S.C. 19090	:	**SUPREME COURT**
FAIRWINDCT, INC., STELLA SOMERS, MICHAEL SOMERS AND SUSAN WAGNER	:	
v.	:	
CONNECTICUT SITING COUNCIL	:	**AUGUST 26, 2013**

OPPOSITION TO MOTION FOR EXPEDITED SCHEDULE

Pursuant to Practice Book § 66-2, Plaintiffs-Appellants FairwindCT, Inc., Stella and Michael Somers and Susan Wagner (collectively, "Plaintiffs") hereby oppose the motion for expedited schedule, dated August 16, 2013, filed by intervening defendant BNE Energy Inc.

BNE's motion should be rejected because it is an untimely request that the Court suspend its rules based on BNE's factually unsupported claim that it may lose money if oral argument is not completed in the month of September and the Court's decision is not issued by the end of November. BNE does not point the Court to any authority supporting such an extraordinary request, which, if granted, would severely prejudice Plaintiffs' preparation for oral argument and would place the Court under significant and unnecessary limitations in preparing its decision. Plaintiffs urge the Court to reject the motion in its entirety.

I. Specific Facts in Opposition

This appeal is one of two that arise out of the decisions of the Connecticut Siting Council (the "Siting Council") to approve petitions filed by BNE Energy Inc. ("BNE") to construct industrial wind turbine projects on residential property in rural Colebrook, Connecticut. The two residential properties are located approximately half a mile away from each other. The petition that is the subject of this appeal was filed on December 6, 2010. The petition that is the subject of S.C. 19091 was filed on December 13, 2010. The appeals,

which were consolidated for purposes of the record and oral argument, have been fully briefed since mid-June 2013, but the record has not yet been prepared.

The Siting Council held hearings on both petitions in March, April and May of 2011. Plaintiffs participated in those hearings as parties and intervenors under the Connecticut Environmental Protection Act, Connecticut General Statutes § 22a-14 et seq. ("CEPA"). In both proceedings, the Siting Council's Decision and Order (and related Findings of Fact, Conclusions of Law and Opinion) approved BNE's petitions for declaratory rulings that no certificates of environmental compatibility and public need were required for the construction, maintenance, and operation of two 4.8 MW industrial wind turbine projects located on Flagg Hill Road and Rock Hall Road, Colebrook, Connecticut (Petition Nos. 983 and 984). On June 2, 2011, the Siting Council granted BNE's petition in the matter that is the subject of this appeal. On June 9, 2011, the Siting Council granted BNE's petition in the matter that is the subject of S.C. 19091.

Plaintiffs appealed the Siting Council's decisions on July 15 and July 21, 2011. The trial court (Cohn, J.) held an evidentiary hearing regarding both appeals in January and February 2012, heard oral argument on June 12, 2012, and issued decisions dismissing Plaintiffs' appeals on October 1, 2012. At no time did BNE move to expedite those proceedings, which took more than 14 months.

Plaintiffs appealed from the trial court's decisions on October 17, 2012. Plaintiffs raised several issues on appeal, including matters of first impression concerning statutory interpretation and implicating the Siting Council's jurisdiction. At the request of all parties, Plaintiffs' appeals were transferred to this Court and subsequently consolidated for purposes

of the record and oral argument. BNE did not seek an expedited schedule when the appeals were filed or after they were transferred.

On January 9, 2013, Plaintiffs filed motions for articulation, and on the same day, filed motions seeking to extend their briefing deadline to 30 days after the trial court's decision on the articulation motions. Although BNE reported that it objected to the extensions, it did not file an opposition to the extensions. Plaintiffs' consolidated brief was filed on March 22, 2013.

On April 11, 2013, BNE joined in its first motion for extension of time in which to file its opposition brief, seeking an additional 16 days. On May 2, 2013, BNE joined in its second motion for extension of time in which to file its opposition brief, seeking an additional five days. Defendants' consolidated briefs were filed on May 13, 2013. On May 28, 2013, Plaintiffs sought an 11-day extension of time in which to file their consolidated reply brief. BNE consented to the extension. Plaintiffs' consolidated reply brief was filed on June 14, 2013.

On August 16, 2013, 10 months after the appeals had been filed, more than five months after the appeals were transferred to this Court, and two months after these appeals were fully briefed, BNE moved, for the first time, for an "expedited schedule." BNE seeks to schedule argument on just one of the two appeals, which have been consolidated for purposes of the record and oral argument, on any date in September 2013 – which was just two weeks away at the time of BNE's motion – and asks the Court to bind itself to issuing a decision by the end of November 2013.

