

PETITION NO. 984 - BNE Energy, Inc. petition for a } declaratory ruling that no Certificate of Environmental } Compatibility and Public Need is required for the } construction, maintenance, and operation of a 4.8 MW } Wind Renewable Generating facility located on Winsted- } Norfolk Road (Route 44), Colebrook, Connecticut.	Connecticut Siting Council
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June 9, 2011

Opinion

On December 13, 2010, BNE Energy, Inc (BNE) submitted a petition to the Connecticut Siting Council (Council) for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the construction, maintenance, and operation of a 4.8 megawatt Wind Renewable Generating facility located on Winsted-Norfolk Road (Route 44) in Colebrook, Connecticut. Pursuant to CGS §16-50k(a), the project is eligible to be approved by a declaratory ruling as a grid-side distributed resource facility under 65 megawatts that is in compliance with air and water quality standards of the Connecticut Department of Environmental Protection (DEP).

Pursuant to CGS § 16a-35k, the State of Connecticut set forth an energy policy to diversify the fuel mix and to develop and utilize renewable energy resources, such as solar and wind energy, to the maximum extent possible. To accomplish this goal, the State has implemented renewable portfolio standards that require 20 percent of electric generation within the state be produced from Class I renewable energy sources, including wind, by 2020.

The proposed facility would be located on a 124.9-acre site, located west of Route 44 and south of Rock Hall Road. The property is owned by Rock Hall Associates and is forested with second-growth northern hardwoods and is undeveloped, except for a golf driving range located in the western corner at the intersection of Route 44 and Rock Hall Road. Remnants of an old logging road traverse the property, which is associated with extensive earlier timber harvesting. Surrounding land use consists of large tracts of undeveloped forestland including, a sportsmen's club to the west, low-density residential development and sparse commercial development along Greenwoods Turnpike and Route 44. Eighteen residences are located within 2,000 feet of the site property boundaries with nine of those residences located within 2,000 feet of the turbine locations. Approximately 136 occupied buildings of all types are located within 1.25 miles of turbine locations.

The site consists of two ridgelines, the westernmost ridge containing the golf driving range, separated by a lowland valley associated with Mill Brook. Elevations on the property range from 1290 feet above mean sea level (amsl) along Mill Brook to a height of 1500 feet amsl along the eastern ridge, with gently sloping contours. Mill Brook flows southeasterly. Its bordering wetlands (collectively, Wetland 1) are mainly forested; however, near the southeast border of the property, where Mill Brook flows off-site, Wetland 1 becomes an emergent shrub-scrub wetland and marsh. In various other locations, the property also contains three smaller forested wetlands and several intermittent watercourses.

BNE proposes to construct three General Electric 1.6 megawatt wind turbines at the site. Each turbine would include a 100-meter (328-foot) tall tower topped by a nacelle, which contains the generator, other operational equipment, and the hub. The petitioner stated that the 80-meter (262-foot) tall turbine towers would also be viable at the site; therefore, the Council will order the turbines to be no higher than 80 meters at the hub.

Three 132-foot (40.3 meter) long blades connect to the hub, having a nominal rotor diameter of 82.5 meters (270 feet). BNE has also requested approval to use a 100 meter rotor diameter at the site. The total height of the turbine, measured as the height of the tower (hub height) plus the length of a blade at its apex, is 463 feet above ground level (agl) with the 100m turbine tower and 82.5m rotor diameter, or 492 feet agl with a 100m turbine tower and 100m rotor diameter, respectively.

The three turbines would be located on the eastern ridgeline in the northern half of the property east of Mill Brook. Initially, BNE proposed a turbine layout that would require two access roads off of Rock Hall Road, with Turbine 1 located approximately 400 feet east of the golf driving range, 250 feet south of Rock Hall Road and 40 feet west of wetlands associated with Mill Brook. Subsequently, BNE submitted a new turbine layout that relocated Turbine 1 approximately 805 feet to the northeast, which is 195 feet from the Mill Brook wetlands and that requires one access road. The Council does not consider the original turbine layout west of Mill Brook viable, and this configuration will not be discussed further. Due to less site disturbance and greater setbacks to residences, the Council finds the revised turbine layout preferable to the original layout.

All three turbines would be accessed by a new, 20-foot wide road extending from Rock Hall Road. The new road would first access Turbine 1, then continue across a narrow portion of Wetland 1 to ascend a ridge where it forks to access Turbines 2 and 3. Turbine 2 is located on a flat area of the lower slope of the ridge and Turbine 3 is located on the upper slope of the ridge. A fenced, electrical collector yard would be located adjacent to Turbine 1.

Based on the wind data and turbine model selected, the three turbines are estimated to produce 12,614 megawatt hours of electricity per year (using 100m tower and 82.5m rotor diameter). The project is expected to have an annual capacity factor of 30 percent. The electricity from the project would be a Class I renewable resource, consistent with the State's policy of developing and utilizing renewable energy resources to the maximum extent possible, as set forth in CGS §16a-35k.

The Council is charged with implementing State policies, and therefore would like to preface its opinion with two statements. First, while renewable energy sources are seemingly cost-free, they are not available anywhere and everywhere. Sites for conventional power plants are limited only by convenient access to a roadway, river, or pipeline, none of which is particularly difficult to find in Connecticut, but viable locations for some types of renewable energy facilities are severely constrained by topography and weather. Second, some types of renewable energy projects take up more space than conventional power plants—and in different dimensions. Attempts to harvest power from renewable energy sources available across the natural landscape entail designing generation facilities at a correspondingly broad scale. Throughout this proceeding, the Council has found it necessary to analyze environmental and social effects unique to wind energy generating facilities

The Council has evaluated the project proposed by BNE in terms of its effects on the natural environment, public health and safety, and scenic, recreational, and cultural values related to quality of life. We begin with findings regarding the natural environment.

Air, Water, Site Disturbance/ Restoration, Wetlands

The operation of the project would not produce any air emissions or greenhouse gases and therefore would comply with DEP air quality standards.

The Council understands that designing the access road to the turbines on this site poses challenges regarding water quality because of the unavoidability of direct impacts to Wetland 1 and two adjacent intermittent watercourses. However, the Council believes these design challenges can be met, so that the project would not have an adverse impact on water quality.

By ordering a Development and Management (D&M) phase for the project, the Council will assure that the project would be designed to meet DEP water quality standards, in conformance with the 2004 Connecticut Stormwater Quality Manual, the 2000 DOT Drainage Manual and the 2002 Connecticut Guidelines for Soil Erosion and Sediment Control. This D&M phase will provide opportunities for all parties to review design plans and submit comments to the Council.

Overall, development of the site would result in the disturbance of approximately 7.8 acres of land, mainly in the north of the property with approximately 4.8 acres would be restored. Temporarily disturbed areas would include space for construction of the proposed turbines, blade assembly and laydown areas, temporary stockpile areas, crane assembly areas, tower section laydown areas, and crane pads. More precise figures on the amount of disturbance to accommodate construction, as well as associated temporary and permanent drainage features, would be specified during final site design in the D&M phase. The approximate 3 acres of permanent development would consist of the access road, parking areas, turbines, electrical yard, and crane pads. The road and parking areas would consist of compacted stone, and would be permeable. Post-construction, most of the site's temporarily disturbed portions—three to four acres—would be restored to a natural condition by the planting of a native herbaceous seed mixture to create upland meadow areas. A detailed plan for such restoration shall be specified during the D&M phase. Also, the Council will require BNE to monitor all restored areas for invasive species over a three-year period, and remove invasives where necessary, as recommended by the DEP. The specifics regarding such monitoring and removal shall be part of the restoration plan.

The access road would require filling approximately 3,200 square feet of a northerly forested portion of Wetland 1, to permit the crossing of two associated intermittent watercourses at this location. The watercourses are fed by hillside seepage areas. The watercourse crossings would require the installation of two three-sided (bottom-less) culverts to allow the watercourses to preserve their natural substrates. To reduce the disturbance to these watercourses and seepage areas, and to protect sensitive wildlife habitats, the Council will order the relocation of the access road approximately 40 feet upslope of the proposed wetland crossing to an old road bed that was identified on site.

The Council notes the benefit of early site planning so as not to disturb the high-value emergent shrub-scrub portion of Wetland 1 along the southeast border of the property. Finally, the Council finds that the property contains several environmentally-sensitive resources that are worthy of protection. Therefore, the Council will require BNE, during the D&M Phase, to present an open space and conservation plan to protect these resources in their natural state.

