

**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 the “Chelsea Solar Project,” a)
2.0 MW solar electric generation facility)
located off Willow Road in Bennington,)
Vermont)

Case No. 17-5024-PET

**BRIEF OF APPLE HILL HOMEOWNERS ASSOCIATION and MOUNT ANTHONY
COUNTRY CLUB RE CHELSEA SOLAR 2**

NOW COME Intervenors Apple Hill Homeowners Association (AHHA) represented by Lora Block, *pro se*, and Mount Anthony Country Club (MACC) represented by Maru Leon, *pro se*, and submit the following Brief in support of their position that the petition of Chelsea Solar LLC 2 (CS2 or “the Project”) for a Certificate of Public Good (CPG) authorizing the installation and operation of a 2.0 megawatt (MW) solar photovoltaic electricity generation facility located at 1133 Willow Road Apple in Bennington, Vermont should be denied because the Project would interfere with the Orderly Development of the region, would have undue adverse aesthetic impacts, would harm the economy of Bennington and would have an undue adverse impacts to wildlife, air pollution and water pollution.

In addition, the Project in conjunction with the contiguous PUC-approved Apple Hill Solar Project creates a 4 MW solar array that violates the Vermont Supreme Court’s (SCOV) decision regarding the requirement for separate infrastructure. Also, Petitioner has failed to plant mitigation screening in Case 8225. For all of these reasons, the PUC should deny issuance of a CPG for this Project.

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I. INTRODUCTION

The Petitioner, Chelsea Solar LLC 2 (CS2), proposes to construct one of two contiguous commercial-scale solar electric generating facilities on a prominent hillside in a highly visible gateway area of the Town of Bennington, Vermont. CS2 proposes to clear-cut 9.6 acres of a forested 27 acre parcel of land located in the Rural Conservation District (RCON) owned by PLH LLC. The Project is next to and shares infrastructure with the Petitioner's 2 MW Apple Hill Solar project for which the PUC recently a CPG. The forest currently buffers winds, traffic noise and traffic emissions for the residential community known as Apple Hill immediately

uphill, and is occupied by wildlife, and uncommon, rare or very rare plants. The hillside is prominently visible from nearby locations including the Welcome Center, Orchard Road, Routes 7 and 297, and locations a mile or more to the south, including the Mt. Anthony Country Club, Bennington Battle Monument and Southern Vermont College with its National Historic Register mansion and public hiking trails.

In February 2016, the PUC denied a CPG for an earlier version of this Project on the same site, also called Chelsea Solar, finding that it violated the Town Plan's clear written standard on aesthetics.

The PUC issued a CPG for Apple Hill Solar on Sept. 26, 2018.

Between 2015 and 2017, many of the wells in the AHHA residential neighborhood were found to be contaminated with PFOA. A company has taken responsibility for extending municipal water lines to contaminated properties west of Route 7, but is disputing the cause of the contamination of wells east of Route 7, including the AHHA neighborhood. The company has agreed to pay for design of the water line extension for the AHHA neighborhood, but the project timeline and who will pay for the actual installation is unknown at this time.

AHHA intervened and was granted party status by the PUC on the same criteria as *pro se* Intervenor Libby Harris -- orderly development, public health and safety, aesthetics including wind and noise, and natural resources issues including wildlife, air and water pollution. MACC intervened and was granted party status on the additional criterion of economics. Two other parties intervened *pro se* but withdrew due to the failure of the Hearing Officer to issue a timely decision regarding depositions which Petitioner scheduled for Burlington. Intervenor Harris withdrew after the PUC denied protection from Petitioner's deposition.

AHHA and MACC join in this Brief on the issues in common. MACC's additional criteria are addressed in this Brief following the sections with common interests.

