

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Chelsea Solar LLC, pursuant to 30	)	Case No. 17-5024-PET
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 located off Willow Road in	)	
Bennington, Vermont.	)	

AGENCY OF NATURAL RESOURCES MEMORANDUM
REGARDING ISSUE PRECLUSION

March 30, 2018

INTRODUCTION

The Agency of Natural Resources (Agency) files this memorandum in support of the Agency's position that the doctrine of issue preclusion (also known as collateral estoppel) does not prevent the Agency from fully participating in the Public Utility Commission's (Commission) review of the second petition of Chelsea Solar, LLC (Chelsea) in this matter (Case No. 17-5024).¹

BACKGROUND

On June 19, 2014, Chelsea Solar, LLC (Chelsea) filed a petition with the Commission (then Public Service Board) in Docket 8302 seeking a certificate of public good to construct and operate a 2.0 MW solar electric generation facility at 500 Apple Hill Road in Bennington, Vermont (the "Chelsea I" Project).

On January 16, 2015, the Agency and Chelsea executed a partial memorandum of understanding which was then followed by a second partial memorandum of understanding on June 15, 2015 (collectively the "Chelsea I MOUs").

An evidentiary hearing was held in Docket 8302 on July 16, 2015 at which time the Chelsea I MOUs were entered into evidence in that docket.²

¹ Nor does it prevent the Commission from conducting a full review of Chelsea's petition, for many of the reasons discussed in this memorandum.

² The first partial memorandum of understanding dated January 16, 2015 was marked as Exhibit CS-MOU-1, and the second partial memorandum of understanding dated June 15, 2015 was marked as Exhibit CS-MOU-2.

On February 16, 2016, the Commission denied Chelsea's petition for a certificate of public good for the Chelsea I Project.

On May 12, 2017, Chelsea appealed the Commission's final order denying the Chelsea I Project a certificate of public good to the Vermont Supreme Court. That appeal was preceded by the filing of several motions with the Commission by Chelsea (including a motion to re-open the Chelsea I petition to allow for revisions to the Chelsea I Project - including changing the access to Willow Road), and the subsequent denial of those motions by the Commission.

On November 8, 2017, the Vermont Supreme Court dismissed Chelsea's appeal in response to Chelsea's request for voluntary dismissal.

On November 27, 2017, Chelsea filed a new petition with the Commission in Case 17-5024 seeking a certificate of public good to construct and operate a 2.0 MW solar electric generation facility to be accessed from Willow Road in Bennington, Vermont (the "Chelsea II" Project). Chelsea II is proposed to occupy a similar location on the same parcel of land as Chelsea I.

A hearing officer appointed by the Commission held a prehearing conference for the Chelsea II Project on March 2, 2018. Case scheduling, among other items, was discussed at the prehearing conference. The Agency and the Public Service Department (Department) (collectively the "State Parties") proposed a schedule that would arrive at an evidentiary hearing in September of 2018. Chelsea's schedule proposed an evidentiary hearing in April of 2018. The expedited schedule proposed by Chelsea was

based on Chelsea's objective of achieving project operation by December 2018, as a result of Chelsea's pending request for the Commission to extend the project's commissioning deadline to that time.

The parties were asked to file briefs with the Commission in support of their respective schedules at the conclusion of the prehearing conference.

The requested briefs were filed on March 9, 2018.

On March 15, 2018, the Commission extended the commissioning deadline for the Chelsea II Project to August 31, 2019, obviating the need for the expedited schedule proposed by Chelsea.

On March 21, 2018, the hearing officer issued an order establishing a schedule which arrives at an evidentiary hearing on September 13, 2018, effectively adopting the schedule proposed by the State Parties.

In the March 21 order, the hearing officer also requested that the parties "address two threshold legal issues brought out by Chelsea in its [scheduling] brief, that is, the questions of which Town Plan is applicable and the impact that issue preclusion may have on the review of the petition."³

The Agency now submits this memorandum, which is limited to the topic of issue preclusion. The Agency's position is that issue preclusion does not prevent the Agency from performing its statutory role under 30 V.S.A § 248(a)(4)(E) and fully participating

³ Case No. 17-5024, *Petition of Chelsea Solar, LLC* ("Chelsea II"), Order of 3/21/2018.

in the Commission's review of the Chelsea II petition. This conclusion is supported by several of factors outlined as follows and discussed in greater detail in the discussion section below.

