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 Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont.	))))))	Case No. 17-5024-PET

AGENCY OF NATURAL RESOURCES OBJECTION TO THE ADMISSION OF PETITIONER'S TESTIMONY AND EXHIBITS OF BRAD WILSON

May 9, 2018

INTRODUCTION

The Agency of Natural Resources (Agency), pursuant Rule 2.216(C), objects to the admission of certain exhibits and portions of the third supplemental testimony of Brad Wilson dated April 8, 2018 filed on behalf of petitioner, Chelsea Solar, LLC (Chelsea). Evidentiary matters before the Public Utility Commission (Commission) are governed by 3 V.S.A. § 810, which provides, in part, that "[t]he rules of evidence as applied in civil cases in the superior courts of this state shall be followed." The Agency hereby submits the following objections.

BACKGROUND

On June 19, 2014, Chelsea Solar, LLC (Chelsea) filed a petition with the Commission[1] 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, as parties to Chelsea I, 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").

[1] At that time, the Commission was known as the Public Service Board.

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]

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

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. Prefiled testimony of Brad Wilson, among others, was filed in support of the Chelsea II petition.

On December 5, 2017, Chelsea filed the first supplemental testimony of Brad Wilson in Chelsea II.

On February 14, 2018, Chelsea filed the second supplemental testimony of Brad Wilson in Chelsea II.

On April 8, 2018, Chelsea filed the third supplemental testimony of Brad Wilson in Chelsea II. Mr. Wilson's third supplemental testimony includes, as exhibits, the Chelsea I MOUs.[3]

[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.
[3] The January 16, 2015 MOU is now offered in Chelsea II as Exhibit CS-BW-75 and the June 15, 2015 MOU is now offered in Chelsea II as Exhibit CS-BW-77.

The Agency now submits this memorandum in support of its objection to the admission of Exhibits CS-BW-75 and CS-BW-77.[4] The Agency's objection is supported by several of factors outlined as follows and discussed in greater detail below.

- The Chelsea I MOUs, by their own terms, are no longer valid or binding as between Chelsea and the Agency and are therefore inapplicable and irrelevant to the Chelsea II proceeding.

- The Chelsea I MOUs are irrelevant to the Chelsea II Project because Chelsea II involves 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 Chelsea I MOUs are immaterial and unduly repetitious in the context of the Chelsea II Project because Chelsea II must independently satisfy its burden of proof and ultimate burden of persuasion to meet the public good standard based on the law and facts relevant to the Chelsea II petition.

Objection to Exhibit CS-BW-75; Exhibit CS-BW-77 and the third supplemental testimony of Brad Wilson, page 1, lines 7-10.

DISCUSION

I. LEGAL STANDARD

[4] The Agency also objects to the third supplemental testimony of Brad Wilson, page 1, lines 7-10, to the extent that this portion of Mr. Wilson's testimony supports the objected to exhibits.

Vermont Rule of Evidence ("V.R.E.") 401 defines relevant evidence as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[5]

V.R.E. 402 provides that "[e]vidence which is not relevant is not admissible."[6]

The Vermont Administrative Procedures Act, 3 V.S.A. § 810(1), provides that the Commission may deviate from the Vermont Rules of Evidence as follows:

> *Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.* The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.[7]

II. THE CHELSEA I MOUS, BY THEIR OWN TERMS, ARE NO LONGER VALID OR BINDING AS BETWEEN CHELSEA AND THE AGENCY.

The Chelsea I MOUs which Chelsea now purports to offer as evidence in support of the Chelsea II petition are no longer valid or binding on the Agency and are therefore inapplicable and irrelevant 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

[5] V.R.E. 401.
[6] V.R.E. 402.
[7] 3 V.S.A. § 810(1), emphasis added.

> necessary to implement this MOU or to enforce an order of the Board resulting from this MOU.[8]

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*, except as necessary to implement this Second MOU or to enforce an order of the Board resulting from this Second MOU.[9]

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*.[10]

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 held in Chelsea II, 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

[8] Docket No. 8302, Exhibit CS-MOU-1 at 10.
[9] Docket No. 8302, Exhibit CS-MOU-2 at 4.
[10] CS-MOU-1 at 2-3; CS-MOU-2 at 2.

> 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.*[11]

That the Chelsea I MOUs were of limited purpose and effect and are now neither applicable nor relevant to review of the Chelsea II Project, is a conclusion also supported by the Commission's order denying the various Chelsea motions in Docket 8302.[12]

III. 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.[13]

> 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.

