

WOOLMINGTON, CAMPBELL, BERNAL & BENT, P.C
ATTORNEYS AT LAW

Merrill E. Bent, Esq.
*Also admitted in New York
Merrill@greenmtlaw.com
802.362.2560

March 30, 2018

Mrs. Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street
Drawer 20
Montpelier, VT 05620

Re: Chelsea Solar Petition for CPG
PUC Case # 17-5024-PET

Dear Ms. Whitney:

The Town of Bennington submits its response to Petitioner's Brief on Schedule and Scope, as requested by the Hearing Officer.

I am authorized to state that Libby Harris and the Apple Hill Homeowners' Association support the Town's positions as stated in this brief.

Sincerely,

/s/Merrill E. Bent

ROBERT E. WOOLMINGTON EDGAR T. CAMPBELL PATRICK J. BERNAL MERRILL E. BENT
JOHN D. STASNY

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 the “Chelsea Solar]	Docket No. 17-5024-PET
Project,” a 2.0 MW solar electric]	
generation facility located off Willow]	
Road in Bennington, Vermont]	

**TOWN OF BENNINGTON’S RESPONSE TO PETITIONER’S BRIEF ON
SCHEDULE AND SCOPE**

NOW COMES the Town of Bennington (“Town”) and hereby submits this Brief concerning the applicability of amendments to the Bennington Town Plan to the above-referenced request for a Certificate of Public Good pursuant to 30 V.S.A. § 248 (“CPG”). The Town has also conferred with counsel for the Department of Public Service (“DPS”) and supports the Department’s position regarding the preclusive effect of the prior proceeding.

FACTUAL AND PROCEDURAL HISTORY

On June 19, 2014, Petitioner Chelsea Solar LLC (“Chelsea” or “Petitioner”) filed a petition requesting a CPG to install and operate a 2.0 MW AC solar electric generating facility at 500 Apple Hill Road in Bennington, Vermont (“Initial Petition” and “Initial Project”). Following the review process, a technical hearing was held on July 16, 2015, at which Petitioner presented evidence in support of its petition.

The Initial Project, as proposed in Chelsea's Initial Petition, was for installation of 2.8 MW (DC) of 72-cell, ground-mounted, polysilicon photovoltaic solar modules, installed upon an approximately 27-acre tract just north of the Welcome Center at the U.S. Route 7/VT Route 279 interchange in Bennington.

On October 2, 2015, following post-hearing briefing by Chelsea, and intervenor Libby Harris ("Harris"), the Hearing Officer circulated a Proposal for Decision ("PFD") recommending that the then- Public Service Board¹ approve the proposed Project and issue a CPG. The PUC issued an order denying the CPG on February 16, 2016. *Petition of Chelsea Solar LLC for A Cert. of Pub. Good*, 8302, 2016 WL 722444, at *30 (Feb. 16, 2016). ("Final Order"), finding that the Town Plan had provisions that constituted a clear, written community standard, and that the Initial Project would interfere with orderly development of the region and would have an undue adverse impact on aesthetics. In reaching this conclusion, the PUC considered a design standard applicable to all new development in the Town's Rural Conservation District, where the Initial Project was located.

Following the adverse decision from the PUC, Chelsea filed the following motions:

- On March 10, 2016, a request that the PUC take judicial notice of certain documents;
- On March 11, 2016, a motion to vacate the PUC's order for failure to comply with 3 V.S.A. § 811;
- On March 21, 2016, a motion to alter and amend the Final Order, motion to reopen the record, motion for a supplementary hearing, and motion for new findings;
- On March 21, 2016, a motion to amend its petition for a CPG;

¹ Referred to herein as the Public Utilities Commission or "PUC."

- On May 12, 2016, a motion to strike comments filed by the Vermont Department of Public Service and the Agency of Natural Resources; and
- On January 24, 2017, a motion for mediation pursuant to V.R.C.P. 16.3.

In the midst of these filings, the Town passed an amendment to its Town Plan on April 11, 2016. The Amendment included a new provision entitled “Mass and Scale,” expanding upon community and siting standards applicable to solar facilities. (See Exhibit CS-BW-19).

All of the above motions were denied on April 14, 2017 and (by amendment) April 17, 2017 (collectively, “Motions Orders”). On May 12, 2017, Chelsea filed a notice of appeal with the Vermont Supreme Court. On September 8, 2017, while the appeal was pending (Chelsea having requested multiple extensions of time to file its brief), Chelsea filed yet another brief with the PUC—this time a motion pursuant to V.R.C.P. 60(b) requesting that the PUC vacate its Final Order and Motions Orders to consider substantial revisions to the Initial Project. The total number of post-Final Order, non-appellate pages (including briefs and exhibits) filed by Chelsea in Docket 8302 exceeded 580.

The PUC denied Chelsea’s motion, stating that it “cannot review a ***new petition*** for a project in approximately the same location as the [Initial Project] as long as the [Initial Project] is subject to appellate review.” *Petition of Chelsea Solar LLC for Cert. of Pub. Good*, 8302, 2017 WL 4685518 (Oct. 12, 2017) (emphasis added). The PUC invited Chelsea to reuse any testimony or exhibits previously filed in Docket 8302, but also specified that “in order for its new petition to be deemed complete, Chelsea must also

include testimony and exhibits addressing any new potential impacts under all applicable criteria that may arise as a result of the reconfigured project.” (*Id.*)

Chelsea filed a motion with the Vermont Supreme Court expressly requesting that the matter be remanded to the PUC, setting forth its reasoning in a 26-page brief. The Vermont Supreme Court denied the motion. (Motion and Order attached hereto as **Exhibit A**). On October 19, 2017—more than a year and a half after the Final Order issued and the Town passed the Solar Siting Amendment—Chelsea filed a motion to dismiss its appeal, which motion was granted on November 8, 2017. (Order attached as part of **Exhibit A**).

On November 29, 2017, Chelsea filed a new petition to construct a 2.0 MW solar electric generation facility off of Willow Road in Bennington, creating this docket (“New Petition”). The New Petition was deemed administratively complete on December 4, 2017.

Based on the pre-filed testimony of Brad Wilson (which has not been admitted into evidence or otherwise subject to cross examination, nor viewed with the benefit of discovery in this proceeding), the New Petition proposes installation of a 2.0 MW ground-mounted PV solar electricity facility located on the same 27.3-acre parcel of land in the Town of Bennington, in the approximate location of the Initial Petition (“New Project”). (Prefiled Testimony of Brad Wilson, at 3–4).

According to Mr. Wilson’s testimony, the New Project “significantly reduces the Project’s footprint and clearing area compared to the original design in docket 8302,” resulting in “increased setbacks and substantial vegetation being retained. . . .” (Prefiled

Testimony of Brad Wilson, at 2). Mr. Wilson’s testimony states that “portions of the [New] Project’s access road corridor (and associated clearing area) sits outside of the original clearing and Project footprint boundaries.” (Id. at 2–3). Mr. Wilson also states that the New Project plans “also reduce the Project’s equipment profiles. . . .” (Id. at 3). Per Mr. Wilson, changes have also been made to the type and wattage of the modules, the tilt angle, the amount of space between the rows, and the height of the fence surrounding the modules. (Id.). A different method of clearing will also be used for the New Project. (Id.).

MEMORANDUM OF LAW

I. THE TOWN PLAN IN PLACE AT THE TIME OF CHELSEA’S NEW PETITION APPLIES

In its Scheduling Brief dated March 9, 2018, Chelsea Solar asserts that it has a vested right to review of its New Petition under the Town Plan in effect in 2014. (Chelsea Scheduling Brief, at 2, 9–10). In support of that claim, Chelsea cites to *Smith v. Winhall Planning Commission* (140 Vt. 178, 436 A.2d 760 (1981)), *In re Jolley Associates* (2006 VT 132, 181 Vt. 190, 915 A.2d 282 (2006)), and *In re Taft Corners Associates, Inc.* (171 Vt. 135, 758 A.2d 804 (2000)). The holdings in those cases do not provide that a vested right applies in this case.