- Chelsea's petition for the Chelsea II Project is a new petition for a new project which: does not rely on the petition filed in Chelsea I; is substantially different than the rejected Chelsea I Project; and raises issues not involved in the prior review of the Chelsea I Project.
- The issues relative to the Agency's involvement in Chelsea I (i.e., potential natural resource impacts) were not fully litigated in Chelsea I, but rather were resolved amicably through use of memoranda of understanding which, by their own terms, are no longer valid or binding as between Chelsea and the Agency.
- The application of issue preclusion in Chelsea II is neither fair nor consistent with the purpose of, or legal standards and process applicable to, the Section 248 process.
- Assertion of the defense of collateral estoppel by Chelsea against the Agency is premature as the Agency has not yet formally identified issues which it intends to litigate in Chelsea II.

DISCUSSION

Chelsea asserts that the Agency should be prohibited from fully participating in the Commission's review of the Chelsea II Project because Chelsea and the Agency

executed memoranda of understanding in connection with the Chelsea I Project. Chelsea relies on the doctrine of issue preclusion (also known as collateral estoppel) to support this contention. Closer examination of the doctrine, and the Section 248 process, reveals that Chelsea's position is unsupportable.

The Vermont Supreme Court has determined that issue preclusion generally applies in administrative proceedings.⁴ Issue preclusion may apply in a rate case before the Commission if all five elements are met.⁵ The Court addressed these five elements in *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14 (2001), which involved a utility rate case.⁶

The doctrine of collateral estoppel, also called issue preclusion, is similar in effect but more narrow in scope. It bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case. The elements of collateral estoppel are: (1) preclusion is asserted against one who 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*.⁷

⁴ *In re Carrier*, 155 Vt. 152, 157–58, 582 A.2d 110, 113 (1990).

⁵ *Vermont Power Exchange*, 159 Vt. at 181, 617 A.2d at 425.

⁶ Chelsea relies on *In re CVPS* to support its preclusion argument in its scheduling brief dated March 9, 2018. As noted, *In re CVPS* involved a utility rate case. Chelsea fails to cite any authority supporting the proposition that issue preclusion applies to bar a statutory party from fully participating in the review of a Section 248 petition. The Agency is unaware of any Commission decision where issue preclusion was applied to constrain a statutory party's appearance before the Commission and participation in the review of a Section 248 application.

⁷ *In re CVPS*, 172 Vt. at 20 (citations omitted) (emphasis added).

Application of these elements to the instant matter reveals that issue preclusion is both inapplicable and inappropriate as applied to the Agency's participation in the review of Chelsea II.⁸

I. CHELSEA'S PETITION FOR THE CHELSEA II PROJECT IS A NEW PETITION FOR A NEW PROJECT WHICH: A. DOES NOT RELY ON THE PETITION FILED IN CHELSEA I; B. IS SUBSTANTIALLY DIFFERENT THAN THE REJECTED CHELSEA I PROJECT; AND C. RAISES ISSUES NOT INVOLVED IN THE REVIEW OF THE REJECTED CHELSEA I PROJECT.

A. THE CHELSEA II PROJECT IS A NEW PROJECT WHICH IS BASED ON A NEW PETITION THAT DOES NOT RELY ON THE PETITION FILED FOR THE CHELSEA I PROJECT.

At the prehearing conference held on March 2, 2018 in this matter counsel for Chelsea acknowledged that the Chelsea II Project involves a new petition supported by new testimony, and that Chelsea was relying on the new testimony, not what had previously been filed in Chelsea I.⁹

MR. MELONE: We filed essentially new testimony on all the criteria, which I think we are happy to rely on that for this case.

HEARING OFFICER TOUSLEY: Okay. So you're not relying on 8302 testimony.

MR. MELONE: No.

HEARING OFFICER TOUSLEY: That was my misconception then.

⁸ The Agency does not dispute that it, and Chelsea, were parties in Chelsea I (element 1). Also, while there was a final judgement (against Chelsea) in Chelsea I (element 3), it is debatable as to whether there was a "judgment on the merits" of the natural resources issues. In any event, the Agency does not address the third element as believes it is not necessary in light of the analysis of elements 2, 4 and 5, and the other arguments contained in this memorandum.

⁹ Counsel also acknowledged the Chelsea I MOUs were not applicable to Chelsea II. The status of the Chelsea I MOUs is addressed in section II of this memorandum.

