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RE: Summary of high points of appeals
FairwindCT et al v. Connecticut Siting Council

Below is a summary of the highpoints of the appeals filed on July 15 (Docket 983—Flagg Hill Road) and July 21 (Docket 984—Rock Hall Road).

The Connecticut Administrative Procedure Act allows several grounds for appealing the decisions of the Connecticut Siting Council. Some of the issues that will be presented on appeal have never been considered by the Connecticut courts.

What can be appealed under Connecticut law? The Administrative Procedure Act provides that on appeal:

The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Below is a listing of high points of how the Siting Council violated the list provided by the statute. In many cases one of the items listed below will be cited for violations of more than one of the listed criteria in (1)-(6).

The short version:

1. Subject Matter Jurisdiction.

(a.) The Siting Council did not have subject matter jurisdiction over wind turbines until the new bill effective July 1, 2011 was signed into law on July 13, 2011 by the Governor. The proper place for the BNE applications then should have been the Colebrook Planning and Zoning Commission and Inland Wetland Commissions, not the Siting Council. This is a very technical argument. Under the version of the statute that applied to the BNE petitions the Siting Council only had jurisdiction over certain defined electric generation facilities. The qualifying facilities are those that use any fuel, nuclear

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power, and fuel cells. Wind is not a fuel; it is a natural resource. Fuels are burned. Wind is not. It is not until the new law was effective that the Council was granted jurisdiction over wind turbines. In May 2010 the Siting Council published a very tortured memorandum on why it thinks it has jurisdiction over wind turbines; it should have sought legislative change. Fairwind did not raise this argument before the Council as the legislature was in session and this defect would have been fixed by the legislature. Our research shows that this will be a case of first impression.

(b.) There is a provision of the Siting Council statute that allows the local commissions to issue an order to an applicant or petitioner who has a matter pending before the Siting Council; such an order becomes final if it is not appealed to the Siting Council within 30 days of the issuance of the order. The Colebrook Planning and Zoning Commission issued an order with respect to Petition No. 984. BNE never appealed that decision within the 30 days. That order remains valid and outstanding. The Siting Council either had no authority to hear Petition No. 984 until there was compliance with the Planning and Zoning Commission order, or the Siting Council could rule on the petition but BNE is still subject to the Planning and Zoning Commission order and would be subject to a cease and desist order from the P&Z if BNE sought to build without P&Z compliance. Our research shows that this will be a case of first impression.

2. No Decision within 180 days.

Under the Connecticut Administrative Procedure Act the Siting Council had 180 days from the date of the filing of BNE's petitions to render its decisions on the requests for Declaratory Rulings. Failure to render a decision in 180 days is treated as a denial under the statute. The decisions rendered within the 180 days recognized that the petitions were incomplete and ordered an additional set of procedures, the Development and Management Plan Phase, or D&M Phase. The D&M Phase exists under the part of the Siting Council statute that applies to Certificates of Environmental Compatibility and Public Need. The requests by BNE for Declaratory Rulings that no Certificate of Environmental Compatibility and Public Need are required are under a different section of the statute. Under the petition for a declaratory ruling section there is no authority for the D&M Phase. Since the rulings for 983 and 984 are dependent on further proceedings, on appeal Fairwind seeks a ruling from the court that the decisions were a denial of the requests since further proceedings beyond the 180 days were ordered and are not authorized under the statute.

3. Refusal to hear evidence; example evidence of cumulative effects.

During the hearing the Siting Council prevented Fairwind from presenting evidence on many subjects, limited Fairwind's time for cross-examination, denied

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Fairwind the right of redirect examination while granting the right of redirect examination to BNE, and made other evidentiary rulings to the prejudice of Fairwind. We list them in our appeal.

One example that particularly stands out is the rulings on cumulative effects. During the evidentiary hearing for Petition No. 983 the Chairman ruled that Fairwind could not enter evidence concerning the cumulative effects of the wind turbines to be sited on Flag Hill and those proposed for the Rock Hall Road site; he ruled that cumulative effects would be taken up and considered during the evidentiary hearing for Petition No. 984. During the evidentiary hearing for Petition No. 984 the Chairman denied Fairwind, and others, the opportunity to present evidence of cumulative effects. Thereafter, in rendering its decision for Petition No. 984 the Siting Council found that there were no cumulative effects as there was no evidence of cumulative effects. No kidding.

4. Incomplete data.

Bird, bat, water quality, drawings and other environmental studies were incomplete in many ways. For example, breeding bird surveys were done over 3 days, one day in June 2010, and two in July at Flag Hill. None were done at Rock Hall Road. For the Rock Hall Road site BNE offered the Flag Hill bird and bat studies “as close enough for use” on Rock Hall Road. Even one of BNE’s witnesses said that could not be done. New construction drawings were promised on the last day of evidence to be submitted during the D&M Phase. The Council also decided that new wildlife studies can be submitted in the D&M Phase as new studies were undertaken in response to the criticism made by Fairwind. As noted above there is no D&M Phase. Further, even if there were such a phase, there is no right to appeal the results of the D&M Phase. The Council's willingness to accept the submission of evidence after its decision is right out of Alice in Wonderland. “Verdict first, trial after,” said the Red Queen.