The Town of Bennington intervened and opposed the Project. The owner of this Project and four other projects proposed for Bennington by the same project developer filed a lawsuit in Chittenden Superior Court against the Town of Bennington's Select Board, Planning Commission, individual members of the Select Board, individual members of the Town's Ad Hoc Energy Committee, and the Bennington County Regional Commission. After the Town moved the case to Federal Court, the projects' developer withdrew the lawsuit and subsequently filed a lawsuit in Vermont's Environmental Court against the Town of Bennington's Select Board and Planning Commission and Bennington County Regional Commission. The Environmental Court dismissed the projects developer's lawsuit finding that the Court lacked jurisdiction; however, the Environmental Court denied the Town's request for reimbursement of legal fees. The week before the evidentiary hearing in this case, under duress of Petitioner's extended expensive litigation,¹ the Town of Bennington held an emergency meeting to discuss settlement of this case and the other four projects proposed for Bennington by this project's developer. The Town accepted a payment from Petitioner of \$202,250 to stop the bleeding of funds from town coffers resulting from Petitioner's extensive, excessive, expensive litigation against the Town. Residents of Bennington with no prior knowledge of this Project or the adjacent Apple Hill Solar project are reported to view the Town's actions as caving in to bullies. However, given the highly litigious nature of these developers, as evidenced by the record in this case, and the prospect of the expense the Town would have to incur in responding to Petitioner's

¹ Petitioner for this project is currently also suing VTrans in Superior Court over the setback for one of the five Bennington projects known as Battle Creek 1, for which the PUC has issued a CPG.

seemingly-endless litigation, the Town's decision is to some extent understandable but regrettable. The Town's withdrawal does not mean that the Town supports CS2.

AHHA and MACC oppose the petition on the grounds that the Project in its amended form violates the Town Plan and would interfere with the Orderly Development of Bennington, violates the Rule regarding separate infrastructure, and would have an undue adverse affect on aesthetics, wildlife, water and air pollution, public health and safety, and the economy of Bennington. The Commission should conclude that the Project does not promote the public good, and a CPG should not be issued.

II. Orderly Development Findings of Fact

1. The provisions contained in the Revised Town Plan of Oct. 6, 2015 are nearly identical to the Previous Town Plan, with the exception of a standalone amendment adopted on April 11, 2016. INT Cross 1, p. 2, line 14
2. The Project site is in the Town's Rural Conservation District, "located in valley areas outside the Urban Growth Area which have retained their rural and open space character." Town Plan, at 25
3. "The purpose of the Rural Conservation Districts is to preserve this distinctive rural character while accommodating low density residential development in a manner that avoids the need for public water supply and public sewer systems." Town plan at 25-26.
4. There is a clear, written community standard that is applicable to this case that is contained in the 2010 town plan with regard to the rural conservation district. Buscher, Tr. p. 155 line 21
5. The plan carefully protects prominent hillsides from clearing openings that will stand out and will damage the overall aesthetics of the town. Pft. MACC p. 8, line 12. MACC-ML-7.

6. Specific design standards apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such land and uses provide. INT Cross 1, p. 3 line 11

7. The Town Plan states that:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single-family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation. Town plan at 25-26

8. The current proposal to clear-cut 9.64 acres of mature forest is not consistent with the RCON Design Standards which say that “Development shall be blended into the existing natural landscape to minimize its visual impact from public roads and lands,” calls for “the retention of mature forest cover,” and that “Tree removal shall not cause undue alteration of the natural vegetation patterns of the hillside or ridgeline.” Chelsea Solar does not comply with these standards. Pft. MACC, p. 9, line 12, RCON Design Standards Exhibit CS-BW-26.
9. The Project site is situated in a “gateway to Bennington.” According to the Town Plan: “Special attention should be given to visual gateways: points of transition along a public highway where it is evident that the traveler is arriving at a unique place. Gateways are located at entry points to the historical downtown and at places along rural highways where significant visual elements of the town’s landscape first appear.” Town plan at 41.
10. It is a policy in furtherance of the protection of scenic resources that the Town not only seek to protect, but to enhance visual gateways to the community. INT Cross 1, p. 4, line 4

