat. §16-50n(a)(2) provides:

The **parties** to a certification or amendment proceeding or to a declaratory ruling proceeding **shall include**: ...**(2)** each person entitled to receive a copy of the application or resolution under **section 16-50j**, if such person has filed with the council a notice of intent to be a party.

Conn. Gen. Stat. §16-50j(b) provides, “Each application shall be accompanied by proof of service of a copy of such application on:... **(5) each state department, agency and commission named in subsection [(g)] of section 16-50j.**”<sup>6</sup> DEEP, among 11 other state agencies, is named in subsection (g) of section 16-50j.<sup>7</sup> Conn. Gen. Stat. §16-50j(b) also states, “Each application shall be accompanied by proof of service of a copy of such application on: **(1) each municipality in which any portion of such facility is to be located...**”<sup>8</sup> Therefore, the 12 state agencies listed in subsection (g) of section 16-50j and the host municipality in which the proposed facility is to be located, among other persons, shall be included as parties **if a notice of intent to be a party is filed with the Council.** Therefore, as long as the state agency or municipality file a notice of intent to be a party, they are entitled under the statute to participate as a party.

The sole remaining legal issue regarding the Notice of Intent is procedural, namely, must the Council vote on the notice or does the state agency or municipality become parties simply by filing the notice. The short answer is that as a matter of past practice and policy, this Council has typically voted on all such similar notices, and staff would recommend that this Council also do so here.

There is legal support for this recommendation. The DEEP Commissioner’s inclusion as a party, if a notice of intent to be a party is filed with the Council, is distinguishable from the DEEP Commissioner’s inclusion as a party under the Public Utilities Regulatory Authority (PURA) statute. Under the PURA statute, the DEEP Commissioner is automatically a party in all proceedings and

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<sup>6</sup> Public Act 14-94 re-designated subsections (c) to (h) as subsections (d) to (g) after deleting subsection (d).

<sup>7</sup> Conn. Gen. Stat. §16-50j(g) (2017) (“... the Council shall consult with and solicit comments from... DEEP, Department of Public Health, Council on Environmental Quality, Department of Agriculture, Public Utilities Regulatory Authority, Office of Policy and Management, Department of Economic and Community Development, Department of Transportation, Department of Emergency Services and Public Protection, Department of Consumer Protection, Department of Administrative Services and Labor Department.”)

<sup>8</sup> Conn. Gen. Stat. §16-50j(b) (2017).

may participate at his discretion.<sup>9</sup> By contrast, under Conn. Gen. Stat. §16-50n(a), “The parties... shall include: (2) each person entitled to receive a copy of the application or resolution under section 16-50/ if such person has filed with the Council a notice of intent to be a party.” Notice of intent implies acknowledgment; the purpose is to make people aware that there are plans to proceed with something. For example, the federal Clean Water Act requires the filing of a notice of intent that the submitting entity **intends to be authorized** to discharge pollutants and constitutes notice that **continued authorization** is contingent on maintaining eligibility.<sup>10</sup> Additionally, the U.S. Supreme Court upheld a requirement under California’s Warren-Alquist Act that an applicant must first file a **notice of intent to file** an application, after which the commission conducts a review process, and if the **notice of intent is approved**, the applicant must then file an application.<sup>11</sup>

This understanding of the statute is consistent with the Council’s past practice. When host municipalities provide their notice of intent to participate, the Council votes upon those notices. Similarly, the Council routinely acknowledges notices of intent to withdraw and notices of intent to surrender certificate, and in one instance, held a public hearing on a notice of intent to surrender certificate.<sup>12</sup> Also, under the PUESA, persons are required to submit Notice of Intent to Acquire Real Property.<sup>13</sup> Under Conn. Gen. Stat. §16-50z, “any person engaged in the transmission of electric power or fuel... intending to acquire real property in contemplation of a possible future facility... shall, prior to entering any binding commitment therefor, file with the Council a statement of intent to acquire such property.”<sup>14</sup> Within 30 days of the filing of the notice of intent, the Council may hold a hearing to review the conformity of the acquisition with its regulations.<sup>15</sup> Acquisition may not proceed without **approval from the Council**.<sup>16</sup> This also applies to Notice of Intent to Modify an Existing Facility.<sup>17</sup>

On July 6, 2017, the Council received an Application for Party Status, pursuant to Conn. Gen. Stat. §16-50n and §4-177a, from the Town. Like DEEP, the Town is a person entitled to receive a copy of an application or resolution under Conn. Gen. Stat. §16-50/(b). The Town could have entitled their submission, “Notice of Intent to be a Party.” During a regular meeting held on July 20, 2017, the Council took up the Town’s Application for Party Status as an agenda item and voted unanimously

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<sup>9</sup> Conn. Gen. Stat. §16-9b (2017) (“The Commissioner of Energy and Environmental Protection shall be a party to each proceeding before the Public Utilities Regulatory Authority and may participate in any such proceeding at said Commissioner’s discretion.”)

