STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar, LLC pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	]]]]]]	Docket No. 17-5024-PET

EMERGENCY MOTION TO STAY PROCEEDINGS

NOW COMES intervenor Town of Bennington ("Town"), by and through its attorneys, Woolmington, Campbell, Bernal & Bent, P.C., and submits the following in support of its emergency motion to stay proceedings in the above-referenced docket.

I. PROCEDURAL POSTURE

The petition in this docket was filed November 29, 2017, and deemed administratively complete on December 4, 2017, although certain inconsistencies as to which additional information was required were noted. The Town of Bennington is an intervenor as of right pursuant to Board Rule 2.209(A) and 30 V.S.A. § 248 (a)(4)(H).

Petitioner has commenced filing prefiled testimony in support of its petition. A preconference hearing has been requested, but not yet scheduled. Because this proceeding is active and the hearing request remains pending, this motion should be considered on an emergency basis.

II. FACTUAL GENESIS OF MOTION

On January 25, 2018, Petitioner filed a 60-page, 26-count omnibus lawsuit against the Town of Bennington, the Bennington County Regional Commission, and

multiple individual members of the Town's Siting Committee ("Complaint"). (*See* Ex. A).[1] The Complaint, filed in Chittenden County Superior Court,[2] seeks, *inter alia*, the following declaratory or injunctive relief:

- Declaration that 30 V.S.A. § 248(s)(1) is unconstitutional;
- Declaration that 24 V.S.A. § 4352(b) (concerning the determination of energy compliance for a municipal town plan) is unconstitutional;
- Declaration that the Town's Screening Ordinance violates 24 V.S.A. § 4414(15);
- Declaration that Town's Screening Ordinance *and* 24 V.S.A. § 4414(15) are unconstitutional;
- Declaration that Chelsea Solar, LLC is not subject to the Town's Screening Ordinance or any provision of the Town Plan passed after the date of the Public Utility Commission's determination;
- Declaration that Bennington's Town Plan is unconstitutional;
- Declaration that the Town's decision not to consent to reduce an applicable setback is unconstitutional
- Declaration that the Bennington Town Plan's "anti-solar" provisions violate Petitioner's constitutional rights;
- Declaration that the Town's recently passed Energy Amendment to its Town Plan ("Energy Amendment") fails to comply with 24 V.S.A. § 4352;[3]

[1] Petitioner is one of four Plaintiffs named in the Complaint. Two of the other Plaintiffs (Apple Hill Solar LLC and Otter Creek LLC) are Petitioners in other proceedings before the PUC (Dockets 8454 and 17-3727-PET, respectively). The fourth Plaintiff, PLH, LLC is an owner of real property in Bennington, and is not a participant in this proceeding.

[2] The Complaint alleges that venue is proper "because all Plaintiffs reside in Chittenden County." (Complaint, at ¶ 17). However, it is clear that all of the Plaintiffs recently changed their principal place of business in anticipation of litigation to engage in forum shopping. As relevant to this docket, Petitioner Apple Hill Solar, LLC filed an annual report with the Vermont Secretary of State on January 4, 2018 indicating that its principal place of business was New York, New York. Just 11 days later, a business amendment was filed changing the principal address to a "virtual office" in Shelburne, Vermont. Counsel for Petitioner acknowledged in a recent comment given to the Bennington Banner that, "The suit was largely prepared before the Select Board's unanimous vote in favor of the plan." (*See* Ex. B1-3). It is blatantly obvious that the recent address change was made in anticipation of litigation for the sole purpose of increasing the cost and inconvenience to the Defendants. As none of the parties nor the underlying claims have a genuine connection to the forum Petitioners have chosen, it is unlikely that the Superior Court will countenance this attempt to abuse the litigation process.

[3] The Energy Amendment, which was unanimously passed by the Town's Selectboard on January 22, 2018, has not yet been considered by the Commissioner of Public Utility or the Regional Planning Commission for a determination of energy compliance pursuant to 24 V.S.A. § 4352(b). The Complaint concerns not only the Energy Amendment, but the validity of the Town Plan as a whole.

- Declaration that the Energy Amendment violates 24 V.S.A. ch. 117 (Municipal and Regional Planning and Development);
- Declaration that the Bennington County Regional Commission ("BCRC") is required to adhere to the Administrative Procedure Act in making an affirmative determination of energy compliance under 24 V.S.A. § 4352; and
- Injunction against BCRC from taking any action towards certifying the Energy Amendment or Screening Ordinance pursuant to 24 V.S.A. § 4352.

While the Complaint is rife with mischaracterizations of fact and hyperbolic distortion, it is not necessary for the Public Utility Commission ("PUC") to consider those issues for purposes of deciding this motion. The applicable legal doctrines are clear taking the allegations in the Complaint at face value.

