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 a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont	)	Docket No. 8302
Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	)	Case No. 17-5024-PET [not consolidated]

MOTION UNDER RULE 60(b) AND MOTION TO CONSOLIDATE OF CHELSEA SOLAR LLC

In accordance with V.R.C.P. 60(b)(6), Chelsea Solar LLC ("Chelsea" or "Petitioner") hereby files this motion for relief from the Orders of February 16, 2016, April 14, 2017 and April 17, 2017 (the "Chelsea Orders") issued by the Public Utility Commission ("PUC" or the "Commission"). On February 16, 2016, the Commission issued an order (the "Denial Order") denying Chelsea Solar a certificate of public good ("CPG") for its proposed solar electric generation facility in Bennington (the "Project"). The Denial Order became final on April 17, 2017, when the PUC issued its correction to its April 14, 2017, order regarding various motions filed by Chelsea Solar (the "Motions Order").

For the reasons stated herein, Chelsea requests that the Commission vacate the Chelsea Orders and consolidate docket 8302 into Case No. 17-5024-PET, and treat the petition in Case No. 17-5024-PET as an amendment to the petition in docket 8302. By granting Chelsea's motion, the Commission would reduce and simplify the scope of the litigation over the Chelsea solar project, thus reducing the burden on the Commission and the parties. The recent filing of

testimony by the Department of Public Service (the "Department") in Case 17-5024-PET breaches the memorandum of understandings reached with respect to the pre-amended Chelsea project on the pretext of the existence of the Chelsea Orders, underscoring the immediate need to vacate those Orders. Making matters worse, that testimony from David Raphael is based upon a *post hoc* rationale informed by the Chelsea Orders and grounded in the opposition from neighbors and the Town. Raphael's new ground-breaking theory of orderly development is based upon the preposterous notion that the neighbor and Town opposition constitutes *post hoc* evidence of a community development standard under the Town Plan. Still worse, Raphael completely ignores the vested rights order issued in Case 17-5024 on May 17, 2018, describing it as a mere "technicality" that is outweighed by the current opposition from neighbors and the Town, which in dizzying circularity constitutes evidence of lack of regional orderly development. The Department's filing also makes clear that the litigation in Case 17-5024-PET may continue to expand as long as the Chelsea Orders remain.

BACKGROUND

Chelsea filed its original petition for a CPG on June 19, 2014. After more than two years in development, hundreds of thousands of dollars, and a lengthy section 248 process, a technical hearing was held. 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 district was contrary to the Town Plan. And why would they have? The PUC had already approved commercial utility-scale solar projects in the Bennington RCON zone (and indeed has approved such a project ***even after*** it denied Chelsea a 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, all outstanding issues concerning the Project's

compliance with the section 248 criteria among Chelsea, the Vermont Agency of Natural Resources ("ANR") and the Department were resolved pursuant to the memorandums of understandings. The hearing was held and the hearing officer issued a proposed decision approving the issuance of a CPG for the Chelsea project.

On August 13, 2015, in a hastily called meeting (of which the Petitioner 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.[1] The Select Board followed up that meeting with a letter to the PUC expressing its generalized (falsely-based) opposition to the projects (the "Town Letter").

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 that the project violated a clear, written community standard—the Town Plan—thus allegedly not satisfying the requirements of 30 V.S.A. §248(b)(5).

On January 6, 2016, the PUC issued an order requesting comments on the Town Plan issue raised by Harris, in response to which Chelsea filed comments. On February 16, 2016, the PUC rejected the hearing officer's proposed findings regarding aesthetics and issued the Denial Order.[2] In March 2016, Chelsea filed several motions with the PUC and also filed an

[1] As part of the discovery process in 8302, the Department requested a simulation without any vegetation in order to verify the location of the Chelsea project in relation to the Apple Hill project. The simulation was presented to the Select Board by the neighbors as an "as built" simulation, devoid of any vegetation, which was knowingly false. The actual color "as built" visual simulation of the Chelsea project from the Vermont Welcome Center, which was not shown during the meeting, shows that the Chelsea project could not be seen, a conclusion with which the PUC agreed with in the Motions Order.

[2] In the Denial Order, the Commission 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 Commission also held that construction of the 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 Commission did not state which Finding(s) regarding aesthetics the Commission did not adopt.

amendment to its CPG application. On April 14, 2017, the PUC issued the Motions Order denying Chelsea's motions.

The Commission's denial of the CPG in the Chelsea Orders hinged on its reading of the Bennington Town Plan as containing a clear, written community standard *prohibiting* commercial ground-mount solar projects from the zoning district in which the project site is located—the rural conservation ("RCON") zone. The Commission reiterated that rationale in the Motions Order. *See*, Motions Order at 11-12 ("The Town Plan does not, however, permit commercial energy generation facilities in the Rural Conservation District, because it has been set aside for limited residential development and certain rural commercial activities.") An appeal to the Vermont Supreme Court ensued.

On September 8, 2017, Chelsea filed its first Rule 60(b)(6) motion (the "First 60(b) Motion"), which the Commission denied on jurisdictional grounds on October 12, 2017. The Commission, however, invited Chelsea to dismiss its appeal with the Vermont Supreme Court and bring the Chelsea project back to the Commission for review. Chelsea did so.

Since the Motions Order, the Town of Bennington's counsel has publicly stated that the Commission's legal conclusion regarding commercial ground mounted solar projects being excluded from the RCON zone was *simply not credible*. *See*, Case 17-5024, Exhibit CS-BW-12 (also docket 8302, Att. II, Exh. BWS-1 to the First 60(b) Motion), Transcript of August 14, 2017, Select Board meeting, at 21:[3]

> 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.

[3] In order to spare the Commission and the parties from receiving more copies of exhibits already received multiple times, unless otherwise stated, the exhibit references are to the corresponding exhibits filed in Case 17-5024 which are electronically available.

That conclusion was re-affirmed in the Town's Rule 30(b)(6) deposition in docket 8454.[4]

Now the Town and the Department are attempting to use the Chelsea Orders to prejudice Chelsea. The Commission should vacate the Chelsea Orders in order to prevent further harm to Chelsea.

LEGAL STANDARD

Rule 60(b)(6) "is an omnibus clause providing that 'the court may relieve a party … from a final judgment, order, or proceeding for … any other reason justifying relief from the operation of the judgment.'" *Pierce v. Vaughan*, 2012 VT 5 (2012) at P9. "[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied." *Id*. citing *Cliche v. Cliche*, 143 Vt. 301, 306 (1983). V.R.C.P. is made applicable to Commission proceedings under Commission rule 2.105.

The appropriate standard in this case is the flexible standard used by the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), under which a party is entitled to relief if there is a significant public interest involved and there is a significant change in facts or law. Here that standard is easily met. The public interest in deploying renewable energy to combat climate change is extraordinarily high. The Governor's Climate Action Commission was told late last year that "Vermont is 'nowhere near' meeting goals set in law and policy to stem the state's contribution to global climate change."[5] Further, everyday

[4] Exhibit CS-BW-25. *See also*, Exhibit CS-BW-12, Transcript of August 14, 2017, Select Board meeting, at 38 (Town of Bennington's counsel, Rob Woolmington, stating: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district.")

