

**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
Winsted-Norfolk Road in Colebrook,
Connecticut (“Wind Colebrook North”)**

Petition No. 984

April 29, 2011

OBJECTION TO AND MOTION TO MODIFY PROTECTIVE ORDER

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby object to the Protective Order dated April 28, 2011, adopted by the Council governing the use of certain allegedly confidential and proprietary material provided to the Council by the petitioner, BNE Energy Inc. (“BNE”).

The Grouped Parties object to the unduly limited use of such material imposed by the Protective Order because the Protective Order adopted by the Council: (1) applies to information that is not subject to confidential protection; (2) applies to information that is already available to the general public on the internet; and (3) applies to site-specific wind data collected by BNE. The Grouped Parties further object to the procedure announced by the Council that will prevent parties and intervenors from cross examining any witness on the content of the allegedly confidential information.

In light of these facts, the Grouped Parties move the Council to immediately order that all documents filed under seal that are already in the public domain are not entitled to protection. The Grouped Parties further move that the Council modify its Protective Order in accordance with the attached proposed order.

In support of this Objection, the Grouped Parties state the following:

1. On March 25, 2011, BNE filed a Motion for Protective Order and Motion to File Under Seal. In that Motion, BNE indicated that it intended to file with the Council raw wind data collected by and belonging to BNE, GE's setback rules, the Mechanical Loads Assessment ("MLA") reportedly conducted by GE for BNE and certain noise emission characteristics of the proposed wind turbines.
2. On April 25, 2011, BNE subsequently filed under seal additional information responsive to FairwindCT's third set of interrogatories, purportedly including a second MLA, information related to the dimensions of the proposed turbines, additional wind data collected by BNE and information from GE regarding the equipment used to transport the wind turbine components and the clearances required.
3. BNE claimed that the setback rules, MLAs, transportation, turbine dimensions and noise emission characteristics (collectively, the "GE Safety Information") are proprietary and confidential pursuant to a confidentiality agreement between BNE and GE. (BNE's Motion for Protective Order, Mar. 25, 2011, at 1-2.)
4. Accordingly, BNE sought permission to file the GE Safety Information and the BNE wind data under seal and requested that such material be submitted to the Council subject to protective order. (Id.)
5. Without having had an opportunity to review the BNE wind data or GE Safety Information, and relying on the content of the information filed by BNE under

seal in Petition No. 983, on April 22, 2011 the Grouped Parties filed an objection to BNE's Motion for Protective Order.

6. In their objection, the Grouped Parties argued that a protective order in this petition with the same restrictions as the protective order in Petition No. 983 would not only keep all of this information secret from the general public, but would also prevent any meaningful inquiry into such information and would deny the Grouped Parties and all other parties and intervenors any meaningful cross-examination whatsoever with respect to GE Safety Information and the BNE wind data, in contravention of Conn. Gen. Stat. § 4-178.
7. On April 26, 2011, the Council overruled the Grouped Parties' objection and granted BNE's motion for protective order. An executed copy of the protective order was not made available to the parties until April 28, 2011.
8. On April 28, 2011 one of the Grouped Parties' attorneys visited the Council offices to view the material filed under seal. An Affidavit in support of this Objection executed by that attorney is attached hereto.
9. As detailed in the attached Affidavit, Ms. Gianquinto's review of the material filed under seal revealed that at least one of the documents is already publicly available. (Aff. ¶ 7.) Specifically:
 - A document titled "Setback Considerations for Wind Turbine Siting," that was filed under seal is publicly available on the internet, currently hosted by the New York State Public Service Commission at <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7>

BF6A567D4-3F56-4125-968F-28CBF62BD6F6%7D. That document is not entitled to protection.

10. There may be other documents filed under seal by BNE that are similarly already public information. (Aff. ¶ 9.)
11. Despite its representations to the contrary, BNE did not file MLAs related to this project. (Aff. ¶ 15.)
12. The noise emission characteristics filed under seal are contained in a document provided by GE that discusses the expected noise that would be caused by various wind speeds at various heights. (Aff. ¶ 12.)
13. Also filed under seal is a document concerning the turbines' expected power curve and other documents and brochures regarding the technical specifications of the turbines. (Aff. ¶ 13.)
14. Another document filed under seal is more than 20 pages long and details the requirements and specifications of the trucks used to transport the turbine components and associated equipment and the road clearance required for those trucks. (Aff. ¶ 14.)
15. The material totals approximately 70 pages and is half an inch thick. (Aff. ¶ 5.)
16. The BNE wind data is contained on two CDs. The first CD contains two zipped PDF files. One of the files is 1176 pages long, and contains more than 112,000 lines of data. The other file is 1334 pages long and contains more than 96,000 lines of data. (Aff. ¶¶ 17-18.) The second CD contains two zipped Excel

files. One file contains 7060 lines of multi-column data. The other file contains 29,558 lines of multi-column data. (Aff. ¶ 18.)