In *Smith*, the denial of a subdivision application by the Winhall Planning Commission was reversed by the Superior Court. The Planning Commission appealed to the Vermont Supreme Court. The Court determined that a bylaw amendment passed while the initial application was pending would not apply. *Smith*, 140 Vt. at 180, 436

A.2d at 761. *Smith* does not apply at all to the present facts, as this proceeding does not concern Chelsea's first petition. Chelsea litigated that issue to its conclusion, and then filed this New Petition.

Jolley involved an application for a proposed gas station and convenience store project in Shelburne. Jolley filed its application five days prior to the effective date of a newly enacted zoning amendment. The Environmental Court held that the new amendment should apply to the application. The Vermont Supreme Court reversed and remanded the matter to the Environmental Court, finding that Jolley had a vested right in the bylaw that was applicable at the time the application was filed. The Environmental Court then denied the application on substantive grounds, but *expressly* concluded that the denial was "without prejudice to its being reopened upon motion filed within 45 days after any further decisions have issued from the Planning Commission and/or the ZBA on any further applications filed by this applicant for this project; in particular any application . . . for site plan approval and any application to the ZBA under § 210.6." *Jolley*, 2006 VT 132, ¶¶ 1–3.

The Court in *Jolley* held that the Environmental Court's decision denying the application "without prejudice," "was in essence, if not technically, a remand." *Id.* at ¶ 14. The Court went on: "By this statement, the [Environmental Court] indicated that it did not intend to finally resolve the issue of site plan compliance. . . . We thus conclude that the issue of site plan compliance was not finally determined by the May 2002 decision." *Id.* at ¶ 14. It was upon this finding that the Court concluded that Jolley had a vested right to refile a conditional use application under the prior version of the bylaws.

This is *exactly the opposite* of what occurred here. In this case, Chelsea received a final decision on February 12, 2016, which was intended to finally resolve the issue of its entitlement to a CPG for the Initial Project under § 248. After filing excessive post-decision motions over the course of over a year, Chelsea appealed to the Vermont Supreme Court. When Chelsea decided to dismiss that appeal, it first requested that the matter be remanded to the PUC, which request was *expressly denied*. (See **Exhibit A**). Upon dismissal of the appeal, the Final Order became final and binding.

The Court in *Jolley* discussed what would have occurred had the Environmental Court's decision been a final determination: "Ordinarily, denial of a[n] . . . application requires that the applicant file a new application that substantially revises its proposal to 'address[] all concerns that prevented approval of the prior application.' ***The newly filed application is then subject to the bylaws in effect at the time of its filing.***" *Jolley*, 2006 VT 132, ¶ 16 (citing *In re Armitage*, 2006 VT 113, 181 Vt. 241, 917 A.2d 437 (2006) and *Smith, supra*) (emphasis added). That is the case here, and the law is clear: the newly filed petition is subject to the Town Plan in effect at the time of its filing—November 29, 2017. *Id.*

Chelsea references the following language from *Jolley*: "reapplication [for a denied permit] would not require the sort of substantial revision that should dictate a loss of vested rights" (Chelsea Scheduling Brief, at 2). Chelsea asserts that this supports the argument that *any* reapplication for a denied permit would not result in the loss of vested rights. That is not what the case says. The quotation (which is pulled jarringly out of context) was to distinguish why, *in the particular case at hand*, the permit would not

result in the loss of vested rights (as it otherwise would have). It was because “the only identified concern that required revision—removal of the canopy—was spelled out by the court.” *Jolley*, at ¶ 16. In other words, the Court is saying that had the required revision been *more* extensive than simple “removal of the canopy,” then it *would* have resulted in the loss of vested rights.

The changes made in this application are substantial. As set forth in the history, *supra*, the New Project differs from the Initial Project in a number of ways. It is not as simple as “removal of the canopy.” There are differences in the mass and scale of the project; the type, size, tilt, and spacing of the modules being used; the method and amount of clearing; the equipment being used; the project setbacks; the location of a roadway and gate (which removes the New Project from within the boundaries of the Initial Project). These are significant changes, which requires new pre-filed testimony and exhibits from the Petitioner, as well as new discovery from all of the parties. The issue of the cumulative impact with regard to the nearby proposed Apple Hill Project (Docket No. 8454) must also be addressed.

Chelsea cites *In re Taft Corners Associates* for the proposition that “conformance with the town plan . . . should be measured as of the start of the development process.” (Chelsea Scheduling Brief, at 2). Again, the quotation is pulled out of context and does not convey a holding in that case. That quotation was summarizing another case, *In re Molgano* (163 Vt. 25, 653 A.2d 772 (1994)), in which the Court determined that for purposes of the Act 250 Prong assessing “conformance with a town plan,” the plan to be applied is the plan that was in effect at the time the Act 250 application was made.

The *Molgano* holding actually dictates that, in the context of review of this petition, the PUC must consider the “conformance with town plan” under the Town Plan that was in effect when Chelsea’s petition was filed—November 29, 2017.

What none of the cases referenced by Chelsea say is that a developer can file successive applications *ad infinitum* under the Town Plan that existed at the time it conceived of a development concept. Permitting such a rule would greatly diminish the ability of Vermont municipalities to control development within their jurisdictions.

Even if the prior version of the Town Plan applied, which it does not, the Town would still have the right to review the New Project under that version of the Town Plan. The Town’s position regarding the issues in this docket are based on the correct legal conclusion that the New Project should be assessed under the version of the Town Plan in effect on the date that the Petition was filed. This position was stated just after Chelsea’s representative acknowledged: “I understand completely that this is a new petition.” (Transcript of March 2, 2018 preconference hearing, at p. 12, line 16). The Town expressly repeated that concession in articulating its position: “And then I think it was Mr. Melone who just confirmed that . . . he acknowledges that this is a completely new proceeding. It’s a new application, and as such, there is a Town Plan amendment that was adopted prior to the new petition being filed which is applicable.”

The prefiled testimony of Brad Wilson addresses the Siting Amendment, as well. (Wilson Prefiled Testimony, at 40–41). That testimony provides several reasons why Mr. Wilson believes the Town Plan “mass and scale” provision does not apply—including several unfounded legal conclusions—but makes no mention of the issue now

raised in Chelsea's Scheduling Brief. It is obvious that Petitioner commenced this proceeding understanding that the Siting Amendment was applicable to its project.

II. ISSUE PRECLUSION DOES NOT BAR REVIEW OF THE PROJECT IMPACT

Chelsea asserts in its Scheduling Brief that "Issue Preclusion" bars re-litigation of the Project. (Chelsea Scheduling Brief, at 10). However, Chelsea actually recites the standard for *claim* preclusion (*res judicata*), rather than issue preclusion (*collateral estoppel*). (Note that *Russell v. Atkins* (165 Vt. 176, 679 A.2d 333 (1996)) is actually a claim preclusion case). Claim preclusion applies to "*claims* that were or should have been litigated in a prior proceeding." *In re Tariff Filing of Central Vermont Service Corp.*, 172 Vt. 14, 20, 769 A.2d 668, 673 (2001).

The claim in this case—that Petitioner is entitled to a CPG based on its New Project—was neither litigated nor decided in the prior proceeding. The PUC only addressed the claim that the Petitioner was entitled to a CPG based on its Initial Application. Furthermore, if the issues underlying the Petition were identical or near identical, then the successive-application doctrine would bar the petition altogether. *In re Armitage*, 2006 VT 113, ¶ 4, 181 Vt. 241, 917 A.2d 437 (2008).

The Vermont Supreme Court has examined the relationship between the successive-application doctrine and claim preclusion in the zoning context. *In re Dunkin Donuts S.P. Approval (Montpelier)*, 2008 VT 139, 185 Vt. 583, 969 A.2d 683 (2008). This analysis applies equally in this context (as do other cases concerning the successive-application doctrine and even vested rights, as discussed *supra*). In *Dunkin Donuts*, the Court stated that "claim preclusion 'does not apply to administrative

proceedings as an inflexible rule of law.” *Id.* (quoting *Johnston v. Wilkins*, 2003 VT 56, ¶ 8, 175 Vt. 567, 830 A.2d 695). The successive-application doctrine precludes review of a second application regarding a project after a previous application had been denied, “unless a substantial change of conditions ha[s] occurred or other considerations materially affecting the merits of the request have intervened between the first and second applications.” *Id.* (quoting *Application of Carrier*, 155 Vt. 152, 157, 582 A.2d 110, 113 (1990)).

