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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar, LLC, for a Certificate of)
Public Good, pursuant to 30 V.S.A. § 248, authorizing the)
installation and operation of the “Chelsea Solar Project,” a)
2.0 MW solar electric generation facility to be located off)
of Willow Road in Bennington, Vermont)

**THE DEPARTMENT’S RESPONSE TO
“CHELSEA SOLAR LLC’S BRIEF ON SCHEDULE AND SCOPE”**

Now comes the Vermont Department of Public Service (the “Department”), by and through undersigned counsel, and requests that the Public Utility Commission (the “Commission”) issue an order stating that, 1) issue preclusion, an affirmative defense raised by the Petitioner in “Chelsea Solar LLC’s Brief on Schedule and Scope” does not have any effect on the review of the Petition in the instant case, and 2) the Petitioner does not have vested rights to a determination based upon the 2014 version of the Bennington Town Plan, and in support thereof states as follows:

1. On March 9, 2018, the Petitioner submitted a brief in support of the Petitioner’s proposed schedule (“Petitioner’s Schedule Brief”) wherein the Petitioner argued that (1) the Project,

“must be judged under the town and regional plans and rules in effect in 2014” and (2) that the scope of review in the instant case is limited by issue preclusion.¹

2. Regarding the issue of the Town Plan, the Department has conferred with the Town of Bennington. On March 30, 2018, the Town filed a brief arguing that the Petitioner’s rights vested on November 28, 2017 when the Petition in the instant case was filed and, as such, the Project is subject to all amendments made to the Bennington Town Plan (the “Town Plan”) prior to that date. The Department supports the arguments presented by the Town on this issue and joins their request for a ruling in their favor.

I. Issue preclusion does not limit the scope of review in this proceeding the five elements of Issue Preclusion are not established.

3. Regarding the Petitioner’s assertion of issue preclusion, the Department’s position is that issue preclusion does not limit the scope of review in this proceeding. The Petitioner contends that by asserting issue preclusion the Department and the Agency of Natural Resources (“ANR”) are bound by agreements set forth in Memorandums of Understandings entered into in Docket No. 8302, and the scope of review of the instant case is limited by findings that were made by the Commission in Docket No. 8302.
4. The Vermont Supreme Court has held that issue preclusion may apply in administrative proceedings so long as five enumerated elements are met.² “[I]ssue preclusion, . . . bars the relitigation of an issue . . . that was actually litigated by the parties and decided in a prior case.”³ Issue preclusion can be asserted when: “(1) preclusion is asserted against one who

¹ Chelsea Solar LLC’s Brief on Schedule and Scope, 03/09/2018, at 2.

² *In re Tarriff Filing of Central Vermont Public Service Corp.* 172 Vt. 14 (Vt. Sup. 2001) at 21.

³ *Id.* at 20., citing to *State v. Dann*, 167 Vt. 119, 126 702 A.2d 105,110 (1997).

was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair.”⁴

5. The Department will focus its analysis on prong (2) whether the same issues were raised in the prior action; prong (3) whether the issues were resolved by a final judgment on the merits; and prong (5) whether applying preclusion is fair.

A. The same issues were not raised in the prior action because a revised project design and the cumulative effect of Apple Hill and the Chelsea Project are new issues for review in the instant case.

6. The Petitioner has failed to satisfy the second prong because the Petitioner has not demonstrated that the same issues were raised in the prior proceeding. This is a new petition involving new witnesses who present testimony and evidence that was not presented in Docket No. 8302. The Petitioner stated at the prehearing conference held on March xxx, 2018, “[w]e filed essentially new testimony on all the criteria.”⁵ The Petitioner stated that they were not relying on testimony that was submitted in Docket No. 8302, and explained, “[w]e are relying on the new testimony that’s been filed.”⁶
7. The Project submitted by the Petitioner for review in the instant case was reconfigured and changed in many ways. After the original design of the Project was not approved by the Commission, the Petitioner submitted a revised design of the Project. When evaluated within the context of a §248 review, the revised design will likely result in new issues.
8. The Department identifies one new issue that is implicated by the revised project design. The Petitioner recently filed supplemental testimony suggesting that a new alternative access

⁴ *Id.*

⁵ Docket No. 17-5024-PET, Prehearing Conference Transcript, 03/02/2018, at 11-12.

