

**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

May 31, 2011

**MOTION TO STRIKE
BNE ENERGY INC.’S POST-HEARING BRIEF**

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby move to strike a portion of the Post-Hearing Brief, dated May 27, 2011, filed by Petitioner, BNE Energy Inc. (“BNE”). On the last page of its brief, BNE asks the Council to approve its proposed project with 80-meter hub heights, rather than the 100-meter hub heights that are proposed in its petition. This request is improper and not based on any evidence presented during the hearings on this proceeding. The Council does not have the authority to approve a petition that has not been properly presented to it. Therefore, BNE’s request should be stricken.

BNE’s petition was filed on December 13, 2010. In that petition, BNE seeks approval to site three GE 1.6 MW turbines with 100-meter hub heights. Although BNE sought approval for two different blade lengths in its petition and throughout this proceeding, BNE never sought permission for two different hub heights until the last several minutes of the last day of evidence in this proceeding. Now, on the final page of its post-hearing brief, BNE asks the Council to approve a project with 80-meter hub heights:

If, however, the Council determines that a wind turbine with a 100-meter hub height will present an undue visual impact, BNE alternatively requests approval

for the GE 1.6-MW turbine at an 80-meter hub height, which would reduce the overall tip height of the turbines to less than 400 feet. See May 5, 2011 Tr. at 384.

(BNE Post-Hearing Br. at 49.) This request should be stricken from BNE's post-hearing brief because it is wholly unsupported by any evidence in the record.

On May 5, 2011, as Acting Chairman Tait was closing the evidentiary proceeding, BNE's counsel inquired about whether BNE could submit a late-filed exhibit responding to earlier questions from Council members about whether BNE could relocate its turbines to be farther away from the residential property line to the north of the site. The following discussion took place:

ACTING CHAIRMAN TAIT: . . .

I'd like to thank all counsel and all parties and witnesses for bearing with us through these three proceedings -- yes, Miss Larson?

MS. LARSON: Professor Tait, I just have an inquiry quickly as to how you would like BNE to proceed with Mr. Golembiewski's inquiries regarding a relocated turbine or the potential to do so? Would you like a late filed exhibit?

MR. GOLEMBIEWSKI: Oh -- I guess. Before we make our decision, right? I don't know. It's not -- I mean I would like the information, but if we don't have time --

ACTING CHAIRMAN TAIT: Mr. Harding.

MR. HARDING: Mr. Harding is certainly going to want an opportunity to cross-examine any --

ACTING CHAIRMAN TAIT: Well I don't see how we can accomplish that at this time. It involves redesigning the whole project.

MR. COREY: If I may respond --

ACTING CHAIRMAN TAIT: Yes, please do --

MR. COREY: -- to that issue? I would just say on behalf of BNE that, you know, we've -- we've tried our best to design the project appropriately, balancing all of the various issues that you have to take into consideration. And in response to many different issues, we tried to respond and address those issues with respect to setbacks and wetland impacts, narrowing the road, moving the turbines further away from homes. And we are committed to do whatever we can to address those issues. And at the break we did look at that and it does appear initially that it can be done to meet that additional setback that you had

requested.

In addition -- you know, obviously there's been some concerns on visual impacts and so forth. And the -- the Colebrook sites are different than Prospect. In Colebrook the 80 meter hub height does work. And if the Council were to decide and determine that hundred meter hub heights are just too tall, we would -- certainly would like the opportunity to be at 80 meters and make it work. And we're committed to doing that. And we understand this is the first wind project in Connecticut and we'll try our best to make it work and accommodate and mitigate to the fullest extent possible.

MR. HARDING: Motion to strike the closing statement by Mr. Corey.

ACTING CHAIRMAN TAIT: We'll take it for what it's worth.

(5/5/11 Tr. 325:6-326:23.)

As is clear from the above transcript excerpt, and as Acting Chairman Tait expressly acknowledged, BNE's proposal involves "redesigning the whole project" – in other words, BNE proposed at the hearing, and now requests in its post-hearing brief, that the Council approve a project that has not been presented to the Council by petition and is not supported by any evidence. The visual resources evaluations, the noise evaluation, the wind speed data, the environmental studies, the FAA applications, the shadow flicker reports, the ice throw reports – all of the evidence relates to 100-meter hub heights.

No evidence concerning the deployment of wind turbines with 80-meter hub height was offered at any time in any hearing. No evidence was offered as to the length of the wind turbine blades to be deployed on the 80-meter alternative. No viewshed analysis was provided for the 80 meter hub height; no shadow flicker analysis was provided; no ice throw or blade throw studies were performed. The effects of siting turbines with 80-meter hubs are unknown because BNE did not present any evidence about this last-minute alternative.

The record is almost completely silent regarding the 80-meter hub height. In fact, to the best of the Grouped Parties' knowledge, the only evidence in the record of this proceeding that is specific to the 80-meter hub height are (1) the above "closing statement" from Mr. Corey and (2) the letter from the State Historic Preservation Office relaying its conclusion that BNE's proposed project will have an adverse effect on Rock Hall "whether at 100 meter hub height or 80 meter hub height."¹ (SHPO Letter, dated May 19, 2011; see also Grouped Parties' Proposed Findings of Fact, dated May 27, 2011, ¶¶ 90-110.)

Because there is no evidence to support the "alternative" that BNE presented at last minute during the evidentiary hearing, its request that the Council site turbines with 80-meter hubs should be rejected out of hand. See, e.g., Citywide Props., LLC v. Planning and Zoning Commission of Bridgeport, No. CV084023167S, at *3-4 (Jan. 6, 2010, Owens, J.T.R.) (substantial evidence test not met where no evidence offered). If BNE "would like the opportunity to be at 80 meters and make it work," it should present a petition or application for such a project to the Council. Only with a proper petition should BNE's alternative hub height be considered. To hold otherwise would not only violate the substantial evidence rule, but also deny the Grouped Parties and all other parties and intervenors of the right to cross examine BNE regarding its proposed "redesign[] of the whole project" – a right that is protected by the Constitution and by the Uniform Administrative Procedures Act, which explicitly grants to a party in a contested case the right to "conduct cross-examinations required for a full and true disclosure of the facts." Conn. Gen. Stat. § 4-178(5); see also id. § 4-177(a) ("In a contested case, each party and the agency conducting

¹ The record also contains a brief discussion about the height and specifications of the single turbine located at Jiminy Peak, which has an 80-meter hub height. (5/5/11 Tr. 286:7-18 (Libertine).)

the proceeding shall be afforded the opportunity . . . at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.”); id. § 4-178(7) (“parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed”).

WHEREFORE, for the foregoing reasons, the Grouped Parties request that BNE’s request for approval of a project with 80-meter hub heights be stricken from BNE’s post-hearing brief.

By:



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CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail
and e-mail to the following service list on the 31st day of May, 2011:

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

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



Emily A. Gianquinto