

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 on Willow Road in Bennington, Vermont	
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**THE DEPARTMENT OF PUBLIC SERVICE’S
PROPOSED FINDINGS OF FACT AND INITIAL BRIEF**

The Vermont Department of Public Service (“Department”), by and through the undersigned counsel, hereby submits its Proposed Findings of Fact and Initial Brief in the above-captioned proceeding. This case involves a petition filed by Chelsea Solar LLC (“Chelsea”) with the Vermont Public Utility Commission (“Commission”) requesting a certificate of public good (“CPG”) under 30 V.S.A. § 248 for the proposed construction and operation of a 2.0 MW solar electric generation facility in Bennington (the “Project”). The Project has significant impacts on the relevant 30 V.S.A § 248 criteria, specifically § 248(b)(1) – orderly development of the region, and § 248(b)(5) – aesthetics.¹ The Project is incompatible with the rural character of the region, is inconsistent with the overarching land use goals of the community, and does not reflect the existing and desired land use patterns of the area that make it consistent with the development of the region. Furthermore, without adopting certain mitigation measures, the Project will have an undue adverse impact on aesthetics. For the reasons set forth below, the Department recommends that the Commission deny Chelsea a CPG.

¹ The Department limits its findings to the potential impacts of the Project with respect to aesthetics and orderly development of the region pursuant to 30 V.S.A. § 248(b)(1) and 30 V.S.A. § 248(b)(5).

I. Procedural History

On November 29, 2017, Chelsea filed a petition requesting a CPG for the Project.

On December 4, 2017, the Commission issued a notice of complete petition for the Project.

On January 1, 2018, the Town of Bennington (“Town”) filed an emergency motion to stay the proceedings. The Commission denied the Town’s motion on February 14, 2018.

On February 15, 2018, Libby Harris filed a motion to intervene. The Commission granted that motion on March 2, 2018.

On March 2, 2018, a prehearing conference was held.

On March 9, 2018, Chelsea filed a brief in support of its proposed schedule wherein it argued that it had a vested right to a review of its Petition under the 2010 Bennington Town Plan (“Town Plan”) because the Petition is a reconsideration of Chelsea’s petition in Docket 8302 (“Chelsea I”), which was filed on June 19, 2014. The Commission granted Chelsea’s request on May 17, 2018.

On March 19, 2018, Apple Hill Homeowner’s Association (“AHHA”), represented by Lora Block, filed a motion to intervene. The Commission granted that motion on April 13, 2018.

On March 21, 2018, a prehearing conference order was issued that established dates for a site visit, public hearing, and deadlines for the initial phases of the proceeding.

On April 9, 2018, Chelsea filed a motion to amend the schedule in this proceeding. On April 12, 2018, the Commission denied Chelsea’s motion.

On April 17, 2018, a site visit and public hearing were held.

Also on April 17, 2018, Libby Harris and AHHA filed an objection to the admissibility of the prefiled testimony of Brad Wilson filed on behalf of Chelsea. The Commission overruled the objection on June 5, 2018.

On April 19, 2018, Roberta Caslin filed a motion to intervene. On April 20, Maru Leon, representing the Mt. Anthony Country Club, and David Griffin filed a motion to intervene. On April 24, 2018, Caroline McEver filed a motion to intervene. The Commission collectively granted the motions to intervene on May 30, 2018.

On May 23, 2018, the Town filed a motion for leave to take interlocutory appeal of the hearing officer's May 17, 2018 Order granting Chelsea's request that it has a vested right to review of its Petition under the 2010 Town Plan. The Commission granted the Town's motion on June 14, 2018.

On June 19, 2018, Libby Harris, Caroline McEver, Roberta Caslin, and David Griffin (the "Movants") jointly filed a motion to quash notices of deposition served on them by Chelsea requiring them to travel beyond 50 miles in violation of V.R.C.P. 45(c)(3)(A). The Commission granted the Movants' motion on June 29, 2018.

On June 22, 2018, Chelsea filed a memorandum of understanding ("MOU") between Chelsea and the Vermont Agency of Natural Resources.

On June 27, 2018, the Town filed a motion for a protective order precluding Chelsea from taking the deposition of every individual member of the Town's Selectboard. The Commission granted the Town's motion on August 7, 2018.

On June 28, 2018, Roberta Caslin and Caroline McEver filed withdrawals of appearance in the proceeding.

On July 5, 2018, Libby Harris, AHHA, and the Mt. Anthony Country Club filed a motion to quash new notices of deposition served on them by Chelsea and a motion for a protective order. The Commission denied their motion on July 31, 2018.

On July 23, 2018, Chelsea filed a motion to exclude the prefiled testimony of the Department's expert, David Raphael. The Commission denied Chelsea's motion on August 13, 2018.

