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

CHELSEA SOLAR LLC'S RESPONSE TO THE OBJECTION OF THE DEPARTMENT OF PUBLIC SERVICE TO THE MOTION UNDER RULE 60(b) AND MOTION TO CONSOLIDATE

Chelsea Solar LLC ("Chelsea" or "Petitioner") hereby files this response to the objection filed by the Department of Public Service (the "Department") to Chelsea's second rule 60(b)(6) motion and motion to consolidate.

The most obvious deficiency in the Department's response is that it fails to address Chelsea's motion under the correct legal standard. As Chelsea has argued, the appropriate standard in this case is the 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 Department not only fails to discuss the *Rufo* standard, but relies on citations from two cases, *both of which were decided before* the United States Supreme Court's decision in *Rufo*. While those cases are relevant in a general situation, they are inapposite to the standard under which the motion should be judged—the *Rufo* standard.

But even those two cases do not support the Department's position. For example, the Department cites *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17 (1st Cir. 1992). The First Circuit in *Teamsters* denied the rule 60(b)(6) motion because the movant had not shown a significant case on the underlying merits. The First Circuit stated, 953 F.2d at 20:

> There is, however, an additional sentry that guards the gateway to Rule 60(b) relief. Although we appear never to have said so unreservedly, it is the invariable rule, and thus, the rule in this circuit, that a litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise. [citations omitted.] This tenet is dispositive here. The Union, in its Rule 60(b)(6) motion, did not make any allusion to the viability of its underlying suit. Moreover, the defendants, in their written opposition to the motion, argued at some length that the Union's claims were doomed to fail.

Rather than supporting the Department's objection, the First Circuit's decision confirms that Chelsea's motion should be granted. Unlike the situation in *Teamsters*, Chelsea has made a strong showing that the underlying merits favor Chelsea. Chelsea has more than satisfied the First Circuit's test in *Teamsters* that it "possesses a potentially meritorious claim or defense which, if proven, will bring success in its wake." *Id*. at 21.

The only other case cited by the Department—*Grievance of Merrill*, 157 Vt. 150, 153, 596 A.2d 345, 347 (1991)—also underscores why Chelsea's motion should be granted, especially because it is a Vermont case. In *Merrill*, the Vermont Supreme Court ordered the Vermont Labor Relations Board ("VLRB") to rule on a rule 60(b)(6) motion to reopen. The VLRB upon remand granted the rule 60(b)(6). The basis for the grant of the rule 60(b)(6) motion was to correct an error in the original judgment. Thus, an error in the original judgment was sufficient on its own to grant the rule 60(b)(6) motion. The error alone equated to injustice or hardship. The *Merrill* standard is easily met here for the reasons argued in Chelsea's motion.

Moreover, here it would be unjust and a hardship for Chelsea to carry the burden of the First CPG Order.[1] As even the Department concedes in its objection, the Project in Case 17-5024 is a continuation of the same 2.0MW project in docket 8302. In docket 8302, the Department executed a memorandum of understanding agreeing that the Project satisfied all relevant section 248 criteria.

One of the hardships and injustices is, as noted by the Department, its filing testimony adverse to the Project, even though the Project is smaller and less impactful than the original design. There is no reasonable basis on which the Department can claim *in good faith* that the smaller design could result in a complete 180-degree turn in its position. Such behavior by governmental entities is given no quarter by the courts. *See, e.g.*, *W.V. Pangborne & Co. v. New Jersey Dep't of Transp.*, 116 N.J. 543, 561-562 (N.J. 1989) ("[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.") (internal citations and quotations omitted.); *United States v. Vaval*, 404 F. 3d 144, 152 (2d Cir. 2005) (A reviewing court must not hesitate to examine the conduct of the government to ensure it "comports with the highest standard of fairness.")

Chelsea also disputes the Department's factual premise that the memorandum of understandings between the Department and Chelsea terminated as a result of the First CPG Order. The agreements between Chelsea and the Department are memorialized in (i) that certain Partial Memorandum of Understanding, dated as of February 9, 2016, between the Chelsea and the Department (the "First Department MOU"), and (B) that certain Second Partial Memorandum of

[1] Unless otherwise stated, capitalized terms have the meaning ascribed in the Chelsea second rule 60(b)(6) motion.

Understanding, dated as of June 17, 2015, between the Petitioner and the Department (the "Second Department MOU" and together with the First Department MOU, the "Department MOUs").

The Department MOUs make it clear that (i) all issues regarding the Project as between Chelsea and the Department had been resolved[2], (ii) the Department would not object to any prefiled direct and supplemental testimony and exhibits of Chelsea[3], (iii) Chelsea's filings (as modified by the Department MOUs) complied with each of the Section 248 criteria[4] and (iv) the Department supports the Project.[5]

There is no dispute as to the validity and enforceability of the MOUs when executed. The MOUs can only be terminated if the Commission fails to approve *the MOUs* in all material aspects.[6] The Commission, however, in the First CPG Order, specifically accepted the MOUs "with all of their provisions and conditions without material change or condition".[7] Thus the Department cannot ignore its specific agreements to support the Project in the MOUs.

