

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

DWW SOLAR II, LLC PETITION FOR	:	PETITION NO. 1313
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	:	AUGUST 24, 2017

**COMMENTS OF DEPARTMENT OF ENERGY & ENVIRONMENTAL PROTECTION
REGARDING PARTY STATUS**

On August 9, 2017, the Siting Council requested comments from parties and intervenors to this proceeding regarding the following two questions:

1. Whether the August 1, 2017 Notice of Intent of the Department of Energy and Environmental Protection ("DEEP") is non-discretionary to the Council pursuant to Conn. Gen. Stat. § 16-50n(a)(2) and Conn. Gen. Stat. § 16-50l(5) as cited by DEEP in the Notice of Intent; and

2. Whether DEEP may participate as both a party, pursuant to Conn. Gen. Stat. § 16-50n and Conn. Gen. Stat. § 4-176(d), and as a voting member of the Council, pursuant to Conn. Gen. Stat. § 16-50j(b), in the above-referenced proceeding.

As discussed below, DEEP's status as a party is effected upon filing of a notice of intent and is not subject to approval by the Siting Council.¹ Furthermore, DEEP may participate both as a party and as a member of the Siting Council in these proceedings.

¹ Similarly, the Department of Agriculture is a party, by right, in Siting Council proceedings upon filing of a Notice of Intent.

Question 1

Pursuant to the statutes governing declaratory ruling proceedings before the Siting Council, like this current action, DEEP becomes a party by right upon filing of a notice of intent to be a party.

DEEP filed its Notice of Intent to Be a Party on August 1, 2017 ("Notice of Intent") which informed the Siting Council of DEEP's intent to be a party to this declaratory ruling proceeding. DEEP's Notice of Intent was filed pursuant to Conn. Gen. Stat. § 16-50n(a)(2). Section 16-50n(a) states, "The parties to a . . . declaratory ruling proceeding *shall include*: . . . (2) each person entitled to receive a copy of the application or resolution under section 16-50l, if such person has filed with the council a notice of intent to be a party" (Emphasis added.) Conn. Gen. Stat. §16-50n(a). Therefore, in order to attain party status in a declaratory ruling before the Siting Council a party must: 1) be a person, 2) be entitled to receive a copy of the application or resolution under section 16-50l, and 3) have filed a notice of intent to be a party in the declaratory ruling proceeding.

DEEP has met the first requirement. As defined in § 16-50i(c), a person means any "governmental agency." Conn. Gen. Stat. § 16-50i(c).

DEEP has met the second requirement. Section 16-50l requires that copies of applications for certificates be sent to "each state department, agency and commission named in subsection (h) of section 16-50j" Conn. Gen. Stat. § 16-50l. In 2014, subsection (h) became subsection (g) when former subsection (d) was deleted. The first agency listed in Subsection (g) of Section 16-50l that Siting Council must consult with and solicit comments from is DEEP. Conn. Gen. Stat. § 16-50j(g)(1). Thus, DEEP is entitled to receive a copy of the application or resolution under § 16-50l.

DEEP has met the third requirement. On August 1, 2017, DEEP filed its Notice of Intent with the Siting Council.

The path to party status for DEEP in a declaratory ruling proceeding is simple and straightforward. Any argument that the list provided in § 16-50l must be confined to only certificate proceedings must fail due to the plain language of § 16-50n(a). Section § 16-50n(a), whose purpose is to define who can be a party to declaratory ruling proceedings, provides that "[t]he parties to a . . . declaratory ruling proceeding shall include. . . ." Such language is simply not susceptible of any other interpretation. To ignore this language would render § 16-50n(a) meaningless. "It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions." (Internal citations and quotation marks omitted). *Office of Consumer Counsel v. Dept. of Pub. Util. Control*, 234 Conn. 624, 646 (1995). The reference in § 16-50n(a) to the list in § 16-50l is clearly intended to provide the list of those people and agencies that shall be parties to a certificate, amendment or declaratory ruling proceeding as long as they meet the other requirements of 16-50n(a).²

Finally, at least one Connecticut court has concluded that, "Section 16-50n(a)(2) provides that the parties to a certification *or other proceeding* shall include each person entitled to receive a copy of the application under § 16-50l." (Emphasis added.) *City of New Haven v. Connecticut Siting Council*, No. CV020513195S, 2002 WL 31126293, at *7, n. 13 (Conn. Super. Ct. Aug. 21, 2002) (concluding that the Attorney General can be both a party and represent the Siting Council without conflict.)