<sup>10</sup> 33 U.S.C. §1251, *et seq.* (2017).

<sup>11</sup> *Pacific Gas & Electric Co. v. State Energy Resources, Conservation and Development Commission*, 461 U.S. 190, 197 (1983) (The Warren-Alquist Act requires a commission to determine if adequate capacity for the storage of spent nuclear fuel rods is available before the building of additional nuclear plants.)

<sup>12</sup> Connecticut Siting Council, Notice of Intent to Withdraw, Docket Nos., including, but not limited to, 310; 313; 348; 350; 356; 357; 367; 372; 377; 378; 389; 394; 407; 409A; 418; 419; 430; 443; 447; 448; 450; 457; and 459; Connecticut Siting Council, Notice of Intent to Surrender Certificate, Docket Nos. 96, 103 and 190B (Upon the Certificate Holder’s filing of a notice of intent to surrender certificate with the Council, the City of Meriden filed a Motion to Reopen on Changed Conditions, which was granted by the Council.)

<sup>13</sup> Conn. Gen. Stat. §16-50z (2017).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; R.C.S.A. §16-50z-1, *et seq.* (2017).

<sup>16</sup> *Id.*

<sup>17</sup> R.C.S.A. §16-50j-56, *et seq.* (2017); R.C.S.A. §16-50j-71, *et seq.* (2017); (“the owner or operator of any energy component and associated equipment, or the owner or operator of any tower and associated equipment, shall give the Council... notice in writing... of the owner or operator’s intent to install such energy component and associated equipment, or intent to install such tower and associated equipment... Within 60 days of the filing of the notice of intent, the Council determines the conformity of the modifications with its regulations. Modifications may not proceed without acknowledgment by the Council.”)

to grant party status to the Town.<sup>18</sup> The Town did not contest the Council taking up the Town's Application for Party Status as an agenda item; there's no harm in an affirmative, unanimous Council vote. Regardless of the statutory path taken to attain party status, they all lead to the same result - a Council vote.

**2. Whether DEEP may participate as both a party and as a voting member of the Council in a proceeding.**

Unlike the DEEP Commissioner under the provisions of Conn. Gen. Stat. §16-50j(b), the Town is not a voting member of the Council. Neither are 10 of the 12 state agencies named in Conn. Gen. Stat. §16-50j(g). The PURA is the only other state agency beside DEEP for which the Chairperson, or the Chairperson's designee, is a voting member of the Council.<sup>19</sup> Consequently, under the provisions of the UAPA and the PUESA, the DEEP Commissioner is afforded three separate and distinct modes of meaningful participation in a Council proceeding held on an application for a certificate or a petition for a declaratory ruling – as a **member** of the agency under Conn. Gen. Stat. §4-166(1) and §16-50j(b), as a **party** to the agency proceeding under Conn. Gen. Stat. §4-176(d) and §16-50n(a), and as a **limited appearance** by providing state agency comments under Conn. Gen. Stat. §16-50j(g) and §16-50n(f).

The extent of each mode of participation is as follows:

Mode of Participation	Vote on proposed project	Right to appeal Council's final decision	Right to Cross examine petitioner and parties/intervenors	Be cross examined by petitioner, parties/intervenors and Council	Submit oral and written comments
Member	X		X		
Party		X	X	X	
Limited Appearance					X

As is apparent from the above chart, if the DEEP Commissioner were to employ each mode of participation simultaneously during a Council proceeding, the DEEP Commissioner would enjoy the benefits of a vote on the proposed project; a right to appeal the Council's final decision; the right to cross examine the petitioner and all other parties and intervenors to the proceeding, as well as to be cross examined by the petitioner, all other parties and intervenors to the proceeding and the Council; and to submit oral and written limited appearance comments. No other member of the Council, no other party or intervenor to the proceeding and no member of the public may enjoy all of these benefits simultaneously, if at all.

The Connecticut Supreme Court recognizes a common law right to fundamental fairness in administrative hearings.<sup>20</sup> Due process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and to offer rebuttal evidence.<sup>21</sup> The

<sup>18</sup> See Council Meeting Minutes, July 20, 2017.