Wildlife

The Council recognizes that the subject property offers sufficient diversity and extent of habitat to attract a rich community of wildlife. Accordingly, we find wildlife protection to be particularly important.

The forested part of Wetland 1 contains habitat areas along Mill Brook well-suited for the Wood turtle, a state species of special concern. The hillside seepage areas could support the spring salamander, a state-listed threatened species. Wetland 1 supports a diversity of amphibian species. The site could also support several snake species that use wetland edges as foraging grounds, including the eastern ribbon snake and the smooth green snake, both state special concern species. Development of the site would not adversely affect the overall habitat for any of these species, and site clearing presents an opportunity to increase prime habitat for the two snake species by creating upland meadow areas that they favor. Accordingly, the Council will order BNE to annually mow the cleared areas adjacent to Turbine 1 to maintain its habitat value for the two snake species. The Council will also order that BNE use management procedures as specified by Dr. Michael Klemens to reduce the potential for construction-related impacts to populations of the wood turtle.

The Council will require periodic inspection of the site during construction by an independent environmental inspector approved by the Council to ensure that appropriate environmental safeguards protective of the wetlands and of amphibian and reptile species are being implemented properly.

An initial bird study has been performed by BNE at the Colebrook South property (P. 983) with studies continuing through the Fall of 2011. The Colebrook South site is approximately 0.8 miles southwest of the proposed site. Due to the similarities of habitat on the proposed and Colebrook South sites, the species identified at Colebrook South are considered to be representative of those likely to be found on the Colebrook North site. Both sites contain forested wetlands, dense forest, and open areas with edge habitat but the presence of the golf range only at the proposed site could favor species that use maintained grassland as habitat. Although operation of the turbines could result in the mortality of none to 67 birds per year based on estimates presented in the Colebrook South project, and despite the limitations of the original interim study, the Council is persuaded that the project would not adversely affect birds at the population level. Estimated fatalities are orders of magnitude below the average number of birds killed yearly by cars or collisions with buildings. The Council notes that BNE is conducting ongoing bird studies at Colebrook South that will be concluded in the Fall of 2011. Further, the Council will require three years of third-party post-construction monitoring, with results submitted to the Council and the DEP for analysis, and with the potential for mitigation measures to be implemented if significant bird mortality is determined.

Bat studies were also conducted on the Colebrook South property and are considered to be indicative of bat species composition and relative abundance on the Property. Based on these studies, three types of bats listed as state special concern species could occur at the site. They are tree-roosting species known to be most at risk from wind turbines. Furthermore, the project's proximity to several hibernacula increases the potential numbers of bats that could be foraging around the wind turbines during some periods. Experts agree that forested wetlands with standing water tend to attract foraging bats: this raises the possibility that the Turbine 1, which is closest to Wetland 1, may create a risk of bat mortality. Because the mortality of bats is projected to be low to moderate (up to 190 deaths per year), the Council concurs with the DEP in requiring post construction monitoring and will require three years of third-party post-construction monitoring, as recommended in draft guidelines issued by the U.S. Fish and Wildlife Service, with annual reports submitted to the Council and the DEP for analysis, and with the potential for mitigation measures to be implemented if high bat mortality is determined.

Overall, on issues of wildlife, the Council's opinion is that inspection and monitoring ordered by the Council will be sufficient to manage impacts. Furthermore, if necessary, varying types of and approaches to mitigation could be undertaken.

Public Health and Safety

Concerning the project's effects on public health and safety and on scenic, recreational and cultural resources, the Council puts considerable weight on impacts to the project's closest neighbors. Connecticut is a small, densely-populated state—the fourth most densely-populated state in the country. Yet the Town of Colebrook, with only 48 people per square mile, is over 10 times less densely populated than Connecticut as a whole, and neighbors to the proposed project are relatively few and far between. The more rural an area is, the smaller the number of people that would be adversely affected by development of any kind, including wind turbines. Notwithstanding the low population density, the Council must consider the following matters regarding public health and safety: ice throw/drop, shadow flicker and noise.

Ice Drop/Throw

The risk of ice drop and ice throw from the turbines was analyzed carefully, and the Council believes it is not a concern, provided that the proposed mitigation measures, stated below, are employed. Ice dropping from a stationary turbine (82.5 meter rotor diameter) would land within 131 feet of the turbine 90 percent of the time. Additionally, the likelihood is remote that a significant mass of ice dropped from a blade would land farther away than 164 feet: this would only occur if the wind were blowing harder than 55 mph, the turbines cut-out speed. Although one neighboring property is within range of exceptional ice drop, up to 394 feet with 100m rotor diameter, the affected portion of this parcel is a heavily forested hillside. As for ice throw, the likelihood of ice being thrown beyond the site boundaries is also remote. If no mitigation measures were employed, the maximum distance ice could be thrown from the proposed turbines would be 870 feet using an 82.5 meter rotor diameter and 935 feet using a 100 meter rotor diameter rotor. There are no residential structures within this distance from the proposed turbines locations. Rock Hall Road is within the theoretical distance ice could be thrown, but the probability of a car traveling on Rock Hall Road being hit with ice thrown from the 82.5-meter diameter rotor blades is once in 1,400 years. Ice throw beyond site boundaries could be avoided altogether by automatic or manual shut-down of the turbines during icing conditions, and by special attention to blade de-icing by personnel who would come on-site to re-start the turbine after shutdown. Accordingly, the Council will order that BNE submit a detailed Ice Safety Management Plan during the D&M phase. The plan shall specify procedures for shut-down and start-up under icing conditions, stipulating that start-up procedures under such conditions be performed only by on-site personnel. The plan shall also include a final recommendation, fully supported, on the potential for fitting the turbines with GE's Winter Ice Operation Mode.

Shadow Flicker

Shadow flicker is another impact of the proposed wind project that has been measured to a high degree of predictability. The property experiencing the most hours of shadow flicker per year would be the Northwestern Connecticut Sportsmen's Association lodge at 177 Winsted-Norfolk Road, which would likely experience approximately 22 hours and 21 minutes per year with the 82.5m rotor diameter. The probable case study model indicates no residences would experience over ten hours of shadow flicker per year with the 82.5m rotor diameter. The Council views shadow flicker as a potential annoyance rather than a health threat and finds that the low levels and specific timeframes of occurrence will not adversely impact the surrounding area.

Noise

Noise is a serious public-health concern, such that virtually all states have regulations limiting noise. The noise from wind turbines, in particular, has distinctive features. For instance, it has a large component of low-frequency sound. In addition, while certain elements of turbine noise are distinctly enveloping, or continuous, others can vary unpredictably, depending on wind speed, direction, and turbulence. Given these features, individuals have widely different sensitivities to turbine noise: thus, the health effects of wind-turbine noise are uniquely hard to predict. On balance, the Council is satisfied that noise emitted by the project would meet Connecticut DEP allowable limits at the nearest residential receptors, and that the DEP regulations are protective of the public health. Additionally, noise from the turbines is based on wind speed and would be loudest for a small percentage of the project's operation. Nonetheless, the Council acknowledges that some health professionals question the adequacy of state regulations either to measure or minimize the health impacts of wind-turbine noise. Furthermore, if mitigation were to become necessary, it could be difficult and costly for individuals. In view of these concerns, the Council will order BNE to conduct post-construction noise monitoring to ensure compliance with DEP noise criteria.

Overall, on issues of public health and safety, the Council's opinion is that the turbines do have a beneficial health effect in ameliorating air pollution and that the potential adverse impacts resulting from the project's operation are manageable, since varying types of and approaches to mitigation could be undertaken.

Visibility

Concerning values related to quality of life, the Council finds the visibility of the proposed turbines does not have a substantial adverse effect. Year-round views of the project within a mile radius of the site would be from open areas and wetland areas around the site. Some of the open areas are associated with residential development, while others are associated with commercial, agricultural and recreational uses. Approximately 26 properties within a mile of the turbine locations would have partial year-round views of at least the hub and associated blades. Approximately another 71 would have views of the turbines during "leaf-off" conditions.