By BNE's own admission, its sudden desire to expedite these proceedings on extremely short notice, which would prejudice Plaintiffs' preparation for oral argument and would force the Court to issue a significant decision with very little time for consideration, is

motivated by monetary concerns. (See Motion at 5-6.) According to the improper "evidence" offered in its motion,[1] if BNE does not begin construction on its proposed wind turbine projects by the end of December, it will forfeit apparently "significant . . . federal tax incentives for wind energy . . . ." (Id. at 5.)

Nowhere in BNE's motion does it explain or attempt to excuse its failure to bring this motion in a timely manner. There is no reason for this Court to suspend its usual rules to permit BNE to jump the line in front of other cases ready for assignment, while prejudicing Plaintiffs and the Court by imposing an artificially short timetable for preparation for argument and drafting of the decision.

II. Legal Grounds in Opposition

Plaintiffs oppose BNE's motion in its entirety for several reasons.

A. Plaintiffs Will Be Significantly Prejudiced if BNE's Motion Is Granted

BNE waited to seek an expedited hearing for any date in the month of September until August 16, 2013 – just two weeks before its first proposed potential argument date. Plaintiffs will be prejudiced by such an expedited schedule.

First, counsel would be forced to prepare for argument on a very limited timeline, without even the benefit of a record.[2] This appeal, and its companion appeal, concern matters of first impression and require in-depth analysis and mastery of many relevant statutes, public acts and case law. These appeals raise questions concerning jurisdiction,

---

[1] Plaintiffs have also separately moved to strike the improper "evidence" offered by BNE in support of its motion. In the event that the Court does not strike the improper "evidence," however, Plaintiffs must address the merits of certain of BNE's "evidence."

[2] The lack of a record will also prejudice the Court. Moreover, any order to expedite preparation of the record (which is in the hands of the clerk's office) would force Plaintiffs to spend what little time they had to prepare for argument in overseeing the record preparation and correcting citations for the Court, which would further prejudice Plaintiffs.

standing and the rights of parties intervening in administrative proceedings under CEPA. Forcing Plaintiffs' counsel to argue on such limited notice would limit her ability to properly prepare and effectively present Plaintiffs' case.

Second, counsel chosen by Plaintiffs to argue these appeals is scheduled to be out of the country from September 24, 2013 through October 6, 2013, and thus will be unavailable for part of the small window of time in which BNE seeks to schedule argument. Plaintiffs should not be prejudiced by being deprived of their chosen counselor because BNE waited until the eleventh hour to seek expedited review.

Finally, BNE apparently seeks this expedited schedule only for one of the two now-consolidated appeals. That could mean that Plaintiffs need to prepare to argue both cases on a severely limited timeline, or could mean that S.C. 19091 would be argued at a later date on a non-expedited schedule, thus forcing Plaintiffs to prepare for and argue the appeals separately. These appeals were consolidated to avoid such duplication of efforts by the parties and by the Court.

B. BNE's Worry About Missing Out on Tax Incentives Is Not an Exceptional Circumstance that Warrants Suspension of the Court's Rules

BNE is asking the Court to except it from the typical scheduling procedures of the Court, which provide that cases are "ready for assignment when the record and all briefs of all parties, including reply briefs, have been filed . . . ." Practice Book § 69-2. Here, no record has been filed. BNE also seeks exemption from the rule that assignments "ordinarily will be made in the order in which cases become ready for argument . . . ." Id. § 69-3. Absent exceptional circumstances, arguments are not scheduled outside of the Court's regular eight terms. The assignment of days for the first term of this Court, which begins on September 16, 2013, just two weeks from the date of BNE's motion, has already been released.

Practice Book § 60-3 provides for suspension of the rules "[i]n the interest of expediting decision . . . ." BNE is asking the Court to suspend its rules by scheduling argument in an appeal that is not ready for assignment, in advance of other appeals that are ready for assignment, and outside of its regular terms – all because BNE has apparently only just now realized that it up against a December 31, 2013 deadline for beginning construction in order to take advantage of certain federal tax shelter benefits. Not once, in all of the time since Plaintiffs originally appealed the Siting Council's decisions to the trial court more than two years ago, has BNE sought to expedite this appeal.[3] Instead, since April 2013, BNE jointly moved for two extensions of time, and consented to Plaintiffs' one extension of time – all in the face of the looming December 2013 tax incentive deadline. The Court should not condone BNE's attempt to "expedite" an appeal that BNE itself has prolonged.[4]

Nor should the Court set a precedent for the suspension of its rules based on mere monetary concerns. Plaintiffs are confident that many parties to appeals would like the process to move faster, particularly where the appeals concern development and construction projects. However, the Court has reserved decisions to expedite arguments and decisions for those of true public importance, particularly those that implicate the timely procession of elections. See, e.g., Repub. Party of Conn. v. Merrill, 307 Conn. 470 (2012) (scheduling argument outside of Court's normal first term in case concerning the order in which gubernatorial candidates were to appear on the ballot); Miller v. Schaffer, 164 Conn. 8 (1972) (expediting an appeal concerning a redistricting plan so that a bench ruling was

---

[3] Notably, BNE informs the Court that Congress extended the tax credit deadline from December 2012 to December 2013 – which means that BNE presumably has been aware of an impending tax credit deadline since at least late 2011.