The “balance of flexibility and finality” afforded by the successive-application doctrine “is incompatible with strict application of claim preclusion, which is ‘intended to protect the courts and the parties from the burden of relitigation.’” *Id.* (quoting *Russell, supra*). Here, the successive-application doctrine is what *allows* an applicant relief from the preclusive effect of a prior denial.

Issue preclusion, on the other hand, “is similar in effect, but more narrow in scope.” *In re Tariff Filing of Central Vermont Service Corp.*, 172 Vt. at 20, 769 A.2d at 673. It bars relitigation of specific *issues* that were actually litigated and decided in a prior case, but only where the issue was necessary to the resolution of the dispute. *Scott v. City of Newport*, 2004 VT 64, ¶ 8, 177 Vt. 491, 493, 857 A.2d 317, 321 (2004). It applies where “an issue of fact . . . is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Scott*, 2004 VT 64, at ¶ 8.

While it is true certain legal conclusions and other, more general facts, may be barred from relitigation (e.g., the legal conclusion that the Town Plan contains a clear, written community standard applicable to the Project or the fact that the Project is located in the Town of Bennington), the overall Project Petition is not. In addition to the specific components of the project that have changed, their overall collective impact must be assessed, as well as the cumulative impact alongside the Apple Hill Project. None of these new components or changes, nor their overall, cumulative impact, could have been assessed in connection with the First Petition.

Because Chelsea does not assert which individual issues addressed in the Final Order it believes are barred from relitigation (other than the ANR and DPS MOUs, which those agencies will address), no general determination can be made as to any preclusive effect under that doctrine.

III. THE TOWN HAS NOT “REPUDIATED” THE BASIS FOR THE PUC’S RULINGS.

Chelsea asserted in its Scheduling Brief that the PUC’s non-adoption of various Findings in the Final Order “were based upon conclusions that have since been repudiated by the Town.” (Chelsea Scheduling Brief, at 11). More specifically, Chelsea claims that the PUC “based its two unfavorable rulings on its conclusion that the Bennington Town Plan established a clear, written community standard prohibiting commercial scale solar projects in the Bennington rural conservation (“RCON”) zoning district.” (Chelsea Scheduling Brief, at 6). While it is true that the Bennington Town Plan establishes a clear, written community standard, the PUC did *not* conclude that it prohibited commercial scale solar projects in the Rural Conservation District.

The PUC's decision actually stated that "[w]hile limited residential development is permitted, commercial development is prohibited with certain rural exceptions." (Final Order, at 51–52). The PUC went on to explain that this particular project was not permitted because it did not satisfy the design standard applicable to new development in the Rural Conservation District. (Final Order, at 51–52, 55–57).

With regard to Orderly Development, following its analysis, the PUC stated:

For the reasons we discussed above, we also disagree with the Hearing Officer's conclusion on orderly development. Rather, we find, based on our review of the Town Plan, that the Project will unduly interfere with orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project Site that would be violated if the Project were to be constructed.

(Final Order, at 53–54) (emphasis added).

With regard to aesthetics, the PUC stated that "[t]he Town Plan States that 'agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.'" (Final Order, at 57). The PUC concluded that the Initial Project violated the clear, written community standard, and would have an undue impact on aesthetics based on a combination of the nature of the project, the clearcutting required, and its prominent, visible location on a hillside. (Final Order, at 56–58).

Nowhere does the PUC conclude that the Town Plan prohibited all commercial scale solar projects in the Rural Conservation District. Rather, the PUC reviewed the applicable community standards, and made a determination that the particular project in front of it would violate those standards.

Statements made at a public meeting (again, taken out of context) do not in any way “repudiate” the PUC’s conclusions. Nor did the Town assert that the underpinnings of the PUC rulings were not credible. It has been—and remains—the Town’s position that while certain appropriate uses are permitted in the Rural Conservation District, the development of any such permitted use must comply with all Town bylaws, ordinances, and must conform with the Town and Regional Plans.

This is further supported by the fact that the PUC indicated that Chelsea could submit a new petition for a project in the same location. If the PUC’s conclusion had been that solar development was entirely precluded in the Rural Conservation District, then it seems unlikely it would have made that indication at all. (Order Denying Chelsea VRCP 60(b) Motion, 2017 WL 4685518, at *5).

CONCLUSION

Based on the foregoing, the Town respectfully requests that the Hearing Officer determine that the version of the Town Plan that was in effect at the time Chelsea filed its New Petition on November 29, 2017 applies to the present proceeding.

/s/ Merrill E. Bent

Merrill E. Bent, Esq.

Woolmington, Campbell, Bernal & Bent, P.C.

4900 Main Street, PO Box 2748

Manchester Center, VT 05255

(802) 362-2560

merrill@greenmtlaw.com

EXHIBIT A

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-195

SEPTEMBER TERM, 2017

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SEP 22 2017

In re Petition of Chelsea Solar LLC
(Allco Renewable Energy Limited*)

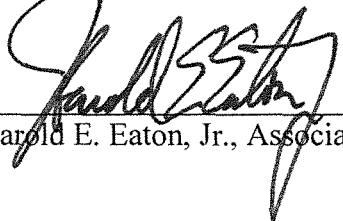
} APPEALED FROM:
}
}
} Public Utility Commission
}
} DOCKET NO. 8302

In the above-entitled cause, the Clerk will enter:

Appellant moves to remand this case to the Public Utility Commission for the taking of additional evidence. The request is denied.

Appellant's motion for an extension of time is granted. Appellant's brief and printed case shall be filed 30 days from entry of this order, or sanctions may be imposed and the appeal dismissed without further notice.

FOR THE COURT:



Harold E. Eaton, Jr., Associate Justice

**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

Docket No. 2017-195

In Re: 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 to be located at 500 Apple Hill Road in Bennington, Vermont

Appeal From:

Public Service Board
DOCKET NO. 8302

MOTION OF APPELLANT
ALLCO RENEWABLE ENERGY LIMITED
FOR REMAND OF THE CASE
TO THE VERMONT PUBLIC UTILITY COMMISSION

Thomas Melone
Allco Renewable Energy Limited
1735 Broadway, 17th Floor
New York, NY 10019
Phone: (212) 681-1120
Fax: (801) 858-8818
thomas.melone@allcous.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
BACKGROUND	2
LEGAL STANDARD	10
ARGUMENT	11
I. The Common Sense Approach is to Remand This Case For the Taking Of Additional Evidence	11
A. Economy of Judicial and Agency Resources Favor Remand.....	11
B. The PUC Failed to Give Adequate Consideration to an Alternate Plan.....	13
C. The PUC Acted On Incomplete Information	15
D. Remand Is Required To Avoid Unconstitutional Selective Enforcement.	17
II. Remand is Appropriate Under 3 V.S.A. §815(b)	17
A. The Additional Evidence is Material	18
B. There Were Good Reasons For Failure to Present the Additional Evidence.....	18
III. Remand is Appropriate Because the PUC Failed to Afford Chelsea Its Procedural Rights Under 3 V.S.A. §811	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

<i>In Re Burlington Elec. Dep’t</i> , 141 Vt. 540 (1982)	1, 18
<i>In Re Chaves A250 Permit</i> , 2014 VT 5 (2014)	18
<i>In re G.T.</i> , 170 Vt. 507 (2000)	17
<i>In re Jolly Assocs.</i> , 2006 VT 132 (2006)	13
<i>In re Lakatos</i> , 2007 VT 114 (2007)	1, 18
<i>In re Maple Tree Place</i> , 156 Vt. 494 (1991)	11
<i>In re Petition of Rutland Renewable Energy, LLC</i> , 2016 VT 50 (2016)	4
<i>In re Programmatic Changes to the Standard-Offer Program</i> , 2014 VT 29 (2014)	1
<i>In re State Aid Highway No. 1</i> , 133 VT 4 (1974)	22, 23
<i>People v. Acme Markets, Inc.</i> 37 N.Y.2d 326, 334 N.E.2d 555 (N.Y. 1975)	17
<i>State ex rel. Gunstone v. Washington State Highway Comm’n</i> , 72 Wash. 2d 673, 434 P.2d 734 (1967)	11
<i>Vermont Elec. Power Co., Inc. v. Bandell</i> , 135 Vt. 141 (1977)	20