Cultural and Historic Resources

Two historic resource areas are within two miles of the site: the Colebrook Center Historic District and the Rock Hall property. No year-round views of the turbines are expected from the Historic District. There would be limited year-round views of the turbine blades from the pool area at the Rock Hall property, approximately a half-mile to the north of Turbine 3, and potentially seasonal views of the Turbine 3 hub through the trees during leaf-off conditions. Although the State Historic Preservation Office (SHPO) determined the potential views of the turbine blades would alter the "country house" character and setting of the Rock Hall property, the Council carefully reviewed the visual analysis and associated simulations and finds the visual impact to be minimal. Additionally, the Council acknowledges that SHPO is primarily responsible to certain federal agencies involved with managing the National Register of Historic Places, and only provided advisory comment on the Rock Hall property to the Council. The Council's determination of minimal visual impact to the Rock Hall Property is based on the 100 meter hubs and 82.5 meter rotor diameter and notes visibility will be improved by using 80 meter hubs at the proposed turbine locations.

Recreational and Scenic Resources

Visibility of the project from recreational and scenic resources would include views of all three turbines from the observation tower at Haystack Mountain State Park, approximately 4.1 miles northwest of the site. Brief views would be possible from two scenic roads: a portion of Route 183, a state-designated scenic road approximately 2.5 miles southwest of the site; and a portion of Winchester Road in Norfolk, a locally designated scenic road approximately 3 miles southwest of the site. None of these impacts is substantially detrimental to the scenic qualities of these resources.

Cumulative Impacts

The Council has reviewed possible cumulative impacts from both wind turbine projects (Petitions 983 and 984) at certain properties. No evidence in the record shows that any building is within a half-mile of both a turbine in the Colebrook South project and a turbine in the Colebrook North project. We find no cumulative impacts in terms of noise, ice drop/throw or shadow flicker, and we find that cumulative impacts in terms of visibility are not substantial.

Town of Colebrook Infrastructure

Improvements to the Town of Colebrook's infrastructure, including but not limited to roads and road intersections, may be necessary both before and after construction. The Council will ensure that the Town's concerns relating to its infrastructure are addressed prior to the commencement of construction by requiring, during the D&M phase, a detailed plan mutually agreed-upon between BNE and the Town for handling impacts to the Town's infrastructure, including a description of the impacts anticipated, a pre-construction assessment of the affected infrastructure, and a process for monitoring the condition of the infrastructure and any remediation measures, post-construction. The Council expects this plan will come out of a Host Community agreement now in the process of being negotiated between the Town and BNE, an agreement we presume will be completed before the D&M phase. Regardless of how the plan is agreed upon, the Council will require pre- and post-construction inspection of the Town's affected infrastructure by an independent engineer, paid for by BNE and subject to Council approval, as a basis for ensuring that the Town will be made whole on any damage to its infrastructure.

Decommissioning

The record shows that the expected life of the project would be 20-30 years, after which time the turbines would be evaluated for upgrade or decommissioning. Recognizing the likelihood of significant environmental impacts associated with decommissioning, along with potential impacts to the Town's infrastructure, the Council will require a detailed decommissioning plan as part of the D&M phase.

The Council finds the proposed project would benefit the State by utilizing a renewable fuel source to generate electricity, thereby decreasing the use of older, less efficient generation without detriment to the local environment or surrounding community. Based on the record in this proceeding we find that the effects associated with the construction, operation, and maintenance of this wind renewable electric generating facility at the proposed site, including effects on the natural environment; public health and safety; scenic, historic, and recreational values are not in conflict with the policies of the State concerning such effects, and are not sufficient reason to deny the proposed project. Therefore, the Council will issue a favorable decision for this project, accompanied by conditions, including a detailed Development and Management Plan with elements designed to protect on-site resources and mitigate impacts off-site.

PETITION NO. 984 - BNE Energy, Inc. petition for a } Connecticut
declaratory ruling that no Certificate of Environmental }
Compatibility and Public Need is required for the construction, } Siting
maintenance, and operation of a 4.8 MW Wind Renewable }
Generating facility located on Winsted-Norfolk Road (Route 44), } Council
Colebrook, Connecticut.

June 9, 2011

Decision and Order

Pursuant to the foregoing Findings of Fact and Opinion, the Connecticut Siting Council (Council) finds that the effects associated with the construction, maintenance, and operation of a 4.8 MW wind renewable generating project (known as Wind Colebrook North) in Colebrook, Connecticut would not have a substantial adverse environmental effect, would meet all applicable U.S. Environmental Protection Agency and Connecticut Department of Environmental Protection (DEP) Ambient Air Quality Standards and Water Quality Standards; and therefore, would not require a Certificate of Environmental Compatibility and Public Need.

The facility shall be constructed, operated, and maintained substantially as specified in the Council's record in this matter, and is subject to the following conditions:

1. Unless otherwise approved by the Council, the wind turbines shall be constructed using a 80 meter hub height and a 82.5 meter rotor diameter.
2. The Petitioner shall provide a copy to the Council of all required final decisions and/or permits issued by the DEP, Army Corps of Engineers, and all other applicable federal or State regulatory agencies concerning the proposed project, when available. If there are provisions in any regulatory decision that are inconsistent with the Council's record in this matter, the Petitioner shall notify the Council immediately.
3. The Petitioner shall not commence construction activities until securing Council approval of a Development & Management Plan (D&M Plan). The D&M Plan shall be served on all parties and intervenors as listed in the service list for comment, and submitted to and approved by the Council in one or more sections prior to the commencement of facility construction and shall include, but not be limited to:
 - a. A detailed site plan showing the placement and/or extent of vegetative clearing, grading, wetland buffers, access roads, turbine foundations, building specifications, equipment and material laydown and staging areas. Wind Turbine 3 shall have a location and/or rotor diameter that ensures rotating turbine blades would be confined to the host property;
 - b. Provide an open space and conservation plan to protect environmentally-sensitive areas of the property for the life of the project;
 - c. Details for the modification and restoration of Town infrastructure affected by the project including a pre-construction survey, protections during construction, post construction survey, and restoration plan to render affected infrastructure to pre-project conditions or better;
 - d. An erosion and sediment control plan, consistent with the 2002 Connecticut Guidelines for Soil Erosion and Sediment Control (E&S Guidelines), as amended. The plan shall contain a narrative that specifies how the plan complies with the E&S Guidelines;
 - e. Stormwater Management Plan, consistent with the 2004 DEP Stormwater Quality Manual;
 - f. Drainage Calculations for site development consistent with the 2000 Connecticut Department of Transportation Drainage Manual;

- g. Provisions for crossing Mill Brook (Wetland 1) that relocates the access road onto the old woods road where seepage areas from intermittent watercourses are already channelized, in accordance with the Herpetological Assessment dated May 1, 2011 (Klemens);
 - h. Wood Turtle Protection Plan that includes isolation measures, contractor education, protective measures and an independent third party environmental monitor to ensure proper implementation of the protective measures, in accordance with the Herpetological Assessment dated May 1, 2011 (Klemens);
 - i. Wetland and Wildlife Restoration plan to include provisions for habitat restoration, invasive species control over a three-year period, and the maintenance of permanent meadow areas adjacent to Turbine 1, in accordance with the Herpetological Assessment dated May 1, 2011 (Klemens);
 - j. Ice Safety Management plan that includes provisions to mitigate the potential for ice throw and ice drop. The Petitioner shall submit an evaluation regarding the feasibility of installing the optional Winter Ice Operation Mode;
 - k. A post-construction noise-monitoring protocol describing locations, frequency and methods to be employed for a post-construction noise study. After Council approval of the noise monitoring protocol, the Petitioner shall conduct the post-construction noise study. Upon review of the subsequent noise study, the Council, in consultation with the DEP, will evaluate and determine if any mitigation measures should be employed, including turbine operations management, to ensure the project complies with DEP noise regulations;
 - l. Provision for an independent third-party monitor to evaluate on-site construction erosion and sedimentation controls and to ensure establishment of appropriate environmental safeguards protective of amphibian and reptile species; and
 - m. Project Decommissioning Plan.
4. The Petitioner shall attempt to reach a Host Community Agreement with the Town of Colebrook prior to the submission of the D&M Plan. Any agreement that is reached between the Petitioner and the Town shall be submitted to the Council.
5. The Petitioner shall continue and submit ongoing bird and bat studies and perform post-construction monitoring of bats and birds to document any mortality from project operations. The extent of monitoring shall be coordinated with the DEP Wildlife Division. An annual summary of the study results shall be submitted to the Council and DEP for a period of three years, with the first report due one year after commencement of operation. At the end of the three-year study period, the Council, in coordination with the DEP, will evaluate and determine if any mitigation measures should be employed to reduce bat and/or bird mortality.
6. The Petitioner shall provide the Council with written notice of commencement of site clearing, foundation construction, turbine installation, completion of site remediation, and commencement of site operation.
7. The Petitioner shall submit a first year operating report within three months after the conclusion of the first year of operation that includes a discussion of the number of hours of operation, wind speeds, and the amount of generation produced by the facility.
8. Unless otherwise approved by the Council, this Decision and Order shall be void if all construction authorized herein is not completed within four years of the effective date of this Decision and Order or within four years after all appeals of this Decision and Order have been resolved.