[5] *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.")

scientists urge immediate action to combat climate change. There has also been a significant change in the facts and the law. As to the law, the Town Attorney's statements and the Town's Rule 30(b)(6) testimony in docket 8454, confirm that the Commission's conclusion that commercial scale solar is not permitted in the RCON zone is manifestly erroneous. That fact is more than sufficient to justify vacating the Chelsea Orders. But there is more. Subsequent to the denial of the Chelsea Project, the Commission approved a commercial solar facility in the RCON zone—Paper Mill Solar.

As to the facts, the basis on which the Commission denied a CPG for the Chelsea Solar project no longer exists with respect to the revised plans, which were timely filed in this Docket[6] and filed again in Case No. 17-5024-PET.

Chelsea also meets the high threshold *normally* required by Rule 60(b)(6), which "reflects the need to balance finality of judgments with the need to examine possible flaws in the judgments." *See, Bouret-Echevarria v. Caribbean Aviation Maint. Corp*., 784 F.3d 37, 42 (1st Cir. 2015) ("There must be an end to litigation someday and therefore district courts must weigh the reasons advanced for reopening the judgment against the desire to achieve finality in litigation.") (internal citations and quotations omitted). Normally courts would examine four factors as they balance the competing interests of finality and adjudication on the merits:

> (1) the motion's timeliness, (2) whether exceptional circumstances justify extraordinary relief, (3) whether the movant can show a potentially meritorious claim or defense, which, if proven, could bring her success at trial, and (4) the likelihood of unfair prejudice to the opposing party. However, this compendium is neither exclusive nor rigidly applied. Rather, the listed factors are incorporated into a holistic appraisal of the circumstances. There is no ironclad rule requiring an in-depth, multi-factored analysis in every case. Sometimes one factor predominates to such an extent that it inexorably dictates the result.
>
> *Id*. at 43 (internal citations and quotations omitted).

[6] PUC Rule 2.204(G) allows proposed amendments to be filed at any time.

Chelsea meets all four factors. *First*, Chelsea's motion is timely. It is being submitted within a reasonable time after Chelsea withdrew its appeal to the Vermont Supreme Court. It is also being submitted promptly after it has become evident that both the Town and the Department in their respective June 22, 2018 filings of pre-filed testimony in Docket 17-5024-PET are relying to some extent on the erroneous Chelsea Orders. *Second*, there are many exceptional and extraordinary factors surrounding this proceeding as described in this motion and Chelsea's other filings, such as, (i) the false information that triggered the cascading events leading to the Denial Order, (ii) the Commission's approval of other commercial ground-mounted solar projects in the RCON zone *both before and after* the Denial Order, (iii) the violation of Chelsea's due process rights, (iv) the Town discrediting the primary basis for the Commission's conclusions and (v) Chelsea's relinquishing its appeal rights at the invitation of the Commission. Chelsea forgoing its appeal rights is sufficient justification on its own for Rule 60(b)(6) relief because it was justified. *Ackermann v. United States*, 340 U.S. 193, 197 (1950).

Third, the revised plans and testimony submitted both in this Docket and in Case No. 17-5024-PET easily clear the hurdle of a meritorious position that could be successful in a re-opened proceedings. *Fourth*, there is no unfair prejudice to any party. No party's rights are being lost or prejudiced.

ARGUMENT

I. The Commission's Interpretation In The Chelsea Orders Is Not Supportable.

The Commission's rationale in the Chelsea Order 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 Commission 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 Commission 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 Commission 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. Since the Motions Order, the Town of Bennington's counsel has publicly stated that the Commission's legal conclusion regarding commercial ground mounted solar projects being excluded from the RCON zone was *simply not credible*. *See*, CS-BW-12, Transcript of August 14, 2017, Select Board meeting, at 21:

> 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. [7]

In September 2017, the Town re-affirmed that position in its rule 30(b)(6) deposition in this docket 8454. *See* Exh. CS-BW-25 at 5-6.

> Q: …the basic question right now is, is there anything that would not allow the development of a commercial scale solar facility, in general?
>
> A. … the answer is no.

The second basis—*i.e.,* being sited in a prominently visible location on a hillside or ridgeline— has also been discredited by the Town.

[7] *See also*, Exh. CS-BW-12, Transcript of August 14, 2017, Select Board meeting, at 38 (Town of Bennington's counsel, Rob Woolmington, stating: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district.")

When development on hillsides is to be restricted, clear standards must be set, and that must begin with defining hillside. *See, In Re Kisiel*, 172 VT 124, 130 (2000). Here there is no objective standard to guide enforcement. The Vermont Supreme Court has held that a Town Plan restriction on construction on hillsides constituted a clear, written community standard only when a specific objective criteria regarding slope measurement was provided. *See, In Re Green Peak Estates*, 154 Vt. 363, 368 (1990) (enforcing specific standard prohibiting development on slopes in excess of 20 percent). Here however there is no objective standard to guide either the determination of what is a "hillside" or what is a "prominently visible location" as the Town has conceded.

In its rule 30(b)(6) deposition in docket 8454, *see* Exh. CS-BW-25 at 5-6, the Town confirmed there is no definition of hillside:

> Q. Now, the sentence you just read talks about hillsides or ridge lines. Is there a definition in the town plan of a hill site [sic]?
>
> A. Not to my knowledge, not a specific definition as a term of art or anything like that, no.

The Town also confirmed that the determination of what constitutes a "hillside" is an *ad hoc* standard-less from the gut determination:

> Q. So how do you decide what's a hillside?
>
> A. You just use the common understanding of what a hillside or a ridge line is.
>
> Q. So based on the slope or is it not based on any kind of specific –
>
> A. It's not based on any kind of specific criteria. Like I said, it's not defined, so it's not like if it's a twenty percent slope or a ten percent slope, and that's a hillside

Finally, the Town confirmed there is also no definition of "prominently visible location."

> Q. [] is there a definition in the town plan of "prominently visible location"?

A. No explicit definition, no.

The Town stated that the intention of the prominently visible hillside aspect is determined from the vantage point of "a valley or from a lower point." *See*, *id*. at 7-8. In docket 8302 the only such vantage point was the Vermont Welcome Center and the Commission conceded that the original Chelsea project would not be visible from there. *See*, Motions Order at 14. But the absence of a definition of "prominently visible location" and the fact that the Town needs to resort to what it perceives as the intention of the prominently visible location language establishes that the alleged restriction is not clear and is not based on any objective standard.