On August 3, 2018, the Department filed a motion to quash a notice of deposition served on the Department by Chelsea. The Commission granted the Department's motion on August 27, 2018.

On August 5, 2018, Libby Harris, AHHA, and the Mt. Anthony Country Club filed a motion for reconsideration of the Commission's July 31, 2018 order denying their motion to quash and motion for protective order. The Commission denied their motion for reconsideration on August 31, 2018.

On August 20, 2018, a site visit was held.

On August 30, 2018, the Commission affirmed the hearing officer's May 17, 2018 order ruling that Chelsea had a vested right to the laws in effect at the time Chelsea filed the Chelsea I petition on June 19, 2014.

On August 31, 2018, Libby Harris filed a withdrawal of appearance in the proceeding.

On September 17, 2018, the Town filed a withdrawal of appearance in the proceeding and withdrew the prefiled testimony of its witness Daniel Monks.

On September 19, 2018, Chelsea filed an MOU between Chelsea and the Town.

On September 20-21, 2018, the Commission conducted an evidentiary hearing.

II. Review of the Project Under the Section 248 Criteria

a. 30 V.S.A. § 248(b)(1) – Orderly Development of the Region

i. Proposed Findings

1. The Project will unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of the affected municipality. This finding is supported by findings 2 through 8, below.

2. The Project site is identified in the Town Plan as part of a Rural Conservation District. The purpose of a Rural Conservation District is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development. Exh. PSD-DR-2 at 5.

3. Specific design standards articulated in the Town Plan state that development in Rural Conservation Districts cannot be sited in “prominently visible locations...and must minimize clearing of natural vegetation.” Exh. PSD-DR-2 at 31.

4. The Project site is part of an identified scenic resource area referred to as a gateway. Gateways enhance the character of a community and can be improved upon with effective land use planning. Important gateways located near the Project site include those along Route 9 from the east and west, along Route 7 from the north and south, and Route 279 to the southwest. Exh. PSD-DR-2 at 7, 32.

5. Approximately 9.64 acres of existing vegetation will be cleared prior to Project construction. Exh. PSD-DR-2 at 2.

6. An existing vegetated buffer will remain on boundaries to the north, west, and south of the proposed site. No buffer will remain on the eastern boundary. The portion of forest located along the northern and eastern boundaries of the highway corridor, where the Project is located,

serves as a buffer for the undeveloped and rural qualities of the Rural Conservation District.

Exh. PSD-DR-2.

7. The Bennington County Regional Plan and the Bennington Regional Energy Plan articulate a number of goals supporting development of local renewable energy resources. Exh. PSD-DR-2 at 32-33.

8. The Town Plan contemplates and recommends several characteristics for land use within the Rural Conservation District while also seeking protections for the Town's scenic resources. Exh. PSD-DR-2 at 22.

ii. Discussion

Before issuing a CPG for an in-state facility pursuant to Section 248(b)(1), the Commission must find that the facility:

[W]ill not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.²

Orderly development refers to the systematic planning and development of land uses and associated infrastructure in a region or municipality. It is based on a legal process that sets forth land use parameters and regulations to guide future development in a pattern envisioned and adopted by the jurisdictional authority.³

The Town Plan qualifies as a plan requiring due consideration in the orderly development analysis.⁴ It identifies the Project site as being within a Rural Conservation District.

² 30 V.S.A. § 248(b)(1).

³ Exh. PSD-DR-2 at 30.

⁴ The Department's conclusions are based on the testimony of the Department's expert witness, David Raphael, whose analysis was based largely on the Town Plan and filed with the Commission before the Town of Bennington entered into a settlement agreement with Chelsea. For purposes of this initial brief, the Department references the Town Plan (entered into evidence as Exh. CS-BW-81) in its orderly development and aesthetics analyses.

Considerable acreages of agricultural land, extensive woodlands, and low-density residential development exist in Rural Conservation Districts, the purpose of which is to preserve the distinctive rural character while accommodating low-density residential development.⁵ The purpose, intent, and other guidance in the Town Plan regarding acceptable land uses in the Rural Conservation District is therefore critical to the orderly development analysis. The Town Plan states that development of renewable energy resources in the Rural Conservation District must balance the need for locally-produced energy with the need to protect natural and scenic resources. Furthermore, renewable energy projects must be planned in a manner that preserves the visual integrity of scenic elements and reflects the existing and designed land use patterns of the area.

Here, clearing 9.64 acres of forest for the Project conflicts with the Town's intent for appropriate uses in the Rural Conservation District because it will create an industrial affect to the land. For the same reason, the Project as proposed contradicts the intent of the Town Plan to protect scenic resources, most significantly scenic gateways. Finally, keeping the site intact is essential in order to keep consistent with the land use patterns of the area because the site currently acts as a boundary between the highway infrastructure and the Rural Conservation District.⁶ The Project will therefore unduly interfere with the orderly development of the region.

b. 30 V.S.A. § 248(b)(5) – Aesthetics

i. Proposed Findings

9. The Project as proposed will have an undue adverse impact on aesthetics and on the scenic and natural beauty of the area. This finding is supported by findings 9 through 23, below.

