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]	Docket No. 17-5024-PET

TOWN OF BENNINGTON'S MOTION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL OF ORDER GRANTING CHELSEA'S REQUEST THAT THE VESTED RIGHTS DOCTRINE APPLY TO THE REVIEW OF PETITION FOR CPG

The Town of Bennington ("Town") hereby moves pursuant to V.R.A.P. 5(b) for leave to take an interlocutory appeal of the May 17, 2018 "Order Granting Chelsea's Request that the Vested Rights Doctrine Apply to Review of Chelsea's Petition for a Certificate of Public Good."

MEMORANDUM

I. Procedural History

On March 9, 2018, Chelsea Solar LLC ("Chelsea") filed a memorandum in support of its proposed schedule. Chelsea argued that it has a vested right to review of its petition for a Certificate of Public Good ("CPG") under the Bennington Town Plan ("Town Plan") in effect in 2014. Chelsea asserted that the petition in this new docket should be treated as a reconsideration of the petition filed on June 19, 2014 in Docket 8302 ("Chelsea I"). The Town and the Department of Public Service filed memoranda in opposition to

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Chelsea's claim of vested rights. By Order dated May 17, 2018 (the "Order"), the Hearing Officer ruled that Chelsea has a vested right to review of its new petition under the Town Plan in effect three years earlier when the Chelsea I Petition was filed.

This appeal would present the following question of controlling law:

Does Chelsea have a vested right to review of its 2017 petition under the Town Plan in effect when its prior petition was deemed complete in 2014?

II. Legal Argument

V.R.A.P. 5(b)(1) provides that a court "must permit an appeal from an interlocutory order or ruling if the court finds that: (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (b) an immediate appeal may materially advance the termination of the litigation." The statute is considered to have three criteria (subsection (A) being considered as two separate criteria).

The Vermont Supreme Court has held that the requirements of Rule 5(b) are "guiding criteria." Although all three criteria must be met, "[t]he three factors should be viewed as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." *In re Pyramid Co. of Burlington*, 141 Vt. 294, 302, 449 A.2d 915, 919 (1982) (quoting 16 C. Wright, A. Mille, e. Cooper, & E. Gressman, Federal Practice and Procedure § 3930 (1977)); *see also Eagles Place, LLC Const. Application*, 2015 WL 606150, at *1 (Vt. Super Feb. 4, 2015) (Walsh, J.); *In re Bennington Wal-Mart Demolition/Constr. Permit*, 2012 WL 5357960, at *1 (Vt. Super. Aug. 31, 2012) (Walsh, J.).

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The criteria for an interlocutory appeal are satisfied with respect to the Order, and interlocutory appeal is not only warranted, but judicious under the circumstances.

A. <u>The Order Involves a Controlling Question of Law</u>

"A controlling question of law is one that deals solely with substantive issues of law." *In re Bennington Demolition*, 2012 WL 5357960, at *1 (citing *In re Pyramid, supra*). "Whether a question of law is 'controlling' is not defined by whether the question governs the outcome of the litigation. This factor requires a practical application that focuses upon the potential consequences of the order at issue." *In re Pyramid Co. of Burlington*, 141 Vt. at 302. "An answer to a controlling question of law will, at a minimum, have an immediate effect on the course of litigation and save resources to either the court system or the litigants." *In re Bennington Wal-Mart*, 2012 WL 5357960, at *1 (citing *In re Pyramid, supra*); *see also In re Morgan Meadows/Black Dog Realty Subdivision Act 250 Permit*, 2008 WL 7193316, at *1 (Vt. Super. Dec. 1, 2008) (Wright, J.).

The Order determined a controlling question of law—whether Chelsea has vested rights to project review under the Town Plan in effect at the time its prior petition for a CPG was deemed complete, when (a) the prior petition was denied by final, unappealed order of the PUC, (b) remand for an amendment to the prior petition had been denied by the Vermont Supreme Court, (c) the project proposed in the new petition materially differs from the prior project, and (c) there have been material changes in provisions of the Town Plan made after the prior petition was denied, and more than a year prior to filing of the new petition.

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Whether Chelsea has such vested rights is "completely separate from the merits" of its entitlement to a CPG, though it does bear on how that will ultimately be determined. *See Miller-Jenkins v. Miller-Jenkins*, 2005 WL 6743555 (Vt. Super. Jan. 1, 2005) (Cohen, J.).

The answer to the question of which version of the Town Plan applies will have an immediate effect on the course of litigation. The answer will determine the scope of the evidence relevant to the proceeding, as well as the parties' positions for the duration of the process—including for purposes of the hearing and for preservation of issues for appeal. Should the issue be reversed on a later appeal, the entire matter would need to be re-heard, and the evidentiary process would start anew as the scope of the proceeding would be markedly different. Thus, pursuing the issue on appeal at this time will allow the litigants to be spared the time and expense of the present proceeding only to repeat these efforts entirely upon remand, should the Order be reversed. See *In re Bennington Wal-Mart*, 2012 WL 5357960, at *1; *Petition of Vermont Electric Power Producers*, Docket 5736, 1995 WL 88118, at *1 (Order Granting Interlocutory Appeal, Vt. PSB Mar. 13, 1995).