² In 1989, the legislature expanded the list of proceedings under § 16-50n(a) to include declaratory ruling proceedings. In interpreting a statute, we are guided "by the presumption that the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law" (Internal citations and quotation marks omitted.) *Thomas v. Dep't of Developmental Servs.*, 297 Conn. 391, 404 (2010).

As DEEP has met the three criteria under § 16-50n(a), it is a party in this proceeding and requires no further action from the Siting Council.

Question 2

The second question posed by the Siting Council as to whether DEEP can participate in this proceeding as both a member of the Siting Council and a party must be answered in the affirmative. The relevant statutes compel this response. There is nothing exceptional or inappropriate in this arrangement and it has been the standard operating procedure for contested cases at DEEP for decades.

The framework for the DEEP Commissioner's ("Commissioner") participation in both roles is laid out in the statutes. As discussed above, the statutes defining Siting Council procedures clearly provide for DEEP to be a party in declaratory ruling proceedings. And, pursuant to Conn. Gen. Stat. § 16-50j(b), which defines the composition of the Siting Council, the Commissioner of DEEP, or his designee, is the first person listed who shall be a member of the Council. Conn. Gen. Stat. § 16-50j(b)(1). Any ruling from the Siting Council that prohibits the Commissioner from fulfilling both roles would clearly be contrary to these statutes. Furthermore, there is nothing in the statutes that suggests that if DEEP elects to become a party, the Commissioner must step down from his seat on the Siting Council. It is apparent from the plain meaning of the statutes that DEEP may both sit on the Siting Council and also be a party before it.

In fact, DEEP conducts numerous contested case proceedings every year in which the Commissioner serves as both the final decision maker and also appears as a party in the proceeding. DEEP has functioned in this manner for over 25 years. The cases in which DEEP serves simultaneously in both roles include a wide variety of contested case proceedings from

permitting proceedings to enforcement actions. Consistent with the Uniform Administrative Procedure Act, Conn. Gen. Stat. §§ 4-166 through 4-189, and DEEP's Rules of Practice, R.C.S.A. §§ 22a-3a-2 through 22a-3a-6, the Commissioner, in the person of his staff, appears before DEEP, in a proceeding where the Commissioner is also the decision-maker in the proceeding. Throughout such contested case proceedings, the Commissioner has two roles, but they are kept separate, and he fulfills the duties of both at the same time.

From an administrative law perspective, there is nothing unusual about the Commissioner's dual role as a voting member of the Siting Council and as a party before the Council. In fact, the contrary is true. A departure from the model in which the DEEP Commissioner fulfills both roles would be an unprecedented departure from the norms of administrative law governing administrative proceedings in Connecticut.³

DEEP has and will resolve any perceived conflicts generated by its dual role through the implementation of appropriate ethical screens. Guidance on the ethical concerns of this dual role can be found in *City of New Haven v. Conn. Siting Council*, 2002 WL 31126293 (Superior Court, Aug. 21, 2002). In that case, the Attorney General, who had intervened in a Siting Council proceeding under Conn. Gen. Stat. § 22a-19, appealed the decision of the Siting Council to Superior Court. The Attorney General, however, also represented (and still represents) the Siting Council. *See* Conn. Gen. Stat. §§ 3-125 and 16-50n(d). The Court ruled that there was no legislative impediment to the Attorney General serving in both roles. "The obvious way of

³ See Conn. Gen. Stat. § 4-176e, which makes clear that in an agency proceeding, including those to which the agency is a party, a hearing officer may be a member of the agency conducting the proceeding. That statute provides that "[e]xcept as otherwise required by the general statutes, a hearing in an agency proceeding may be held before (1) one or more hearing officers, provided no individual who has personally carried out the function of an investigator in a contested case may serve as a hearing officer in that case, or (2) one or more of the members of the agency." Under this provision, provided the Commissioner has not "personally carried out the function of an investigator" in this matter – which he has not done – he is clearly allowed to serve as a hearing officer, along with other members of the Siting Council, in this matter.

avoiding conflict is to find that the Attorney General's Office can fulfill both duties at the same time. . . . The Attorney General and several Assistant Attorneys General have initiated and prosecuted the administrative appeal, while several other Assistant Attorneys General have independently represented the Siting Council.” *New Haven*, 2002 WL 31126293 at *8.

