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August 24, 2017

VIA ELECTRONIC MAIL AND U.S. MAIL

Melanie Bachman
Acting Executive Director
Connecticut Siting Council
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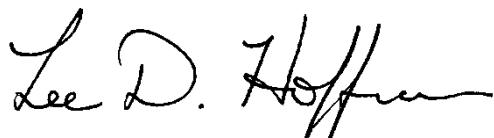
Re: Petition No. 1313 – Petition of DWW Solar II, LLC for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for a 26.4 Megawatt AC Solar Photovoltaic Electric Generating Facility in Simsbury, Connecticut

Dear Ms. Bachman:

DWW Solar II, LLC (“DWW”) hereby respectfully submits this response to the Connecticut Siting Council’s August 9, 2017 Request for Comments concerning the Department of Energy and Environmental Protection’s (“DEEP”) Notice of Intent to Be a Party in the above-referenced Petition.

Should you have any questions concerning the foregoing, please contact me at your convenience. I certify that a copy of this letter has been provided to all parties listed on the service list.

Sincerely,



Lee D. Hoffman

**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

August 24, 2017

**DWW SOLAR II, LLC'S RESPONSE TO THE CONNECTICUT SITING COUNCIL'S
AUGUST 9, 2017 REQUEST FOR COMMENTS**

The petitioner, DWW Solar II, LLC (“DWW”) respectfully submits this response to the Connecticut Siting Council’s August 9, 2017 Request for Comments concerning the Department of Energy and Environmental Protection’s (“DEEP”) Notice of Intent to Be a Party in the above-referenced Petition. In its Request for Comments, the Siting Council asked two questions of the parties and intervenors in this matter. These questions are addressed in turn below.

The first question was whether DEEP’s August 1, 2017 Notice of Intent was non-discretionary and whether the operative statutes (Conn. Gen. Stat. §§ 16-50n(a)(2) and 16-50l(b)(5)) required the Siting Council to grant the DEEP party status in the above referenced Petition. The operative language of Conn. Gen. Stat. § 16-50n(a)(2) would seem to answer this question clearly. The case currently before the Siting Council is a petition for declaratory ruling. As such, Conn. Gen. Stat. § 16-50n(a)(2) provides that “[t]he parties to a . . . declaratory ruling proceeding *shall include*: . . . each person entitled to receive a copy of the application or resolution under Conn. Gen. Stat. § 16-50l, if such person has filed with the council a notice of intent to be a party.” (Emphasis added).

Turning to Conn. Gen. Stat. § 16-50l(b)(5), one finds that a copy of such applications must be served upon, among others, “each state department, agency and commission named in

subsection (h) of Conn. Gen. Stat. § 16-50j.” Conn. Gen. Stat. § 16-50j(h) no longer exists, due to changes that eliminated Conn. Gen. Stat. § 16-50j(d). By eliminating Conn. Gen. Stat. § 16-50j(d), the General Assembly inadvertently referred the reader to a statute that was no longer there. However, the 2013 version of Conn. Gen. Stat. § 16-50j included a subsection (h), which listed several state agencies that must be consulted in the Siting Council process, including the Department of Energy and Environmental Protection. Accordingly, it seems clear that the General Assembly intended for the DEEP to be a party to petition proceedings before the Council, assuming that the DEEP filed the appropriate Notice of Intent.

What is less clear, however, is the role that the DEEP should play in the petition process once it asserts its rights to be a party to the proceeding. This leads to the Council’s second question in its Request for Comments, namely whether the DEEP should participate as both a party to this petition as well as a voting member of the Council under Conn. Gen. Stat. § 16-50j(b). As is explained in greater detail below, care must be taken in an administrative proceeding involving decision-making agencies that also have a role in the proceedings, lest due process rights be infringed upon. DWW respectfully submits that so long as such due process rights are protected and the representative of the DEEP that sits on the Siting Council remains unbiased, the DEEP may proceed both as a party to the proceedings as well as one of the members of the Council that renders a decision.

DWW bases this analysis on the body of case law which discusses the circumstances that give rise to a duty of recusal by a sitting member of an administrative agency. A leading case is *Petrowski v. Norwich Free Academy*, 199 Conn. 231 (1986). The question presented in *Petrowski* is what constitutes an impartial administrative hearing panel sufficient to satisfy constitutional due process. The *Petrowski* Court recognizes that due process requires a fair

hearing before a fair tribunal, which principle applies with equal vigor to administrative adjudicatory proceedings. The Court also recognizes that members of administrative boards have the benefit of a presumption of honesty and integrity. Therefore, in order to overcome this presumption, a demonstration of actual bias or conflict of interest is required. In performing this analysis, the *Petrowski* Court looked for a “direct, personal, pecuniary interest,” *Petrowski* at 240, in the outcome of the proceeding and in the absence of evidence of such found there was no need for recusal.