STATUTES

3 V.S.A. §809(e)	21-23
3 V.S.A. §811	20-23
3 V.S.A. §815(b)	1, 10, 17, 18
30 V.S.A. §8	21
30 V.S.A. §248(b)(1)	4, 5, 18, 201, 21
30 V.S.A. §248(b)(5)	3, 18, 20

OTHER AUTHORITIES

PUC Rule 2.204	14
----------------------	----

MOTION FOR REMAND TO THE VERMONT PUC

Appellant Chelsea Solar LLC (“Chelsea”) moves this Court to remand this case to the Public Utility Commission (the “PUC”) for the taking of additional evidence pursuant to 3 V.S.A. §815(b) and pursuant to this Court’s common sense approach to remand in the interests of justice.

This is not the first time this Court has been called on to resolve a dispute involving these two solar projects on land in the Town of Bennington—the Chelsea Solar project (the “Project”) and the Apple Hill Solar project—which were submitted in 2013 in response to Vermont’s standard offer solicitation. Originally the PUC refused to issue an agreement for the Apple Hill project based upon the PUC’s claim that the Chelsea and Apple Hill projects were not separate projects. This Court reversed the PUC’s decision. *See, In re: Programmatic Changes to the Standard-Offer Program*, 2014 VT 29 (2014).

This Court has stated that it would not allow parties to bide their “time for months during complex, lengthy, and expensive proceedings, and then attempt an ambush when those proceedings draw to a close.” *In Re Lakatos*, 2007 VT 114 (2007) at P9 quoting *In Re Burlington Elec. Dep’t*, 141 Vt. 540, 547 (1982). Chelsea was doubly ambushed. First by intervenor Libby Harris and then by the PUC. But now that the Town of Bennington (the “Town”) has agreed that similar revised plans for the Apple Hill solar project (which the PUC has agreed to consider) are consistent with the standards of the Bennington Town Plan (the “Town Plan”), and Chelsea has submitted a rule 60(b) motion to the PUC, the common sense approach is to remand this case to the PUC for the taking of additional evidence.¹ Remand under

¹ The rule 60(b) motion is included in the appendix to this motion. The appendix will be referenced by page numbers beginning with “A.” On September 7, 2017, the undersigned

these circumstances is even more warranted in light of the fact that every day scientists urge immediate action to avoid devastating consequences to the planet from climate change, and Vermont's Climate Change Commission was told last month that Vermont is nowhere near on a path to meet its climate goals.

BACKGROUND

After more than two years, hundreds of thousands of dollars of Project costs, and a lengthy section 248 process, a technical hearing was held by a hearing officer on Chelsea's section 248 application. No party at the hearing (or at any time prior to the hearing) raised the issue of whether putting a commercial ground-mounted utility-scale solar project in the Bennington rural conservation ("RCON") district was contrary to the Town Plan. And there was no reason why they would have raised it. The PUC had already approved commercial utility-scale solar projects in the Bennington RCON district (and indeed has approved such a project *even after* it denied Chelsea a certificate of public good ("CPG")). Moreover, the Town had received and reviewed the plans for the Chelsea Project more than 1 year before the hearing, and made no objection or comment. Further, the Bennington by-laws permit solar as well as various other commercial uses in the RCON zone. In addition, all outstanding issues concerning the Chelsea Project's compliance with the section 248 criteria among Chelsea, the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service (the "Department") were resolved pursuant to the memorandums of understandings. Chelsea also entered into a memorandum of understanding with the local Apple Hill Homeowner's Association to address many of their concerns. The hearing was held and the hearing officer issued a proposed decision approving the issuance of a CPG for the Chelsea Project.

emailed all Appellees asking for their position on this motion. As of the time this motion was packaged for fedex pickup, no Appellee had responded with its position.

Then, on August 13, 2015, in a hastily called public Select Board meeting (of which the Chelsea received no notice) the Town Select Board voted to oppose the Chelsea and Apple Hill solar projects based upon false visual information provided by the neighbors.² The Select Board followed up that meeting with a letter to the PUC expressing its opposition to the projects. By the time the false information could be corrected, the train had left the station in the fervor of the times of municipal revolt against what was perceived as the PUC's insensitivity to local concerns.

In her October 13, 2015, comments on the Chelsea proposed decision, Libby Harris, a neighbor and intervenor in these proceedings ("Harris") claimed for the first time (copying comments the Town made with respect to the Apple Hill project) that the project violated a clear, written community standard allegedly set forth in the Town Plan—thus allegedly not satisfying the requirements of 30 V.S.A. §248(b)(5). Harris' objections, however, were different than the basis used by the PUC to deny the CPG. Harris claimed that the Project was subject to specific design standards applicable in the RCON zone, which is true, but she never argued that commercial solar facilities were prohibited in the RCON zone. A316-320. Rather, Harris based her aesthetics complaint on her incorrect allegations that the "record [was] devoid of actual [color] photographic simulations, arguing that it was 'impossible to understand the visual impact of the final project based upon the evidence in the record.'" See, A318, Harris October 13, 2015,

² The Select Board was shown a color large-scale visual simulation of the combined Chelsea and Apple Hill solar projects from the vantage point of the Vermont Welcome Center. The shown simulation was devoid of any vegetation, thus the projects were clearly in view. That simulation was prepared during discovery at the request of the Department because the Department had requested a simulation without vegetation to verify the location of the solar panels in the computerized model. The actual color visual simulations of the Chelsea project from the Vermont Welcome Center, which were not shown during the meeting, show that the Chelsea Project could not be seen, a conclusion with which the PUC agreed in the Motions Order. See, A227, Motions Order at 15.

comments at 5. Of course, that was simply not true as color visual simulations were in the record showing the Project was hardly visible, and the testimony of Chelsea's aesthetics expert was also in the record explaining that minimal impact on the view.

On January 6, 2016, the PUC issued an order requesting comments on the Town Plan issue raised by Harris. Chelsea filed comments including an excerpt from the Bennington by-laws governing development in the RCON zone, which by-laws permit solar, but the PUC refused to consider the by-laws and any other evidence sought to be presented by Chelsea in those comments. *See*, A263, Denial Order at 51, fns. 25, 27.

At the time the PUC was considering the hearing officer's recommended decision to issue the CPG, there was a backlash against the PUC for what was perceived in various corners as trampling on municipalities with respect to siting solar projects. This Court has stated that the atmosphere at the time created a "backlash that persuaded the Legislature to amend § 248 to give towns greater control over solar generation facilities." *In re Petition of Rutland Renewable Energy, LLC*, at P10. *See also, id.* at P42 (Robinson, J. concurring) (referring to the situation as a "political maelstrom" noting "frustrated municipalities all around the state that feel 'ignored' and 'steamrolled' by the PUC.")

The Denial Order

On February 16, 2016, the PUC issued the Denial Order rejecting certain of the hearing officer's proposed findings regarding aesthetics and orderly development.³ The basis for the

³ In the Denial Order (A261-274), the PUC adopted all the findings recommended by the hearing officer except for Findings 30 and 32 related to the orderly development of the region criteria under 30 V.S.A. §248(b)(1). The PUC also held that construction of the Chelsea Project would violate a clear, written community standard, applicable to the Project site under the first prong of the second part of the *Quechee* test, and thus held that there would be an undue adverse effect on aesthetics. The PUC did not state which Finding(s) regarding aesthetics in particular the PUC

denial was the issue raised by Harris in her post-proposed decision comments—i.e., that project violated a clear, written community standard and as such would have an undue, adverse impact on aesthetics. But as argued above, the PUC’s basis was much different than Harris’ claims. Harris never made an argument based upon the facts in the record but rather on her incorrect assertion of the absence of testimony, analysis and color visual simulations. The PUC nevertheless rejected the uncontested testimony of Chelsea’s expert that it did consider, ignored the supplemental testimony of Chelsea’s expert (and the actual screening plan), ignored its own prior precedent approving solar and other utility scale projects in the RCON zone, and relied on factors not raised by Harris.