The Town's concessions are fatal to the claim that "being sited in a prominently visible location on a hillside" constitutes a clear, written community standard. Without a definition, the terms are ambiguous and there is no meaningful way to have the term create a development standard. *See, In Re Kisiel*, 172 VT at 130.[8]

The third basis in the Chelsea Order has also been discredited. The RCON guideline that development "must minimize clearing of natural vegetation" is on its face vague as there is no clear guidance as to what the requirements are. *See, In Re Kisiel*, 172 VT at 130. The situation in *In Re Chaves A250 Permit,* 2014 VT 5 (2014) is similar to that presented here. In *Chaves*, the neighbors argued that the regional and town plans used mandatory language regarding "minimizing impacts" on historical sites. The Vermont Supreme Court held that the language was broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contained no specific requirements that were legally enforceable. *See, Chaves*, 2014 VT at 12. That is true here as well.

[8] During the 30(b)(6) deposition in docket 8454, the Town confirmed that the neighboring Apple Hill project is not prominently visible because it would not be "visible from the valley and does not break the height of the ridge line." *See* Exh. CS-BW-25 at 18.

The Denial Order illustrates the lack of any standard. The Denial Order stated that "the clearing of 10.6 acres of existing vegetation runs afoul of [the minimize clearing] provision in the Town Plan and its vision for orderly development." Denial Order at 53. How is there an objective standard? At what point does clearing run "afoul" of the purported standard? Is it 1 acre? 2 acres? Where exactly between zero and 10.6 is the standard? And once that number is determined on what substantial evidence or basis is that number determined from the Town Plan? But even that basis has now been discredited by the Town.

In the Town's 30(b)(6) deposition, Dan Monks testified that the minimize clearing standard fluctuates depending upon the use. If the use, like the project, reasonably requires a certain amount of clearing, then it is permitted. According to the Town, the Town Plan is intended only to address gratuitous clearing. However, even that guideline is vague and made on an *ad hoc* basis because there is no objective criteria against which to determine whether clearing is gratuitous or reasonably required.

The issues advanced by the project's challengers in *Chaves* were remarkably similar to those advanced here by the Town, and rejected by the Supreme Court in *Chaves*. The challengers cited "the purpose of the rural residential-3 district, where the project [was] located, [was] to 'provide for agriculture, forestry, *low-density residential development* and other compatible land uses in a manner that maintains the Town's rural character, scenic landscape and natural resources.'" *Chaves,* 2014 VT at 40. (emphasis added.) That is exactly the same argument used here with respect to the RCON District. The challengers in *Chaves* also cited the town plan's "stated policy in the scenic areas section [] to '[m]aintain natural and man-made features that are of local scenic, cultural and historic significance and protect them from activities that impair their integrity, character and/or quality.'" *Id*. The challengers further cited

"the town's policy [] to '[p]rotect places of outstanding cultural, aesthetic, archeological, natural and/or historical value from development that impairs their character and quality.'" *Id.* Finally, the challengers relied on language in the regional plan which specified that the type of project at issue, mineral extraction, should "*minimize[]* adverse effects on aesthetics ... and special community resources." *Id*. (emphasis added.) The Court rejected the challengers attempt to equate the town plan with the status of an unambiguous, clear and unqualified community standard because it "contain[ed] no specific requirements that [were] legally enforceable." *Id*. at P41. The Court also cited *In re JAM Golf, LLC*, 2008 VT 110, ¶¶ 13-14, 185 Vt. 201, 969 A.2d 47, which held that ordinances that required design to "'protect' natural resources was unconstitutionally vague because it created no real standard." *Id*. The Court's holding in *Chaves* is controlling as the Bennington Town Plan does not contain any specific requirements that are *legally enforceable*. *See also*, *Regan v. Pomerleau*, 2014 VT 99, P16 (2014) (rejecting claims based upon the town plan because they were not "*mandatory and set[] forth no specific enforceable standards*.") As the Supreme Court emphasized in *Regan*, to constitute a clear, ambiguous community standard, a town plan must require mandatory compliance and set forth specific enforceable standards

The RCON goals are *not* clear, unambiguous written community standards for another independent reason—*other express goals in the Town and Regional Plans support the project.* The Vermont Supreme Court in *Chaves* faulted the challengers for not recognizing that the town and regional plans expressed other goals, thus ambiguity was *by definition* created. The Court held that the town plan's language did "not express unambiguous standards in that *both the town and regional plans* also express other goals." *Id.*, 2014 VT at P42. (emphasis added.) Specifically, the Court noted that the town plan recognized the importance of the project's

proposed operations. *Id.* at P42. That is also the case here.

The Town Plan includes a *multitude* of statements and goals promoting local distributed solar resources, such as the Project. *See* Attachment 1. Moreover, the Bennington Town energy plan describes various goals encouraging solar resources, such as the Project. Indeed, municipal plans must "encourage the development of renewable resources." 24 V.S.A. §4302(a).

Similarly, the Bennington regional plan describes various goals which recognize the importance of solar energy resources, such as the Project. *See* Attachment 1.

All of those goals support the Chelsea project and contravene the conclusion that the three factors of the Chelsea Orders constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Chelsea project. As the Supreme Court stated in *Chaves* these other specific priorities must be considered and are enough to debunk the argument that the Town Plan creates an unambiguous, clear and unqualified enforceable standard.

II. The Chelsea Orders Were Based Upon a Denial Of Due Process.

Chelsea was denied due process, a full and fair opportunity to litigate, and its rights under the Common Benefits Clause of the Vermont Constitution were violated.

The Town had received and reviewed the plans for the Chelsea Project more than 1 year before the technical hearing and made no objection or comment. In addition, ANR and the Department after extensive discovery and review by their experts entered into agreements with Chelsea stipulating that the Chelsea project satisfied the criteria for issuance of a CPG. Chelsea also entered into a memorandum of understanding with the local Apple Hill Homeowners Association to address many of their concerns.

The hearing was held on July 16, 2015. Evidence regarding aesthetics and visibility of

the project was presented by Chelsea's expert, Mark Kane who testified that the project would be fully screened from the Vermont Welcome Center, and from the neighbors. The project would also be screened on the west side, but a momentary screened view of some project components through existing and supplemental vegetation would be possible to vehicle occupants traveling at high speed along the Route 7 north interchange. According to Kane, such occupants would *need to be looking for the projec*t in order to notice it through the vegetation. Kane's overall conclusion was that the project would have no undue adverse effect on aesthetics.

Harris' Post-Proposed Decision Objections.

On October 13, 2015, intervenor Libby Harris filed comments on the Chelsea proposed decision claiming for the first time that the Project violated a clear, written community standard allegedly set forth in the Town Plan. Harris' objections, however, were different than the bases used by the PUC to deny the CPG. Harris claimed that specific design standards were applicable in the RCON zone, which is true. Those design standards are contained in the Town's By-laws, and referred to in the Town Plan. Those Bylaws describe the Town Plan's provisions as "goals," not standards. *But Harris never argued that commercial solar facilities were prohibited in the RCON zone or that the Project was prominently visible, and never raised any issue under 30 V.S.A. §248(b)(1)*. Rather, Harris based her aesthetics complaint only 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." Of course, that was simply not true, and the testimony of Chelsea's aesthetics expert was also in the record explaining the minimal impact on the view. Harris also extensively questioned Mark Kane at the technical hearing. But on October 13, 2015, the Town emailed the 1-page (falsely-based) Town Letter to the PUC.