11. As quite nicely observed from the golf course, the gateway area and this site provides from that distance – about a mile – a really good view of the intact, more or less undeveloped or very low density developed area that this project is part of, and that contributes substantially to the rural character and overall sense that this is an undeveloped hillside that is part of the gateway into the Town of Bennington. Raphael Tr. p. 58 line 25

12. The Town's Scenic Resource Inventory (Exhibit CS-BW-24) is applicable to this Project.

INT Cross 1. p. 3, line 1

13. The Scenic Resources Inventory states:

[A] visual “gateway” can be described as a point along a public highway where it becomes evident that the traveler is arriving at a unique place. Very often gateways are located at a point of transition between the rural countryside and a more developed historic town or village center. In other places they are found where a view that includes locally significant visual elements first appears. **Gateways offer an important first visual impression to a town...**” (Emphasis added) Scenic Resources Inventory at 20

14. The Scenic Resources Inventory continues:

There are a number of gateways in Bennington. Some are located near the outskirts of Town and feature views that include important elements of the local landscape such as the Battle Monument and/or surrounding mountains.... Particularly important gateways are those located along the major state highways entering Town. Gateways along Route 9 from the east and west and along Route 7 from the north and south greet thousands of travelers every day. **The recently opened Route 279 is another important entry point to the Town with natural gateway scenes.** (Emphasis added). SRI at 20

15. Such scenic resources are (unduly) adversely impacted when they are no longer “intact,” but rather broken up by incongruous structures and buildings. SRI at 33-38.

16. “From the north, as Route 7 sweeps around a bend and begins to descend toward the valley, a gateway scene featuring the Battle Monument set against Mount Anthony comes into view in dramatic fashion. This sweeping view is one of the most distinctive in Bennington.” SRI at 20-21

17. The Report from the Applicant's aesthetics expert, Mark Kane, acknowledges that "the primary viewshed for the Project encompasses areas along route 7 and VT 279." (Exhibit CS-MK-2 at 7). These areas are explicitly identified in the Town Plan as "particularly important" scenic gateways, as to which special attention must be given to avoid adverse visual impacts." INT Cross 1, p. 5 line 5
18. In planning for development of the Project area, the Town has emphasized the crucial importance of preserving the scenic quality of this community gateway. INT Cross 1 p. 8, line 7
19. The Town Plan calls for the protection and enhancement of visual gateways in town, including points of transition along a public highway, where significant visual elements of the town's landscape first appear. INT Cross 1. p. 9 line 1
20. The Project would have an undue adverse impact on aesthetics. The scenic quality of the landscape is one of Bennington's most important assets. The Project is sited in a prominent location on a hillside, and is out of character with its surroundings, including the major roadways into town, the Welcome Center, woodlands and limited, well set-back and screened residential areas. INT Cross 1 p. 6. line 17
21. The Project would also significantly diminish the scenic qualities of the area. INT Cross 1. p. 7, line 1
22. Until entering to the 9/14/18 settlement agreement, it was the position of the Bennington Selectboard that it "recommends that the certificate of public good be denied for the Project because the Project would have an undue adverse impact on aesthetics, orderly development of the region, and the public health and safety." INT Cross 1 p. 5 line 12