MR. MELONE: No. We are relying on the new testimony that's been filed . . . I understand completely that this is a new petition.¹⁰

It is apparent from a review of the Chelsea II petition that it contains testimony from several witnesses who were not even involved in the Chelsea I matter.¹¹ At least two of these witnesses, Mr. Dhaliwal and Mr. Jewkes, cover topics which are relevant to the review of impacts to natural resources under Section 248(b)(5). Because there is new testimony, there is the need for the Agency to fully evaluate the Chelsea II Project. This requires discovery, and may require Agency testimony, a contested hearing and briefing.

**B. THE CHELSEA II PROJECT IS SUBSTANTIALLY
DIFFERENT THAN THE CHELSEA I PROJECT WHICH WAS
REJECTED BY THE COMMISSION.**

The Chelsea II Project is substantially different than the Chelsea I project. If it wasn't substantially different, there would be no need for any further review. The outcome would be predetermined (i.e., denial based on the same reasons as Chelsea I). Commission Rule 5.408 recognizes that substantial changes to a project have the potential for impact under the Section 248 substantive criteria, and by necessity must undergo further review.

5.408 Amendments to Projects Approved under Section 248

An amendment to a certificate of public good for construction of generation or transmission facilities, issued under 30 V.S.A. § 248, shall be required for a substantial change in the approved proposal. *For the*

¹⁰ Tr. 3/2/18 at 11-12.

¹¹ New witnesses for Chelsea II include: Hamoor Dhaliwal; Ian Jewkes; Ryan Haac; and Scott Reynolds. Some of the witnesses present testimony on topics that weren't addressed in Chelsea I. Others present testimony on topics that may have been addressed in Chelsea I, but may now need to be treated differently due to changes in the regulatory environment and project modifications. In those instances, such testimony is effectively "new."

*purpose of this subsection, a substantial change is a change in the approved proposal that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a).*¹²

Because there is the potential for significant impact under the substantive criteria (and possibly the general good of the state), Chelsea II must undergo a full Section 248 review and the Agency must be able to participate fully in this review.¹³

C. THE CHELSEA II PETITION RAISES ISSUES NOT RELEVANT TO THE REVIEW OF THE CHELSEA I PROJECT.

A review of the Chelsea II petition reveals that it raises issues that were either not involved in the Chelsea I matter or are now different in scope or extent.¹⁴ It is necessary to independently review such issues in Chelsea II to understand the extent of impacts in light of the project's substantial changes, and changes in the regulatory environment, and attempt to identify ways in which the new project can avoid or minimize such impacts, or whether it cannot meet the 248 standards. One such example relates to the existence of

¹² PUC Rule 5.408 (emphasis added).

¹³ Chelsea's position appears to be that only the "changes" need to be reviewed. This is an oversimplification which ignores the practical reality that one change in a project may trigger the need to modify another aspect of a project, which modification may trigger yet another issue. Projects aren't so compartmentalized such that each component is entirely independent of all the others. This is especially true when dealing with natural resource impacts. It also ignores the reality that projects are often modified as they work their way through the Section 248 review process. Finally, it ignores that "changes" which take place outside the confines of a project – such as another project nearby, or the listing of a species as threatened – may raise issues which were not contemplated, or relevant, to a prior project review.

¹⁴ These include, but may not be limited to, issues related to the following. 1. Tree clearing - which has the potential to impact Northern Long-eared Bat (*Myotis septentrionalis*), a species which became federally listed (threatened) after Chelsea I was proposed but prior to filing of the Chelsea II petition. (During that time period, the Agency's Department of Fish and Wildlife adopted regulatory (i.e., Act 250 and Section 248) review guidance and requirements (consistent with federal regulations) for protecting this species.) 2. Impervious surfaces and stormwater. 3. Potential impacts related to access for operations and maintenance, based on a modification now proposed, but not fully elaborated, after the Chelsea II petition was deemed complete. 4. A greater extent of rare plants than what had previously been identified (See, Exhibit CS-DB-3).

the Apple Hill Solar (Docket No. 8454) project proposal which has just recently completed an evidentiary hearing. Potential cumulative impacts now attributed to the Chelsea II Project will need to be analyzed based on the assumption that the Apple Hill project will exist along-side of it.¹⁵ This was not necessarily the case in Chelsea I.

The potential for cumulative impacts is real and analysis of the cumulative effect of both projects on natural resources appears to be lacking. For example, the Chelsea II petition (Exhibit CS-DB-2 at 8-9) acknowledges the potential for tree clearing to impact northern long-eared bat (NLEB). However, there is no analysis of the cumulative effects of such clearing on this state and federally listed species. Impacts of tree clearing on NLEB was an issue that wasn't considered in Chelsea I and will need to be addressed in Chelsea II.