9. The Petitioner shall provide the Council with not less than 30 days written notice that the facility plans to cease operation.
10. This Declaratory Ruling may be transferred, provided both the facility owner/operator/transferor and the transferee are current with payments to the Council for their respective annual assessments and invoices under Conn. Gen. Stat. §16-50v. In addition, both the facility owner/operator/transferor and the transferee shall provide the Council with a written agreement as to the entity responsible for any quarterly assessment charges under Conn. Gen. Stat. §16-50v(b)(2) that may be associated with this facility.

By this Decision, the Council disposes of the legal rights, duties, and privileges of each party named or admitted to the proceeding in accordance with Section 16-50j-17 of the Regulations of Connecticut State Agencies.

The parties and intervenors to this proceeding are:

Petitioner	BNE Energy, Inc.	<p>Lee Hoffman, Esq. Pullman & Comley, LLC 90 State House Square Hartford, CT 06103-3702</p> <p>Paul Corey, Chairman BNE Energy Inc. Town Center, Suite 200 29 South Main Street West Hartford, CT 06107</p>
Party	<p>Stella and Michael Somers</p> <p>FairwindCT, Inc.</p>	<p>Nicholas J. Harding Emily A. Gianquinto Reid and Riege, P.C. One Financial Plaza, 21st Floor Hartford, CT 06103</p>
Party	David R. Lawrence, MD	<p>David R. Lawrence, MD Jeannie Lemelin, LPN 30 Flagg Hill Road Colebrook, CT 06021</p>
Party	Town of Colebrook	<p>The Honorable Thomas D. McKeon First Selectman Town of Colebrook Town Hall 562 Colebrook Road P.O. Box 5 Colebrook, CT 06021</p> <p>David M. Cusick Howd, Laviere & Finch, LLP 682 Main Street Winsted, CT 06098</p>
Party	<p>Kristin M. Mow</p> <p>Benjamin C. Mow</p>	<p>Richard T. Roznoy, Esq. Attorney at Law 11 School Street P.O. Box 850</p>

		East Granby, CT 06026
Intervenor	The Connecticut Light and Power Company	<p>John R. Morissette Manager – Transmission Siting and Permitting Northeast Utilities Service Company P.O. Box 270 Hartford, CT 06141-0270</p> <p>Christopher R. Bernard Manager, Regulatory Policy (Transmission) The Connecticut Light and Power Company P.O. Box 270 Hartford, CT 06141-0270</p> <p>Joaquina Borges King Senior Counsel Northeast Utilities Service Company P.O. Box 270 Hartford, CT 06141-0270</p>
Party	Jeffrey and Mary Stauffer	<p>Jeffrey and Mary Stauffer 21 Brightwood Drive Woodbridge, CT 06525 (203) 410-3433 Maryhubbard86@gmail.com</p>
Party	Walter M. Zima Brandy Grant	<p>Walter M. Zima 12B Greenwood Turnpike Colebrook, CT 06021</p> <p>Mailing: 12B Greenwood Turnpike Winsted, CT 06098</p> <p>Brandy Grant 12B Greenwood Turnpike Colebrook, CT 06021 Mailing: 12B Greenwood Turnpike Winsted, CT 06098</p>

Party	Eva Villanova	Eva Villanova 28 Flagg Hill Road Colebrook, CT 06021 Mailing: 134 Forest Avenue Winsted, CT 06098
Party	Susan Wagner	Nicholas J. Harding Emily A. Gianquinto Reid and Riege, P.C. One Financial Plaza, 21 st Floor Hartford, CT 06103

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Conclusions of Law

A. The proposed wind renewable generating project was properly filed as a petition for a declaratory ruling.

BNE Energy, Inc. (BNE) filed a petition for a declaratory ruling with the Connecticut Siting Council (Council) on December 13, 2010 that no Certificate of Environmental Compatibility and Public Need (CECPN) is required for the construction, maintenance and operation of a 4.8 megawatt (MW) wind renewable generating facility located on Winsted-Norfolk Road, Colebrook, Connecticut (Petition). The proposed grid-side distributed resource project has a capacity of not more than 65 MW and utilizes wind renewable energy sources. Therefore, BNE's proposed project was properly filed as a petition for a declaratory ruling under Conn. Gen. Stat. §16-50k (a).

Pursuant to Public Act 05-1, An Act Concerning Energy Independence (codified at Conn. Gen. Stat. §16-50(k), "[T]he Council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... (B)... any ... grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Environmental Protection." The legislative purpose of P.A. 05-1 was to incent distributed resource projects and reduce peak electric demand, which is consistent with the energy policy of the state under Conn. Gen. Stat. §16a-35k to diversify the state's energy supply mix and to develop and utilize renewable energy sources, such as solar and wind energy, to the maximum practicable extent.¹ The Act established a rebuttable presumption that there is a public benefit for a grid-side distributed resource project with a capacity of 65 MW or less.² Under the Public Utility Environmental Standards Act (PUESA), which governs the Council's jurisdiction, a public benefit exists if a proposed electric generating facility is necessary for the reliability of the electric supply of the state or for the development of a competitive market for electricity.³

The Council's standard of review under the PUESA for a petition for a declaratory ruling is to make a determination that the proposed facility will have no substantial adverse environmental effect and therefore, would not require a CECPN.⁴ Under Conn. Gen. Stat. §16-50p, the statutory criteria for a determination of substantial adverse environmental effect is: "The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, electromagnetic fields..., conflicts with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and

¹ 2005 Conn. Acts 1 (Spec. Sess.); Conn. Gen. Stat. §16a-35k (2011).

² *Id.*

³ Conn. Gen. Stat. §16-50p(c) (2011) (establishing a public benefit standard for an electric generating facility as opposed to a public need standard for other facilities under Conn. Gen. Stat. §16-50p(a)(3)(A)); *See also Citizens for Defense of Oxford v. Connecticut Siting Council*, 2000 Conn. Super. LEXIS 2994 (Conn. Super. 2000).

⁴ Conn. Gen. Stat. §4-176 (2011); Conn. Gen. Stat. §16-50k (2011); R.C.S.A. §16-50j-38.

wildlife.”⁵ The Council is required to state why the adverse environmental effects or conflicts with state policies are or are not sufficient reason to deny the project.⁶ In 2007, the Council approved a 37.5 MW wood biomass generating facility in Plainfield under Conn. Gen. Stat. §16-50(k) (a) and in accordance with the statutory criteria for a determination of substantial adverse environmental effect under Conn. Gen. Stat. §16-50p.⁷

Pursuant to the provisions of the Uniform Administrative Procedure Act (UAPA), within 60 days of receipt of BNE’s petition and based on the nature and scope of the proposed project, the Council decided to hold a public hearing on the matter.⁸ BNE provided the Council with information required for an application for a CECPN under the Council’s Application Guide for a Renewable Energy Facility.⁹ The Council held two public hearings in the Town of Colebrook on March 22, 2011 and March 23, 2011 at which members of the public attended and spoke both for and against the project.¹⁰ Evidentiary hearings were continued on April 26, 2011, April 28, 2011 and May 5, 2011.¹¹ Eleven parties and intervenors participated in the hearing process.¹² Based on the record developed in the proceeding, the Council found that the project complies with DEP air and water quality standards, is consistent with the state’s Class I Renewable Portfolio Standard and the state’s energy policy, and that the effects associated with the construction, operation and maintenance of the wind renewable electric generating facility at the proposed site, including effects on the natural environment; public health and safety; scenic, historic and recreational values are not in conflict with the policies of the state concerning such effects and are not sufficient reason to deny the petition.

