

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling for the Location,
Construction and Operation of a 4.8 MW
Wind Renewable Generating Project on
Flagg Hill Road in Colebrook,
Connecticut (“Wind Colebrook South”)**

Petition No. 983

May 6, 2011

**RESPONSE TO PETITIONER'S CLARIFICATION OF OBJECTION RE:
PARTICIPATION OF VICE-CHAIRMAN TAIT**

FairwindCT, Inc., Stella and Michael Somers, and Susan Wagner (the “Grouped Parties”) respond to the untimely filing by BNE Energy Inc., (BNE), in which BNE objects to the participation of Vice-Chairman Tait in these proceedings and request his recusal. BNE’s claim is not well-founded; there is no requirement for recusal by the Vice-Chairman under the facts alleged. BNE’s right to make such claim has been waived and is not seasonably raised.

While this is not a trial it is useful to consider the standards of recusal that are applicable to judges and magistrates. It is the Grouped Parties' position that the standard applicable to judges and magistrates is a higher standard than the standard that should be applied to one member of a nine-member administrative law body. The Vice-Chairman's participation meets the higher judicial standard. Our legislature has set out a standard in Conn. Gen. Stat. §51-39(b) which provides that a judge or family support magistrate shall not be disqualified to act in any

proceeding by reason of being an inhabitant of a town which is involved in a proceeding, or being liable for taxation in a town involved in a proceeding or by reason of being related to any taxpayer or inhabitant of the town involved in a proceeding.

BNE has not alleged that this matter will ever come before the Norfolk Inland Wetlands Commission for consideration or decision. BNE has not alleged that Norfolk is involved in these proceedings, and even if it were, under the standard provided in §51-39(b), there would be no reason for recusal. None of the disqualifying relationships listed in §51-39(a) are alleged by BNE. The Council's disclosure with respect to the Vice-Chairman does not demonstrate a financial or personal interest or familial relationship which would disqualify him.

Furthermore, §51-39(c) provides that any judge that is disqualified may act if the parties consent in open court. Consent in open court arises when parties fail to express timely objections. Vice-Chairman Tait's participation in these proceedings and his relationship to Norfolk, a nonparty, has been known to BNE since the beginning of this proceeding. The Siting Council circulated a memorandum dated March 21, 2011 advising all parties and intervenors that Vice-Chairman Tait is a member of the Norfolk Inland Wetlands Commission. BNE claims in their Objection of this same date that BNE never received copy of such memorandum because counsel for BNE was omitted from the Council's email distribution of the memorandum. BNE's Chairman, Paul Corey, who also represents BNE in this proceeding and is on the service list for this proceeding was a recipient of the March 21, 2011 email from the Council. Therefore, BNE's claim that they did not receive copy of the memorandum in question is false and BNE has known since March 21, 2011 of Vice-Chairman Tait's relationship to Norfolk and the Council's

request for timely objection to his participation in this proceeding. Whether BNE received copy of such memorandum or not, the memorandum is posted on the Council's website in both Petition No. 983 and Petition No. 984. The Council has, in other instances during the hearings on these petitions, indicated it is the position of the Council that the materials available on the website are considered to be in the possession of the parties to these petitions. Furthermore, as BNE has stated in their own objection to Vice-Chairman Tait's participation, BNE has known since the public hearing on March 23, 2011 that Vice-Chairman Tait may know at least one member of the public that is opposed to the project. The fact that Vice-Chairman Tait may know at least one member of the public that is opposed to the project is not grounds for disqualification, and if it were, for it to be seasonably raised, it should have been raised promptly after the disclosure was made and would require that the relationship be one that is a disqualification relationship under §51-39(a). No such allegations are made.

It is also well known that on Monday, May 2, 2011, in the Wind Prospect docket, Petition No. 980, a straw poll was taken by the Council. Based on his view of the merits in that proceeding Vice-Chairman Tait cast a tentative vote against that project. BNE is the petitioner in that proceeding.

BNE now makes this strategic objection in this docket, on the eve of the last day of evidence, based on its suspicion that Vice-Chairman Tait may vote the same way in this proceeding. There is no evidence of any such intention. The Vice-Chairman's comments in the Wind Prospect matter reveal that he intends to vote on each of the BNE petitions on their individual merits.

"It is well settled that, in both civil and criminal cases, the failure to raise the issue of [judicial] disqualification either before or during the trial, can be construed as the functional equivalent of consent in open court" (Internal quotation marks omitted.) State v. D'Antonio, 274 Conn. 658, 671 (2005). This is because the Supreme Court "will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, *for a cause which was well known to them before or during the trial*. We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Emphasis added; internal quotation marks omitted.) Timm v. Timm, 195 Conn. 202, 205, (1985).

Consent in open court arises when parties know or have reason to know of the judge's participation in the trial proceedings and the facts that require disqualification, but nevertheless, fail to object in a timely manner. See State v. D'Antonio, 274 Conn. 671 (judge who presided over plea negotiations also presided over trial); Timm v. Timm, 195 Conn. 203-205 (judge who presided over settlement conference also presided over trial); Krattenstein v. G. Fox & Co., 155 Conn. 609, 614-15 (1967) (same).


This late strategic objection to participation by Vice-Chairman Tait should not be indulged. There is no appearance of impropriety, there has been full disclosure, there is no basis for disqualification and objection was not made in a seasonal fashion.

There is no prejudice. There has been delay on the part of BNE. Delay results in waiver.

BNE's objection must be denied.

Respectfully submitted,

FairwindCT, Inc., Stella and Michael Somers and
Susan Wagner

A handwritten signature in black ink, appearing to read "Nicholas J. Harding", written over a horizontal line. The signature is stylized and includes a long, sweeping flourish that extends to the right and then curves downwards.

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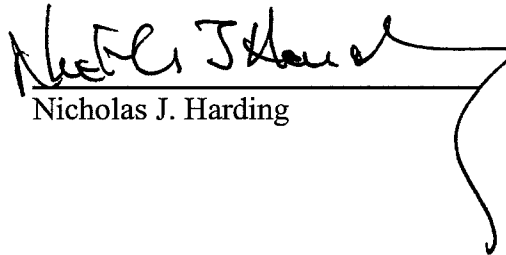
CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail and e-mail to the following service list on the 6th day of May, 2011:

Lee D. Hoffman
Bonnie L. Heiple
Paul Corey
Thomas D. McKeon
David M. Cusick
Richard T. Roznoy
David R. Lawrence and Jeannie Lemelin
Walter Zima and Brandy L. Grant
Eva Villanova

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King


Nicholas J. Harding