The PUC's Request For Comments

On January 6, 2016, the PUC issued an order requesting comments on the Town Plan issue ***raised by Harris***, not every potential issue that someone might raise under the Town Plan, such as the ultimate bases used by the Commission to deny the CPG. Chelsea filed comments on January 15, 2016, including an excerpt from the Bennington by-laws governing development in the RCON zone, which by-laws expressly permit electric facilities, but the PUC refused to consider the by-laws and any other evidence sought to be presented by Chelsea in those comments stating that the record had already closed. *See*, Denial Order, fns. 25, 27.

At the time the PUC was considering the hearing officer's proposed decision to approve 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. The Vermont Supreme 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.")

It is therefore not surprising that the PUC conceded that its review of the Town Plan *had nothing to do with Harris' comments*, but rather was triggered by the generalized (falsely-based) opposition Town Letter filed on October 13, 2015. *See*, Denial Order, fn.23. If the PUC started to look for issues under the Town Plan in October as it has stated, then by the time it issued its request for comments in January 2016, it likely would have identified the bases on which it ultimately denied the CPG. Yet it failed to provide notice to Chelsea of those bases, denying Chelsea due process and the opportunity to fully and fairly litigate them.

Due process requires that there have been a full and fair opportunity to litigate the issue. As argued herein there was not a full and fair opportunity to litigate the issue in docket 8302 because no party had raised the issue. Moreover, there was unconverted testimony from Chelsea's expert concluding that there was no clear, written, unambiguous community standard applicable to the project, which testimony was consistent with the PUC approvals in four prior CPG decisions in the RCON zone. *See*, Attachment 2. The Commission simply *sua sponte* raised and decided the issue without warning or providing Chelsea with an opportunity to respond, and fully and fairly litigate the issue. Those facts alone establish that there was a lack of due process.

But there is more.

A. Chelsea Was Denied Its Due Process Rights Under 3 V.S.A. §811.

The procedural protections in 3 V.S.A. §811 are substantial rights that must be "scrupulously observed and impartially administered. Any failure in this respect can quickly rise to constitutional dimensions." *See, In re State Aid Highway No. 1*, 133 VT 4, 11 (1974). Under the statute's plain language, a majority of the PUC commissioners must have either heard the case or read the record, if it issued a final decision without first issuing an adverse proposed decision to Chelsea, *and* providing the right to file briefs and present oral argument on the issues being decided adversely to Chelsea. In docket 8302 no commissioner heard the case, as the case was heard by a hearing officer. There was no evidence that a majority of the commissioners "read the record." Instead the PUC took the position that only the hearing officer was bound by 3 V.S.A. §811 and that the due process rights guaranteed under 3 V.S.A. §811 simply to not apply to the PUC itself. Such a position is plainly contradicted by the language of the statute, the clear history of the Revised Model State Administrative Procedure Act ("APA") on which the

statute was based, and every other court decision to have decided the issue under similar versions of the Model State APA. It is also contrary to the Vermont Supreme Court's holding that the PUC is only freed from the due process requirements of 3 V.S.A. §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).

The 1961 changes to the Model State APA which substituted "heard the case or read the record," for "heard or read the evidence" were intended to raise the bar "to make certain that *those persons who are responsible for the decision shall have mastered the record.*" *Bowing v. Bd. of Trs.*, 85 Wn.2d 300, 310 (Wash. 1975) (emphasis added.) ("the burden upon the officer is greater under the new act, for the 'record' includes many things which are not strictly 'evidence.' It contains motions, pleadings, proposed findings, exceptions, decisions, reports -- all of the proceedings in fact.")

Not surprisingly, as a model law dating back more than 50 years, there is substantial case law involving its application to factual situations similar to those in this case. Petitioner has found no case that supported the Commission's position that the requirement to issue a proposed decision only applies to a hearing officer and not to the Commission itself. Quite to the contrary, the cases uniformly conclude the opposite.[9]

[9] *See, e.g., Bice v. Taylor*, 157 So. 3d 161 (Ala. Civ. App. 2014) ("a decision-maker who did not hear the case or read the record [is required] to prepare a proposed order and circulate that order to the adversely affected party in order that he or she may challenge the proposed order by filing exceptions and presenting briefs and oral arguments."); *Doe v. Bd. of Med. Examiners*, 2006 Haw. LEXIS 186 (Haw. 2006) (agency erred by reversing the hearings officer's recommended order and by rejecting the hearings officer's findings of fact and fact-based conclusions of law without first providing party adversely affected with a copy of its proposed final decision and order); *Lampe v. Zamzow's, Inc.*, 102 Idaho 126, 127 (Ida. 1981) ("an opportunity of oral argument before a final decision is entered [must be provided] in those instances where 'a majority of the officials . . . who are to render the final decision have not heard the case or read the record. . . .'") (internal citations omitted.); *Walker v. Okla. Dep't of Human Servs.*, 2001 OK CIV APP 107, P2 (Okla. Civ. App. 2001) ("if the agency head had not heard the case or read the record, then before a final agency order adverse to a party is made, a copy of the proposed order shall be sent to the parties at least fifteen days before the hearing or meeting. At the hearing or meeting, parties

It should also be no surprise that courts have addressed the issue of what to do when the record does not affirmatively show whether agency officials read the entire record and, if some did, which ones did. In *Pet v. Department of Health Servs*., 228 Conn. 651, 681 (Conn. 1994), the Connecticut Supreme Court held that it *cannot be assumed* that agency officials read the record. If the record does not affirmatively indicate that a majority of the agency officials read the record, then the agency decision must be vacated.

Like the Connecticut Supreme Court, the Vermont Supreme Court has previously been unwilling to speculate or assume a majority of the agency officials "read the record." *See*, *In re State Aid Highway No. 1*, 133 Vt. 4, 10 (vacating order because it was "impossible to determine" from the record what members of the agency satisfied the requirements of §811.) *Accord*, *Morgan City v. Louisiana Dep't of Environmental Quality*, 604 So. 2d 144, 149 (La. App. 1992) (vacating agency decision because "the record does not establish [which officials] either heard the case or read the record"); *Citizens Bank of Bryan v. First State Bank,* 580 S.W.2d 344, 347-348 (Tex. 1979) (vacating agency decision for failure to issue a proposed decision and give a party adversely affected the right to file briefs and present oral argument on those adverse issues when one of the two agency officials issuing the final decision did not hear the case or read the record); *See also, Doe v. Bd. of Med. Examiners*, 2006 Haw. LEXIS 186 (Haw. 2006) (agency erred by reversing the hearing officer's recommended order without first providing party adversely affected with a copy of its proposed adverse final decision.) All the case law for the

---

may file exceptions, present briefs and oral argument concerning the proposed order."); *In re Zar*, 434 N.W.2d 598, 601 (S.D. 1989) (Even when a hearing examiner is appointed, the agency's failure prior to rendering a decision adverse to a party to allow the party adversely affected "to present briefs and [oral] arguments before making its final decision not only contravened the clear language of SDCL 1-26-24, but also denied [party adversely affected] due process of law."); *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 347-348 (Tex. 1979) ("cases before administrative bodies will not be decided by agency officials who had neither heard the case nor read the record" unless "a proposal for decision [is] served on the parties, and an opportunity …afforded the adversely affected parties to file exceptions and briefs prior to the final decision."); *Accord, Bowing v. Bd. of Trs.*, 85 Wn.2d 300, 310 (Wash. 1975).

past fifty-plus years shows that the PUC's failure to issue a proposed decision adverse to Chelsea violated due process, and hence denied a full and fair opportunity to litigate the issues.