23. The plans for vegetative screening around the Project, as well as the size and dimension of the Project in conjunction with neighboring, permitted Apple Hill Solar Project, would create significant aesthetic, visual, safety, and environmental impacts, which would involve Route 7, Route 279, and the Bennington Welcome Center, where the general public would be directly affected. INT Cross 1 p. 5 line 15
24. The Project must be considered cumulatively with the Apple Hill Solar Project. INT Cross 1 p. 6, line 1
25. The Project will inevitably cause damage to the environmental, safety, visual, and aesthetic values of the natural and historical surroundings around the Project site. INT Cross 1 p.6 line 11
26. Until the 9/14/18 settlement agreement, The Selectboard opposed the Chelsea Solar Project solar array, as proposed, which viewpoint reflects the opinions of the citizens of the Town of Bennington. INT Cross 1 p. 6 line 11.
27. The large-scale, modern, industrial visual of the proposed solar arrays is inconsistent with the wooded setting of the surrounding area. INT Cross 1 p. 7 line 4
28. The Project will employ “low-reflective” photovoltaic modules which are by definition not non-reflective, as well as a black chain-link fence with black metal posts, which are not earth-tone colors (nor are the modules). INT Cross 1 p. 7 line 13
29. Development in the Rural Conservation District should be designed to preserve the agricultural and forest lands and to protect the extraordinary scenic resources such lands provide. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, and must minimize clearing of natural vegetation. The Project fails to

meet those standards. Thus, the adverse aesthetic impact is undue because it violates clear, written community standards in the Town of Bennington Town Plan and the Scenic Resources Inventory, which are intended to preserve the aesthetics and scenic beauty of the Rural Conservation District and the important scenic gateway areas into Bennington. INT Cross 1 p. 7. line 19

30. The proposed Project contravenes these standards. It is sited in a prominently visible location on a hillside in a gateway area of Bennington. INT Cross 1 p. 9. line 4
31. The project is located in the town's rural conservation district in valley areas outside the urban growth area which have retained their rural and open space character. Buscher, Tr. p. 120
32. The town plan directs different types of commercial and industrial growth to appropriate areas, which do not include Apple Hill. Pft. MACC p. 7, line 11
33. While there are other solar projects in the RCON district referenced by the Petitioner, none of them are visible from the area that is most important to maintain the aesthetic beauty of Bennington. MACC PfSrt, p. 10, A15
34. The Project would unduly interfere with the orderly development of the region. The purpose of the Rural Conservation District in which the Project is sited is to preserve the District's distinctive rural and open space character while accommodating low density residential development. The Town Plan specifies that any development in the Rural Conservation District must protect the extraordinary scenic resources that agricultural and forest lands provide and, further, that it cannot be sited on prominently visible locations on hillsides or ridgelines and must minimize clearing of natural vegetation. INT Cross 1. line 14

35. Planting a huge box wrapped in plastic or poly sheeting in the Rural Conservation District on a prominent hillside will be an astonishing negative sight, out of character for the town and District. Pft. AHHA p. 5, line 19
36. In conjunction with the nearby Apple Hill Project, over 14 acres of natural vegetation would be clearcut. INT Cross 1 p. 9. line 6
37. The Project would abruptly interrupt the intact forest lands with development that is not low density or residential; and so would interrupt the distinctive rural character of the area that is also a visual gateway to Bennington. INT Cross 1 p. 9. line 7
38. Bennington is the regional business, residential, and industrial center; thus the gateways to Bennington serve the entire region – not only the Town. INT Cross 1 p. 9 line 10
39. The Project is inconsistent with the Town Plan and unduly interferes with the orderly development of the Town and surrounding area. INT Cross 1 p. 9 line 15
40. Until the 9/14/18 settlement agreement, it was the Select Board's conclusion that the Project violates every one of the standards set forth in the Previous Town Plan and, as such, it is inconsistent with the land conservation measures contained in the Previous Town Plan. INT Cross p. 9 line 20
41. It quite literally does not comply with the Town Plan. This area was not planned for commercial or industrial development. The proposed project is just that, commercial/industrial development not planned for in this area. MACC PfSrt. P. 9 A13
42. This sudden reversal of the Town's position in terms of the Chelsea Solar project's conformance with the Town Plan is not the result of an oversight or misinterpretation, but is

wholly the result of a financial agreement, having nothing to do with the meaning of the Town Plan language. MACC PfSrt, p. 10 A18