The PUC’s rationale was that the Project violated the following three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the PUC found *sua sponte* that development in the RCON zone was limited to “limited residential development” and thus a commercial ground-mount solar project was prohibited in the RCON zone. *Second*, the PUC found *sua sponte* that the Project violated the Town Plan criterion that prohibits development “in prominently visible locations on hillsides and ridgelines” in the RCON zone. *Third*, the PUC found that the Project violated the Town Plan criteria that “any development must minimize the clearing of natural vegetation.” The PUC, however, did not explain what “minimize clearing” meant, or how the Project violated it. The PUC also *sua sponte* rejected proposed findings 30 and 32 concluding that the Project would unduly interfere with the orderly development of the region and thus not satisfy 30 V.S.A. §248(b)(1) (even though no party ever raised that issue) again based upon the PUC’s legal conclusion of the Town Plan’s provisions relating to development in the RCON zone.

did not adopt, but presumably that it would be at least the second sentence of Finding 112 and the first part of Finding 104.

Contemporaneously with the issuance of the Denial Order the PUC took the highly unusual step of issuing a press release touting its denial of the CPG. The PUC also posted the press release on its web site's home page. The PUC did not issue a revised proposed decision adverse to Chelsea prior to issuing the Denial Order. Nor did the PUC ever claim that a majority of the PUC commissioners read the record of the case prior to issuing the Denial Order.⁴

The neighboring Apple Hill solar project was on a parallel but slightly delayed track in the section 248 process. As of February 2016, the technical hearing had been held and post-hearing submissions made. No proposed decision, however, had yet been issued for the Apple Hill project.

In March 2016, both Chelsea and Apple Hill solar filed several motions with the PUC, and each also filed an amendment to its CPG application. The amendments for each project revised the plans so as to comply with the criticisms (justified or not) of the earlier plans. The net result was a substantially smaller footprint for each project, substantially less clearing (and less clearing than other RCON zone permitted uses), and projects that would be completely screened from the public and the neighbors. The revised projects were specifically designed to have no adverse effect on aesthetics, thus eliminating the reasons (justified or not) for the PUC's denial of the CPG for the Chelsea project.

The Motions Order

On April 14, 2017, the PUC denied Chelsea's motions (the "Motions Order") to re-open the record or reconsider the Denial Order. The PUC also refused to accept the amendment to the Chelsea site plans. The Commission also provided further commentary regarding two criteria in the Town Plan which it believed the Project violated.

⁴ It is undisputed that a majority of the PUC commissioners did not hear the case.

With respect to the primary basis for denial of the CPG—that commercial ground-mounted solar facilities are not permitted in the RCON zone (*a position the Town acknowledged on August 14, 2017, is not credible*), see A157 and discussion *infra*—the PUC discounted the fact that the Town of Bennington had previously supported, and the PUC had approved, commercial ground-mounted solar facilities and other electric facilities in the RCON zone. The PUC also failed to acknowledge the issuance of a CPG to another commercial ground-mounted solar facility in the RCON zone since the issuance of the Denial Order.

With respect to the second Town Plan criteria allegedly violated by the Project—*i.e.*, being sited in a prominently visible location on a hillside or ridgeline—the PUC acknowledged that the Project was not visible from the Vermont Welcome Center. Nevertheless the PUC stated that because the Project would be visible *from somewhere*, it still failed the Town Plan’s criteria prohibiting the siting of structures “in prominently visible locations on hillsides and ridgelines.” To support that conclusion, the PUC quoted Finding 110 of the Denial Order, which referenced Chelsea’s expert, Mark Kane’s initial pre-filed testimony at 4: “‘while the extent of the visibility is not large’ the Project would ‘create an adverse impact with respect to the visual resources of the area. That is, the Project would be visible.’”⁵ The PUC’s reliance on that slim reed is manifestly erroneous for two reasons. *First*, it ignores Kane’s supplemental testimony (as was made clear in Kane’s affirmation dated March 21, 2016, submitted with Chelsea’s motions and amendment). A28, ¶11, A212, ¶12. The language cited by the PUC was from Kane’s original pre-filed testimony (Kane pf.) where he stated that there would be some transient low visibility as cars drove around the Project site in the highway interchange. The PUC, however, simply failed to account for the supplemental testimony and supplemental mitigation plan, the purpose

⁵ See, A289-290, Motions Order at 14-15.

of which was to screen the Project from direct and unfiltered views from the vantage point referenced by Kane in his original pre-filed testimony—i.e., motorists travelling at high speed through the highway interchange. A212, ¶12, A28, ¶11. With the successful implementation of that mitigation Kane stated that the Project would have little impact on the surrounding visual resource. *Id.* He also stated that the Project would not likely be noticeable to motorists travelling around the western edge of the Project site unless one was intentionally looking for the Project. *Id.* The PUC’s use of superseded testimony is clear error and simply reinforces Chelsea’s claim that a majority of the PUC commissioners did not record the record.

Second, the PUC’s reliance on mere “visibility” ignores the language of the Town Plan allegedly violated, which refers to *prominently visible* locations on hillsides or ridgelines, not merely visible locations. As Mark Kane explains, A212, ¶12, A28, ¶11, Finding 110 in which the PUC relied does not account for his supplemental testimony. Had the PUC accounted for that supplemental testimony, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridge as it would be barely visible.” *See*, A28, ¶13.

Although the PUC refused to re-visit its conclusions in the Denial Order or accept the amendment with respect to the Chelsea Project, the Commission took the opposite approach with respect to the Apple Hill project and re-opened the Apple Hill proceeding and agreed to accept the amendment and review the revised site plans. *See*, A201.

The PUC’s based its different treatment of Chelsea (vs Apple Hill) on the notion that the PUC’s January 2016 request for comments on the Town Plan issue was sufficient due process for Chelsea because Chelsea had the opportunity to introduce evidence through its response to that request. But there are two manifest errors with that theory. *First*, Chelsea *did* provide further

evidence in its response such as additional references to the Town Plan, regional plan and the Town's specific land use measures governing the RCON district and how the Project satisfied them. The PUC, however, refused to consider those because they were not previously offered into evidence. *See*, A263, Denial Order, at 51, fn. 25 ("in the Chelsea PFD Comments, Chelsea cites to section 9.2 of the Town Plan at page 100. This part of the Town Plan was not included in the excerpts and therefore as not admitted into evidence.") *See*, A263, *id.*, fn. 27 ("Citing table 3.13 of the Bennington zoning rules attached as 'Exhibit A' to the Chelsea PFD Response, Chelsea argues that certain allowable uses in the Rural Conservation Districts include 'electrical facilities.' Exhibit A is not in evidence because Chelsea failed to offer it into the record; therefore we cannot rely on Exhibit A in making our determination.")

Second, Harris never raised the primary issue relied on by the PUC—*i.e.*, that commercial ground-mounted solar projects were prohibited in the RCON zone. As a result Chelsea had no reason to specifically address such a claim. Further, Harris never argued that the Project was sited in a prominently visible location on a hillside or ridgeline. To be sure Harris talked about aesthetics and viewpoint, but she based her aesthetics argument on her incorrect allegation that the record was devoid of color visual simulations, analysis of aesthetics and a screening plan. *See*, A318, Harris Comments at 5 ("It is impossible to understand the visual impact of the final project based on the evidence in the record.") Harris made those incorrect factual assertions even though she questioned Chelsea's expert at the technical hearing about the exact evidence she claimed in her comments was absent from the record. As a result Chelsea had no reason to address the second basis on which the PUC concluded the Town Plan was violated because it was not raised. An opportunity to submit evidence that is excluded is not an opportunity at all. Nor is it fair or consistent with due process for Chelsea to be presumed to need to address

arguments of which it has no notice.