B. Chelsea Was Denied Due Process and Equal Protection For Additional Reasons.

The Common Benefits Clause of the Vermont Constitution guarantees equal protection of the laws. "The concept of government exercising its authority inequitably and without a rational basis or for the emolument of a particular group [or against a particular person] was anathema to that end." *In re Town Highway No. 20*, 2012 VT 17, P34 (2012). Government action is judged under a "more stringent test" under the Common Benefits Clause than the United States Constitution's Equal Protection Clause's rational basis test. *Baker v. State*, 170 Vt. 194, 205 (2000). In docket 8302 Chelsea's rights to equal protection, due process and property were violated under both standards.

Chelsea was discriminated against as compared to other applicants for CPGs in the RCON District. *See, Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a constitutional claim as a "class of one" by showing that plaintiff had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (recognizing constitutional claim for denial of a permit "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents.")

In docket 8302 the discrimination was manifest. In the Motions Order the PUC admitted to selective enforcement. The PUC's explanation for its different treatment of Chelsea as compared to other electric facilities (including solar projects) it approved in the Bennington RCON zone *before* its denial (*see*, Att. 2) of the CPG for Chelsea was that no one complained.

As the Vermont Supreme Court acknowledged in *In re G.T.,* 170 Vt. 507 (2000), such an explanation is the paradigm of unconstitutional discrimination. *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 docket 8302 is striking. In *Acme Markets* the Sunday sales law was enforced only upon complaint, which turned it into a tool for private purposes. The same was true in docket 8302. Both before and after[10] it issued the Denial Order, the PUC issued CPGs for commercial ground-mount solar projects in the RCON zone, turning the PUC's *sua sponte* interpretation into a tool for private purposes.

Chelsea's rights under the Common Benefits Clause were also violated by the Town. The Town's opposition is not based upon any legitimate regulatory concerns but solely on political pressure from neighbors, none of whom would see the project. The Town's opposition was also manifestly discriminatory in comparison to its treatment of other commercial scale solar and electric projects in the RCON zone, which the Town supported. "[The] government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. The government's primary obligation is to comport itself with compunction and integrity." *W.V. Pangborne & Co. v. New Jersey Dep't of Transp*., 116 N.J. 543, 561-562 (N.J. 1989) (internal citations and quotations omitted.) A reviewing court must not hesitate to examine the conduct of the government to ensure it "comports with the highest standard of fairness." *United States v. Vaval*, 404 F. 3d 144, 152 (2d Cir. 2005).

Discrimination against Chelsea is also visually shown in Exhibits 6 and 7 to the Town's 30(b)(6) deposition conducted in docket 8454. *See*, Exh. CS-BW-25. Those exhibits depict the Paper Mill project and show what type of screening passes muster under the screening by-law

[10] *ER Paper Mill Village Solar LLC*, 16-0049-NMP, 2016 Vt. PUC LEXIS 631 (November 18, 2016).

and the Town Plan. When those are compared to the Chelsea plan simulations, it is clear that there was no basis on which to conclude Chelsea violated any aesthetic criteria of the Town. The Paper Mill project is plainly visible from public roads and neighboring properties. Whereas the Chelsea project was proposed to be screened in all directions, with the limited potential for automobile occupants traveling at high speed going north on Route 7 to glimpse some Project components for a few seconds through vegetation and supplemental landscaping.

Finally, the Town's recently approved commercial net-meter solar project sited and visible in what the Town considers a scenic gateway,[11] shows quite clearly that the Town Plan's "scenic standards" are not standards at all but merely optional ad-hoc criteria that can be applied at will by the political elite of the Town.

Chelsea Was Ambushed Furthering Violating Due Process.

The Vermont Supreme 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 hit with an ambush trifecta. First by the Town, then by intervenor Libby Harris, and then by the PUC.

The Town began the cascading post-hearing series of events by hastily calling a Select Board meeting at the behest of neighbors, without any notice to Chelsea. The neighbors then proceeded to present false information to the Select Board about the project, resulting in the Select Board voting to oppose the project. After the Select Board realized it was provided false information, it refused to re-visit its position succumbing to the political pressure from neighbors. Similarly, Harris waited until after the technical hearing and proposed decision to raise her RCON design objections. Even though Chelsea provided comments and sought to

[11] *See*, *ER Bennington Solar I, LLC*, 2016 Vt. PUC LEXIS 570 (October 19, 2016).

submit additional and relevant evidence to rebut her claims, the PUC completed the third leg of the ambush by refusing to consider the additional evidence offered by Chelsea [Denial Order, fns. 25, 27], and worse, simply deciding the matter on grounds not raised by Harris or anyone else in the first place, and without giving Chelsea an opportunity to address them.

The PUC's failure to allow Chelsea to present evidence, briefs and oral argument on those issues prior to the PUC's adverse decision violates due process. *See, e.g., In re Zar*, 434 N.W.2d 598, 601 (S.D. 1989) (the agency's failure prior to rendering a decision adverse to a party to allow the party adversely affected "to present briefs and [oral] arguments before making its final decision not only contravened the clear language of SDCL 1-26-24, but also denied [party adversely affected] due process of law.").

The PUC's January 2016 Request Was Not Sufficient Due Process.

The PUC based its different treatment of Chelsea (vs Apple Hill) on the notion that the PUC's January 2016 request for comments was sufficient due process for Chelsea because Chelsea had the opportunity to introduce evidence through its response to that request. But there are several manifest errors with that theory. *First*, Chelsea was not accorded its due process rights under 3 V.S.A. §811. *Second*, due process requires more than litigation by ambush, especially where the agency ferrets out the issues *sua sponte* and then acts as decision-maker, all without providing an opportunity to Chelsea to address those issues.

Third, due process requires that the agency decision-makers master, and base their decision on, the *entire record*. That rule requires the agency decision-makers to provide notice of *and an opportunity to respond* to the specific alleged bases for adverse decision because the record *must include* "the evidence and argument that the [adversely affected party] *could have presented* if he had been given adequate notice of the potential causes [and the] chance to present

his side of the story [otherwise it] is the essence of arbitrariness." *Friedler v. GSA*, No. 15-cv-2267, 2017 U.S. Dist. LEXIS 153573, *57 (D.D.C. September 21, 2017) (internal quotations and citations omitted) (emphasis added.)

Fourth, 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,* Denial Order, fn.25 ("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."); *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.")