II. THE ISSUES RELATIVE TO THE AGENCY'S INVOLVEMENT IN CHELSEA I (I.E., POTENTIAL NATURAL RESOURCE IMPACTS) WERE NOT FULLY LITIGATED IN CHELSEA I, BUT RATHER WERE RESOLVED AMICABLY THROUGH USE OF MEMORANDA OF UNDERSTANDING WHICH, BY THEIR OWN TERMS, ARE NO LONGER VALID OR BINDING AS BETWEEN CHELSEA AND THE AGENCY.

The contested issue for which preclusion was sought in *In re CVPS* (the exercise of prudence, or lack thereof, in connection with CVPS entering into a power supply contract) was *fully litigated*, albeit perhaps not litigated very well. *Id.*, at 28. There, the litigation which took place before the Commission included: direct testimony by CVPS; direct testimony by the Department; rebuttal testimony by CVPS; surrebuttal testimony

¹⁵ In other words, there will be the need to address the potential for cumulative impacts. See, Case Nos. 8797 and 8798, *Petition of Otter Creek Solar*, Order of 2/27/2018 at 34.

by the Department; twenty days of contested hearings; and “briefs addressing at length the prudence of the HQ contract [and other issues].” *Id.*, at 21-23.

Conversely, natural resource issues did not need to be “fully litigated” between the Agency and Chelsea in Chelsea I.¹⁶ Rather, memoranda of understanding were executed after discovery on Chelsea and collaborative discussion between the parties. In other words, the Agency and Chelsea, amicably, and without the need for full litigation, resolved the natural resource issues presented by the Chelsea I Project. This is entirely different than the fact pattern which supported issue preclusion in *In re CVPS*.

Additionally, the Chelsea I MOUs which Chelsea now claims preclude the Agency from fully participating in the Commission’s review of the Chelsea II petition are not applicable to this proceeding.

Paragraph 10 of the January 16, 2015 partial memorandum of understanding states:

The Parties agree that *this MOU shall not be construed by any party or tribunal as a waiver as to jurisdiction or otherwise having precedential impact on any future proceeding involving either Party*, except as necessary to implement this MOU or to enforce an order of the Board resulting from this MOU.¹⁷

Paragraph 7 of the June 15, 2015 second partial memorandum of understanding states:

The Parties agree that this Second MOU *shall not be construed by any party or tribunal as a waiver as to jurisdiction or otherwise having precedential impact on any future proceeding involving either Party*,

¹⁶ There was no need for testimony (either direct or surrebuttal) by the Agency. The natural resources issues were amicably resolved and therefore not contested between Chelsea and the Agency at the evidentiary hearing. Nor was it necessary to brief them.

¹⁷ Docket No. 8302, Exhibit CS-MOU-1 at 10.

except as necessary to implement this Second MOU or to enforce an order of the Board resulting from this Second MOU.¹⁸

The Chelsea I MOUs also contain language which indicates both parties agree that the Chelsea I Project:

...subject to compliance with the below conditions, will satisfy the conditions under Section 248(b)(5). *The Parties further agree that the below conditions shall be incorporated into any Certificate of Public Good ("CPG") issued by the Board.*¹⁹

A CPG was never issued for Chelsea I and the contemplated conditions were never established. Therefore, the objectives of the Chelsea I MOUs were never realized.

Finally, at the March 2, 2018 prehearing conference, counsel for Chelsea acknowledged that the Chelsea I MOUs are not applicable in the Chelsea II proceeding.

MR. MELONE: No. We are relying on the new testimony that's been filed. We are also relying on that October 2017 order from the PUC. I think they put a year extension on the commissioning deadline for a reason, for this to be an expedited proceeding. And the PUC specifically said that this review of this proceeding would be prompt, and I think -- *I understand completely that this is a new petition. I understand that the DPS MOU is no longer applicable, and the same thing with ANR.*²⁰

That the Chelsea I MOUs were of limited effect, and are not relevant to review of the Chelsea II Project, is a conclusion also supported by the Commission's order denying

¹⁸ Docket No. 8302, Exhibit CS-MOU-2 at 4.

¹⁹ CS-MOU-1 at 2-3; CS-MOU-2 at 2.