The Corrections Order

On April 17, 2017, the PUC issued a further order (A311) because it realized that the primary basis in the Motions Order on which it denied much of Chelsea's relief—alleged untimeliness of Chelsea's filings—was simply wrong.

Efforts With the Town Regarding the Revised Plans

For the better part of the past year, Chelsea and Apple Hill Solar have engaged both intervenor Harris and the Town in settlement discussions to address their concerns and produce projects that all would agree would not be visible to the public or the neighbors. Adjustments to the amended plans of both projects were made based upon input from the Town.⁶ The revised final plans and visual simulations were prepared and distributed to the Town, the neighbors and made available to the public. The Town's Select Board held several public meetings on the revised plans, culminating last month in the Select Board voting to withdraw its opposition to the Apple Hill project because in the words of the Town Attorney, the revised plans are "consistent with what I see is the text of the Town Plan." *See*, A174. The Town, however, voted to continue its opposition of the Chelsea Project in this Court because that appeal currently involves the original (not the revised) plans. *See*, A149.

LEGAL STANDARD

Under 3 V.S.A. §815(b), remand to the PUC to take additional evidence is appropriate if (1) "the additional evidence is material" and (2) "there were good reasons for failure to present it

⁶ Harris never seriously engaged in settlement discussions claiming, among other things, that solar was not permitted in the RCON zone even though she was, at the same time, urging that solar be restricted to the sites designated as preferred in the plan approved by the Town's solar siting committee, which designated hundreds of acres in the RCON zone as preferred sites for solar, but none of which were near her property.

in the proceeding before the [PUC].”

Under this Court’s inherent authority to act in the interests of justice, remand is appropriate, among other reasons, if “the [PUC] may have acted on incomplete or inadequate information; or may have failed to give adequate consideration to an alternate route.” *In re Maple Tree Place*, 156 Vt. 494, 499 (1991) (quoting the “common sense approach to remand” contained in *State ex rel. Gunstone v. Washington State Highway Comm’n*, 72 Wash. 2d 673, 674-75, 434 P.2d 734, 735 (1967)).

ARGUMENT

I. The Common Sense Approach Is To Remand This Case For the Taking Of Additional Evidence.

This Court takes a “common sense approach to remand.” *In re Maple Tree Place*, 156 Vt. 494, 499 (1991). Remand is appropriate if “the [agency] may have acted on incomplete or inadequate information; or may have failed to give adequate consideration to an alternate route.” *Id.* (internal citations and quotations omitted). Remand to the agency for further consideration is “not a determination that the [agency] is wrong,” but rather “an indication that the disinterested court, which has reviewed the record, is not satisfied on the basis of that record that the [agency] is right.” *Id.* (internal citations and quotations omitted). Remand is appropriate even if “no grounds for reversal [are] found.” *Id.*

An early remand is particularly appropriate here for several reasons.

A. Economy Of Judicial And Agency Resources Favor Remand.

It would be inefficient use of judicial and agency resources to fight over a site plan that Chelsea has already agreed it would revise so as to comply with the criticisms (justified or not) of the earlier plan. Chelsea has filed a rule 60(b) motion with the PUC submitting the revised plans and asking the PUC to provide relief from its Denial Order. *See*, A1 *et seq.* Both the

Chelsea and Apple Hill projects have been significantly reduced in size through a combination of using higher wattage black-faced solar modules (which were not available when the original section 248 petition was filed), reducing row-to-row spacing, and decreasing the tilt angle of the modules. With additional adjustments to the plan at the Town's suggestion, the net result is that both projects would be completely screened from view from the public and the neighbors. Expert testimony on the revised site plans states that there is no adverse effect on aesthetics because the projects cannot be seen. *See*, A46-47, ¶¶58-59.

The PUC has already agreed to re-open the Apple Hill section 248 proceedings, *see* A201, and review the revised site plans for that project. After months of public comments, on August 14, 2017, the Bennington Select Board voted 5-1 to discontinue its opposition to the Apple Hill Solar project in PUC docket 8454 because the revised plans meet the requirements of the Bennington Town Plan. At the Select Board's public hearing, the Town of Bennington's counsel, Rob Woolmington, stated: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district. I think what they've done is consistent with what I see is the text of the Town Plan." *See*, A174.

The Select Board, however, voted to continue its opposition to Chelsea in this proceeding because the original plans are at issue, not the revised plans. A149. But there is no reason for the parties to continue litigating the original plans in this Court when Chelsea is willing to move forward with the revised plans submitted to the PUC in the rule 60(b) motion. Moreover, when the PUC issued the Denial Order in February 2016, it did not have the benefit of any input from the Town in the Chelsea proceeding. Now it does. That input is directly contrary to the PUC's blanket legal conclusion that the Town Plan bars commercial solar projects. On that particular

issue the following statement from the Town’s attorney at the August 14 public hearing is especially relevant:

the Town Plan I do not think can credibly be construed to bar alternative energy projects in the rural [conservation] district because of the preceden[ts], because of the language of the plan, because of the way the zoning by-laws allow specific uses in that area and because of the planning that’s been underway for the future that includes a number of properties in that area for solar energy.

See, A157.⁷

Thus a common sense approach to the current dispute is to remand the case to the PUC for further consideration of the revised plans. Remand makes even more sense in the current environment. The Governor’s Climate Action Commission was told last month that “Vermont is ‘nowhere near’ meeting goals set in law and policy to stem the state’s contribution to global climate change.”⁸ Further, everyday scientists urge immediate action to combat climate change.

B. The PUC Failed To Give Adequate Consideration To An Alternate Plan.

In *In re Jolley Assocs. (Town of Shelburne)*, 2006 VT 132, P13, this Court stated that “[r]emand is appropriate to return the matter [] for further consideration if the proposed use or site plan, or both, were [] subject to a different approach,” citing *Maple Tree Place*. (emphasis added.) That is precisely the case here as the revised site plans fully eliminate the bases for the

⁷ The PUC’s conclusion was also contradicted by the PUC’s approval of commercial solar projects in the Bennington RCON district both before and after the Denial Order. See, e.g., CPG (#NMP-6523), October 15, 2015, Kobelia Bennington GLC Solar LLC, approving a solar project before the Denial Order; see, Exhibit B to Chelsea’s Motion for Mediation filed January 20, 2017, for the order approving one afterwards—Order approving CPG for ER Paper Mill Village Solar, LLC, November 17, 2016 .

⁸ *Vermont ‘nowhere near’ climate change goals, panel hears*, VT Digger, August 16, 2017, available at <https://vtdigger.org/2017/08/16/vermont-nowhere-near-climate-change-goals-panel-hears/>. (“‘We’re nowhere near achieving the type of (greenhouse gas) reductions we need to reach our goals,’ said Jeff Merrell, the Department of Environmental Conservation’s air quality planning section chief and a speaker at the task force meeting.”)

denial of the CPG. The PUC refused to give any consideration to the alternate plan proposed by Chelsea. The PUC's rationale was that because Chelsea proposed the alternate plan after the evidentiary record closed, it would not consider it.⁹ However, it is unclear when the PUC officially closed the record, if at all.

In the Motions Order, the PUC also suggested that Chelsea had an opportunity to completely revise the Project once the PUC issued its request for comments on Harris' claim that the project would violate the Town Plan. But it was not reasonable for Chelsea to have anticipated from the PUC's request for comments that the PUC (i) would ignore the two years of effort designing a project that was reviewed by experts including those of the Department, (ii) would ignore expert testimony and visual analysis in the record, (iii) would act contrary to its actions approving other projects approved in the RCON zone, (iv) would ignore the supplemental testimony of Chelsea's aesthetics expert, and (iv) would not adopt the hearing officer's conclusions on bases never raised by any party, and would do so all without proposing another decision or scheduling further evidentiary hearings.