Fifth, Harris never raised the primary or secondary issues relied on by the PUC—*i.e*, that commercial ground-mounted solar projects were prohibited in the RCON zone or 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*, 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. Chelsea had no reason to address the bases on which the PUC concluded the Town Plan was violated because they were not raised. It

is neither fair nor consistent with due process for Chelsea to be presumed to need to address arguments of which it has no notice.

III. It Would Be Unjust To Not Vacate The Chelsea Orders.

The Chelsea Order was based upon multiple mistakes of law as argued above. *First*, as argued above, the Chelsea Orders' conclusions regarding the RCON zone have discredited and are not supportable. *Second*, Chelsea's due process and equal protection rights were violated as argued herein. *Third*, the Denial Order required strict adherence to its interpretation of a municipal plan and elevated that one factor above all others, which was erroneous as the Vermont Supreme Court made clear in its subsequent decision in *In re Petition of Rutland Renewable Energy*, *LLC,* 2016 VT 50. Under §248(b)(1), the Commission must find that the "will not unduly interfere with the orderly development of the region . . . We emphasize that the statutory requirement relates to the orderly development of the region, not to a particular municipality within the region." *Id.* at ¶9. In this case, as in *Rutland Renewable Energy*, although it is conceivable that "localized impacts may be found to interfere with orderly regional development due to their character or severity, there is no credible evidence in the record that demonstrates that the localized impacts from this particular project would rise to such a level."[12]

The region is Bennington County not the Town. The site itself and the clearing required at the site for the Project is a mere 0.004% of the approximately 370,000 acres in the region. The PUC made no analysis of the region or how the Project would unduly interfere with orderly development of the region. The only evidence in the record on the orderly development of the region was presented by Chelsea's expert, Mark Kane, which provides that the Project will not unduly interfere with the orderly development of the region and will not cause any direct impacts

[12] *In re Petition of Rutland Renewable Energy*, LLC, 2016 VT 50, ¶ 12.

on the capacity of the region to develop, all of which conclusions were consistent with other PUC approvals in the RCON zone. *See*, Att. 2.

Fourth, the Commission changed the "due consideration" language in section 248(b)(1) to Act 250's requirement in Section 6086(a)(10) of 10 V.S.A. Chapter 151 that a project must conform to the Town Plan. The Vermont Supreme Court has construed the phrase "due consideration in Section 248(b)(1) to 'at least impliedly postulate[] that municipal enactments, in the specific area, are advisory rather than controlling'". *In re Vt. Elec. Power Co.*, 2006 VT 69, P25 (internal citations and quotations omitted.) In a complete break from PUC precedent, and without any explanation therefor, the PUC insisted on strict adherence to the purported goals in an excerpt from the Town Plan, without considering the entire town and regional plans or the Town's actions in implementing such plans. Requiring strict adherence is contrary to law. Failure to adequately explain its rationale and the balancing it undertook is arbitrary and capricious and a violation of due process.

The proper analysis under section 248(b)(1) would have been for the PUC to look at the overall *regional* effects of the Project, just as it did in the *Petition of UPC Vermont Wind, LLC* in Docket No. 7156. In that Docket, the PUC determined that even though the project in question was (i) inconsistent with the regional plan's description of traditional land use in a "rural area" and (ii) visible to neighboring towns, the PUC found no undue interference with the orderly development of the region and issued the CPG. The PUC's determination was then upheld by the Vermont Supreme Court. *See, In re UPC Vermont Wind, LLC*, 185 Vt. 296 (2009). With respect to the Chelsea project, there was no evidence in the record of non-conformance with the regional plan and the project was not visible to neighboring towns. Nor, as the PUC conceded, was it visible from nearby vantage points such as the Vermont Welcome Center. Thus, the

PUC's conclusion was erroneously premised solely on the alleged impacts of the project within the immediate vicinity and not the overall region.

The PUC's decision in *UPC Vermont Wind* also shows that Chelsea was being denied equal protection of the laws and due process because there was no rational basis on which to take the approach the PUC did in *UPC Vermont Wind*, and the other projects approved in the RCON zone and then take the opposite approach in the Chelsea Orders.

Further, the appropriateness of the site for solar (and thus its lack of adverse regional or local impact) is further highlighted by an email by Bennington Select Board Vice Chair, Don Campbell, to intervenor 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."*
>
> Exhibit CS-BW-17.

Fifth, there exist inconsistent determinations on the same issue in proceedings prior to the Denial Order, and *after*—the Paper Mill solar project. *See*, Att. 2. It is the Denial Order that is the aberration, not the others.

Sixth, relief under Rule 60(b)(6) is appropriate if there was a failure to appeal and the failure "was justifiable." *Ackermann v. United States*, 340 U.S. 193, 197 (1950). Here, Chelsea discontinued its appeal at the request of the Commission. It would be unjust for Chelsea to continue to be saddled with the Chelsea Orders in the circumstances here.

CONCLUSION

For the reasons stated above, Chelsea moves the Commission to grant this motion, vacate the Chelsea Orders, consolidate docket 8302 into Case 17-5024, and treat the petition in Case 17-5024 as a timely filed amendment to the original petition by Chelsea filed June 19, 2014.

Dated: June 25, 2018

CHELSEA SOLAR LLC

/s/Thomas Melone
Thomas Melone
Allco Renewable Energy Limited
1740 Broadway – 15th Floor
New York, NY 10019
(212) 681-1120
Thomas.Melone@AllcoUS.com

Attorneys for Chelsea Solar LLC

ATTACHMENT 1

The Town Plan expresses the following goals and policies:

- ✓ "Support efforts to develop renewable energy facilities." P.3.
- ✓ "[E]fforts must be made to establish reliable local energy from renewable sources." P. 7.
- ✓ "The economic sectors and needs identified earlier in this chapter will remain important to the community, but will need to be adapted over time to take advantage of opportunities offered by things such as local renewable energy resources." P. 12.
- ✓ "Produce as much of the community's energy demand as possible using local resources." P.12.
- ✓ "support [] local foods and renewable energy." P.14.
- ✓ "Incentives for investment in conservation and renewable energy systems should be supported." P.55.
- ✓ "Future electricity supply constraints are a concern because of expiring contracts with Vermont Yankee and Hydro Quebec as well as possible fuel shortages at regional fossil-fuel based generating plants. Resolving these problems will require implementation of a "smart grid" where supply can be more closely matched with demand as well as through development of a large number of small renewable-energy-based generating facilities distributed throughout the region." P. 83.
- ✓ "[T]he great majority of fuel used for transportation and heating and cooling homes and businesses is derived from nonrenewable fossil fuels. In addition to the negative environmental impacts associated with burning oil, gas, and similar fuels, the available supply of those fuels is strictly limited and within a relatively short period of time, production will not be able to keep pace with demand (for further details, see Bennington Regional Energy Plan, 2009). The result will be escalating prices and physical shortages of energy products that will begin to cause severe problems if we have not reduced our reliance on those fuels." P.92.
- ✓ "The town [] should support [] development of renewable energy resources." P.94.