<sup>19</sup> Conn. Gen. Stat. §16-50j(b) (2017) (Attorney Larry Levesque has been the PURA Chairperson's designee since March 25, 2010. PURA did not file a Notice of Intent to be a Party in this proceeding.)

<sup>20</sup> *Grimes v. Conservation Commission*, 243 Conn. 266, 273 (1997).

<sup>21</sup> *Id.*; *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207 (1974)

federal courts also recognize that a fair trial in a fair tribunal is a basic requirement of due process that also applies to administrative hearings, which must be attended, not only with every element of fairness, but with the very appearance of complete fairness.<sup>22</sup> The U.S. Supreme Court held in *Withrow v. Larkin*, “Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.”<sup>23</sup> Thus, the issue of DEEP’s dual roles presents a legal issue of fundamental fairness in the administrative process.

With reference to a limited appearance through state agency comments, in the case of *FairwindCT, Inc. v. Connecticut Siting Council*, the plaintiff-citizens’ group claimed the Council deprived them of the right to fundamental fairness in the administrative hearings by denying their request to cross examine an employee of the DEP who had submitted comments in the form of a limited appearance on the proposed wind projects pursuant to Conn. Gen. Stat. §16-50(j)(g).<sup>24</sup> The Connecticut Supreme Court disagreed with plaintiffs and held the right to cross examination in this instance was a matter of discretion for the Council, as is the use that the Council decides to make of the comments, and the Council did not deprive plaintiffs of a fundamentally fair proceeding.<sup>25</sup> The Court concluded that the Council reasonably could have determined, on the basis of the record before it that cross examination of the DEP employee was not required to allow the plaintiffs to present a full and true disclosure of the facts.<sup>26</sup> Therefore, when state agency comments are submitted to the Council, cross examination on those comments is discretionary to the Council.

With reference to party status, pursuant to the UAPA, parties to an agency proceeding “shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency..., and (2) at a hearing, to respond, to cross examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.”<sup>27</sup> This includes, but is not limited to, submission of oral or documentary evidence, cross examinations required for a full and true disclosure of the facts, and an opportunity to contest material noticed.<sup>28</sup> Parties also have rights to appeal a final decision of an administrative agency to the Superior Court.<sup>29</sup> According to the Connecticut Supreme Court, the statutes “...were intended to embody the common-law principles of fundamental fairness by ensuring that hearings on petitions for declaratory rulings are conducted in a manner that will not prejudice the parties and that will result in a full and true disclosure of the facts.”<sup>30</sup> Under the UAPA, cross examination is required for a full and true disclosure of the facts.<sup>31</sup> As a party, the DEEP Commissioner has an opportunity to cross examine the other parties and intervenors in the proceeding and the other parties and intervenors in the proceeding have an opportunity to cross examine the DEEP Commissioner. Furthermore, any party or intervenor has a right to appeal a decision of an administrative agency.

With reference to Council membership, the Connecticut Supreme Court has held it is not a violation of due process “for the same authority which initiated the subject matter of the hearing to listen to and determine its outcome as long as that authority gives the person appearing before it a fair, open

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<sup>22</sup> *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (DC Cir. 1970).

<sup>23</sup> *Id.*

<sup>24</sup> *FairwindCT, Inc., et al v. Connecticut Siting Council*, 313 Conn. 669, 718 (2014).

<sup>25</sup> *Id.*; See also *Corcoran v. Connecticut Siting Council*, 284 Conn. 455 (2007) (“Nothing in the statute requires the Council to abide by comments of other state agencies.”)

<sup>26</sup> *Id.* at 720.

<sup>27</sup> Conn. Gen. Stat. §4-177c (2017).

<sup>28</sup> Conn. Gen. Stat. §4-178 (2017).

<sup>29</sup> Conn. Gen. Stat. §4-183 (2017).

<sup>30</sup> *FairwindCT, Inc.*, *supra* note 24; See also *Grimes*, *supra* note 20.