⁹ The PUC's rationale, however, is less than clear. At one point the PUC states that "Chelsea's Motion to Amend the Petition is untimely under Rule 59(e) because it was offered after the [Denial] Order." A297, Motions Order at 22. Then the PUC stated: "Because the amendment was proposed after the evidentiary record closed, it is not appropriate to address the substance of this Motion to Amend the Petition as part of our reconsideration of the [Denial] Order. The Motion to Amend the Petition is therefore untimely." *Id.* Although it is not clear when, if at all, the record closed, the PUC's refusal to accept the amendment directly contradicts the plain language of PUC Rule 2.204(G). The PUC treated the amendment as a motion to amend, but unlike VRCP 15, Rule 2.204(G) does not require consent or a motion for an amendment. Rather Rule 2.204(G) is self-executing and expressly permits amendments "at any time," and the only basis on which the Rule disallows an amendment is if the PUC affirmatively finds that the amendment has "the effect of unreasonably delaying any proceeding" or that it would "unreasonably adversely affect[] the rights of any party." No such findings were made by the PUC. No party objected to the amendment within the ten-day period stated in rule 2.204(G).

C. The PUC Acted On Incomplete Information.

Prior to the issuance of the Denial Order, the PUC realized that it was going to issue the Denial Order based upon incomplete information. The PUC realized from Chelsea's submission in January 2016 on the Town Plan issue that the PUC did not have the complete Town Plan or complete regional plan. The PUC also realized from the Bennington by-laws submitted at that time that it did not have the full picture of the intention of the Town Plan because the by-laws provided the guidelines as to the Town Plan's development criteria in the RCON zone. In addition, as the PUC conceded in the Motions Order, it did not have a real grasp on the facts and fudged calculations in order to reconcile certain facts in the proposed decision with its own analysis. A287, fn. 26.

Crucially, in the Motions Order the PUC admitted that it was basing its decision on superseded testimony. The PUC's rationale for disagreeing with the hearing officer's proposed findings regarding aesthetics and orderly development rested on the Project allegedly violating three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the PUC found that development in the RCON zone was limited to "limited residential development" and thus a commercial ground-mount solar project such as the Project was prohibited in the RCON zone. *Second*, the PUC found that the Project violated the Town Plan criterion that prohibits development "in prominently visible locations on hillsides and ridgelines" in the RCON zone. *Third*, the PUC found that the Project violated the Town Plan criteria that "any development must minimize the clearing of natural vegetation."

The first basis has been discredited by the Town. As stated above, the Town Attorney has publicly stated that the PUC's finding that commercial grounded-mounted solar is not

permitted in the RCON zone under the Town Plan *is simply not credible*. See, A157. As to the second basis, as argued above, the PUC (i) ignored the supplemental testimony of Mark Kane, which superseded what was relied on by the PUC, (ii) ignored the plain language of the Town Plan by equating mere alleged “visibility” with being in a “prominently visible location[] on [a] hillside[],” A290, and (iii) ignored the evidence that Chelsea did submit in connection with its January 2016 comments. Had the Commission accounted for the supplemental testimony and actual evidence, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridgeline as it would be barely visible.” See, A28, ¶13. The PUC’s second basis is simply not credible either.

The end result is that the PUC’s disagreement with the hearing officer’s proposed findings relies solely on the vagaries of a statement that development in the RCON zone must “minimize clearing”. Even the PUC has failed to explain what type of standard that really is, how it could possibly be a clear and unambiguous standard, how it applies to the Project, and how the Project allegedly fails it.¹⁰

Whether any of that information would be decisive is for the PUC to determine in the first instance. Accordingly, remand is appropriate on that basis as well.

¹⁰ The Chelsea site’s usefulness for solar was emphasized in a recent email by Bennington Select Board Vice Chair, Don Campbell, to Libby Harris, a copy of which was provided by Harris:

“the lot is small, there is no river or lake to protect, the forest is in terrible condition (basal area is so low it barely qualifies as forest in many places and it is rife with invasives), it does not connect to other conserved lands, it is not part of an animal corridor, it does not provide significant public access, it is not high quality farm land nor is it suitable for low-income housing, and is not tribal or cultural heritage land.”

See A186.

D. Remand Is Required To Avoid Unconstitutional Selective Enforcement.

To make matters worse, in the Motions Order the PUC admitted to selective enforcement of its view of the allegedly violated provisions of the Bennington Town Plan. The PUC's explanation for its different treatment of Chelsea as compared to other solar projects it approved in the Bennington RCON zone before its denial of the CPG for Chelsea, was that no one complained.¹¹ As this Court acknowledged in *In re G.T.*, 170 Vt. 507 (2000), such an explanation is the paradigm of unconstitutional discrimination and selective enforcement. See, *id.* at 514 citing *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 334 N.E.2d 555, 558, 372 N.Y.S.2d 590 (N.Y. 1975) (discriminatory enforcement found where Sunday sales law was unenforced, save upon complaint). The parallel between the *Acme Markets* case and this case is striking. In *Acme Markets* the Sunday sales law was enforced only upon complaint, which turned it into a tool for private purposes. Here, both before and after it denied Chelsea a CPG, the PUC issued CPGs for solar projects in the RCON zone, a result directly at odds with the basis for its denial here that putting solar facilities in the RCON zone violates the Town Plan.

II. Remand Is Appropriate Under 3 V.S.A. §815(b).

Remand to the PUC to take additional evidence is appropriate if (1) “the additional evidence is material” and (2) “there were good reasons for failure to present it in the proceeding before the [PUC].”

¹¹ In the Motions Order, the PUC only mentioned its decisions rendered prior to the Denial Order. See A294, Motion Order at 19, fn. 48. The PUC did not address the fact that even after it issued its well-publicized Denial Order, and Chelsea filed its various post-order motions, the PUC continued to issue CPGs to commercial utility scale solar projects in the RCON zone. This was pointed out to the PUC in Chelsea's motion for mediation filed on January 20, 2017. In that motion Chelsea attached the PUC's order dated November 17, 2016, issuing a CPG for a commercial utility-scale solar facility in the RCON district.

A. The Additional Evidence Is Material.

Chelsea meets the two-prong test for remand under 3 V.S.A. §815(b). The evidence Chelsea wishes the PUC to consider is certainly material, as it eliminates the bases for the PUC's denial. The evidence Chelsea wishes to present and have the PUC consider is contained in its rule 60(b) motion (A1 *et seq.*) and includes:

1. The revised plan for the Project (and the affirmations related thereto) which eliminates all potentially adverse effects to aesthetics, thus eliminating the bases under 248(b)(1) and 248(b)(5) (whether correct or not) for the denial of the CPG;
2. The Town's position with respect to compliance with the Town Plan of the revised Apple Hill plans, which in all material respects are the same as the Chelsea proposed plan;
3. The publicly stated legal position of the Town discrediting the primary basis for the PUC's denial of the CPG, all of which are equally applicable to the Chelsea project;
4. The PUC's approval (subsequent to the Denial Order) of a utility scale solar project in the RCON zone;
5. The full Town Plan and Regional Plan which set forth a multitude of goals that support the project; and
6. Chelsea's expert's supplemental testimony, which the PUC has admitted it failed to consider, and the affirmations explaining to the PUC the consequences of its failure.

B. There Were Good Reasons For Failure To Present The Additional Evidence.

This Court has stated that it is good policy for applicants to resolve differences by amending projects to respond to issues raised by interested participants. *See, In Re Chaves A250 Permit*, 2014 VT 5 (2014) at P16. ("Applicants are encouraged to resolve differences with

interested parties by amending a project to respond to issue.”) This Court has also stated that it would not allow parties to bide their “time for months during complex, lengthy, and expensive proceedings, and then attempt an ambush when those proceedings draw to a close.” *In Re Lakatos*, 2007 VT 114 (2007) at P9 quoting *In Re Burlington Elec. Dep’t*, 141 Vt. 540, 547 (1982).