- ✓ "Generation of energy from renewable energy resources supports conservation of non-renewable energy resources while helping to maintain a clean environment." P. 94.

- ✓ "Potential renewable energy resources in Bennington include: *** Solar energy to heat buildings, water, and to power photovoltaic cells. Pp. 94-95.

- ✓ "It is likely that the smart grid will rely on many distributed small generators located closer to the points where the electricity is used; consequently, the town should support economically and environmentally sound development of local electricity generating capacity." P. 95.

- ✓ "Actively promote the energy-related benefits of town policies that:*** Support development of renewable energy resources." Pp. 95-96.

- ✓ "Create and support programs and facilities that provide stable, affordable, and clean renewable sources of energy, including wood (and other biomass), wind, water (hydroelectric), solar, and geothermal. Give strong consideration to the energy needs of the community when evaluating the environmental and economic affects of such programs and facilities." P. 96.

- ✓ "The town should continue to pursue [] renewable energy projects." P.96.

The policies and goals expressed in Bennington energy plan encourage projects such as the Chelsea Solar project, and also encourage the use of trees for biomass:

- ✓ "Alternative energy sources such as solar, [] and biomass-based fuels can provide significant amounts of clean energy well into the future. Developing these resources is extremely important." P.2.

- ✓ "Commercial Renewable Energy Opportunities in Bennington *** The amount of money spent on energy in Bennington—as pointed out in previous sections—suggests that real economic benefits can be realized if some significant portion of that energy is generated from local sources." P.38.

- ✓ "renewable energy must focus on local resources." P.38.

- ✓ "Available resources that potentially can provide for some of the area's energy needs include: biomass (wood and field crops), [] and direct solar radiation. [] Developing those resources now also will help provide energy security for the

community, assuring availability of the energy needed to sustain economic prosperity well into the future." P. 38.

- ✓ "Biomass Energy Potential *** Any discussion of renewable energy in Bennington County must include wood, which together with direct solar energy, is the most obvious and ubiquitous source of locally available energy. The Bennington Regional Energy Plan estimates that forests, just within Bennington County, could sustainably provide over 150,000 cords of wood per year for fuel (in addition to timber harvested for sawlogs, veneer wood, and pulpwood). That quantity of wood could easily satisfy all of the residential space heating needs for the region, with a significant volume of biomass remaining for use in commercial/industrial applications and for electricity generation. Forest resources in nearby areas of new York and Massachusetts provide additional resources that could be available for local energy utilization (Biomass Energy Resource Center data)." P.38.

- ✓ "Although widely available, a significant increase in the utilization of local wood products for commercial energy production poses some serious challenges. Much of the forested land in Bennington County is not currently available for harvesting because it is located in federally designated wilderness or other protected areas." P.38.

- ✓ "Despite the hurdles that must be overcome to make wood a significant, and perhaps primary, local source of heat energy, its abundance, reliability, and the fact that reliance on this fuel provides jobs and recycles money in the local economy suggest that planning for greater utilization of the resource should be pursued. The reduced net carbon and sulfur dioxide emissions realized through combustion of biomass rather than coal, oil, or gas provides an additional reason to pursue greater use of this renewable resource." P.38.

- ✓ Space heating in homes and small businesses can be accomplished with wood or wood-pellet burning stoves or furnaces. Cord wood is readily available from local suppliers and requires little preparation beyond splitting and drying." P.38.

- ✓ "Solar energy technologies are proven and [] have a relatively minor environmental impact." P.43

- ✓ "there are compelling reasons to attempt to implement solar technologies wherever possible." P.43.

- ✓ The town energy committee should "advocate for [] renewable energy projects. P. 45

- ✓ "All developments should be planned to take maximum advantage of opportunities for utilization of solar energy." P.45.

- ✓ "The town should support efforts to develop appropriate cost-effective biomass energy resources." P.47.

The goals of the Bennington Regional Energy plan:

- ✓ "Alternative energy in the form of 'renewable' sources such as solar [] can provide significant amounts of clean energy well into the future. Developing those resources is extremely important." P. i.

- ✓ "To maintain a good quality of life, vibrant communities, and prospering economies, we will have to [use] energy obtained from clean renewable sources." P. i.

- ✓ "Decrease our reliance on non-local energy sources through [] development and use of local renewable energy sources." P.i.

- ✓ "Renewable energy will become increasingly important in the coming decades, and the most efficient and valuable energy sources will be the ones that are closest to the end users." P.ii.

- ✓ "it will be important to supplement any out-of-region generating capacity (nuclear, hydro, and other sources) with locally generated electricity." P. ii.

- ✓ "A 'smart grid' that relies on many smaller scale distributed sources of electricity will need to be developed." P.ii.

- ✓ "By taking a lead in efforts to [] develop local renewable energy sources [] Bennington County can become a uniquely vibrant and successful region." P.ii.

- ✓ "The impacts on climate, the so-called 'global warming' that has resulted from the rapid release of billions of tons of carbon dioxide that had been locked in solid and liquid fossil fuels, has been well-documented. The disruption of natural ecosystems, human settlements, and economic activity, together with the other adverse environmental impacts of fossil fuel combustion (e.g., smog, acid rain) further compel us to seek and use alternative sources of energy." P.6.

- ✓ "Transportation is an energy-intensive and complex process, whether the commodity being transported is food in a truck or electricity over a transmission line. Because we need to conserve energy in every way possible, local production of energy for use in our region will become increasingly important. We must find ways to []use the renewable energy resources available locally for [] electricity generation." P. 6.

- ✓ "[N]ew large-scale generating sources will need to be found and supplemented with locally generated electricity from renewable resources." P. 7.

- ✓ "Decrease our reliance on non-local energy sources through [] development and use of local renewable energy sources." P.8.

- ✓ "Give full consideration to use of locally available renewable energy resources for [] and electricity." P.24.

- ✓ "Seek additional electric generating capacity from local renewable resources to provide energy for electric vehicles." P.30.

- ✓ "***Such present day objectives as viewshed protection***, [] ***will need to be partially retracted to make way*** for the compelling future demand for energy." P.32. (emphasis added.)

- ✓ "Support development of local and regional industries that produce energy through conservation and renewable sources of energy." P.32.

- ✓ "We must transition from nonrenewable to renewable energy sources, and because of net energy constraints resulting from acquisition, processing, and transportation of energy, much of that renewable energy will need to be derived from local sources." P.34.

- ✓ "Energy from renewable sources can help address space and water heating needs, provide fuel for transportation, and generate electricity (that can, in turn, be used for heating, transportation, and many other functions). Space and water heating can be accomplished using solar energy, wood (cordwood, pellets, or chips)." P.34.

- ✓ "[C]ommercial generation of electricity using [] large scale arrays of pv panels, [] can offset coal, natural gas, and nuclear fuel use, adding valuable years to the generating capacity of those energy sources." p.36.