Members of the Siting Council knew that data was incomplete and normally the matter would be rejected; but not for Colebrook, or was it not for wind turbines? The Siting Council provides an audio link over the internet of its deliberations. Each member has a microphone on the member’s table. On June 2, 2011, the Council considered and voted on its final changes to Petition No. 983 and considered its draft for Petition No. 984. The lunch break ran from 1:00 to 1:45 PM. The following was heard over the internet at about 1:42 PM:

The DEP representative was being thanked for his work on the decision.

He said: “It was a difficult one to swallow because [whisper] because we had

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incomplete data. You know, in my usual DEP mode, we say come back when you have complete data. But we couldn't do that here." The person he was speaking to said, "I know."

Exactly Fairwind's point. And then the DEP representative voted for both projects!

5. Approval of 80 meter turbines in Petition No. 984.

In the closing minutes of the evidentiary hearing for Petition No. 984, the Chairman of the BNE made a plea that 80 meter hub height turbines would work at that site as well as the 100 meter hub height turbines as proposed, and if the Council could not see fit to approve the 100 meter turbines would they then approve the 80 meter turbines. Fairwind objected claiming that there was no evidence in the record to support this statement. Colin Tate, acting as chairman that day, overruled the objection and allowed the statement into the record "for what it was worth." In granting Petition No. 984 the Siting Council approved the wind turbines with an 80 meter hub height on Rock Hall Road. No evidence in the record supports the 80 meter hub height turbines; other than the 13 lines of transcript referred to there is no other testimony or evidence concerning these turbines.

6. Historic Properties.

The Siting Council has a long-standing practice of deferring to the State Historic Preservation Office on matters dealing with historic resources. In Petition No. 984 the State Historic Preservation Office found that there would be an adverse effect on the Rock Hall Luxe Lodge, a property on the National Register of Historic Places, if wind turbines *with either* the 100 or 80 meter hub height were sited on Rock Hall Road. Staff from the State Historic Preservation Office had visited Rock Hall in advance of its ruling and notification to the Siting Council. The Siting Council never visited Rock Hall Luxe Lodge. The Siting Council decided that, contrary to the opinion of the State Historic Preservation Office, wind turbines with the 80 meter hub height would not have an adverse effect on Rock Hall Luxe Lodge.

7. Noise.

The Siting Council ignored the Department of Environmental Protection regulations with respect to noise modeling and measurement and found, based on BNE's erroneous technique of modeling sounds, that there would be no violation of the Noise Regulations. Fairwind's noise engineer modeled the noise data provided by BNE to the property line and found violation of the DEP noise regulations at the property line for

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both Petition No. 983 and Petition No. 984.

8. Water quality standards.

BNE's own engineer conceded that the site plans submitted with the petition were not complete and contained errors, and, despite having since been significantly revised, remain incomplete and still contain errors. He testified that the plans presented are preliminary drawings that will not be complete until approval of this project. In fact, the plans cannot be completed until BNE conducts a detailed geotechnical investigation, collects test pit and infiltration data, determines the depth of the season-high groundwater on the site, does additional field topographic work, completes design of the dewatering features at the proposed wetlands crossing and obtains subsurface information for final road and drainage design. BNE started doing this work during the weeks of July 25 and August 1.

The language of the statute is clear. In order to obtain a declaratory ruling, BNE must, at a minimum, show that its proposed project complies with DEP water quality standards. It must make that showing at the time its petition is filed – not through subsequent revision, and not after approval is secured.

The Siting Council determined there will be compliance with the water quality standards at the end of the D&M Phase. There is no evidence to support that conclusion.

9. Sealed evidence.

The Council allowed BNE to file evidence under seal and then restricted Fairwind's ability to review the material. Material filed under seal could only be reviewed at the offices of the Siting Council, no notes could be taken, and no copy could be taken away even after signing a nondisclosure agreement. Some of the material that was filed under seal was available in the public domain, including it on the Internet. Even when asked to modify its protective order the Siting Council continued to keep the matters under seal.

Some of the information kept under seal was the turbine manufacturer's safety setback criteria. Fairwind believes that safety criteria are never proprietary and should never be subject to restrictive protections to prevent cross-examination on the subject of compliance with safety setbacks.

Other important steps to take:

The US Fish & Wildlife Service, is currently debating whether or not there will be

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national wildlife *rules or just guidelines* for industrial wind energy, and if *rules*, what will be at stake is this: *if they adopt strict mandatory rules, it could severely restrict wind energy in every state in the country.*

The Fish & Wildlife Service is asking for public input. If you want to wade through the technical details look at <<<http://www.fws.gov/windenergy/>>>.

Send your comments in an email to "windenergy@fws.gov".

Comments end on August 4, 2011, so comment by then.