⁶ *Id.* at 12.

route will be provided for operations and maintenance after the Project is constructed.

However, details on the new access are not provided. It will be necessary to conduct discovery to obtain additional information on this modification including, at a minimum, location and construction details, vegetative clearing and stormwater implications, and aesthetics.

9. The Department identifies a second new issue that is implicated by the revised project design: cumulative impact of the proposed Chelsea Project and the neighboring Apple Hill Solar project ("Apple Hill"). Based on the procedural posture of the neighboring Apple Hill solar project, identified as Docket No. 8454, a final decision on issuance of a CPG to Apple Hill will almost certainly be reached during the review process of the instant case. Thus, the Department will consider the cumulative impacts of the neighboring project during the review of the Chelsea Project.
10. The cumulative impact will significantly affect the Department's review of the Project and is likely to impact some or all §248 criteria on which the Department typically provides recommendations. The cumulative impact was not addressed in Docket No. 8302 and will raise issues under multiple §248 criteria that were not explored in Docket No. 8302.
11. Additionally, the Department did not file testimony in Docket No. 8302 but will file testimony in the instant case. On February 16, 2016, the Commission issued an order denying the Petitioner's application for CPG in Docket No. 8302 and finding that the Project would unduly interfere with the orderly development of the region and would have an undue adverse impact on aesthetics. The Department intends to introduce testimony on the aesthetic impact of the Project and orderly development of the region to determine whether the revised project has ameliorated the Commission's concerns identified in Docket No. 8302. If the

Department's witness(es) review the redesigned project and conclude that the revisions did not adequately resolve the Commission's concerns regarding aesthetic impact, that will raise new issues unique to this docket and the redesigned Project.

12. Further, the original petition was submitted on June 19, 2014 and the application for a CPG was denied on February 16, 2016. Years that have passed since the original petition was filed in Docket No. 8302 and changes have occurred in the regulatory environment independent of the review of the Chelsea Solar project. The Town of Bennington has amended its Town Plan. On April 11, 2016, the Bennington Selectboard approved an amendment to the Town Plan which imposes additional limits to the mass and scale of solar electric generation facilities allowed in the Town. Additionally, northern long-eared bat is now federally listed as a threatened species under the federal endangered species act, which will affect ARN's review of the Project. While the Petition presents some level of analysis related to how tree clearing may affect the species, the analysis does not appear to address all elements of the Project. There also appears to be a need to examine how cumulative impacts may affect the species. These are just two examples of changes that have developed independently of the Project itself that will affect the review of the Project and potentially raise new issues not implicated in Docket No. 8302.

B. The issues sought to be precluded were not resolved in favor of the Petitioner with a final judgment on the merits because the Commission rejected proposed findings regarding aesthetics and orderly development of the region.

13. The Petitioner fails to satisfy the fourth prong of issue preclusion because the issues of aesthetics and orderly development were not resolved in favor of the Petitioner with a final judgment on the merits. Additionally, the Petitioner stated at the prehearing conference for this instant case that the MOU's entered into in Docket No. 8302 were no longer in effect. The Petitioner stated, "I understand completely that the DPS MOU is no longer applicable, and the same thing with ANR" ⁷
14. Puzzlingly, the Petitioner contends that "because the findings adopting the MOUs with DPS and ANR were part of the First CPG Order, both DPS and ANR are precluded from taking any new and different positions here to collaterally attack the project, unless they can clearly demonstrate the issue relates solely to the amendments." ⁸
15. The Petitioner's argument that the Final Order of the Commission in Docket No. 8302 incorporated and gave preclusive effect to all the provisions of the Department's MOU does not support their assertion of issue preclusion. The Commission's final order expressly rejected the proposed findings of the hearing officer related to aesthetics and orderly development.
16. The Commission's final order states, "[w]e do not adopt the Hearing Officer's conclusion (proposed finding 30) that the Project will not unduly interfere with the orderly development of the region because we find that the Project is inconsistent with the Bennington Town Plan

. . . ." ⁹

⁷ Prehearing Conference Transcript 03/02/2018 at 12.