⁵ Exh. PSD-DR-2 at 31.

⁶ Exh. PSD-DR-2, at 35-36.

10. The Project site is currently wooded and undeveloped. The site slopes at a 9% grade from the northeast corner to the southwest corner, falling approximately 80 feet over this distance. Exh. PSD-DR-2 at 6.

11. The area to the south and west of the proposed Project includes US Route 7, the Route 7 and VT 279 interchange, and the Vermont Welcome Center. The Welcome Center is located about 1,000 feet south of the proposed Project site, the views from which are considered important to the Town of Bennington's gateways. Exh. PSD-DR-2 at 7.

12. The area to the north and east of the site contains a forested buffer, the residences of the Apple Hill neighborhood, and a former apple orchard. It is generally a low-density residential development within a quiet, wooded setting. The nearest residence is about 280 feet to the proposed Project fence on the north, and another dozen residences are within about 600-1,000 feet of the proposed Project site. Exh. PSD-DR-2 at 8.

13. There will be limited visibility of the Project from the south and west where highways and commercial and industrial development are prevalent. There may be minimal visibility from the Vermont Welcome Center or the roadway, but the Project is sufficiently separated by topography and existing vegetation and is compatible with the development patterns that are already present and visible in the area. Important off-site locations such as Willow Park and the Downtown Bennington Historic District will have no visibility. Exh. PSD-DR-2 at 8, 13.

14. It is possible that the Project will be visible from important long-distance viewing locations like White Rocks lookout or the Bennington Battle Monument. However, the Project will be low in height and will not occupy a wide panorama view so as to be better absorbed into the background of the adjacent vegetation, topography and hills. Furthermore, the viewing angle, scale, size and

distance of the Project will be so small and minor in the wide panorama view essentially rendering it insignificant. Exh. PSD-DR-2 at 10, 13.

15. The Project will be directly visible from nearby residences, most of which are oriented toward the Project and in the direction of views to Mount Anthony Country Club and the Bennington Battle Monument. This includes two homes directly adjacent to the Project site on the north and one to the northeast at the end of Apple Hill Road, which will have the highest visibility. Other residences located upslope from the Project could have filtered views of the Project, particularly during leaf off conditions. Exh. PSD-DR-2 at 14.

16. The colors and materials proposed for the Project will aid in helping the Project blend into the landscape. The solar panels will be black and attached to a fixed mounting system composed of gray steel and aluminum support pieces. The metal/gray color of the frames and racks that support the panels are less visible and often blend in with surrounding ground cover, trees, buildings, and background landscape, even in the winter. The Project will be surrounded by a 10-foot high black chain-link fence with black mesh fabric, which typically blends well into background elements and is a suitable color and material. New utility poles and electric lines will be of similar type and size as those already present in the area and will not appear out of place or contextually inappropriate. Any potential glare from the panels will be minimal given the nature of solar panels, which is to absorb light rather than reflect it. The panels will also have anti-reflective coatings to reduce potential reflectivity. Moreover, potential for glare at most viewing locations will be mitigated or eliminated due to intervening vegetation and topography and orientation of the panels. This includes views from the residences to the north and east of the Project site. Exh. PSD-DR-2 at 10-11.

17. The Project site will require 9.64 acres of vegetation and forest to be clear-cut. Exh. PSD-DR-2 at 11.

18. The Bennington County Regional Plan (“Regional Plan”) contains broad guidance for land use and development in the region. Exh. PSD-DR-2 at 33.

19. The Project site is identified in the Town Plan as a Rural Conservation District, which is defined as being located outside of urban growth areas and “hav[ing] retained [its] rural and open space character.” The purpose of the Rural Conservation Districts is to “preserve the distinctive rural character of the area.” Development in the Rural Conservation Districts “cannot be sited in prominently visible locations on hillsides...shall utilize earth tone colors and non-reflective materials on exterior surfaces...and must minimize clearing of natural vegetation.” Exh. PSD-DR-2 at 21.

20. Areas in the vicinity of the Project have been designated as scenic gateways important to the scenic quality and visual character of the Town. Exh. PSD-DR-2 at 23.

21. The Project has incorporated several primary mitigation measures, including:

- a. The provision of buffer areas with existing vegetation;
- b. Proposed landscape mitigation measures in two planting zones;
- c. Burial of electrical lines within the Project boundaries;
- d. Selection of “slim mounting brackets” that will allow the array to follow the contours along with dark toned supporting structures;
- e. Wooden poles to connect the Project’s power output to the grid;
- f. Low reflective photovoltaic surfaces for the arrays;
- g. Fencing around the Project boundary; and
- h. Location of inverter skid in an area screened by retained existing vegetation.