B. <u>There Exists Substantial Ground for Difference of Opinion as to the Legal Issue</u>

This case also presents substantial ground for difference of opinion regarding the controlling legal question. *Id.*; *see also In re Morgan Meadows/Black Dog Realty Subdivision Act 250 Permit*, 2008 WL 7193316, at *1.

This appeal presents circumstances of first impression. Chelsea asserts vested rights to review under a superseded version of the Bennington Town Plan even though its prior petition was denied by final order of the PUC after the applicant engaged in

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voluminous, protracted and repetitive post-judgment motion practice that consumed more than one year, an appeal to the Vermont Supreme Court, and a rejected request to the Supreme Court to allow resumption of the prior proceeding.

Only when petitioner's extended legal maneuvers failed did Chelsea file its new petition. Meanwhile, the Town of Bennington had been methodically working to amend its Town Plan in accordance with the requirements of 24 VSA Ch. 117. Allowing Chelsea to obtain review of a new petition under a long-superseded version of the Town Plan would encourage future litigants to follow the same pattern—deliberately protracting litigation with a multitude of successive post-judgment filings and motions to extend appellate deadlines, only to file a new petition that simultaneously substantially revises the project *and* seeks to take advantage of earlier provisions of law. This would seriously impede a municipality's ability to revise its own municipal plans and ordinances, and would embolden some litigants to drag out litigation in an effort to spend down public coffers and immunize themselves from changes in law.

The conclusion that the PUC's denial of Chelsea's V.R.C.P. 60(b) motion was actually intended to allow Chelsea's new petition to be "treated as a continuation of the previous petition" is debatable. If that is what was intended, the order would say so, as the court in *Jolley* had expressly done. *In re Jolley*, 2006 VT 132, ¶¶ 1–3 (reciting specific language that denial of an application 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

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project; in particular any application . . . for site plan approval and any application to the ZBA under § 210.6").

This is highlighted by the fact that the *Jolley* court actually stated what would occur under the circumstances presented in this case: "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*, at ¶ 16.

Further, it is clear from the Supreme Court's order dated September 22, 2017, denying remand of the first petition, that Chelsea was not entitled to additional consideration of it prior petition.

C. Permitting the Appeal May Materially Advance Termination of the Litigation

Interlocutory review of the Order also presents the possibility of materially advancing this litigation. *See, e.g. In re Montpelier WWTF Discharge Permit*, 2009 WL 4396738, at *1 (Vt. Super. Aug. 10, 2009) (Durkin, J.). If the PUC reverses the Order, it may end the litigation altogether due to the mass restriction set forth in the amended Town Plan. While that may be an unlikely outcome, "[t]hat possibility in itself suffices to meet the third requirement of Rule 5(b)(1)." *Id.*

This criteria is also satisfied if "an immediate appeal will help to expedite the ultimate termination of the case, including time spent on appeal." *Morgan Meadows/Black Dog*, 2008 WL 7193316, at *1; *accord In re Bennington Wal-Mart*, 2009 WL 4396738, at *1.

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In granting leave to appeal, the *Bennington Wal-Mart* Court reasoned:

> If we deny the motion for interlocutory appeal and hear the case on its merits, the decision will likely be appealed to the Vermont Supreme Court. If the Supreme Court then finds that we were required to remand the case rather than hearing it on its merits, then our merits hearing, and all of the associated proceedings, will have been for naught. All of the litigation will ultimately have to be repeated—first before the Commission and then before the Environmental Division on appeal. Alternatively, if the Supreme Court affirms our decision, then we can proceed to hear the case on its merits, without remand. . . .

In re Bennington Wal-Mart, 2009 WL 4396738, at *1.

This reasoning applies equally to this issue. If the motion for an interlocutory appeal is denied, and the matter proceeds through the § 248 process, the decision will likely be appealed to the full Commission, and potentially to the Vermont Supreme Court, including an appeal on the vested rights issue. If either of those bodies concludes that the vested rights question was answered incorrectly, then all of the associated proceedings, including the technical hearing, will have been for naught, and all of the litigation will need to be repeated, first before the Hearing Officer, then through appellate process. Alternatively, if the decision is affirmed upon the interlocutory appeal, then the proceeding can continue on the merits, without subsequent remand. Thus, "an immediate decision on this matter would assist a timely 'termination of the litigation.'" *Id.* (quoting V.R.A.P. 5(b)). An immediate decision would also "advance the ultimate termination of the case by avoiding relitigation. . . ." *Morgan Meadows/Black Dog*, 2008 WL 7193316, at *1; *see also Petition of Vermont Electric Power Producers*, 1995 WL 88118, at *1.

CONCLUSION

As set forth above, all of the criteria for an interlocutory appeal are satisfied in this case. Accordingly, the Town's Motion should be granted, and appeal taken to the full Commission for review of the Order.

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