B. The PUESA does not require public disclosure of proprietary information.

BNE filed a Motion for Protective Order consistent with Council Procedures for the Filing of Proprietary Information in this matter on March 15, 2011 seeking permission to file certain confidential and proprietary business information of BNE and GE under seal. Conn. Gen. Stat. §16-50o requires submission into the record “the terms of any agreement... entered into by the applicant and... any third

⁵ Conn. Gen. Stat. §16-50p(a)(3)(B) (2011).

⁶ Conn. Gen. Stat. §16-50p(a)(3)(C) (2011).

⁷ Connecticut Siting Council, Petition 784, *available at*

<http://www.ct.gov/csc/cwp/view.asp?a=2397&Q=320968&PM=1> (last visited May 4, 2011) (The Council held a public hearing on the petition for the convenience of the public and to develop a full record for its decision. The Council requested that the petitioner publish notice of the petition and provide notice to abutting landowners. Members of the public attended the hearing and spoke both for and against the project. Based on the record developed in the proceeding, the Council found that the project would provide 15% of the state’s Class I Renewable Portfolio Standard, the facility would benefit the state by removing a renewable resource from the waste stream, prolonging the life of regional landfills and generating energy that may displace older, non-efficient generation without detriment to the local environment or surrounding community and that the effects associated with the construction, operation and maintenance of the facility at the proposed site, including effects on the natural environment; public health and safety; scenic, historic and recreational values were not in conflict with the policies of the state concerning such effects and were not sufficient reason to deny the petition. The Council approved the facility with conditions including a Development and Management Plan, an independent environmental consultant and a post-construction noise survey at the property boundaries and nearest residential receptors).

⁸ Conn. Gen. Stat. §4-176(e) (2011); Connecticut Siting Council, Meeting Minutes, January 20, 2011.

⁹ Connecticut Siting Council, Petition 984, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011) (the petitioner was not required to follow the Application Guide in filing a petition for a declaratory ruling).

¹⁰ Public Hearing Notice of the Connecticut Siting Council, February 7, 2011, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/p983p984hearingnotice.pdf (last visited May 27, 2011).

¹¹ Connecticut Siting Council, Petition 984, Findings of Fact ¶12, June 9, 2011, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

¹² *Id.* at ¶3.

party, in connection with the construction or operation of [a] facility,” but does “not require the public disclosure of proprietary information or trade secrets.”¹³ In its Motion for Protective Order, BNE sought to protect information and data regarding wind resources, wind speeds, wind generation and related proprietary information. In compliance with a Mutual Non-Disclosure Agreement between GE and BNE, BNE also sought to protect GE information and formulas relating to setback recommendations, mechanical loads assessments and related proprietary information.¹⁴ GE did not request party or intervenor status in the proceeding.

“Proprietary information” is defined in Black’s Law Dictionary as “information in which the owner has a protectable interest.”¹⁵ The Department of Public Utility Control defines “proprietary information” as information that may be exempt from public disclosure pursuant to Conn. Gen. Stat. §1-210(b).¹⁶ The Connecticut Freedom of Information Act (FOIA) defines “trade secret” as:

“...information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy...”¹⁷

The Connecticut Supreme Court defined “trade secret” as consisting of any “... compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”¹⁸ The Court set out several factors to be considered in determining whether given information qualifies as a trade secret, which are: 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by others involved in the business; 3) the extent of measures taken to guard the secrecy of the information; 4) the value of the information to the business and competitors; 5) the amount of effort expended in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”¹⁹

Applying the criteria to this petition, it is found that: 1) the petitioner and GE view the information as confidential and proprietary; 2) persons in the business with knowledge of the information are GE, the turbine manufacturer, Paul Corey, president of BNE, Carrie Larson, former attorney for BNE, Lee Hoffman, current attorney for BNE and members of BNE’s witness panel; 3) BNE and GE entered into a Mutual Non-Disclosure Agreement relating to the information and GE clearly indicates the information is proprietary and not to be disclosed on each page of the documents; 4) the wind data and

¹³ Conn. Gen. Stat. §16-50o (2011).

¹⁴ Connecticut Siting Council, Petition 984, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011) (a copy of the Mutual Non-Disclosure Agreement was filed with the Council on March 25, 2011).

¹⁵ BLACK’S LAW DICTIONARY 1235 (7th ed. 1999).

¹⁶ State of Connecticut, Department of Public Utility Control, Basic Procedures for Filing Proprietary Information Under Protective Order, *available at* <http://www.ct.gov/dpuc/cwp/view.asp?a=3364&q=405172> (last visited May 27, 2011).

¹⁷ Conn. Gen. Stat. §1-210(b)(5)(A) (2011).

¹⁸ *Dept. of Public Utilities of the City of Norwich v. Freedom of Information Commission*, 55 Conn. App. 527, 530 (Conn. App. 1999), citing *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314, 318-19 (1963).

¹⁹ *Id.*

formulas used in the assessments have independent economic value that, if generally known, would be a disadvantage to GE and BNE, and would be an advantage to market competitors and future wind project proponents; 5) GE and BNE expended effort and incurred costs in development of the information; and 6) the wind data and formulas used in the assessments could not be properly acquired or duplicated by others.

In objections to BNE's Motion for Protective Order, other participants in the proceeding informed the Council that the GE setback recommendation documents are posted on the New York Public Service Commission website.²⁰ While posted on that website, the GE documents are clearly marked on each page: "Confidential and Proprietary – Do not copy without consent." There is no copy of a consent form from GE posted on that website, nor has a consent form from GE been submitted into the record for this petition. However, parties and intervenors in this proceeding, including, but not limited to expert witnesses, were afforded the opportunity to review the materials submitted under the protective order upon signing a Non-Disclosure Agreement.²¹ Furthermore, parties and intervenors were afforded the opportunity to submit interrogatory questions related to the confidential and proprietary information and responses to those interrogatories would have been provided by BNE under seal.²² The parties may also have availed themselves of the statutory process under the FOIA for a determination from the Freedom of Information Commission that the parties were denied access to public records.²³

In a recent decision, the Connecticut Supreme Court held that the review of documents "is guided by the principle that the party claiming an exemption from the disclosure requirements of the [Freedom of Information Act] bears the burden of establishing the applicability of the exemption."²⁴ The Court also stated that "whether a document expressly is marked "confidential" is not dispositive, but is merely one factor a court may consider in determining confidentiality. Certainly, however, the fact that a document is marked "confidential" creates a presumption of confidentiality. To the extent that the presumption may be rebutted, it is not dispositive. It is difficult to imagine a document that could be more clear on its face regarding whether and for what reason it is intended to be confidential."²⁵ The GE and BNE documents sought to be protected in this petition are clearly marked "confidential and proprietary – do not copy without consent." On that basis and absent a requirement under the PUESA to disclose proprietary information, the Council granted BNE's Motion for Protective Order on April 26, 2011 and reaffirmed that decision on May 5, 2011.²⁶

C. The Council did not engage in ex parte communications with Epsilon Associates, Inc.

Anticipating receipt of applications and petitions for renewable energy facilities, in October 2010, the Council employed Epsilon Associates, Inc. (Epsilon) for a two year contract as a consultant to study and measure the consequences of proposed renewable energy facilities on the public health, safety and environment. Under Section Four of the contract, it states: "...2. Contractor will review and provide opinion, interrogatory suggestions, comments and recommendations on various renewable energy projects *on an as needed basis*; 3. Contractor will author proceeding documentation, including but not limited to,

²⁰ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

²¹ *Id.*

²² *Id.*

²³ Conn. Gen. Stat. §1-206 (2011); *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108 (Conn. App. 2011).

²⁴ *Lash v. Freedom of Information Commission et al.*, 300 Conn. 45 (2011), citing *New Haven v. Freedom of Information Commission*, 205 Conn. 767 (1988).

²⁵ *Id.*

²⁶ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

requested reports, comments, interrogatories, proposed conditions and pre-filed testimony; 4. Contractor will be available to attend, cross-examine, and testify at public hearings as an expert witness, *as necessary...*²⁷ Under Conn. Gen. Stat. §16-50n(e), “the Council may employ one or more independent consultants to study and measure the consequences of the proposed facility on the environment. ... any study and any report issued as a result thereof shall be part of the record in the proceeding.”

