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 REPLY TO THE OBJECTION OF THE TOWN OF BENNINGTON TO THE MOTION UNDER RULE 60(b) AND MOTION TO CONSOLIDATE

As provided by rule 2.105 of the Vermont Public Utility Commission (the "Commission") and VRCP 78(b)(1), Chelsea Solar LLC ("Chelsea") files this response to the objection filed by the Town of Bennington (the "Town") to Chelsea's second rule 60(b)(6) motion and motion to consolidate.

The most obvious deficiency in the Town'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 *Rufo* standard is not constrained by a one-year time limitation. Moreover, the facts and circumstances here do not neatly fit into any of the first three clauses of rule 60(b).

The Town also fails to address Chelsea's motion in the context of the non-*Rufo* situations. *See,* Chelsea Motion at 6. Instead the Town bases its opposition solely on its allegations that the

issues have been decided. Under that logic there would never be a need for Rule 60 because, by definition, the movant seeks relief from a prior decision.

The Town overstates the relevance 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 2.0 MW 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.

The case relied on by the Town—*Iannarone v. Limoggio*, 2011 VT 91—is inapposite. *Iannarone* involved a family law proceeding, an area where the Court has noted: "there is no area

of the law requiring more finality and stability than family law." *Id*. at 17. (internal quotations and citations omitted.) *Iannarone* does not apply here for the simple reason that the facts are not analogous. In *Iannarone* the Court applied claim preclusion in a subsequent action between the wife and the husband. The case involved a 2008 action that sought to relitigate issues from a 2005 action. The wife did not seek to obtain relief from the 2005 action, as would be the equivalent of what Chelsea seeks here.

The Town's other estoppel arguments fare no better. If a party were estopped from seeking relief under rule 60 because an issue had been decided, there would not be a need for Rule 60 because, by definition, the movant seeks relief from a prior decision. Law of the case is similarly inapplicable for the same reason and, *inter alia*, the reasons advanced by the Town in its April 28, 2016, opposition to Chelsea's motion to reconsider in response to Chelsea's assertion that the Commission had determined in four prior cases that the Town Plan did not include a clear, written, unambiguous community standard applicable to the RCON zone. *See*, Town of Bennington Opposition to Motion to Reconsider, April 28, 2016 at 11:

> even if a precedent were directly on point, an agency can depart from prior precedent provided that the new decision contains a reasoned explanation. *New York & Atlantic Railway Company v. Surface Transportation Board*, 635 F.3d 66 (2d Cir. 2011) (construing federal Administrative Procedures Act); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 389 (D. Conn. 2008) (upholding administrative decision on the ground that it was well reasoned).

Similar precedent abounds. "An initial agency interpretation is not instantly carved in stone"; the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis[.]" *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 863-64 (1984)). *See also, e.g., Davila-Bardales v. I.N.S.*, 27 F.3d 1, 5 (1st Cir. 1994) ("If an administrative agency decides to depart significantly from its own precedent, it must

confront the issue squarely and explain why the departure is reasonable."); *FCC v. Fox TV Stations, Inc*., 129 S. Ct. 1800, 1813 (2009) ("the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so.") However, to prevent a claim it was acting in an arbitrary or capricious manner, where an agency changes its interpretation, the agency must show awareness of a change from a prior decision and give a reasoned explanation for the adoption of the new interpretation. *FCC v. Fox TV Stations, Inc*, 556 U.S. 502, 515-16, 129 S. Ct. 1800 (2009). That is the only requirement here—the Commission must recognize the interpretation was different than the first CPG order of February 16, 2016 (the "First CPG Order") and give a reasoned explanation. Of course, the bases for a different interpretation are numerous as Chelsea has argued.

The Town claims that the Commission "did not rule out commercial solar development as one" permitted use in the Bennington rural conservation district ("RCON"). The Town's claim is manifestly erroneous. In both the First CPG Order and the Order Denying Chelsea Motions dated April 14, 2017 (the "Motions Order"), the Commission made it clear that it concluded that commercial scale solar was prohibited RCON. *See, e.g.,* 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.") (emphasis added.)

At the end of its opposition, the Town concedes that if case 17-5024 is viewed as a continuation of docket 8302, a proposition that the hearing officer has already ruled is the case, then the Town's only remaining argument is the law of the case doctrine. But as argued above, that doctrine does not apply.

Finally, the Town's complaints regarding the filings regarding the Chelsea Project 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 RCON district. Instead the Town aggressively sought to uphold the docket 8302 First CPG Order on bases that it knew, and has subsequently conceded through the sworn deposition testimony of Daniel Monks, were not even credible.[1] Indeed, the Town makes no secret of its selective, *ad hoc* use of its purported goals and standards.[2]

CONCLUSION

For the reasons stated above, in Chelsea's motion, and in its reply to the Department's objection, 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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[1]*See also*, Exhibit CS-BW-12, Transcript, August 14, 2017, Select Board hearing at 21 ("the Town Plan [can]not [] 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.")

[2] *See, e.g.*, the selectboard meeting of September 14, 2015, discussing screening ordinances, available at: https://youtu.be/7ZV-kxuqUNo?t=1h41m17s. Daniel Monks concedes that the Town selectively applies the "material in the Town Plan and in the Scenic Resource Inventory" based upon how the selectboard feels about a particular project. Monks states: "We already have an immense amount of material in the Town Plan and in the Scenic Resource Inventory that does protect us, if we choose to argue that case. Now, *often times we choose not to because we think the project is okay*, but there's lots in there that gives us tools to work with as far as solar's concerned." (emphasis added.)

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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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