²⁰ *Tr.*, 3/2/2018 at 12 (emphasis added).

the various Chelsea motions in Docket 8302.²¹ In sum, the natural resource issues were not “fully litigated” in Chelsea I. The terms of the Chelsea I MOUs do not apply to the Chelsea II Project, a new project, with new issues. Therefore, the second element of collateral estoppel, that the same issue was raised (and fully litigated) in the prior proceeding, is not satisfied.

III. THE APPLICATION OF ISSUE PRECLUSION IN CHELSEA II IS NEITHER FAIR NOR CONSISTENT WITH THE PURPOSE OF, OR LEGAL STANDARDS AND PROCESS APPLICABLE TO, THE SECTION 248 PROCESS.

Application of issue preclusion to prohibit the Agency’s full participation in the review of the Chelsea II Project would be unfair and result in an affront to the purpose and intent of Section 248 and the legal standards and process that govern the Commission’s review of facilities which must obtain a certificate of public good.

The fourth and fifth elements of collateral estoppel—whether there was a full and fair opportunity to litigate the prudence issues in the 1994 rate case, and whether it is fair to apply preclusion here—are generally considered together. Among the factors to consider are the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens in each action, the procedural opportunities of each forum, and the possibility of inconsistent determinations.²²

Section 248(a)(4)(E) states:

The Agency of Natural Resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations

²¹ See, Docket No. 8302, Order of 4/14/2017 at pages 28-30.

²² *In re CVPS*, 172 Vt. at 30-31.

concerning any other matters to be determined by the Commission in such a proceeding.²³

It is well settled that a Section 248 petitioner bears both the burden of production and the ultimate burden of persuasion of satisfying the 248(b) criteria before its project can be found to be in the public good. It is also clear, from the above quoted provision, that the Agency has a statutory obligation to “appear” and provide the Commission with “evidence and recommendations” upon which the Commission may base its findings. In fulfilling this role, the Agency typically reviews the evidence “produced” by the petitioner and evaluates it against the science and regulatory standards in effect at that time to determine whether the petitioner has satisfied its ultimate burden of “persuasion” (i.e., does the project avoid an undue adverse impact on the natural environment?).

When Chelsea’s issue preclusion stance is analyzed in the context of the above it becomes clear that the entire 248 certificate of public good review process, and the Agency’s statutory role in that process, is at risk of becoming severely undermined.

When the Chelsea I Project was proposed, the NLEB (a forest dwelling bat species) was not listed under the federal endangered species act. The Agency did not review potential impacts to this species in connection with Chelsea I, even though the project involved forest clearing. The NLEB was then listed in 2015. In 2017, as a result of the federal listing, the Agency developed regulatory review guidelines designed to be consistent with the federal approach to protecting the species. the Agency now applies the guidelines in its review of Section 248 and Act 250 projects. Under the guidelines,

²³ 30 V.S.A. § 248(a)(4)(E).

the forest clearing proposed in Chelsea II, in combination with the clearing proposed in Apple Hill, triggers the need for further study, or other mitigative measures, none of which are proposed by Chelsea in the Chelsea II petition.

Prohibiting the Agency from reviewing the NLEB issue, and providing “evidence and recommendations” concerning potential impacts to NLEB in connection with the Chelsea II proceeding is contrary to the regulatory regime concerning NLEB; the current science concerning this listed species; and the legal standards and process of Section 248. It is also fundamentally unfair. This same reasoning is applicable to the other potential natural resource issues identified in this memorandum.²⁴

IV. ASSERTION OF THE DEFENSE OF COLLATERAL ESTOPPEL BY CHELSEA AGAINST THE AGENCY IS PREMATURE AS THE AGENCY HAS NOT YET FORMALLY IDENTIFIED ISSUES WHICH IT WILL LITIGATE IN CHELSEA II.

The Agency has not yet identified issues for which litigation may be necessary in connection in Chelsea II. Discovery has not been drafted, let alone served and responded to. Until this happens, the Agency will not be in a position to determine if full litigation is necessary. Thus, Chelsea’s assertion of issue preclusion is premature and is not ripe for consideration.²⁵ Application of issue preclusion at this time would be fundamentally unfair and constrain the Agency’s ability to perform its statutorily mandated function.

²⁴ See, footnote 13.

²⁵ This is not intended to imply that issue preclusion is appropriate in any regard.

CONCLUSION

For the reasons stated above, the doctrine of issue preclusion does not prevent the Agency from performing its statutory role under 30 V.S.A § 248(a)(4)(E) and fully participating in the Commission's review of the Chelsea II petition.

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

VERMONT AGENCY OF NATURAL RESOURCES



By:

Donald J. Einhorn, Esq.