- ✓ "Any discussion of renewable energy in Bennington County must include wood, which together with direct solar energy, is the most obvious and ubiquitous source of locally available energy. The 1982 Regional Energy Plan estimated that forests, just within Bennington County, could provide over 150,000 cords of wood per year for fuel (in

addition to timber harvested for sawlogs, veneer wood, and pulpwood). That quantity of wood could easily satisfy all of the residential space heating needs for the region, with a significant volume of biomass remaining for use in commercial/industrial applications and for electricity generation." P.36.

- ✓ "Despite the hurdles that must be overcome to make wood a significant, and perhaps primary, local energy source, its abundance, reliability, and the fact that reliance on this fuel provides jobs and recycles money in the regional economy suggest that planning for greater utilization of the resource should be pursued." P.38.

- ✓ "Obtaining energy from wood is a relatively simple process using simple and time-tested technologies. Many homes can be heated with a single wood or pellet burning stove or furnace. Cord wood used in stoves or furnaces is readily available from many local suppliers and requires little preparation beyond splitting and drying." P.38.

- ✓ "In addition to a concerted effort at conservation in all energy sectors, the most feasible future sources of electricity for the region come from smaller renewable resource based generating facilities distributed throughout the area." P.47.

- ✓ "The value of energy conservation and development of renewable energy resources should be given significant weight when evaluating new projects and programs." p.51.

- ✓ "Recognize and support economically and environmentally sound development of the region's renewable energy resources." P. 52.

The goals of the 2007 Regional Plan:

- ✓ "Energy planning should emphasize the use of diverse and reliable supplies of energy resources in an efficient and environmentally sound manner." P.6.

- ✓ "Particular attention should be given to the development of renewable energy resources in the area." P.6.

- ✓ "Land use, transportation, economic development, and housing policies and strategies should support the efficient use of energy resources." P.6.

- ✓ "Reduce the flow of energy dollars leaving the Bennington region by decreasing our reliance on non-local energy sources." P.65.

- ✓ "Encourage the development of renewable energy resources." P.65.

ATTACHMENT 2

In Docket 8355 the Commission approved a wireless communications tower under Section 248a in the RCON District, which was supported by the Town. Section 248a provides for a more stringent standard with respect to aesthetics, requiring "substantial deference" as opposed to just "due consideration" "to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans." That facility was located entirely in the RCON District. The project was not a limited residential development. Moreover, soaring 90 feet tall, the project was visible on a hillside. If the Town Plan were a clear, unambiguous community standard, a recommendation or a land conservation measure, the Town should have not supported the project and the Commission should not have issued the CPG. But it did, with the Commission holding that the project did not violate any standard in the Town Plan. *See*, Docket 8355, Order January 7, 2015, Finding 5 ("The Project does not violate any written community standards contained in the applicable town or regional plans.")

In Docket 8393, the Commission approved a 140-foot high wireless communication tower in the RCON District, again supported by the Town. The project was not a limited residential development. Soaring 140 feet tall, the project was visible on a hillside. If the Town Plan were a clear unambiguous community standard, a recommendation or a land conservation measure, the Town should have not supported the project and the Commission should not have issued the CPG. But it did, with the Commission holding that the project did not violate any standard in the Town Plan. *See*, Docket 8393, December 18, 2014 Order, Finding 10 ("The

Project is consistent with the land conservation measures in the Bennington Town Plan and the Bennington County Regional Plan.")

In Docket 7763, the Commission approved a major expansion of an electrical facility, a substation, in the RCON District. The work was ***within*** an area specifically designated by the Town of Bennington as a scenic resource, which is in stark comparison to the Chelsea Solar site, which has not been so designated. That approved project required the same clearing as the Chelsea project—15 acres. In addition, it was located on a prominently visible side of Bald Mountain. *See*, Docket No. 7763, Order Dated August 17, 2012, Finding 146 ("The new VELCO Bennington and CVPS Pickett Hill site is located on the eastern edge of the southern portion of the Valley of Vermont physiographic region, on the western lower slopes of Bald Mountain. The area surrounding the property is primarily forested with steep slopes and portions of the eastern boundary of the parcel abut the Green Mountain National Forest. The site is located east of the Bennington Bypass within the Town of Bennington's designated Rural Conservation and Forest zoning districts.")

The project was also far taller than the Chelsea project. ("While a majority of the New Facility's components will be thirty feet high or less, some components will extend to fifty-four feet in height.") The project was visible from several vantage points, and was within an area designated in Bennington's scenic resource inventory. *See*, Docket No. 7763, Order Dated August 17, 2012, Finding 152 ("The new VELCO Bennington and CVPS Pickett Hill substations will be visible from several viewpoints to the west and will have an adverse impact on the scenic character of the area surrounding the New Facility, which is within an area identified as being visually sensitive by the Town of Bennington. In particular, the aesthetic impact of the New Facility will be adverse from the Bennington Bypass, the Bennington Downtown and Urban

Growth Area, the Old Bennington and Bennington Battle Monument area, and the Southern Vermont College.") Yet despite the fact that the project violated all three of the purported standards discussed by the Commission in the Chelsea Order, and additionally was located in the scenic inventory area (which the Chelsea project is not), the Commission had no difficulty concluding that no clear written community standard, recommendation, or land conservation measure was violated. *See*, Docket No. 7763, Order Dated August 17, 2012, Finding 160 ("The Project does not violate a clear written community standard intended to preserve the aesthetics or scenic beauty of the area.")

Similarly, the Commission recently issued a CPG (#NMP-6523) to the Kobelia Bennington GLC Solar LLC 500kw solar project in the RCON District in Bennington. That facility was located entirely in the RCON District. The project was not a limited residential development, and it was visible from the road. The slope of the land was greater than that of the Chelsea site. The Commission held that the project did not violate any standard in the Town Plan. *See*, Docket NMP-6523, Order Dated October 14, 2015, Finding 18. ("There are no land conservation measures contained in the applicable regional or town plans that would prohibit development in the area where the Project is proposed.")

Finally, after the Chelsea Order, the Commission again (with the support of the Town) held that a commercial scale ground mounted solar project in the RCON zone, even if completely visible from public roads does not violate any land conservation measure in the Town Plan or any written community standard in the Town Plan. *See*, ER Paper Mill Village Solar LLC, 16-0049-NMP, 2016 Vt. PUC LEXIS 631 (November 18, 2016).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following:

Judith Whitney
Clerk of the VPUC
Vermont Public Utility Commission
112 State Street
Montpelier, VT 05620

James Porter, Esq.,
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620

Donald Einhorn Esq.
Vermont Agency of Natural Resources.
1 National Life Drive
Montpelier, VT 05620

Libby Harris
531 Apple Hill Road
Bennington, VT 05201

Merrill Bent, Esq.
Robert E. Woolmington, Esq.
Witten, Woolmington, Campbell & Bernal, P.C.
P.O. Box 2748
4900 Main St.
Manchester Center, VT 05255

Plus via ePUC to the parties in Case 17-5024.

/s/Thomas Melone
Thomas Melone
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
Phone: (212) 681-1120
Thomas.Melone@AllcoUS.com

Dated: June 25, 2018