The Council did not request Epsilon to issue any study or report that would have been required to be made part of the record in this proceeding under Conn. Gen. Stat. §16-50n(e). According to the Supreme Court, administrative agencies “are entitled to technical and professional assistance in matters which are beyond their expertise and that such assistance may be rendered in executive session.”²⁸ However, the use of such assistance “cannot be extended to the receipt, *ex parte*, of information *supplied by a party to the controversy* without affording his opposition an opportunity to know of the information and to offer evidence in explanation or rebuttal.”²⁹ Epsilon was not a party to this proceeding. Pursuant to the contract, Epsilon was employed by the Council to provide technical and professional assistance in the review of proposed renewable energy facilities, including, but not limited to, this petition.

On March 29, 2011, FairwindCT, Inc. (Fairwind), a party to this proceeding, filed a Motion for the Council to Issue a Subpoena directing Michael Guski, principal of Epsilon, to testify at the April 14, 2011 evidentiary hearing for Petition 983 regarding any analysis, advice, or assistance provided by Epsilon to the Council in considering this petition.³⁰ In that motion, Fairwind cites to Section Four of the Council’s contract with Epsilon at Paragraph 4, which states, “Contractor will be available to attend, cross-examine, and testify at public hearings as an expert witness, as necessary.”³¹ The Council did not request Epsilon to attend, cross examine or testify at any of the public hearings as an expert witness. The Council requested Epsilon to review and provide opinion on the petition and to provide the Council with recommended interrogatories. The portions of the interrogatories authored by Epsilon were ultimately issued to the petitioner and copies of the interrogatories were provided to all parties and intervenors in the proceeding. Furthermore, pursuant to a FOIA request dated April 12, 2011 from Nicholas Harding, the attorney representing Fairwind, the Council publicly disclosed all of its communications with Epsilon, including posting copies of those documents on the Council website. Therefore, the Council did not engage in *ex parte* communications with Epsilon.

D. The Council has a statutory duty to consult with and seek comments from other state agencies.

Under Conn. Gen. Stat. §16-50j, “prior to commencing any hearing... the Council shall consult with and solicit written comments from the Department of Environmental Protection... All such comments shall be made part of the record... Said departments and the Council shall not enter any contract or agreement with any party to the proceedings or hearings...that requires said departments or Council to withhold or retract comments, refrain from participating in or withdraw from said proceedings or hearings.” On February 7, 2011, pursuant to Conn. Gen. Stat. §16-50j, the Council solicited agency

²⁷ Personal Service Agreement between Epsilon Associates, Inc. and the Connecticut Siting Council, dated October 1, 2010 (emphasis added).

²⁸ *Pizzola v. Planning and Zoning Commission of the Town of Plainville*, 167 Conn. 202, 208 (1974).

²⁹ *Id.* (emphasis added).

³⁰ Connecticut Siting Council, Petition 984, Motion for Council to Issue Subpoena, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/motions/fwct_motion_for_council_subpoena_to_episil_on.pdf (last visited June 3, 2011) (Despite the Council’s decision not to consolidate the evidentiary hearings for Petitions 983 and 984, Fairwind filed motions and objections pertaining to both petitions. The Council ruled on the motions and objections separately in each proceeding).

³¹ Personal Service Agreement between Epsilon Associates, Inc. and the Connecticut Siting Council, dated October 1, 2010.

comments on this petition.³² The DEP submitted comments on April 6, 2011.³³ On April 7, 2011, Fairwind submitted a Revised Witness and Exhibit List that listed as a witness the author of the April 6, 2011 DEP comments, Frederick L. Riese, “or such other DEP employee(s) who shall submit comments to the Siting Council in these matters.”³⁴ Unlike the fourteen other witnesses listed on the Revised Witness List, Fairwind did not submit any pre-filed testimony for Mr. Riese. The Council requested pre-filed testimony for any party or intervenor witnesses to be filed on or before March 15, 2011 and April 19, 2011 pursuant to R.C.S.A. §16-50j-25.³⁵ Furthermore, Fairwind failed to proffer what Mr. Riese would testify about, failed to demonstrate how its case would be impaired without Mr. Riese’s testimony and failed to show how Fairwind would be prejudiced without the testimony.

During the proceedings held by the Council in Petition 980, Fairwind, a party to the proceeding, issued a subpoena to Mr. Riese compelling him to appear at the March 31, 2011 hearing in that matter.³⁶ On March 29, 2011, the DEP requested a ruling from the Council that Mr. Riese not be compelled to appear and indicated that the submission of comments does not elevate DEP’s status to that of a party or intervenor and does not constitute pre-filed testimony.³⁷ The Council did not require Mr. Riese to appear at the March 31, 2011 public hearing in Petition 980. During that hearing, Save Prospect Corp., a party to the Petition 980 proceeding, filed a motion to strike the DEP comments from the record, which was denied by the Council as an improper motion on the basis that striking the DEP comments would violate the requirements of the statute that “all such written comments shall be made part of the record.”³⁸ In this proceeding, as in Petition 980, DEP was not a party nor did Mr. Riese or any other DEP employee submit pre-filed testimony. The DEP submitted comments in response to a request from the Council and the Council made those comments part of the record pursuant to Conn. Gen. Stat. §16-50j.

According to the state Appellate Court, the Council “has a statutory duty to seek input from and the expertise of other state agencies and the legislature clearly contemplated the involvement of other state agencies to supply information to the Council in order to render its decision... The Council [acts] properly by taking into account the [DEP] standard setting function in determining the degree of [environmental impact]. It is clearly within the statutory authority of the Council to grant [a petition for a declaratory ruling] subject to specific conditions, including subsequent compliance with DEP standards and regulations. The PUESA provides the Council with numerous means of acquiring information in addition to that which must be submitted by the [petitioner].”³⁹ Mr. Riese was not a witness for the

³² Connecticut Siting Council, Petition 984, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

³³ *Id.*

³⁴ Connecticut Siting Council, Petition 984, Revised Witness and Exhibit List of FairwindCT, Inc., Stella and Michael Somers and Susan Wagner, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/prefile/2011-04-07_revised_witness_and_exhibit_list_of_fairwindct_somers_wagner.pdf (last visited June 3, 2011).

³⁵ Connecticut Siting Council, Petition 984, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011); R.C.S.A. §16-50j-25 (c) (“At the discretion of the Council, any evidence or testimony may be required to be pre-filed by a date specified by the Council. All pre-filed evidence and testimony shall be received in evidence with the same force and effect as though it were stated orally by the witnesses, provided that each such witness shall be present at the public hearing at which such prepared written testimony is offered, shall adopt such written testimony under oath, and shall be made available for cross-examination as directed by the Council.”)

³⁶ Connecticut Siting Council, Petition 980, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=468692> (last visited June 3, 2011).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Town of Preston v. Connecticut Siting Council*, 20 Conn. App. 474 (Conn. App. 1990); *City of Torrington v. Connecticut Siting Council*, 1991 Conn. Super. LEXIS 2084 (Conn. Super. 1991).

Council or any party or intervenor in this proceeding. His comments were filed pursuant to a request from the Council that is statutorily required when the Council commences a public hearing. Those comments were not submitted as pre-filed testimony for the DEP; the DEP has appointed a designee who is a voting member of the Council. Furthermore, those comments were not submitted as pre-filed testimony of a witness for Fairwind. Mr. Riese's comments were submitted into the record pursuant to the requirements of Conn. Gen. Stat. §16-50j, which imposes upon the Council a statutory duty to consult with and seek comments from other state agencies, including, but not limited to, DEP.

E. Consolidation of the evidentiary hearings for Petitions 983 and 984 would have been confusing to the public and unfair to parties.

The 180-day deadline for decision in this petition is June 11, 2011. On December 6, 2010, BNE filed a petition for declaratory ruling for the location, construction and operation of a 4.8 MW wind renewable generating project on Flagg Hill Road in Colebrook, Connecticut, which was designated as Petition 983 by the Council.⁴⁰ The 180-day deadline for decision in Petition 983 was June 4, 2011. The Council rendered its decision on Petition 983 on June 2, 2011.⁴¹ Pursuant to Conn. Gen. Stat. §16-50m and for the convenience of residents and members of the public who wished to express their concerns regarding the proposed wind projects in Petitions 983 and 984, the Council decided to hold two public hearing sessions in the Town of Colebrook on March 22, 2011 and March 23, 2011.⁴² Notice of the public hearings was published on February 7, 2011.⁴³ On February 25, 2011, the Council held a pre-hearing conference for Petitions 983 and 984 where parties and intervenors were given the opportunity to informally discuss procedural matters, including, but not limited to, exchange of pre-hearing interrogatories and submission of pre-filed testimony.⁴⁴ At that time, the Council had not yet developed a schedule of dates for continued evidentiary hearings for either petition.

