STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont	

Order entered: 02/14/2018

ORDER DENYING MOTION FOR EMERGENCY STAY AND SCHEDULING ORDER

I. Introduction and Procedural History

On January 31, 2018, the Town of Bennington (the "Town") filed for an emergency motion to stay these proceedings (the "motion") with the Vermont Public Utility Commission (the "Commission").

On February 7, 2018, the Vermont Department of Public Service ("Department") filed a response to the motion.

On February 9, 2018, Chelsea Solar LLC ("Chelsea") filed a response to the motion (the "Chelsea Response") and the Town filed a reply to the Chelsea response (the "Town Reply").

In this Order, I deny the motion. I also direct the parties to file a joint proposed schedule for this proceeding on March 1, 2018, to be discussed at a prehearing conference on March 2, 2018. If the parties cannot agree upon a joint proposed schedule, they shall each file a proposed schedule on March 1, 2018, for discussion at the prehearing conference.

II. Positions of the Parties

The Town

The Town asks that this proceeding be stayed pending the resolution of a complaint filed by Chelsea[1] in Chittenden Superior Court, either through a successful motion to dismiss the complaint, or through final resolution of the complaint on the merits. According to the Town, this proceeding should be stayed with respect to "filings concerning the substance of the CPG petition, but not as to issues of jurisdiction as may be necessary to address."[2] The Town

[1] Chelsea is joined in the complaint by co-plaintiffs Apple Hill Solar LLC, Otter Creek Solar LLC, and PLH LLC.

[2] Motion at 6.

contends that all of the claims set forth in the Chelsea complaint are related to issues pending before the Commission in this proceeding and that, under the doctrine of primary jurisdiction, the Commission is the appropriate authority to decide those issues.[3] The Town also states that the Town should not be required to litigate the same issues in two different forums, both for reasons of fairness and to avoid the potential for contradictory outcomes from the two proceedings.[4]

In reply to the Chelsea Response the Town states that Chelsea fails to understand its motion. The Town explains that the motion does not assert that the Commission has jurisdiction over the constitutional issues, but instead takes the position that these issues are so intertwined with issues the Commission does need to decide, that when combined with numerous common factual issues before both tribunals, the Commission needs to address these matters first under the primary jurisdiction doctrine. The Town also points out that there are no constitutional issues unless and until the Commission decides the applicability and validity of the various ordinances and Town plans at issue before it.[5]

Chelsea

Chelsea argues that the Town's jurisdictional arguments are flawed, stating that the requirements for the Commission to exercise primary jurisdiction are absent, and that in any event, the Commission's jurisdiction is limited and does not extend to constitutional claims, the certification of town plans under Act 174, claims founded in tort, or statutory challenges to the validity of statutes. Chelsea further argues that the remedies it seeks in Superior Court do not interfere with the Commission's ability to proceed with consideration of the Chelsea petition nor will denying the motion cause the Town to expend more resources before the Commission than it otherwise would in the absence of the Superior Court action.[6] Lastly, Chelsea argues that the movants have not met the high standard necessary for a stay to be imposed on this proceeding.[7]

Department

The Department does not oppose the motion.

[3] Motion at 4-5.
[4] Motion at 5.
[5] Town Reply at 2.
[6] Chelsea Response at 2-5.
[7] OCS Response at 7-8.

III. Discussion

As an initial matter, I note that there is currently no schedule for the proceedings in this case and hence there is no need for an emergency stay. There are, however, several other reasons why I am denying a stay of these proceedings.

Most importantly, none of the claims raised in the Chelsea complaint have been presented to the Commission for resolution and their existence in the complaint has only been brought up in support of the motion for a stay. Therefore, at this time there is no indication that the Commission will need to resolve any of the questions raised by the complaint.

Additionally, it is not clear that the complaint's challenges to the validity of the recent town plan amendments, including those related to the siting of energy projects, are relevant to this proceeding. This proceeding was initiated when the Commission deemed Chelsea's petition for the second Chelsea project complete on December 4, 2017.[8] However, the town plan amendments were not in effect at the time the petition was filed, having only been approved by the Town's selectboard on January 22, 2018.

The Vermont Supreme Court has yet to directly rule on the issue of the applicability of town plan amendments to proper and complete Act 250 applications which are filed while the amendments were pending.[9] In one case, the Court did allow retroactive application of town plan amendments to a pending Act 250 application, but it did so based on a specific statutory construct and the fact that the prior town plan had expired.[10] However, the general rule announced by the Vermont Supreme Court holds that an applicant's rights vest in the law in effect at the time a complete application is filed.[11] Thus, the amendments to the town plan approved by Bennington's selectboard on January 22, 2018, appear not to apply in this

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[8] *See* Case No. 17-5024-PET, order of 12/4/17.