[4] In fact, the affidavit accompanying BNE's motion was executed on August 9, 2013, but BNE waited another full week to file its motion.

issued less than two months from the date of the trial court's judgment) (relied upon by BNE at page 8 of its motion). The one case relied upon by BNE that did not implicate timely elections, Buckman v. People Express, Inc., 205 Conn. 166 (1987), concerned the plaintiff's health insurance coverage.[5] (See Motion at 8.) BNE has not provided, and Plaintiffs are not aware of, any authority indicating that it is appropriate to expedite argument and decision simply because a party may lose money.

C. The Court Should Reject BNE's Weak Attempts to Transform its Desire to Turn a Profit into a Matter of Public Interest

In a transparent attempt to paint its motion as more than just a desire to snap up lucrative federal tax shelter incentives, BNE makes vague references to the "public interest" that would allegedly be served by expediting this appeal. According to BNE, the shelter tax incentives would not just line its pockets, but instead "could be infused into the State of Connecticut's economy." (Motion at 1, 5.) BNE also claims that an expedited schedule is necessary to prevent the "potential loss" of both a loan of $500,000 of taxpayer money made to BNE by the Connecticut Clean Energy Fund ("CCEF") and "significant tax revenue, economic development and jobs that would benefit the Town of Colebrook." (Motion at 1-2, 5-8.) Finally, BNE claims that not expediting this appeal will cause a "delay" in generation of renewable energy in the state. (Id.)

All of BNE's arguments are without merit, do little to mask its true motivation and are not proper considerations for this Court. First, the shelter tax incentives BNE vaguely references confer the benefit directly onto the "taxpayer," i.e., to the owner of the wind turbine

[5] Although Buckman was argued within one week of the Court's decision to grant the plaintiff's motion expedite the hearing, the Court did not expedite its decision, which was issued approximately three months after argument. 205 Conn. at 166-67.

project. See 26 U.S.C. §§ 38, 45. Those incentives would benefit only BNE or its investors, not the residents of Colebrook.

Second, the Town of Colebrook participated in the Siting Council proceedings in opposition to BNE's petitions, as did several individual citizens of the town, so the Town is presumably not concerned about its "potential loss." In addition, the record shows that BNE has never entered into a host community agreement with the Town, so BNE's vague unsupported promises of the tax revenue, economic development and jobs that supposedly will flow from a single three-turbine project are, at best, extremely unlikely to materialize.

Third, the $500,000 loan from CCEF to BNE was for the "pre-development" costs of BNE's installation of 10 MW of wind power in Colebrook – meaning the loan applied to both Colebrook sites that are the subjects of Plaintiffs' two appeals. BNE's attempt to expedite the Court's consideration of only one of the two appeals, which would install only 4.8 MW of capacity, is an indication that half of the taxpayer money loaned to BNE is already a loss.

Finally, BNE's worry that the generation of renewable energy in this State will somehow be "delayed" if the Court does not expedite one of the two appeals should be allayed by the fact that the Department of Energy and Environmental Protection, in accordance with Public Act 13-303, is currently considering numerous responses to its request for proposals for Class I renewable energy resources from private developers for 20 MW projects.[6] The State appears to be proceeding with its renewable energy goals despite the "delayed" outcome of this appeal.

---

[6] BNE's motion appears to have been filed in desperation upon its realization that the 23 other projects proposed in response to DEEP's request for proposals are more credible than any of the three projects BNE has proposed in Connecticut – one that was rejected by the Siting Council, one that has not yet attained a permit from the U.S. Army

In sum, BNE's appeal does not implicate matters of significant public interest or importance that warrant suspension of the Court's rules to the prejudice of Plaintiffs.