In a memorandum dated March 18, 2011, the Council announced a schedule for the evidentiary hearings indicating April 14, 2011, April 21, 2011 and April 26, 2011 for Petition 983, and indicating April 26, 2011, April 28, 2011 and May 5, 2011 for Petition 984, all to be held at the Council offices in New Britain.⁴⁵ During the pre-hearing conference and in motions dated February 8, 2011, March 15, 2011, and April 12, 2011, parties moved to consolidate the evidentiary hearings on both petitions and the petitioner objected. The Council denied the motions on the basis that aside from being confusing and inconvenient for the general public, each petition is on a different schedule because they were filed separately at different times, has different parties with different concerns that are specific to one of the

⁴⁰ Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited June 3, 2011).

⁴¹ Connecticut Siting Council, Meeting Minutes, June 2, 2011.

⁴² Conn. Gen. Stat. §16-50m (2011) ("At least one session of such hearing shall be held at a location selected by the Council in the county in which the facility or any part thereof is to be located after 6:30 p.m. for the convenience of the general public."); Council Meeting Minutes, January 20, 2011, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=953&q=473656> (last visited June 3, 2011).

⁴³ Connecticut Siting Council, Petition 983 Hearing Notice, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/p983p984hearingnotice.pdf (last visited June 3, 2011); Connecticut Siting Council, Petition 984 Hearing Notice, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/pe983_984_hrng_not.pdf (last visited June 3, 2011).

⁴⁴ Connecticut Siting Council, Pre-Hearing Conference Memorandum, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/pe984phcresults.pdf (last visited June 3, 2011).

⁴⁵ Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited June 3, 2011); Connecticut Siting Council, Petition 984, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

projects, is on a separate parcel of land, has a different electrical interconnection and has a different assigned staff siting analyst.⁴⁶

The parties argued that the public notice issued by the Council included both petitions, however, the public notice was issued for the convenience of residents and members of the public who wished to provide comments and express their concerns to the Council regarding the proposed wind projects while the Council was present in the Town of Colebrook. The parties also argued that they would be prevented from presenting evidence and cross examination on the cumulative effects of the two petitions. Conn. Gen. Stat. §16-50p requires the Council to consider the environmental impact of a proposed facility alone and cumulatively with other *existing* facilities.⁴⁷ It is conceivable that the Council could have approved one of the petitions and not the other, or that the Council could have approved or denied both petitions. Therefore, the Council developed complete evidentiary records specific to each proposed facility. The UAPA permits members of an agency to use their experience, technical competence and specialized knowledge in the evaluation of evidence and the determination of factual issues.⁴⁸ This includes knowledge of agency records, such as Petition 983, that are submitted to the Council.⁴⁹ In accordance with the UAPA and in consideration of two complete evidentiary records on two separate proposed facilities, the Council used their experience, technical competence and specialized knowledge in the evaluation of evidence and the determination of factual issues concerning the cumulative environmental impacts of Petitions 983 and 984.

Fairwind filed a Motion Concerning Scheduling dated April 12, 2011 indicating the availability of their individual witnesses on the dates of the continued evidentiary hearings for Petition 984.⁵⁰ Fairwind argued that party and intervenor witnesses should be cross examined in both petitions on one day, however a total of six hours of cross examination of party and intervenor witnesses was allotted for each petition.⁵¹ According to the state Supreme Court, “it is not unconstitutional for the Council, in good faith to balance its statutory time constraints against [a party’s] desire for more time to present their objections to [a] proposal.”⁵² If the evidentiary hearings were consolidated, the total cross examination time of Fairwind’s 14 witnesses would certainly have occurred over two hearing days.⁵³ Furthermore, one pro se party, Jeffrey and Mary Stauffer, participated in Petition 984 only and one represented party, Robin Hirtle, participated in Petition 983 only.⁵⁴ According to the Supreme Court, “constitutional principles permit an administrative agency to organize its hearing schedule so as to balance its interest in reasonable, orderly and nonrepetitive proceedings against the erroneous deprivation of a private interest.”⁵⁵ Therefore, consolidation of the evidentiary hearings for Petitions 983 and 984 would have been confusing for the public and unfair to the Stauffers and Ms. Hirtle.

⁴⁶ *Id.*

⁴⁷ Conn. Gen. Stat. §16-50p(a)(3)(B)(2011) (emphasis added).

⁴⁸ Conn. Gen. Stat. §4-178 (2011); *Feinson v. Conservation Commission*, 180 Conn. 421 (1980); *Torsiello v. Zoning Board of Appeals*, 3 Conn. App. 47 (Conn. App. 1984).

⁴⁹ Connecticut Siting Council, Petition 984, Findings of Fact ¶X, June 9, 2011.

⁵⁰ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

⁵¹ Connecticut Siting Council, Petition 984, Council memorandum dated March 18, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited June 3, 2011).

⁵² *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁵³ Connecticut Siting Council, Petition 984, Council memorandum dated March 18, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited June 3, 2011).

⁵⁴ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited June 3, 2011); Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

⁵⁵ *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

F. The hearing procedure was consistent with due process requirements.

Under the UAPA, each party and the agency conducting the public hearing shall be afforded the opportunity to respond, to cross examine other parties, intervenors and witnesses, and to present evidence and argument on all issues involved.⁵⁶ The Supreme Court recognizes that an agency is not required to use the evidence and materials presented to it in any particular fashion as long as the conduct of the hearings is fundamentally fair, and that due process requires not only that there be due notice of a hearing, but at the hearing parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross examine witnesses and to offer rebuttal evidence.⁵⁷ Three evidentiary hearings of a total of 14 hours were held on this petition.⁵⁸

During a pre-hearing conference held on February 25, 2011, parties and intervenors were afforded an opportunity to informally discuss Council procedures for before, during and after the hearings. The Council also announced dates for submission of interrogatories and pre-filed testimony.⁵⁹ On March 18, 2011, the Council issued a memorandum addressing how the evidentiary hearings in this matter would proceed.⁶⁰ The Council indicated that cross examination would be limited to topics relevant to the final decision to be rendered by the Council under Conn. Gen. Stat. §16-50p: public health and safety, environmental impacts and facility operation. The Council also indicated additional deadline dates for the submission of interrogatories and pre-filed testimony.⁶¹ Furthermore, the Council indicated that time for cross examination on the relevant topics would be limited pursuant to R.C.S.A. §16-50j-30, which states, “to avoid unnecessary cumulative evidence, the Council may limit the number of witnesses or the time for testimony upon a particular issue in the course of any hearing.” According to the Supreme Court, “it is well established that unless administrative regulations are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute.”⁶²

Fairwind filed motions to compel interrogatory responses, or in the alternative to strike BNE’s exhibits and pre-filed testimony on April 27, 2011 and May 2, 2011, which were denied by the Council on the basis that Fairwind would have opportunities during the proceedings for additional cross examination of BNE.⁶³ It is well settled that “parties to... quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right. Pre-trial discovery may be expressly authorized by statute, but, absent an express provision the extent to which a party to an administrative proceeding is entitled to discovery is determined by the rules of the particular agency.”⁶⁴ During the hearings held on

⁵⁶ Conn. Gen. Stat. §4-177c (2011).

⁵⁷ *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247 (1984); *Palmisano v. Conservation Commission*, 27 Conn. App. 543 (Conn. App. 1992).

⁵⁸ Transcript, April 26, 2011; Transcript, April 28, 2011; Transcript, May 5, 2011.

⁵⁹ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011) (pre-filed testimony and responses to interrogatories due March 15, 2011).

⁶⁰ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

⁶¹ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011)(additional pre-filed testimony and responses to additional interrogatories due April 19, 2011).

⁶² *Webster Bank v. Oakley*, 265 Conn. 539 (2003).

⁶³ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011); Transcript, April 28, 2011, p. 5; Transcript, May 5, 2011, p. 8-9 (BNE objected to certain interrogatories on the basis of relevance. However, without waiving objection, BNE provided limited responses to some of the interrogatories. To the extent that Fairwind seeks clarification or more information related to the subject interrogatories, they will have additional opportunities to cross examine the petitioner during these proceedings).

