

**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 23, 2017

**COMMENTS OF DEPARTMENT OF AGRICULTURE REGARDING PARTY STATUS
OF DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION**

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.

For the reasons set forth below, the State of Connecticut Department of Agriculture ("DOA") believes that DEEP's status as a party is non-discretionary to the Council, as is DOA's status as a party,¹ and that DEEP may participate both as a party and as a voting member of the Council in this proceeding.

¹ In DOA's Motion to Be Placed on Service List, dated and filed August 10, 2017, DOA laid out the reasons why DOA's party status is as-of-right upon the filing of its Notice of Intent.

Question 1

By Notice of Intent to Be a Party, dated August 1, 2017 ("Notice of Intent"), which was filed with the Siting Council and served on all parties on the Service List in effect on that date (the July 20, 2017 Service List), DEEP, pursuant to Conn. Gen. Stat. § 16-50n(a)(2), informed the Siting Council of its intent to be a party to this declaratory ruling proceeding.

By statute, DEEP becomes a party to this proceeding upon the filing of the Notice of Intent. 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 supplied).

DEEP is a "governmental agency," and is therefore a "person" under the statute. Conn. Gen. Stat. § 16-50i(c). DEEP is one of the entities entitled to receive a copy of an application for a certificate filed under Conn. Gen. Stat. § 16-50l: § 16-50l(b)(5) requires that copies of applications for certificates be sent to "each state department, agency and commission named in subsection (h) of section 16-50j"

In 2014, subsection (h) became subsection (g) when former subsection (d) was deleted. Subsection (g) lists the agencies that the Siting Council must consult with and solicit comments from. These agencies include DEEP. Conn. Gen. Stat. § 16-50j(g)(1). Thus, DEEP is one of the entities to which § 16-50n(a) -- through § 16-50l(b)(5) and § 16-50j(g) -- refers.

The as-of-right nature of this party status is not limited to certificate proceedings. When § 16-50n(a) points to § 16-50l, it does so *only to supply the list of entities*. It does not do so in order to confine the proceedings in which a notice of intent automatically gives party status to *certificate* proceedings. The latter reading would make subsection (2) in § 16-50n(a)

meaningless in a declaratory ruling proceeding. It would read this provision out of the statute.

"It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions." *Office of Consumer Counsel v. Dept. of Pub. Util. Control*, 234 Conn. 624, 646 (1995) (internal citations and quotation marks omitted).

Question 2

The second question can be answered simply by consulting the statute. The Public Utilities Standard Act, §§ 16-50g -- 16-50ll ("the Act"), establishes the Siting Council. For proceedings concerning facilities that are not "hazardous waste facilities," the Siting Council consists of nine (9) members, one of whom is the DEEP Commissioner, or his designee. Conn. Gen. Stat. § 16-50j(b).² Section 16-50n(a) of the Act says who the parties to certification and declaratory ruling proceedings "shall be." As described above in response to Question 1, these parties include DEEP, if DEEP files a notice of intent to be a party.³ There is nothing in the Act that says if DEEP elects to become a party, DEEP must step down from its seat on the Siting Council. Thus, the plain language of the statute is that DEEP may both sit on the Siting Council and also be a party before it.

This is not the only time the General Assembly has enacted legislation where DEEP is both on the decision-making body and also can be a party before it. Under the statutes governing the former Underground Storage Tank Petroleum Clean-Up Account Review Board ("UST Board"), DEEP was a member of the UST Board.⁴ *See* Conn. Gen. Stat. § 22a-449d(b) (2011

² For the siting of hazardous waste facilities, the Siting Council consists of thirteen (13) members, none of whom is the DEEP Commissioner.

³ Even if one reads § 22a-16-50n(a)(2) to be limited to certificate proceedings, the statute still clearly allows DEEP to be both a party and a member of the Siting Council.

⁴ The legislature abolished the UST Board effective June 15, 2012. *See* June 12 Sp. Sess. P.A. 12-1. A copy of the statute as it existed immediately prior to this change is attached hereto at Tab A.

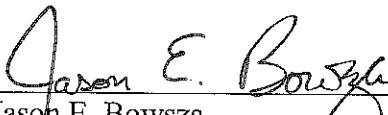
rev.). The UST Board statute gave DEEP the power to appeal a decision to the UST Board, *see* Conn. Gen. Stat. § 22a-449f(h) (2011 rev.), and, if DEEP did not like the UST Board's decision after hearing, appeal that decision to the Superior Court, *see* Conn. Gen. Stat. § 22a-449g (2011 rev.). There is thus nothing unusual about a structure where DEEP wears two hats: one as a member of the decision-making body and another as a party before that body. It seems evident that when the legislature enacts a statute with such a structure, it knows what it is doing and intends the result.

Question 2 seems to imply that DEEP might have to make a choice between remaining on the Siting Council as a voting member for this declaratory ruling or participating in the declaratory ruling proceeding as a party. There is no need to force DEEP to such a choice: the statute clearly does not require it and DEEP can manage any perceived conflicts by keeping its "two hats" separate through the implementation of appropriate ethical screens. Guidance on this issue 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 wearing both hats. "The obvious way of 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.

Similarly, here, DEEP can "fulfill both duties at the same time": DEEP can sit on the Siting Council for this declaratory ruling and DEEP can independently be a party before the Siting Council in the matter. Indeed, this "two hat" situation is one that DEEP (successfully) faces – and has faced for over 25 years – in each contested order and permit proceeding that is held before DEEP's Office of Adjudications. Consistent with the Uniform Administrative Procedure Act, Conn. Gen. Stat. §§ 4-166 through 4-189, and DEEP's Rules of Practice, Regulations of Conn. State Agencies, §§ 22a-3a-2 through 22a-3a-6, the DEEP Commissioner, in the person of his staff, appears before DEEP, in the person of the hearing officer. After the hearing, a final decision is issued by the DEEP Commissioner or his designee. Throughout this process, the DEEP Commissioner wears two hats: as a party and as the final decision-maker. The DEEP Commissioner has two roles in the proceeding, but they are kept separate, and he "fulfills both duties at the same time."

The legislature intended DEEP 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 . . ."). It also said DEEP could become a party to proceedings before the Siting Council if DEEP wished to. Provided DEEP keeps these roles separate, DEEP should be allowed to fill both.

STEVEN K. REVICZKY, COMMISSIONER
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Certification of Service

I, Jason E. Bowsza hereby certify that a copy of the foregoing Comments of Department of Agriculture Regarding Party Status of Department of Energy and Environmental Protection was sent on August 23, 2017, by e-mail and by first class mail, postage prepaid to the following parties on the Service List in this matter:

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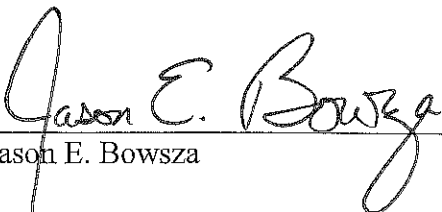
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