<sup>31</sup> Conn. Gen. Stat. §4-178 (2017).

and impartial hearing.”<sup>32</sup> Moreover, there is a presumption that administrative board members acting in an adjudicative capacity are not biased.<sup>33</sup> The presumption of impartiality, however, is overcome if a panel member is shown to have “prejudged adjudicative facts that are in dispute.”<sup>34</sup> “A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing... The test for disqualification has been succinctly stated as being whether a disinterested observer may conclude that [the panel member] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it...”<sup>35</sup> Conn. Gen. Stat. §16a-3j confers authority upon the Commissioner, in consultation with the Procurement Manager, Office of Consumer Counsel and the Attorney General, to issue multiple solicitations for resources on behalf of Connecticut alone or in coordination with other states in the ISO-New England region.<sup>36</sup> DEEP, Massachusetts and Rhode Island coordinated the Tri-State RFP that resulted in the selection of the proposed project.<sup>37</sup> In addition to soliciting proposals under Conn. Gen. Stat. §16a-3j, the Commissioner also evaluates and selects proposals.<sup>38</sup> In the Tri-State RFP, the proposed project was selected by Massachusetts and Rhode Island, but not by DEEP. As a party, the DEEP Commissioner will certainly have judged facts and law in this matter “in advance of hearing it.” Thus, the presumption of impartiality clearly is overcome. If a member of a board fails to disqualify himself despite a conflict of interest, the action of the board on which he participated is rendered **invalid**.<sup>39</sup>

The legal doctrine of necessity dictates that disqualification must yield to necessity where to disqualify would destroy the only tribunal in which relief could be had and thus preclude determination of the issue.<sup>40</sup> The doctrine of necessity does not apply to this matter. Recusal of the DEEP Commissioner from the vote on this matter would reduce the number of voting Council members from 8 to 7 and therefore, would not preclude determination of the issue. However, if he simultaneously participates as a party and a voting Council member in this matter, without the implementation of ethical safeguards, there is a possibility that the final decision of the Council in this matter could be rendered invalid. Invalidation of the Council’s final decision in this matter would adversely impact the New England region, the state, Massachusetts, Rhode Island, the Council, DEEP, PURA, the petitioner, the other parties and intervenors in the proceeding, and the ratepayers. As a final example, if the DEEP Commissioner simultaneously participates as a Council member and as a party, absent

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<sup>32</sup> *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 151–52 (1993). See also *Gonzalez v. State Elections Enforcement Commission*, 145 Conn. App. 458, 469 (2013); *Eif v. Dep’t of Pub. Health*, 66 Conn. App. 410, 425 (2001).

<sup>33</sup> *Gonzalez*, 145 Conn. App. at 469, citing *Moraski v. Connecticut Board of Examiners*, 291 Conn. 242, 262 (2009).

<sup>34</sup> *Gonzalez*, 145 Conn. App. at 469.

<sup>35</sup> *Id.*

<sup>36</sup> Conn. Gen. Stat. §16a-3j (2017) (“In order to secure cost-effective resources to provide more reliable electric service for the benefit of the state’s electric ratepayers and to meet the state’s energy and environmental goals and policies..., the Commissioner..., in consultation with the procurement manager, Office of Consumer Counsel and the Attorney General, may, in coordination with other states in the control area of the regional independent system operator..., or on behalf of Connecticut alone, issue multiple solicitations ...”).

<sup>37</sup> *Id.*; New England Tri-State Clean Energy RFP: Connecticut, Massachusetts and Rhode Island, November 12, 2015, *supra* note 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Petrowski v. Norwich Free Academy*, 199 Conn. 231, 238-239, 241 (1986); *Thorne v. Zoning Commission*, 178 Conn. 198, 203-205 (1979) (“The appearance of impropriety created by a public official’s participation in a matter in which he has an interest is sufficient to require disqualification for the purposes of promoting public confidence in the fairness of the decision-making process and preventing the public official from placing himself in a position where he might be tempted to breach the public trust bestowed upon him.”); *Kovalik v. Planning & Zoning Commission*, 155 Conn. 497 (1967) (“The Chairman’s refusal to withdraw from the commission created a situation the evil of which the law seeks to avoid. It renders the action of the commission invalid.”)

<sup>40</sup> *Clisham v. Board of Police Commissioners*, 223 Conn. 354, 374 (1992).

implementation of any ethical safeguards, as both a Council member and as a party, he would be privy to any privileged and confidential attorney-client communications from the Council's legal staff related to the matter.

Therefore, with regard to DEEP's Notice of Intent to be a Party, staff recommends party status be granted with the condition that the ethical safeguards of separation of functions and responsibilities proffered by the DEEP Deputy Commissioners in the August 24, 2017 response to the Council's Request for Comments be implemented to establish a wall between the DEEP Commissioner and his designee on the Council acting as a member of the Council in this proceeding and the Deputy Commissioners and DEEP staff acting as a party to this proceeding, and that said ethical safeguards be affirmatively stated **in writing no later than September 7, 2017**, to assure the Council, the parties and the public that the DEEP Commissioner has not prejudged the adjudicative facts and law that are in dispute in this matter.