⁶⁴ *Pet v. Department of Health Services*, 228 Conn. 651 (1994).

April 28, 2011 and May 5, 2011, Fairwind was afforded opportunities during cross examination of the petitioner to seek clarification and more information related to the interrogatory questions that were the subject of Fairwind's motions to compel.⁶⁵

The Connecticut Supreme Court held that limitation of cross examination of witnesses does not violate due process and the Court has held repeatedly that the "procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause."⁶⁶ Under the UAPA, the agency and the parties to a proceeding may conduct cross examination required for a full and true disclosure of the facts.⁶⁷ The Council provided parties and intervenors with twice as much time to cross examine the petitioner as the petitioner was provided to cross examine parties and intervenors.⁶⁸ Fairwind used more than half of the parties' cross examination time and was also granted an additional 15 minutes of cross examination on the petitioner's rebuttal.⁶⁹ Therefore, Fairwind was afforded the opportunity to conduct cross examination required for a full and true disclosure of the facts.

Fairwind was also afforded the opportunity to fully and fairly present evidence in opposition to the petition. Fairwind presented its case during the April 28, 2011 and May 5, 2011 evidentiary hearings. Of Fairwind's 14 witnesses, Dr. Arline Bronzaft, Mr. Gerry Meyer and Dr. Scott Reynolds, were unable to be present, adopt their written testimony under oath and be cross examined on either date. On May 5, 2011, the Council allowed Dr. Bronzaft, Mr. Meyer and Dr. Reynolds' pre-filed testimonies into the record.⁷⁰ According to the Supreme Court, "constitutional principles permit an administrative agency to organize its hearing schedule so as to balance its interest in reasonable, orderly and nonrepetitive proceedings against the erroneous deprivation of a private interest and it is not unconstitutional for the Council, in good faith to balance its statutory time constraints against a [party's] desire for more time to present their objections to a proposal."⁷¹ Furthermore, the Council accepted submissions from parties after the close of the evidentiary record providing additional opportunities for parties to voice their concerns.⁷² Therefore, the hearing procedure was consistent with due process requirements.

G. The resignation of Council Chairman Daniel F. Caruso during the pendency of this proceeding did not warrant a "mistrial."

On March 22, 2011, Attorney Jeffrey Tinley (Tinley), representing Save Prospect Corp., a party to Petition 980, submitted a letter to the Council describing a conversation that had taken place between he and former Council Chairman Caruso (Caruso) in the chambers of Judge Caruso's Probate Court on

⁶⁵ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011); Transcript, April 28, 2011, p. 5; Transcript, May 5, 2011, p. 8-9 ("To the extent that Fairwind seeks clarification or more information related to the subject interrogatories, they will have additional opportunities to cross examine the petitioner during these proceedings").

⁶⁶ *Pet v. Department of Health Services*, 228 Conn. 651 (1994).

⁶⁷ Conn. Gen. Stat. §4-178 (2011); R.C.S.A. §16-50j-28; *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁶⁸ Connecticut Siting Council, Petition 983, Council Memorandum dated April 19, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript, April 14, 2011, p. 168. (A total of four hours was allotted to parties for cross examination of the petitioner and a total of two hours was allotted to the petitioner for cross examination of the parties).

⁶⁹ Transcript, May 5, 2011, p. 247-248; 287; 308; 360; 367-381.

⁷⁰ Transcript, May 5, 2011, p. 112-113; 122-124.

⁷¹ *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁷² Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011) (The record closed on May 5, 2011. A letter from the State Historic Preservation Office was submitted on May 23, 2011. During a Council meeting held on May 26, 2011, the Council granted a request from Fairwind to submit a letter from the U.S. Army Corps of Engineers.)

March 18, 2011.⁷³ Tinley accused Caruso of engaging in ex parte communications in violation of Conn. Gen. Stat. §4-181. Upon receipt of the Tinley letter, Caruso resigned as Council Chairman on March 24, 2011. During the evidentiary hearing held on April 26, 2011, the Council considered a Motion for Mistrial or in the Alternative for Continuance, Reconsideration and to Alter Schedule dated March 29, 2011 filed by Fairwind in response to the alleged ex parte communication in the Tinley letter.

In its motion, Fairwind cited to a state Supreme Court case in which the Superior Court judge assigned to a judicial civil trial matter engaged in ex parte communications.⁷⁴ A public hearing on a petition for a declaratory ruling filed under the UAPA and the PUESA is not a trial; it is an administrative proceeding. Furthermore, Council decisions are rendered by nine voting members rather than one judge. During the public hearing held on April 26, 2011, the Council denied Fairwind's motion for mistrial, motion for continuance and motion to alter the schedule and granted the motion for reconsideration.⁷⁵ As a result, the Council reaffirmed all of the 15 previous rulings in this proceeding.⁷⁶ Therefore, the resignation of Caruso as Council Chairman and the reaffirmation of the 15 rulings during Caruso's chairmanship cured any alleged predisposition upon which to judge the merits of this petition by Caruso and the other eight Council members.

H. Chairman Stein met the requirements to participate in the deliberations and vote on this petition.

Robert Stein was named as Acting Chairman of the Council on March 24, 2011. He presided over the evidentiary hearings held in this petition on April 26, 2011, April 28, 2011 and May 5, 2011. During the evidentiary hearing held on April 26, 2011, Chairman Stein stated for the record that he fully intended to participate in the deliberations and the final decision on this petition.⁷⁷ On April 27, 2011, the Council issued a memorandum indicating Chairman Stein had met the requirements under the UAPA to make an informed decision on the matter and that any party or intervenor who had objections should notify the Council in writing no later than May 2, 2011.⁷⁸ On April 29, 2011, the Council received an objection from Fairwind to the participation of Chairman Stein in the deliberations and vote on this petition pending receipt of information with respect to the nature and scope of Chairman Stein's site visit, as well as presenting an interpretation of the Council memorandum to indicate that Chairman Stein had already decided to vote in favor of the petition.

It is well settled that members of an administrative agency need not be present at public hearings in order to participate in decisions if the member acquaints themselves sufficiently with the issues raised and the evidence and arguments presented at public hearings in order to exercise an informed judgment.⁷⁹ Chairman Stein announced during a public meeting of the Council on May 12, 2011 that he had read the transcripts of the hearings held on March 22, 2011 and March 23, 2011 over which he did not preside, reviewed the entire record and conducted a site visit.⁸⁰ He met the requirement of sufficient acquaintance

⁷³ Connecticut Siting Council, Petition 980, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=468692> (last visited May 4, 2011).

⁷⁴ See *Abington Ltd. Partnership v. Heublein*, 246 Conn. 815 (1998).

⁷⁵ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

⁷⁶ *Id.*

⁷⁷ Transcript, April 26, 2011, p. 6.

⁷⁸ Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited June 3, 2011).

⁷⁹ *New Haven v. Public Utilities Commission*, 165 Conn. 687 (1974); *Dana-Robin Corp. v. Common Council of the City of Danbury*, 166 Conn. 207 (1974); *Loh v. Planning and Zoning Commission of the Town of Fairfield*, 161 Conn. 32 (1971).

⁸⁰ Connecticut Siting Council, Meeting Minutes, May 12, 2011.

with the issues raised and the evidence and arguments presented at the public hearings in this matter to exercise an informed judgment.

Fairwind's objection sought information from the Council with respect to the nature and scope of Chairman Stein's site visit. Site visits are not required by the UAPA or the PUESA. The purpose of a site visit is to acquaint members with the property at issue; the purpose of a hearing is to afford the parties the opportunity to present and to rebut evidence.⁸¹ Site visits are neither a hearing nor an integral part of the hearing process.⁸² Courts recognize that site visits, although not required by statute, may be necessary for evaluation of property and that site visits are an appropriate investigative tool.⁸³ Chairman Stein publicly disclosed that he had read the transcripts of the public hearings over which he did not preside, reviewed the entire record and conducted a site visit. Therefore, Chairman Stein met the requirements of the UAPA and the Supreme Court to exercise an informed judgment on this petition.

⁸¹ *Manor Development Corp. v. Conservation Commission*, 180 Conn. 692 (1980); *Grimes v. Conservation Commission of the Town of Litchfield*, 49 Conn. App. 95 (Conn. App. 1998);

⁸² *Grimes v. Conservation Commission*, 243 Conn. 266, 277-9 (1997).

⁸³ *Id.*