D. BNE Has Not Provided Any Evidence that it Would Be Able to Secure the Lucrative Tax Incentives It Claims Warrant an Expedited Schedule

BNE's motion and the attached affidavit[7] make broad, generalized references to the potential loss of "approximately $4.5 to $5 million in federal tax incentives that could be infused into the state of Connecticut" if this appeal is not expedited so that construction can begin by the end of the year. (Motion at 6; Affidavit ¶ 4.) Nowhere in its papers does BNE identify the federal laws that it is referencing. A review of those laws and guidance from the Internal Revenue Service on the interpretation and application of those laws reveals that the "beginning of construction" deadline is a requirement of "physical work of a substantial nature," such as excavation for the foundations of the wind turbines or the pouring of concrete pads for the wind turbines, pursuant to a binding written contract that meets specific requirements. See 26 U.S.C. § 45; American Taxpayer Relief Act of 2012, § 407; I.R.S. Notice 2013-29, §§ 4.01-4.03. Even if this Court agreed to issue a decision in this appeal by November 30, 2013, BNE has not provided any evidence that it would have the funds immediately on hand to conduct the required substantial physical work by the end of the year, and to conduct continuous substantial physical work thereafter to maintain its eligibility

---

Corps of Engineers, and this one, for which there are a host of issues, ranging from the Siting Council's lack of subject matter jurisdiction to the project's expected violations of state noise regulations.

[7] Plaintiffs note that the affidavit attached to BNE's motion violates several of the procedural rules that govern submissions to this Court. As noted above, Plaintiffs have separately moved to strike the improper affidavit and the portions of BNE's motion that rely upon the "evidence" contained in the affidavit. Although Plaintiffs do not believe the "evidence" is properly before this Court, Plaintiffs must address briefly its substance in order to fully respond to the motion.

for the incentives. See I.R.S. Notice 2013-29, §§ 4.01, 4.06.[8] Nor can BNE prove its practical ability to do such work during the winter in the coldest, snowiest corner of the state.

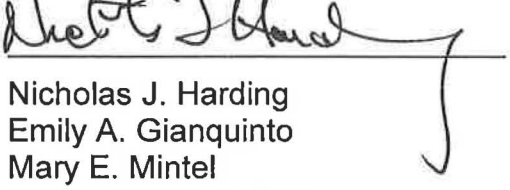
In fact, it is not clear what project BNE desires so urgently to begin constructing – the three 1.6 MW wind turbine project proposed in its petition and approved by the Siting Council, or the three 2.85 MW wind turbine project it just recently proposed in response to DEEP's request for proposals. If BNE plans to revise its project to use different turbines with larger capacities, it will need to secure new approvals from the Siting Council and once again revise its site plans and related work. There is no evidence BNE has begun that process.

III. Conclusion

For the foregoing reasons, Plaintiffs ask that the Supreme Court deny BNE's untimely and unwarranted motion for expedited schedule.

PLAINTIFFS-APPELLANTS

FAIRWINDCT, INC., STELLA SOMERS, MICHAEL SOMERS, and SUSAN WAGNER

By: 

Nicholas J. Harding
Emily A. Gianquinto
Mary E. Mintel
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
Tel. (860) 278-1150
Fax. (860) 240-1002
Juris No. 049362

[8] I.R.S. Notice 2013-29 also permits a taxpayer to take advantage of a safe harbor provision if it pays or incurs 5% or more of the total cost of the project before the end of 2013 and thereafter makes continuous efforts to complete the project. I.R.S. Notice 2013-29, § 5.01. If the project could generate up to $5 million in tax incentives, the total costs of the project likely amount to millions more. BNE has not offered any evidence that it has the financial ability to take advantage of the "beginning of construction" safe harbor.

CERTIFICATION

I hereby certify that the foregoing complies with the requirements of Practice Book § 66-3. I further certify that a copy of the foregoing was served by first-class U.S. mail in accordance with the provisions of Practice Book § 62-7, and by e-mail, on the following counsel of record on August 26, 2013:

For Connecticut Siting Council:

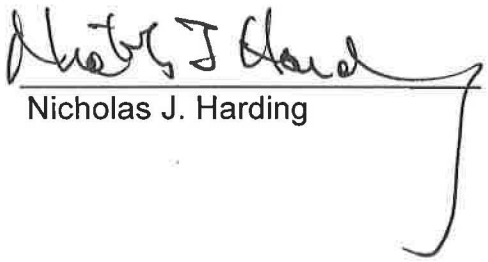
Robert L. Marconi, AAG
Office of the Attorney General–Finance
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2682
Fax: (860) 827-2893
Robert.Marconi@ct.gov

Clare E. Kindall, AAG
Office of the Attorney General–Energy
Department DPUC
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2682
Fax: (860) 827-2893
Clare.Kindall@ct.gov

For BNE Energy, Inc.

Lee D. Hoffman, Esq.
Michael Kurs, Esq.
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel: (860) 424-4300
Fax: (860) 424-4370
LHoffman@pullcom.com
MKurs@pullcom.com

Paul Corey, Esq.
12 Fernwood Road
West Hartford, CT 06119
Tel: (860) 561-5101
Fax: (888) 891-6450
pcorey@bneenergy.com



Nicholas J. Harding