[11] *Tr.*, 3/2/2018 at 12 (emphasis added).
[12] *See*, Docket No. 8302, Order of 4/14/2017 at pages 28-30.
[13] 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.

> HEARING OFFICER TOUSLEY: That was my misconception then.
> MR. MELONE: No. We are relying on the new testimony that's been filed . . . I understand completely that this is a new petition.[14]

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.[15] 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 without any constraints or limitations which may be implied by the Chelsea I MOUs. In this regard any prior agreements, such as the Chelsea I MOUs, which were based on different facts provided by different witnesses are irrelevant to the Chelsea II proceeding.

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).

[14] *Tr.* 3/2/18 at 11-12.

[15] 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."

Because Chelsea II is a new petition, it must undergo a full Section 248 review and the Agency must be able to participate fully in this review based on the law and facts which are relevant to the Chelsea II project, not some former iteration of the project. Because the Chelsea I MOUs were based on the facts and law applicable to the Chelsea I project, not the Chelsea II project, they are irrelevant to the Chelsea II project. Further, their insertion into the Chelsea II would serve no meaningful purpose and could create confusion and complicate review of the petition presently before the Commission.

C. THE CHELSEA II PETITION RAISES NEW ISSUES WHICH WERE NEITHER RELEVANT TO THE REVIEW OF THE CHELSEA I PROJECT NOR CONSIDERED BY THE PARTIES ENTERING INTO THE CHELSEA I MOUS.

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.[16] 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, without the distraction and confusion which would potentially arise from introduction of the Chelsea I MOUs. One such example relates to the existence of 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

[16] 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 project will exist along-side of it.[17] This was not necessarily the case in Chelsea I.

Also, when the Chelsea I Project was proposed, the northern long-eared bat (NLEB), which is 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 federally listed in 2015. In 2017, the Agency developed regulatory review guidelines designed to be consistent with the federal approach to protecting the species. Under the guidelines, 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 were addressed in Chelsea I.

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. Because the Chelsea I MOUs were based on the regulatory regime in place at the time of the Chelsea I petition, and the regulatory regime has changed prior to the filing of the Chelsea II petition, the MOUs are irrelevant to this proceeding.

IV. THE CHELSEA I MOUS ARE IMMATERIAL AND UNDULY REPETITIOUS IN THE CONTEXT OF THE CHELSEA II PROCEEDING.

As stated above, the Chelsea I MOUs are no longer in effect by their own terms. The Chelsea I MOUs were also developed in a different case, in a different factual and

[17] 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.

regulatory context. They are irrelevant to this proceeding. Based on those different material facts and circumstances, they are also immaterial to this proceeding.

To the extent that some provisions of the Chelsea I MOUs may address substantially similar issues presented by the Chelsea II project, the Chelsea I MOUs are unduly repetitious. This is because the petitioner has an independent obligation to address these issues through its testimony and exhibits which were prepared for, and filed in support of, the Chelsea II petition in order to meet its burden of production and its ultimate burden of persuasion. Introduction of unduly repetitious evidence serves no productive purpose and will only force the parties, and the Commission, to unnecessarily expend additional time and resources – a result made evident by the need to file this objection.

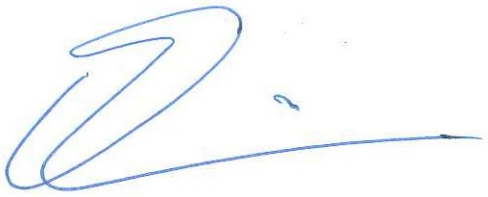
Should the Commission decline to sustain the Agency's objection and admit the Chelsea I MOUs into the Chelsea II record, then the Agency respectfully requests that the Commission find that Chelsea II is bound to the conditions agreed to in the MOUs as a baseline standard for mitigating undue adverse impacts on the natural environment. In other words, the agreed to conditions are the starting point for the Chelsea II project. From that starting point, the Agency should be permitted to present evidence and recommend additional measures (even project denial), if deemed necessary to avoid undue adverse impacts to the natural environment, and satisfy the public good standard, based on the current facts and law which govern the Chelsea II petition.

CONCLUSION

The Agency respectfully requests that Exhibit CS-BW-75; Exhibit CS-BW-77 and the third supplemental testimony of Brad Wilson, page 1, lines 7-10, to the extent that it offers the two exhibits, be struck from the record in this matter for the reasons set forth above.

Dated at Montpelier, Vermont, this 9th day of May, 2018.

VERMONT AGENCY OF NATURAL RESOURSES



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