The standards elucidated in *Petrowski* were further articulated in *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, a Connecticut Superior Court case which dealt with a claim of bias on the part of two voting members of the Siting Council. The principles articulated by the court are illustrative, though not dispositive, for the matter currently before the Council:

“*Rado v. Board of Education*, 216 Conn. 541, 583 A.2d 102 (1990), articulates Connecticut law on bias by members of administrative agencies, as follows: “It has been generally recognized ... that due process does not require that members of administrative agencies adhere in all respects to the exalted standards of impartiality applicable to the judiciary. *Schweiker v. McClure*, 456 U.S. 188, 197 n. 11, 102 S. Ct. 1665, 72 L.Ed.2d 1 (1982). “The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.” *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173-74 (2d Cir.1984); see *Petrowski v. Norwich Free Academy*, *supra*, at 237. A presumption of impartiality attends administrative determinations, and the burden of establishing a disqualifying interest on the part of an adjudicator rests upon the one seeking disqualification. *Schweiker v. McClure*, *supra*, at 195-96; *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). To overcome the presumption, the plaintiff ... must demonstrate actual bias, rather than mere potential bias, of the board members challenged, unless the circumstances indicate a probability of such bias “too high to be constitutionally tolerable .” *Withrow v. Larkin*, *supra*.” *Id.* at 556.

Our Appellate court has reiterated these principles in the following excerpt from *Breiner v. State Dental Commission*, 57 Conn.App. 700, 750 A.2d 1111 (2000): “Absent countervailing proof, members of administrative bodies acting in an adjudicative capacity are presumed to be unbiased. *Jutkowitz v. Dept. of Health Services*, 220 Conn. 86, 100, 596 A .2d 374 (1991). “[To] prove bias as a ground for disqualification, the plaintiff must show more than an adjudicator's announced

previous position about law or policy ... *He must make a showing that the adjudicator has prejudged adjudicative facts that are in dispute.* " (Citations omitted; emphasis added; internal quotation marks omitted.) *Clisham v. Board of Police Commissioners* *supra*, [223 Conn.] at 362, 613 A.2d 254 [1992]. The bias must be so prevalent that it is "too high to be constitutionally tolerable." (Internal quotation marks omitted.) *Id.* at 705-06."

Connecticut Coal. Against Millstone v. Connecticut Siting Council, 2006 WL 1828155, at 2-3 (Conn. Super. Ct. June 14, 2006), aff'd, 286 Conn. 57, 942 A.2d 345 (2008.)

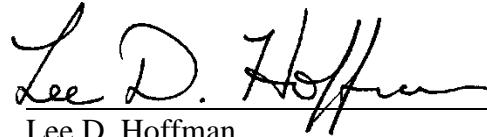
DWW would be remiss, however, if it did not note to the Council that the General Assembly has considered the issue of the interplay between DEEP's interest in a Siting Council issue and DEEP's ability to participate in Siting Council proceedings in an adjudicative capacity. Specifically, DWW notes that while DEEP is designated as a member of the Siting Council for the siting of electric generation facilities, transmission systems, cellular towers and other similar infrastructure under Conn. Gen. Stat. § 16-50j(b), the DEEP is not, however, included as a member of the Siting Council when the siting of hazardous waste facilities are to be considered under Conn. Gen. Stat. § 16-50j(c). An inference can be drawn that the General Assembly, recognizing that DEEP would play a key role in the permitting of such hazardous waste facilities, did not also want the DEEP to play a role in the adjudication of the siting of such facilities. However, DWW can find no articulation in the courts as to the interpretation of such language, and recognizes that the instant matter before the Siting Council is admittedly different from the siting of hazardous waste facilities as contemplated under Conn. Gen. Stat. § 16-50j(c).

Accordingly, DWW has no objection to the DEEP participating as both a party to the proceedings as well as having a representative of DEEP continue as a voting member of the Siting Council for this Petition. However, DWW respectfully requests that the DEEP and the Siting Council develop a method whereby the agencies can assure DWW, and the public at large,

that the standards for impartiality, as elucidated in *Petrowski* and its progeny, will be provided for in this Petition in order to adequately protect DWW's due process rights.

Respectfully Submitted,
DWW Solar II, LLC

By:



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Certification

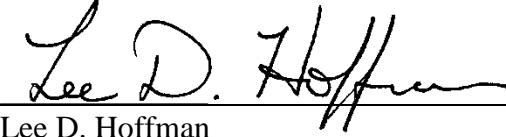
This is to certify that a copy of the foregoing has been mailed via U.S. Mail, first class postage prepaid, and/or electronically mailed on this date to all parties and intervenors of record, as well as all pending parties and intervenors as follows:

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