III. MEMORANDUM OF LAW

A. Legal Standard

The Town seeks a stay in the nature of a continuance in order to "suspen[d] proceedings until a specified event in another case." *In re Woodstock Cmty. Tr. & Hous. Vermont PRD*, 2012 VT 87, ¶ 36, 192 Vt. 474, 492, 60 A.3d 686, 701 (2012) (internal citation omitted) (holding modified as to another point of law by *In re Application of Lathrop Ltd. P'ship I*, 2015 VT 49, ¶ 36, 199 Vt. 19 121 A.3d 630 (2015)). The PUC has control over its own docket, "[b]ut, how this best can be done 'calls for the exercise of judgment. . . .'" *Id.* (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1981)). The decision to grant a stay falls within the sound discretion of the Hearing Officer, and will only be overturned "if the discretion is 'exercised upon grounds clearly untenable, or to an extent clearly unreasonable.'" *In re Woodstock Cmty. Tr. & Hous. Vermont PRD*, 2012 VT 87 at ¶ 36 (quoting *Kokoletsos v. Frank Babcock & Son, Inc.*, 149 Vt. 33, 35, 538 A.2d 178, 179 (1987)); *see also Stone v. Briggs*, 112 Vt. 410, 410, 26 A.2d 828, 829

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(1942).

"[T]he party seeking a stay 'must make out a clear case of hardship or inequity in being required to go forward' if there is a possibility that a stay will damage someone else." *In re Woodstock Cmty. Tr. & Hous. Vermont PRD*, 2012 VT 87, at ¶ 36. The Complaint concerns more than a straightforward question of law to be decided on summary judgment. The lengthy Complaint involves numerous factual issues common to both proceedings. Accordingly, unlike in *Woodstock Community*, there is no lesser measure available which would be adequate to protect the Town's interests. *Compare id.*; *see also In re Application for Water Rights*, 101 P.3d 1072, 1082 (Colo. 2004).

B. The PUC is the Appropriate Authority to Decide the Issues Raised in Both Proceedings.

The Complaint challenges the validity of numerous components of the Town Plan, their conformity with various statutory provisions, and the statutes themselves. All of the claims set forth in the Complaint concern issues that are pending before the PUC, which can and should be decided by the PUC in the context of that proceeding.

Under the primary jurisdiction doctrine, the PUC is the appropriate adjudicative body to consider the issues raised in the Complaint. *C.V. Landfill, Inc. v. Envtl. Bd.*, 158 Vt. 386, 388–89, 610 A.2d 145, 146–47 (1992) ("Under the doctrine of 'primary jurisdiction,' courts may refrain from exercising jurisdiction when an alternative tribunal with expertise in the subject matter is available to decide the dispute."); *Barnet Hydro Co. v. Pub. Serv. Bd.* 174 Vt. 464, 467, 807 A.2d 347, 350 (2002) ("In general, where two tribunals have concurrent jurisdiction, the first tribunal to obtain jurisdiction should adjudicate the case, and the second should defer to the first."); *see generally Travelers*

Indem. Co. v Wallis, 176 Vt. 167, 171, 845 A.2d 316, 320, 2003 VT 103, ¶¶ 7–19.

Following *C.V. Landfill Inc.*, the Town intends to file a motion to dismiss the Complaint on the basis of V.R.C.P. 12(b)(1), as well as V.R.C.P. 12 (b)(3) and (6). Under the primary jurisdiction doctrine, it would not be appropriate for the Superior Court to grant the injunctive or declaratory relief sought in the Complaint until after the PUC decides the issues pending before it (including, among other questions, the applicability of and the weight given to provisions of the Town Plan). *See Comm. To Save the Bishop's House v. Med. Ctr. Hosp. of Vermont, Inc.*, 136 Vt. 213, 218, 388 A.2d 827, 830 (1978) (discussing when "the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court"). The Superior Court should dismiss the Complaint in favor of permitting the PUC to decide the issues pending before it.

C. To Avoid Inequity this Proceeding Should be Stayed until the Superior Court Rules on a Motion to Dismiss to be Filed by the Town.

The Town should not be required to litigate these issues in parallel proceedings; accordingly, this proceeding should be stayed pending resolution of a motion to dismiss the Complaint, to be filed forthwith. In addition to the interests of judicial economy disfavoring duplicative proceedings, consideration of the same issues by two different bodies creates the potential for contradictory outcomes. Furthermore, the resolution of the issues in another forum could impact the positions that the Town and other participants take in this proceeding.

To the extent any harm may result to Petitioner as a result of the requested stay, it is generated by Petitioner's own decision to open a parallel proceeding in another

forum concerning issues already pending before the PUC. Tt would be both a hardship and inequitable to force the participants in this proceeding to further this docket while the Complaint is pending before the Superior Court.

Given how recently the Complaint was filed, and the sheer number of allegations, the Town is not able to seek dismissal by the Superior Court before action is required with respect to this proceeding. It would not be fair for any of the participants to be required to proceed with hiring experts, reviewing and preparing testimony, and expending the time, effort, and cost of advancing this proceeding until there is a ruling from the Superior Court. Even if the Superior Court denied the Town's motion to dismiss and heard the case, a stay of this proceeding would still be required pending adjudication of the Complaint.

For these reasons, the proceeding should be stayed before participants are required to develop prepare for and participate in a scheduling hearing. Accordingly, the Town requests that a stay be considered and granted on an emergency basis.

IV. CONCLUSION

In the interest of fairness, the Town respectfully requests that the Hearing Officer stay this proceeding pending resolution of the Complaint by the Chittenden County Superior Court. Specifically, the Town requests suspension of the schedule and a stay as to filings concerning the substance of the CPG petition, but not as to issues of jurisdiction as may be necessary to address.

Dated at Manchester this 31st day of January, 2018.

TOWN OF BENNINGTON

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