This case involved a lengthy section 248 process, including a technical hearing, and the issuance of a proposed favorable decision by the hearing officer during which no party at the hearing (or at any time prior to the hearing) raised the issue of whether putting a commercial ground-mounted utility-scale solar project in the Bennington RCON zone was contrary to the Town Plan. It would not be reasonable to conclude that Chelsea should have been aware that the PUC was considering ruling against it, particularly on issues never raised by any party, and that Chelsea’s last chance to amend its CPG application to address the perceived shortcomings (especially those raised *sua sponte* by the PUC) would slip away within a few weeks. That is particularly so given the PUC’s prior approvals for CPGs in the RCON zone, and as argued above, the fact that the Harris comments did not raise the primary two bases ultimately relied on by the PUC. There is certainly good reasons for not presenting evidence to rebut a claim when the claim was never made.

Had the PUC issued a revised proposed decision adverse to Chelsea, or at the very least provided some clear notice to Chelsea as to its intentions, then an amendment with the revised plans would have been filed earlier, and the additional evidence that it wishes to present would have been presented earlier.

III. Remand Is Appropriate Because The PUC Failed To Afford Chelsea Its Procedural Rights Under 3 V.S.A. §811.

A remand is required because the record does not show a majority of the PUC commissioners heard the case or read the record. Under the plain language of 3 VSA §811, a majority of the PUC commissioners must have either heard the case or read the record, if it issues a final decision without first issuing an adverse proposed decision. No commissioner heard the case, as the case was heard by a hearing officer. And despite multiple requests, the PUC has refused to state whether a majority of the commissioners “read the record.” Instead the PUC has taken the position that the due process rights guaranteed under 3 VSA §811 simply do not apply to the PUC. A285. Such a position is plainly contradicted by the language of the statute. It is also contrary to this Court’s holding that the Public Utility Commission is only freed from the due process requirements of 3 VSA §811 if a majority of the commissioners either hear the case or read the record. *See, Vermont Elec. Power Co., Inc. v. Bandell*, 135 Vt. 141, 147 (1977) (section 3 VSA §811 does not apply if “the Board does read the record or hear the case, or both.”)

To make matters worse, the PUC’s failure to observe the procedural safeguards of 3 VSA §811, led directly to the PUC concluding that it had the ability to dismiss the amendment Chelsea filed in which Chelsea proposed revised site plans, as compared to the Apple Hill case where it has realized the amended plans should be reviewed. Thus the PUC refused to give Chelsea the opportunity to present an alternate configuration to address the two issues raised by the PUC in the Denial Order—compliance with orderly development of the region (§248(b)(1)) and aesthetics (§248(b)(5)), both of which were never raised as an issue by any party prior to the issuance of the hearing officer’s proposed decision approving the CPG for the project, and in the

case of §248(b)(1) was an issue never raised by any party (including the PUC) prior to the PUC's decision.

Under 30 V.S.A. § 8, the chairman of the PUC may appoint a hearing officer to inquire into and examine any matter within the jurisdiction of the PUC. That was done in this proceeding. 3 V.S.A. § 811 states that, "[w]hen in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding [] shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to *each party adversely affected* to file exceptions and present briefs and oral argument to the officials who are to render the decision." (emphasis added.)

The PUC held that only the hearing officer was bound by 3 VSA §811 and that the PUC is not. A285. There is no question that the hearing officer issued a proposed decision, but that decision was not adverse to Chelsea. It is also true that under 3 VSA §811, the PUC is permitted to adopt all, part or none of the hearing officer's decision and issue its own decision. But the PUC's ability to issue its own decision that is adverse to Chelsea is constrained by 3 VSA §811, constraints which the PUC ignored.

There is no dispute that this case is a contested case, and that a majority of the officials of the PUC who rendered the final decision did not hear the case. In such a circumstance, under 3 VSA §811, the PUC can only be freed of the requirement to issue its own proposed decision adverse to Chelsea if a majority of the PUC commissioners "read the record." The "record," i.e., what must be read, is clearly defined in 3 VSA §809(e), which defines the "record" as including "(1) all pleadings, motions, intermediate rulings; (2) all evidence received or considered; (3) a

statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings thereon; (5) proposed findings and exceptions; and (6) any decision, opinion, or report.”

In its motion to vacate the Denial Order for failure to comply with the requirements of 3 VSA §811, Chelsea pointed out that the PUC had not stated that a majority of the PUC commissioners “read the record.” In response the Department pointed out that there is no requirement in section 811 that the PUC state whether, or which, commissioners “read the record.” While true, that misses the point. This Court cannot adequately review whether section 811 has been complied with without such a statement. In its reply to the Department, Chelsea asked that the PUC simply state which PUC commissioners “read the record.” As stated in that reply, there was no reason to debate the issue of whether a majority of the PUC commissioners read the record because the PUC commissioners can simply clarify the issue by declaration or a statement.

Tellingly, in its Motions Order, the PUC refused to answer the question of whether a majority of the PUC commissioners read the record. Instead the PUC ignored the plain language of section 811 stating: “nothing in Section 811 requires the PUC to circulate a draft of its final decision.” A285, Motions Order at 10. The PUC’s avoidance of the question creates the inference that it cannot give the response required by section 811. The PUC’s conclusion also ignores the plain language of section 811. The PUC has denied Chelsea, as a party adversely affected by the decision, the right to “file exceptions and present briefs and oral argument to the officials who are to render the decision.” Making matters worse, the PUC dismissed the amendment to the site plan only because it had issued an order denying the CPG.

The procedural protections in section 811 are substantial rights which must be “scrupulously observed and impartially administered.” *See, In re State Aid Highway No. 1*, 133

VT 4, 11 (1974) (discussing 3 V.S.A. § 811: “Environmental laws affect very substantial rights, and it is vital that the procedures under which they are enforced be scrupulously observed and impartially administered. Any failure in this respect can quickly rise to constitutional dimensions.”)

The PUC has essentially conceded it did not follow the requirements of section 811 because it held that “section only requires that a hearing officer’s proposal for decision be circulated. Nowhere in that section does it require that the PUC, as the decision maker, circulate a draft of its determination.” A284, Motions Order at 9. This Court should remand the case to the PUC ordering the PUC to clarify whether a majority of the PUC commissioners “read the record.” If the PUC cannot affirmatively state that a majority of the PUC commissioners read the record, as such term is comprehensively defined by 3 VSA §809(e), then the PUC should be required to vacate the Denial Order and issue a revised proposed decision or consider the revised plans. Anything less would require this Court to engage in speculation as to whether a majority of the PUC commissioners “read the record.”

CONCLUSION

For the above reasons, this Court should vacate the Denial Order and remand this case to the PUC.

Dated: September 9, 2017



Thomas Melone, Esq.
Allco Renewable Energy Limited
1745 Broadway, 17th floor
New York, New York 10005
(212) 681-1120
Thomas.Melone@AllcoUS.com

Attorneys For Chelsea Solar LLC

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-195

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOVEMBER TERM, 2017

NOV 08 2017

In re Petition of Chelsea Solar LLC
(Allco Renewable Energy Limited*)

} APPEALED FROM:
}
}
}
} Public Utility Commission
}
} DOCKET NO. 8302
}

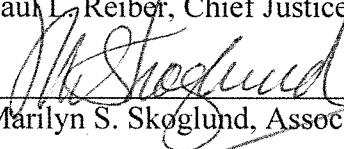
In the above-entitled cause, the Clerk will enter:

Pursuant to appellant's request, the above-captioned appeal is dismissed.

BY THE COURT:



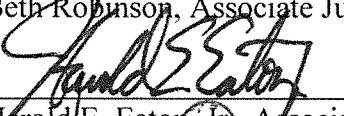
Paul L. Reiber, Chief Justice



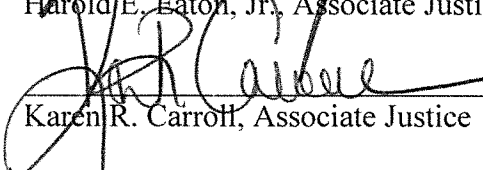
Marilyn S. Skoglund, Associate Justice



Beth Robinson, Associate Justice



Harold E. Eaton, Jr., Associate Justice



Karen R. Carroll, Associate Justice