[9] *In re Ross*, 151 Vt. 54, 56 (1989) ("The second issue is whether a 'complete' Act 250 application, submitted following a proposal to amend a town plan, may be reviewed under the later adopted town plan. Since we hold that the application in the case at bar, made pursuant to 10 V.S.A. § 6086(b), was not sufficiently complete to create a vested right, we do not reach the second issue.")

[10] *In re John A. Russell Corp*., 2003 VT 93, ¶ 15 ("There is nothing in the chapter on municipal planning and zoning that specifically provides for the effect of an unapproved plan in an Act 250 proceeding. Although the wording is somewhat confusing, we take this statutory section as an expression of the Legislature that a pending plan must be given effect even if it is not yet finally approved. *In essence, the plan is retroactive to cover any gap period between the expiration of the old plan and the adoption of the new one*.") (citations omitted) (emphasis added).

[11] *See, e.g. Smith v. Winhall Planning Commission*, 140 Vt. 178, 181-83 (1981) (holding that zoning regulations in effect when application was filed govern an application, not subsequently enacted amendments). *See also In re Ross*, 151 Vt. 54, 58, 557 A.2d 490, 493 (1989) (finding that applicants have a vested right in a town plan upon submission of a "complete" application).

proceeding. Therefore, Chelsea's claims in Superior Court with respect to those amendments appear to bear little relation to the pending petition before the Commission. Based on this reasoning, any challenges filed by Chelsea in Chittenden Superior Court to the validity of actions taken in the development, adoption, approval, and certification of the town plan amendments also appear to bear little relation to the case before the Commission.

Also, while Chelsea is plaintiff on ten counts in the complaint it filed in Chittenden Superior Court, five of those counts are claimed constitutional violations. The Commission is without authority to render judgment on the validity of legislative enactments based on claims that they are unconstitutional.[12] As a result, these claims cannot be heard by the Commission and have little bearing on the process before it. The remaining counts in the complaint largely seek relief that the Commission cannot grant, such as a declaration that the Town's actions violated the public trust doctrine, damages for alleged tortious acts, and relief grounded in claimed violations of Chelsea's civil rights.[13] Even Chelsea's request in count 23 for a declaration that the law in existence at the time the first Chelsea petition was filed in Docket 8302 should apply to this petition is premised on an assertion that Chelsea's constitutional rights have been violated and it is a victim of tortious action by the Town. Again, because these are claims that the Commission is without jurisdiction to entertain or resolve, I conclude that they bear little relation to the pending Commission proceeding. For the foregoing reasons, I hereby deny the Town's motion for an emergency stay of the proceedings in this case.

While I deny the requested stay in today's order, nothing herein should be construed to foreclose the parties' ability in this proceeding to develop the factual record and to make legal arguments related to the issues in the Chelsea complaint in Chittenden Superior Court provided they relate to matters before the Commission and fall within the Commission's jurisdiction.

Finally, the parties are hereby directed to file a joint proposed schedule for this proceeding on March 1, 2018, to be discussed at a prehearing conference to be held on

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[12] *Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357-59 (1988) ("Here, we find no grant of power in the statutory scheme, either express or implied, to determine the constitutional validity of statutes. *Moreover, because administrative agencies are created to carry out statutory purposes, the legislature could not have intended that the [Commission] would be able to question the very validity of its enactments*.") (emphasis added)..

[13] *See, e.g. Trybulski v. Bellows Falls Hydro–Elec. Corp.*, 112 Vt. 1 (1941) (Commission without authority to award damages in tort); *Green Mountain Power Corp. v. Sprint Communications*, 172 Vt. 416 (2001) (Commission without "authority to determine liability for actual damages caused by a person in violation of the applicable provisions of the Underground Utility Damage Prevention System.").

March 2, 2018, at 2 P.M. in the Susan M. Hudson Hearing Room, Third Floor, People's United Bank Building, 112 State Street, Montpelier, VT 05602. If the parties cannot agree upon a joint proposed schedule, they shall each file a proposed schedule on March 1, 2018, for discussion at the prehearing conference.

SO ORDERED.

Dated at Montpelier, Vermont this 14th day of February, 2018

Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: February 14, 2018

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 17-5024-PET - SERVICE LIST

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