⁸ *Chelsea Brief on Schedule and Scope* at 3, citing *In Re Dunkin Donuts SP Approval*, 185 Vt. 583, at 586. ("We have often indicated that a stipulated agreement incorporated into a court order has the same preclusive effect as a final judgment on the merits.")

⁹ Docket No. 8302, Order Denying Chelsea Motions of 02/16/2016 at 50.

17. The Commission also states in its final order, “[w]e appreciate the efforts of Chelsea and the Department to propose an unprecedented and costly vegetative screening plan to mitigate the visual impacts of the Project.”¹⁰ “However, our conclusion that the Project would violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the Project site and its surrounding area concludes our analysis of the aesthetic impacts of the Project using the Quechee test.”¹¹
18. The plain language of the MOU’s themselves reads, “should the Board fail to approve this Stipulation in all material aspects, the Stipulating Parties’ agreements set for the herein shall terminate and the Stipulating Parties shall have the right to submit filings in this docket and the Stipulating Parties’ agreement in this Stipulation shall not be construed by any party or tribunal as having precedential impact on any testimony or positions that may be advanced in these proceedings.”
19. The MOU between the Department and the Petitioner from Docket No. 8302 is comprised mostly of stipulations between the parties regarding aesthetic mitigation measures.¹²
20. It is clear that the Commission did not adopt or approve of all material aspects of the MOU because they rejected the proposition that the proposed mitigative measure were sufficient and rejected the proposed finding that the project, as proposed, would not have an unduly adverse effect on aesthetics. Because all material aspects of the MOU were not approved by the Commission, the agreements between the Petitioner and the Department contained therein are terminated and have no precedential or preclusive value.

¹⁰ *Id.* at 59.

¹¹ *Id.*

¹² Docket No. 8302, Partial Memorandum of Understanding, 02/09/2015; Docket No. 8302, Second Partial Memorandum of Understanding with the Department, 06/17/2015.

C. Applying issue preclusion to this set of facts is not fair and is not in line with the purposes of the doctrine of issue preclusion.

21. The final prong that the Petitioner must satisfy to assert issue preclusion is that applying preclusion is fair.¹³
22. “The purposes of both claim preclusion and issue preclusion are: (1) to conserve the resources of courts and litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudication.¹⁴ It is important to keep these in mind when determining whether the issue is properly presented by the Petitioner.
23. The purpose of review under §248 is to evaluate proposed electric generation facilities and approve only those that promote the general good of the state.¹⁵ It is incumbent upon state agencies charged with reviewing proposed projects for compliance with §248 criteria to conduct a thorough analysis and to apply the current standards that take into account the current will of the people and the most up-to-date science available. To do otherwise is a disservice to the people of the State of Vermont.
24. As such, it is not fair to limit the review of a project that the Commission, in 2016, found to be violative of the Bennington Town Plan and to have an unduly adverse effect on the orderly development of the region and on aesthetics. The Project was amended to address the

¹³ *Id.* at 20., citing to *State v. Dann*, 167 Vt. 119, 126 702 A.2d 105,110 (1997).

¹⁴ *In re Tarriff Filing of Central Vermont Public Service Corp.* 172 Vt. 14 (Vt. Sup. 2001) citing to *Berlin Convalescent Ctr.*, 159 Vt. at 57, 60, 615 A.2d at 144–46; *Ball*, 163 Vt. at 473, 661 A.2d at 94.

¹⁵ 30 V.S.A. §248(a)(1)(B)

concerns of the Commission and a new design submitted. It would not be fair to hinder what must be a full and thorough review of a newly submitted petition.

Dated at Montpelier, Vermont this 30th day of March, 2018.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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cc: Parties of Record by ePUC