Likewise, since the Siting Council has determined that this Declaratory Ruling will be conducted as a contested case, DEEP has established a wall between the Commissioner and his representative on the Siting Council and the Deputy Commissioners⁴ and DEEP staff who will represent him as a party before the Siting Council. This division ensures compliance with the rules regarding *ex parte* communications, which rules apply to the parties, the Siting Council itself, and anyone assigned to assist the Council. *See Conn. Gen. Stat. § 4-181.*⁵

In sum, the legislature intended the Commissioner to be on the Siting Council. *See Conn. Coalition Against Millstone v. Conn. Siting Council*, 2006 WL 1828155 at *5 (Superior Court, New Britain Judicial District, June 14, 2006) ("Section 16-50j(b) provides that the commissioner [of energy and environmental protection] is a member of the council. . . . By making the commissioner a member of the council, the legislature clearly intended that he sit on the council with all the pre-application, extra-record knowledge he had acquired in a particular field which is under his jurisdiction and relevant to a particular application . . ."). The legislature also provided DEEP a non-discretionary pathway to becoming a party to proceedings before the

⁴ Pursuant to Conn. Gen. Stat. § 22a-2, the DEEP Deputy Commissioners can exercise all of the powers of the DEEP Commissioner.

⁵ To the extent that the Siting Council's August 9, 2107 request for comments reflects a potential concern about bias, it is worth noting that disqualification of an administrative arbitrator is a higher standard than that of the appearance of bias standard in a judicial proceeding. Moreover, there is a presumption that administrative adjudicators are not biased and in order to overcome that presumption a complaining party must prove actual bias. *See Moraski v. Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 262 (2009). In this case, clearly no proof of actual bias has been introduced. Indeed, no party has even raised a claim about bias.

Siting Council. It would be contrary to the plain meaning of the statutes to not allow the Commissioner to sit as a member of the Siting Council and the Department to appear as a party.

DEPUTY COMMISSIONERS

ROBERT KALISEWSKI,
SUSAN WHALEN, AND
MARY SOTOS

CONNECTICUT DEPARTMENT OF ENERGY &
ENVIRONMENTAL PROTECTION



By:

Kirsten S. P. Rigney
Bureau of Energy Technology Policy
Department of Energy & Environmental Protection
10 Franklin Square
New Britain, CT 06051
Tel.: (860) 827-2984
Fax: (860) 827-2806
Kirsten.Rigney@ct.gov

I, Kirsten S. P. Rigney, hereby certify that a copy of the foregoing Comments of Department of Energy and Environmental Protection Regarding Party Status was sent on August 24, 2017, by electronic mail to the following parties on the Service List in this matter:

Petitioner, DWW Solar II, LLC

Lee D. Hoffman, Esq.
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702
Tel.: (860) 424-4315
Fax: (860) 424-4370
lhoffman@pullcom.com

Aileen Kenney
Deepwater Wind, LLC
VP, Permitting & Environmental Affairs
56 Exchange Terrace, Suite 300
Providence, RI 02903
Tel.: (401) 648-0607
akenney@dwwind.com

Town of Simsbury

Jesse A. Langer, Esq.
Robert M. DeCrescenzo, Esq.
Updike, Kelly & Spellacy, P.C.
One Century Tower
265 Church Street
New Haven, CT 06510
Tel.: (203) 786-8310
jlanger@uks.com
bdecrescenzo@uks.com

**Connecticut Department of
Agriculture**

Jason Bowsza
Department of Agriculture
450 Columbus Boulevard
Hartford, CT 06103
Tel: (860) 713-2526
Fax: (860) 713-2524
Jason.Bowsza@ct.gov



Kirsten S. P. Rigney