

**STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION**

Petition of Chelsea Solar LLC, pursuant to 30	)	Case No. 17-5024-PET
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	)	

CHELSEA SOLAR LLC’S REPLY BRIEF ON VESTED RIGHTS

The Town glosses over two crucial factors. *First*, the Chelsea Solar LLC (“Chelsea”) solar project is now *and has always been* a 2.0-megawatt AC solar electric generating facility sited on parcel of land located between Willow road and the Apple Hill neighborhood. (the “Project”). If the “changes” such as tilt angle, row spacing, module wattage, fence height, reduced footprint, reduced clearing, and a different access made a project a completely new electric generating facility, the ability to build new facilities in Vermont would grind to a halt. The result would be a never-ending “procedural ping-pong match”—a possibility the Vermont Supreme Court has rejected out-of-hand. *See In Re Chaves A250 Permit*, 2014 VT 5 (2014) (“*Chaves*”) at P16. The only change to the Project outside the original footprint is the access driveway, which was relocated from the north to the south to accommodate the concerns of neighbors, and which the Vermont Supreme Court has already held is of the kind that does not cause a loss of rights to a permit application. *Id.* at P 17-18. *Second*, in response to Chelsea’s first rule 60(b) motion and amendment, the Public Utility Commission (“PUC” or the “Commission”) invited Chelsea to forego its appeal and bring its amended Project back to the Commission. In doing so the PUC set forth the procedural path of refiling the docket 8302 testimony and testimony covering the changes to the Project in ePUC as a new case. Docket 8302 was not an ePUC case, and as a practical

matter, the new procedural path of opening a new case number in ePUC with the prior docket 8302 testimony was also a function of the new ePUC filing system.

As the hearing officer's well-reasoned order of May 17, 2018 (the "May 17 Order") correctly concludes, the Commission's October 12, 2017 Order (the "October 12 Order") "was clearly intended to allow Chelsea to refile its petition and have that petition treated as a continuation of the previous petition, and *Chelsea took actions in reasonable reliance on that Order.*" May 17 Order at 5 (emphasis added.) Crucially, as the hearing officer observed, "the refiled petition does not request approval for a larger project, but instead proposes a project that has a significantly smaller footprint and thus raises fewer concerns for neighbors and other interested parties." *Id.* Echoing the standard of the Vermont Supreme Court in *Chaves*,¹ the hearing officer stated: "It would be bad policy if vested rights were available only if a landowner refuses to make reasonable changes to a project to accommodate the concerns of others." May 17 Order at 5.

The changes here are all designed to lessen impacts, just like in *In re Jolley Assocs. (Town of Shelburne)*, 2006 VT 132 ("*Jolley*"), while retaining the same 2.0MW AC solar electric generating facility. As the Vermont Supreme Court explained in *Chaves*, the decision in *Sisters & Brothers*, 186 Vt. 103, 2009 VT 58, also show that the changes here are of the type that supports the conclusion that pre- and post-changes it is the same project for permitting and vested rights purposes. *See Chaves* at P13. In *Sisters & Brothers*, because the "[t]he revisions proposed in the settlement did not change the nature of the permit requested, alter the location of the project, or increase the scope of the project," the changes were insubstantial. *Chaves* at P14. In fact, as here, several of the changes involved mitigating efforts, which reinforces the fact that the Project as

¹ *See, Chaves* at P16 ("Applicants are encouraged to resolve differences with interested parties by amending a project to respond to issues.")

reconfigured is a continuation of the original project. Also here, as in *Chaves*, the project access point was changed from the south to the north (whereas here it has been changed from the north to the south). *Id.* at 14-15. The neighbors complained that the change in the access point increased the project's impact on them. *Id.* The Vermont Supreme Court squarely rejected the notion that these types of changes are substantial:

That the changed entry point may now impact neighbors more particularly does not amount to a substantial change in the project itself. The question is whether the scope of the project has been substantially changed or the nature of the permit has changed. Here, the changes did not reach the magnitude of a substantial change.

Id. at 15.

As to the Town's interpretation of *Jolley*, Chelsea has sufficiently rebutted those arguments in its opening brief. The Town simply misapplies *Jolley*. The hearing officer correctly recognized that "[t]he Commission's offer to reconsider the Chelsea project is akin to the denial without prejudice addressed in the *Jolley* decision because Chelsea could similarly reasonably rely that the Commission's denial of Chelsea I would not prevent Chelsea from applying for review of the amended Chelsea II petition," *id.* at 8, and that the type of changes are not of the kind to cause a loss of vested rights. *See*, May 17 Order at 9 ("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 Town's arguments regarding the Commission's October 12 Order also miss the mark for the reasons Chelsea has already argued in its opening brief. The May 17 Order correctly concludes the October 12 Order "was clearly intended to allow Chelsea to refile its petition and

have that petition treated as a continuation of the previous petition, and *Chelsea took actions in reasonable reliance on that Order.*” May 17 Order at 5 (emphasis added.)

The Town also overstates the effect of the denial of Chelsea’s first rule 60(b) motion and the denial by the Vermont Supreme Court of Chelsea’s motion for remand to present new evidence. As to the former, the Commission denied it on jurisdictional grounds at the urging of the Town. Thus, no ruling on the merits was made. But then the Commission invited Chelsea to withdraw its appeal, which would reestablish jurisdiction with the Commission so that the Commission could in fact consider the reconfigured Project. As to the latter, there is no indication why the Court denied the motion. The Court may have denied the motion for any number of reasons. Without a written opinion it is impossible to read any tea leaves to haphazard a guess. One plausible reason is that the Court believed no further evidence would be needed to decide the case. Another plausible reason is that the Supreme Court wanted to hear the case. The most recent trip to the Supreme Court was preceded by the 2014 decision in *In re Programmatic Changes to the Standard-Offer Program*, 2014 VT 29 (2014). The 2014 case involved whether the Chelsea Project and the neighboring Apple Hill solar project were separate “plants” for purposes of the standard-offer program. Originally that appeal was assigned for decision by a three-judge panel of the Supreme Court. But the Supreme Court obviously wanted to have the case heard by the full Court in order to issue a precedential decision so it *sua sponte* moved the case from the three-judge panel docket to the full court docket, and then unanimously reversed. In any case, the one sentence denial of a new evidence motion pursuant to a statute not relevant here—3 V.S.A. §815(b)—is wholly irrelevant to Case No. 17-5024-PET.

Finally, instead of addressing the crucial factors, the Town resorts to its by now familiar tactic of statistician—recounting pages, filings and even extensions of filing dates. But the Town’s

statistical complaints are largely a bed of its own making. If the Town had not sent the one-page, knowingly falsely-based letter to the Commission in October 2015, then the certificate of public good (“CPG”) for the Project would likely have been issued. The Town also had the opportunity to correct the record during the post-order motion phase in docket 8302. The Town could have, should have and had a duty to, set the record straight that commercial ground-mounted solar was in fact *not prohibited* in the Bennington Rural Conservation district. Instead the Town aggressively sought to uphold the docket 8302 February 16, 2016 first CPG order on bases that it knew, and has subsequently conceded through the sworn deposition testimony of Daniel Monks, were not even credible.

CONCLUSION

For the reasons stated above, in Chelsea’s opening brief and in the May 17 Order, Chelsea is entitled to vested rights as of a date no later than June 19, 2014.

Respectfully submitted,

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