17. The Grouped Parties object to the sealing of all of this material.
18. The presumption is that anything filed with the Council is public. Conn. Gen. Stat. § 1-210. The Freedom of Information Act does provide for protection of trade secrets, but the MLA, the noise emission characteristics, the setback information and the BNE wind data fail to meet the definition of trade secrets because they do not “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.” See Conn. Gen. Stat. § 1-210(5)(A)(i).
19. Anything that is in the public domain, even if through the work of third parties, certainly should not be entitled to the “secrecy” afforded to trade secrets under our statutory scheme. See Conn. Gen. Stat. § 1-210(5)(A)(ii). Therefore, all of the GE setback information should be unsealed immediately.
20. Moreover, the fact that the GE setback information is already in the public domain also means that the information is not protected under the terms of the NDA between GE and BNE. Pursuant to the terms of that NDA, the setback information expressly does not constitute proprietary information requiring nondisclosure, because the NDA excludes from coverage material that is publicly available through no fault of the recipient of the otherwise-proprietary

information. The NDA also excludes any material that was already public at the time it was given to BNE.

21. The NDA between GE and BNE thus expressly anticipates this occurrence and expressly excludes information that has been previously publicly disclosed from protection. Accordingly, the GE setback information filed under seal by BNE is not subject to the NDA, is not exempt from disclosure under FOIA, and should be unsealed for the public's benefit.
22. The setback information should also be unsealed to permit public cross examination on the information contained therein, and to prevent a repeat of the absurdity that occurred in Petition Nos. 980 and 983 and has already occurred in this petition, where counsel for parties opposing the petition were prevented from cross examining any of BNE's witnesses on information in the public domain because some of that information might have been improperly filed under seal.
23. The Council has, in fact, issued the Protective Order with the same restrictions as those in Petition Nos. 980 and 983. The Protective Order now in place imposes restrictions on the review and use of the GE Safety Information and BNE wind data that make it impossible for the parties and intervenors opposing the petition to effectively use the information at all.
24. First, the Protective Order requires that any party or intervenor who is authorized to review the GE Safety Information and BNE wind data do so by traveling to the Council's offices in New Britain during the Council's business hours. (Protective Order, Apr. 28, 2011, at ¶ 10.) Anyone who is authorized to review the material in

that manner must first sign a non-disclosure agreement. The information may be reviewed but may not be copied. Parties reviewing the material may not even take notes. (Id.) In the case of the BNE wind data, which is available on two CDs in files that together amount to more than 244,000 lines of multi-column data, those restrictions render the data useless. (See Aff. ¶¶ 16-19.)

25. The Protective Order also does not provide that the GE Safety Information and BNE wind data be made available to experts engaged by the parties and intervenors. That restriction deprives the parties and intervenors of the opportunity to meaningfully analyze and cross examine BNE's witnesses on the allegedly confidential and proprietary information. The GE Safety Information and BNE wind data only is of use to the parties if they are permitted to provide the raw data to their experts such that an independent study of BNE's data and the conclusions based thereon can be performed. That analysis is impossible under the Protective Order.
26. The Protective Order also provides that "[i]f the Protected Materials are used in any manner in any proceeding or hearing before the Council, such proceeding or hearing shall not be held before, nor any record of it made available to any person or entity not affiliated with the Council." (Id. ¶ 9.) Council staff has notified the undersigned that no portion of the hearing on BNE's petition shall be closed to the public.