Exh. PSD-DR-2 at 26-27.

22. Other reasonable mitigation measures can be employed in order to maintain mitigation for the life of the Project, including:⁷

- a. Post-construction review of all proposed mitigation plantings and addition of plantings on the property or elsewhere to ensure long-term screening if and as necessary;
- b. Post-construction perimeter clearing review for additional loss of vegetative screening;
- c. A specific analysis and mitigation plan for all external elements including the proposed electrical line connection;
- d. Analysis of existing forest vegetation and a plan for long-term conservation and maintenance of all buffer lands that are part of the Project screening elements, including efficacy of screening before and after construction of the Project, and a forest management plan to ensure the ongoing health and growth of the forest cover;
- e. Confirmation that proposed new mitigation plantings that are not on the Project property will be possible to plant and will be maintained in good health and as effective screening for the life of the Project; and
- f. Projection and retention, for the life of the Project, of the apple orchard to the north of the property.⁸

Exh. PSD-DR-2 at 28.

23. Commission Rule 5.800 was adopted to ensure that “all required aesthetic mitigation measures are implemented and maintained for the life of all facilities,” and that steps are taken to

⁷ As part of the Settlement Agreement with the Town, Chelsea has agreed to implement some of these mitigation measures. See September 14, 2018 Settlement Agreement (“Settlement Agreement”), at 3.

⁸ Chelsea agreed to retain the apple orchard for the life of the Project. See Settlement Agreement, at 2.

“improve the harmony of [a] proposed facility with its surroundings...” PUC Rule 5.801 and 5.804(A).

ii. Discussion

The Commission has adopted a modified version of the two-part *Quechee* test for determining aesthetic impact.⁹ The test first asks whether the project will have an adverse effect on scenic and natural beauty in the area in which it is located.¹⁰ It then asks whether the adverse effect is undue.¹¹ An adverse impact on scenic and natural beauty is not undue if three conditions are met:

First, the project must not violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area. Second, it must not offend the sensibilities of the average person. Finally, the applicant...must take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.¹²

Here, the Project will have an adverse effect on the scenic and natural beauty of the area in which it is located for two reasons. First, the Project is located in a Rural Conservation District, the purpose of which is to preserve the distinctive rural character of the area. It can be surmised that development of a solar array in a Rural Conservation District does not preserve the rural character of the area. Second, clear cutting 9.64 acres of vegetation and forest will have a significant impact on open space values, including visual and aesthetic buffering, that the forest currently provides from the north and east portions of the Project site. Even though the area is

⁹ The test is named after the decision that first adopted it, *In re Quechee Lakes Corp.*, Nos. 3W0411–EB, 3W0439–EB, slip op. at 19–20 (Vt. Env'tl. Bd. Nov. 4, 1985).

¹⁰ *In Re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 14, 202 Vt. 59, 67, 147 A.3d 621, 626 (2016).

¹¹ *Id.*

¹² *Id.*

near to the highway and other commercial areas, these land uses are not readily visible or apparent from the northeast. Rather, there is a perception of rurality that is existing and expected.

The Project as currently proposed does not meet the three conditions articulated in the second part of the Quechee test and will therefore have an undue adverse impact on the scenic and natural beauty of the area. While the proposed Project does not per se violate a clear, written community standard,¹³ the Project will offend the sensibilities of the average person because not only will it disrupt an essential gateway, but it will also change the scenic quality and landscape character of the Apple Hill neighborhood. Additionally, as described herein, Chelsea has failed to adopt sufficient, available, and reasonable mitigation measures that a reasonable person would take to improve the harmony of the proposed Project with its surroundings. On its face, the Project would have an undue adverse impact on its surroundings.

However, the Project will not have an undue adverse impact on the scenic and natural beauty of the area if certain steps are taken to ensure such qualities. In order to avoid offending the sensibilities of the average person, measures must be taken to ensure that the gateway environment in which the Project is located remains. Such measures include retaining existing vegetation in order to reduce the visual presence of the 9.64-acre clear cut and ensuring additional screening as explained herein. Furthermore, the mitigation measures as described above and in Commission Rule 5.800, specifically with regard to maintaining mitigation measures for the life of the Project, must be implemented in order to avoid undue adverse impact on the scenic and natural beauty of the area.

¹³ However, it is clear upon review of the various regional and municipal plans that they indicate an intent to preserve rural character, scenic views, and important landscapes in the region through broad goals and policies.

III. CONCLUSION

For the foregoing reasons, the Project as currently proposed fails to meet the necessary criteria of 30 V.S.A. §§ 248(b)(1) and (b)(5) and Chelsea should therefore be denied a CPG.

Dated at Montpelier, Vermont, this 19th day of October, 2018.

Vermont Department of Public Service

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