STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

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)

DEPARTMENT OF PUBLIC SERVICE'S RESPONSE TO CHELSEA SOLAR'S RULE 60(b)(6) MOTION AND MOTION TO CONSOLIDATE

On June 26, 2018, Chelsea Solar LLC ("Chelsea") filed a motion under V.R.C.P. 60(b)(6) for relief from the Orders of February 16, 2016, April 14, 2017, and April 17, 2017 (the "Chelsea Orders"). As discussed below, the Department of Public Service (the "Department") opposes this motion because Chelsea has not demonstrated that the relief requested would prevent hardship or injustice, or that the circumstances in this proceeding justify the extraordinary relief requested.

Chelsea argues that these Orders should be vacated because the Commission's interpretation in the Chelsea Orders is not supportable, because the Chelsea Orders were based upon a denial of due process, and because it would be unjust to not vacate the Chelsea Orders. The merits of these arguments are based upon the complex history of the case, with which the Commission is familiar. However, "relief under 60(b)(6) requires a showing that exceptional circumstances justify extraordinary relief." *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir.1992). "The central theme of this provision is the prevention of hardship or injustice," (*Grievance of Merrill*, 157 Vt. 150, 153, 596 A.2d 345, 347 (1991) (quoting *Greenmoss Builders, Inc. v. Dun & Bradstreet,*

Inc., 149 Vt. 365, 368, 543 A.2d 1320, 1322 (1988))), and the relief requested in this instance is not intended to prevent hardship or injustice. Neither does this case does not present the type of exceptional circumstance which would justify the extraordinary relief which has been requested, as Rule 60(b)(6) is intended to be applied.

The apparent objective of this motion is to revive certain Memoranda of Understanding ("MOU") which existed between the Department and the Petitioners, and which terminated by their own terms when the Chelsea I project in Docket 8302 was denied by the Commission. Chelsea's Motion states:

> 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 in Case 17-5024-PET breaches the memorandum of understandings [sic] 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.[1]

Chelsea's motion then proceeds to criticize that testimony authored by David Raphael and entered on behalf of the Department. The revival of the terminated MOUs would have the effect of preventing the Department from developing and entering testimony on aesthetics and orderly development in Case No. 17-5024-PET. The petitioners therefore are apparently attempting to prevent the Department from executing its responsibility to assess the project under the Section 248 criteria. Chelsea's motion is an attempt to use Rule 60(b)(6) to extinguish testimony which was entered by the Department, rather than an appropriate use of the Rule to prevent hardship or injustice. This tactical use of Rule 60(b)(6) does not present the type of exceptional circumstance which would warrant the extraordinary relief which Chelsea requests.

The Vested Rights Order issued on May 17, 2018, addresses the Section 248 review

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1 Motion Under Rule 60(b) and Motion to Consolidate of Chelsea Solar LLC, filed June 26, 2018, at 1-2.

which the Commission anticipated in Chelsea II:

> The Commission required the new petition as the vehicle to address the substance of Chelsea II amendments. While done in the procedural context of a new petition as instructed by the Commission, amending Chelsea I to reflect more efficient solar panels is not dissimilar from what occurred in *Jolley* where the project was also amended to use different venting technology. Chelsea II remains a 2.0 MW solar project in approximately the same location as Chelsea I, but with a smaller footprint than the Chelsea I project. As in *Jolley*, this refiled application "would not require the sort of substantial revision that should dictate a loss of vested rights." The Commission recognized this continuation of project development in the October 12 Order by allowing Chelsea to refile relevant evidence from Chelsea I to support Section 248 review in Chelsea II. The new petition in this case simply ensures the thorough documentation of the proposed impacts of that technology change on the Section 248 criteria.[2]

It is clear then, that the expectation of the Commission was that the petitioners would re-file relevant evidence to facilitate Section 248 review in Chelsea II. Chelsea filed new testimony and exhibits in Chelsea II, including testimony and exhibits relevant to aesthetics and orderly development. The Department also filed testimony on aesthetics and orderly development. The Department, in filing the aesthetics and orderly development testimony which precipitated petitioner's instant motion to vacate and consolidate, is proceeding with the Section 248 review of Chelsea II, as directed by the Commission in the Vested Rights Order.

For the reasons explained above, the Department opposes Chelsea's motion to vacate the Chelsea Orders and to consolidate Docket 8302 into Case No. 17-5024-PET.

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2 Petition of Chelsea Solar LLC, Case No. 17-5024-PET, Order of 05/17/2018, at 9.

Dated at Montpelier, Vermont this 11th day of July 2018.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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cc: Parties of Record by ePUC