27. In order to cross examine BNE's witnesses on the GE Safety Information and the BNE wind data, the parties and intervenors must submit written interrogatories under seal – interrogatories that must be drafted based on documents that no party may take notes on – that will be answered by BNE under seal. These restrictions deny the Grouped Parties any meaningful cross-examination whatsoever with respect to the materials subject to the Protective Order, in contravention of Conn Gen. Stat. § 4-178.
28. Moreover, although BNE repeatedly claims that its "hands are tied" with respect to disclosure of the GE Safety Information, the wind data is owned by BNE. BNE may therefore disclose the wind data as it wishes. Because BNE bears the burden of establishing that the instant petition should be granted, BNE can and should be required to allow for reasonable use of that data in its attempt to obtain permission to site the proposed wind turbines. At an absolute minimum, the Council should require BNE to permit opposing parties to use and disseminate the raw wind data to their experts.
29. The Grouped Parties note that in its pursuit of Wind Colebrook North, BNE has been awarded significant amounts of public funds. It used those public funds to put together its petition and accompanying exhibits. It used those public funds to gather the raw wind data it now seeks to protect from public disclosure. It used those public funds to assist GE in conducting the Mechanical Loads Assessments that have yet to be filed with this Council.

30. Given its acceptance of public funds, BNE should be required, at a minimum, to disclose the basic safety information and the raw wind data to the representatives of members of the public who oppose this petition, i.e., the Grouped Parties. Otherwise, BNE will succeed in using public money for a project without being required to cooperate with any attempt to determine if the proposal comports with basic safety standards as established by the manufacturer of the turbines that BNE seeks to site and without having its contention that Wind North South is a sound use of that public money subject to independent verification.
31. In light of the above facts, the Grouped Parties object to the Protective Order and move the Council to modify its Order and immediately order unsealed all documents filed under seal that are publicly available.
32. Specifically, the Grouped Parties move the Order be modified to require BNE to provide copies of the GE Safety Information and the BNE wind data to all parties and intervenors willing to sign a non-disclosure agreement, and that the parties and intervenors be permitted to make copies for review by their experts who sign a non-disclosure agreement. The Grouped Parties further move the Order be modified to permit cross examination of BNE witnesses on the GE Safety Information and the BNE wind data, during which only individuals who have signed the non-disclosure agreement may be present.

WHEREFORE, the Grouped Parties object to the Protective Order entered by the Council and move the Council to immediately order all documents filed under seal that are available in the public domain to be unsealed and also enter an order modifying the terms of the Protective Order in accordance with the attached draft order.

By:



Emily A. Gianquinto
Nicholas J. Harding
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
Tel. (860) 278-1150
Fax. (860) 240-1002

**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
Winsted-Norfolk Road in Colebrook,
Connecticut (“Wind Colebrook North”)**

Petition No. 984

April 29, 2011

PROPOSED ORDER

Whereas, the Council previously entered a Protective Order in this matter, dated April 28, 2011;

Whereas, the Grouped Parties have objected to the Protective Order and moved the Council to modify the Protective Order;

Whereas, upon further review of the Protective Order, the Council has determined that its terms were more restrictive than is necessary to fulfill the Protective Order’s stated goal of preventing “the competitive positions of BNE and GE” from being “undermined”;

Whereas, at least one of the documents filed under seal, a document titled “Setback Considerations for Wind Turbine Siting,” is publicly available through no fault of BNE;

IT IS HEREBY ORDERED that the document identified above is not entitled to be treated as confidential information. It is therefore to be removed from BNE’s sealed filing and returned to BNE. BNE may choose to file that document publicly or to withdraw it from its submission. BNE’s witnesses may be cross examined on the contents of that document.

IT IS HEREBY FURTHER ORDERED that the Protective Order is modified as follows:

1. BNE will immediately provide copies of all other material filed under seal, including any other GE Safety Information or other GE specifications and the BNE wind data, to all parties and intervenors upon receipt of their executed non-disclosure agreements;
2. Parties and intervenors may provide copies of the GE Safety Information and BNE wind data to any experts who execute non-disclosure agreements;
3. Parties and intervenors shall be permitted to cross examine BNE's witnesses on the GE Safety Information and BNE wind data during a portion of the evidentiary hearing that will be closed to the general public;
4. Parties and intervenors shall be permitted to cross examine BNE's witnesses about any information that is within the public domain, even if portions of that information is also claimed by BNE and/or GE to be confidential and proprietary;

SO ORDERED:

CONNECTICUT SITING COUNCIL

By: _____
Robert Stein, Chairman

Date: _____

**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
Winsted-Norfolk Road in Colebrook,
Connecticut (“Wind Colebrook North”)**

Petition No. 984

April 29, 2011

AFFIDAVIT OF EMILY A. GIANQUINTO

The undersigned being duly sworn does hereby depose and say:

1. I am over the age of eighteen, understand the meaning and obligation of an oath, and am competent to testify as to the matters stated herein.
2. I make this Affidavit on personal knowledge.
3. I am an attorney at Reid & Riege, P.C., and I represent FairwindCT, Inc., Stella and Michael Somers and Susan Wagner, parties to Petition No. 984.
4. On April 28, 2011, I visited the offices of the Council in order to view the material filed under seal by BNE in Petition No. 984.
5. The material filed under seal consists of a computer disk and a stack of documents approximately half an inch thick, totaling approximately 70 pages. Some of these documents appear to be duplicates, but I am unable to confirm that with certainty due to the restrictions of the protective order that prevented me from taking notes.
6. Included in such material was certain setback information provided to the Council by BNE related to that petition. The setback information contains information related to safety risks from industrial wind turbines and therefore is related to possible adverse public health effects from siting the proposed wind turbines.

7. Included in the material is a document about setbacks, titled "Setback Considerations for Wind Turbine Siting," that is publicly available on the internet at <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7BF6A567D4-3F56-4125-968F-28CBF62BD6F6%7D>.

8. I was previously familiar with the document referenced in Paragraph 7 before visiting the Council office based on my own searches for information in the public domain regarding setback guidelines provided by GE and my own experience representing parties to Petition Nos. 980 and 983.

9. My review of the documents filed under seal therefore reveals that at least one of the documents is already publicly available. Due to the limitations of the protective order, which prevented me from taking notes on the other documents, I cannot be sure if other documents filed under seal are likewise also already publicly available. Based on my review of the other documents, I suspect that some of them may in fact also already in the public domain.

10. Also filed under seal in Petition No. 984 is a copy of a Mutual Nondisclosure Agreement ("NDA") between BNE and GE governing certain purportedly proprietary documents exchanged by the two parties to the NDA.

11. The NDA contains a provision that, to the recollection of the undersigned (who was prevented from taking notes under the terms of the protective order), exempts from coverage under the NDA information that is available to the public through no fault of the party receiving any otherwise-confidential information. To my recollection, the NDA also expressly states that any information that was previously available publicly before it was given to BNE is not protected under the NDA.

12. The noise emission characteristics document contains data provided by GE regarding expected noise created by certain wind turbines at varying speeds and heights.

13. The power curve document contains GE data regarding the amount of energy generated by its turbines at various speeds.

14. Another document filed under seal is more than 20 pages long and details the requirements and specifications of the trucks used to transport the turbine components and associated equipment and the road clearance required for those trucks. This document contains many calculations and diagrams regarding the required clearance. It also contains some specifications regarding the requirements for the crane pad to be built on site.

15. No Mechanical Loads Assessment was in the sealed filings. Council staff were unable to locate the MLAs when I asked if they were available.

16. In my opinion, all of the documents filed under seal are rendered completely useless to the parties because (1) they are available only during the Council's limited business hours; and (2) the parties cannot even take notes on the documents, which number 70 pages and contain a great deal of technical information.

17. One of the two CDs filed under seal contains what appears to be BNE's raw wind data collected at the Colebrook South site. That data is in two static zipped PDF files, not the native format that my clients requested. One PDF file is 1176 pages long, and contains more than 112,000 lines of multi-column data. The other PDF file is 1334 pages long and contains more than 96,000 lines of multi-column data.

18. The second CD filed under seal contains what appears to be BNE's raw wind data collected by the sodar unit at the Colebrook North site. That data is in two zipped Excel files.

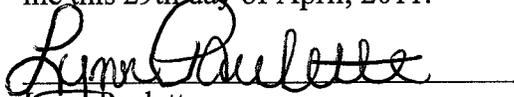
One file contains 7060 lines of multi-column data. The other file contains 29,558 lines of multi-column data.

19. In my opinion, the wind data is rendered completely useless to the parties because (1) it is available only on the Council's computer during the Council's limited business hours; (2) half of the data is in static form and therefore cannot be manipulated and analyzed; and (3) the parties cannot even take notes on the more than 244,000 lines of multi-column data.



Emily A. Gianquinto

Subscribed and sworn to before
me this 29th day of April, 2011.



Lynn Paulette
Notary Public
My Commission Expires: 10/31/2013

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 29th day of April, 2011:

Carrie L. Larson
Paul Corey
Thomas D. McKeon
David M. Cusick
Richard T. Roznoy
David R. Lawrence and Jeannie Lemelin
Jeffery and Mary Stauffer
Walter Zima
Eva Villanova

and a copy was emailed to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King


Emily A. Gianquinto