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[2] "The Parties have discussed various aspects of the Project and have resolved all outstanding issues between them related to the solar array portion of the Project…" ¶2 page 1 of the First Department MOU. "The Department and the Petitioner have now resolved all outstanding issues between them related to that portion of the Project involving the Green Mountain Power distribution line extension and placement of utility poles on the Project site…" ¶4 page 1 of the Second Department MOU.

[3] "All prefiled direct *and supplemental testimony* and exhibits of Chelsea Solar, this MOU and the Petition shall be admitted without objection…" §1 of the First Department MOU (emphasis added).

[4] "The Stipulating Parties agree that the filings described in paragraph 1 above, as modified by the terms and conditions of this Stipulation comply with each of the section 248 criteria…" §1 of the First Department MOU.

[5] "Should the Board waive PUC Rule 3.500 with respect to compliance with the NESC, the Department supports the project so long as Chelsea Solar asserts the project complies with the NEC.

[6] *See* §8 of the First Department MOU, §9 of the Second Department MOU, and Finding 149 of the First CPG Order.

[7] *See* Section VIII. of the First CPG Order, "The finding, conclusions and recommendations of the Hearing Officer are hereby adopted, except as rejected above." The recommendation of the Hearing Officer to accept the MOUs with all of their provisions and conditions without material change or condition (page 47 of the Proposal for Decision, which is part of the CPG Order) was adopted by the Commission.

Because the findings adopting the MOUs with DPS were part of the First CPG Order, DPS is precluded from taking any new and different positions here to collaterally attack the Project, unless it can clearly demonstrate the issue relates solely to the amendments. *See, In Re Dunkin Donuts SP Approval*, 2008 VT 139, ¶12 ("*Dunkin*")

> [w]e have often indicated that a stipulated agreement incorporated into a court order has *the same* preclusive effect as a final judgment on the merits. *See, e.g., Pouech v. Pouech,* 2006 VT 40, ¶20, 180 Vt. 1, 904 A.2d 70 ("Once a stipulation is incorporated into a final order, concerns regarding finality require that the stipulation be susceptible to attack only on grounds sufficient to overturn a judgment.")

(emphasis in original.)

In the case of the MOUs with DPS, those MOUs were approved, *see* First CPG Order, Findings 148, 149 and Ordering Para.1, and were relied on for other Findings (*e.g.* Findings 69, 79, 90, 116, 127, 128). *See also* First CPG Order at 24 and 57 at fn. 46.)

Granting Chelsea's motions will also save the Commission and the parties time and effort. For example, if Chelsea's motions are granted:

1. The issue of vested rights before the Commission would become moot, with the Project being reviewed automatically under the law as it existed in 2014;
2. The Commission would not need to address the reliability and methodology of David Raphael's testimony under *Daubert* because, as the Department concedes, if the motions are granted the Department would be estopped from filing testimony adverse to the Project; and
3. The Commission would not have to address whether the filing of testimony by the Department violates the MOUs and should be stricken.

As Chelsea has argued the correct standard is the *Rufo* standard, which the Department failed to address in its objection. The Commission's order issued on July 10, 2018, in Case 18-

2660-INV, underscores the substantial and immediate public interest involved under *Rufo*:

> Scientists agree that the earth has been and continues to be experiencing a period of climate change that features an increase in average temperatures. These same scientists are also confident that the cause of this climate change is mainly due to human activities, in large part the burning of fossil fuels, which releases greenhouse gases ("GHGs") into the atmosphere, trapping heat.
>
> Global climate change has already begun to have effects on the natural environment in the form of shrinking glaciers, earlier ice breakup on rivers and lakes, shifting plant and animal ranges, loss of sea ice, sea-level rise, drought, severe storms, and longer, more intense heat waves. Scientists are confident that temperatures will continue to rise for decades with associated long-term effects, including changes in precipitation patterns, a further increase in drought and heat waves, intensifying hurricanes, and accelerated sea-level rise.
>
> How much the world's climate will change depends on the amount of GHG emissions and exactly how they interact with the climate. In spite of an increasing awareness regarding our GHG emissions and their impact on the climate, our emission levels continue to increase. Combatting the effects of climate change in part requires mitigation strategies. Mitigation strategies are those strategies designed to curb the level of human-induced GHG emissions into the environment.

(internal footnotes omitted.)

As Chelsea has argued under the *Rufo* standard, Chelsea's motions should be granted—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 as argued in Chelsea's motion. The public interest in deploying renewable energy to combat climate change is extraordinarily high. There has also been a significant change in the facts and the law as argued in Chelsea's motion.

Moreover, Chelsea's motion easily passes muster under the *Merrill* case (relied upon by the Department). In *Merrill* a mere error was sufficient, and that as Chelsea has argued is certainly present here.

CONCLUSION

For the reasons stated above and in Chelsea's motion, the Commission should grant the 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.

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Respectfully Submitted,

/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

CERTIFICATE OF SERVICE

I hereby certify that I have 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

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