43. The Town has been compromised and cannot be seen any longer as objective in any way with respect to their interpretations of the Town Plan. MACC PfSrt. P. 11, A18
44. The terms of the settlement all happened outside of any public planning or plan development process. MACC PfSrt p. 11 A18
45. The Select Board has yielded the public planning process to the threat of costly, unending litigation by developers who are simply buying away any Town opposition to their business ventures. MACC PfSrt p. 11 A18
46. In February 2016, the PUC denied a CPG for the contiguous Chelsea Solar project finding that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed. PUC Case No. 8302 Final Order, p. 54
47. The PUC found that “the clearing of 10.6 acres of existing vegetation runs directly afoul of this provision [see Finding 14 above] in the Town Plan and its vision for orderly future development.” PUC Case No. 8302 Final Order p. 53
48. The PUC found that “The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted, (2) no development may be sited on prominently visible locations on hillsides or ridgelines, (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures, and (4) any development must minimize the clearing of natural vegetation,”

and “The Project violates three of these four specific requirements in the Town Plan for the development in the Rural Conservation District.” PUC Case No. 8302 Final Order, pp. 56-57.

49. The PUC found that “the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard.” PUC Case No. 8302 Final Order, p. 58

50. The PUC has already decided this case once and denied a CPG for those reasons, finding that the proposed 2 MW solar project violates Bennington’s Town Plan. That issue has been decided already. AHHA Pft. p. 6, line 1

51. The PUC found the testimony of Chelsea’s aesthetics expert “to be an inaccurate description of the Town Plan.” PUC Case No. 8302 Final Order p. 53

Discussion and Legal Standard: Section §248(b)(1) requires the Commission to find, prior to issuing a CPG, that the project will 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. 30 VSA §248(b)(1); In re UPC Vermont Wind, LLC, 2009 VT 19.

While there is undoubtedly both a regional and statewide need for additional renewable energy, this demand should not be supplied by an industrial solar project proposal that will destroy the viewshed of a highly scenic area and negatively affect the existing character and economy of the Town of Bennington.

The Project in original and amended plans is located on the same site in the same area of the Town's Rural Conservation District as the previously PUC-denied Chelsea Solar. If constructed, the Project would unduly adversely impact intact scenic resources upon which Bennington artists and businesses rely for their economic well-being that would be broken up by an incongruous black box structure. Petitioner's plan to clear 9.6 acres on a prominent forested hillside and construct a 2 MW solar array next to another 2 MW solar array, each surrounded by 10 foot tall black (or dark green) fences, violates the Town Plan's specific standards applicable to the Project site.

The Project's amended plan does not cure the issues previously identified by the PUC in its denial of Chelsea Solar. The clearing has been reduced to 9.6 acres which Petitioner attempts to claim minimizes the clearing of natural vegetation, however Petitioner has not reduced the estimate for the time it would take to clear the Project site. 9.6 acres is roughly 1/3 of the total acreage of the Petitioner's parcel on which both Chelsea and Apple Hill Solar are proposed to be sited. With the PUC's approval of Apple Hill Solar, the total clearing and cumulative impact must be considered in this decision. The total cleared area would be the majority of Petitioner's 27 acre parcel. In no way does a clear-cut of that size meet the requirement that development in this area "must minimize the clearing of natural vegetation." By moving the Project closer to the eastern property boundary, more vegetation will be removed, making the residential neighborhood located uphill more vulnerable and visible.

Petitioner attempts to address the Town Plan requirement to "utilize earth tone colors and non-reflective materials on exterior surfaces of all structures" by surrounding the solar array with what amounts to a "black box," a ten foot high fence surrounded by black poly fabric. The fence

itself and the solar panel structures are made of metal and are not “non-reflective.” Petitioner has also changed the color of the panels from blue to black. Regardless of the color, solar panels use glass, which is reflective, on the exterior surface.

Petitioner attempts to address the RCON development restrictions by pointing to two other solar projects constructed in the RCON, Paper Mill (a/k/a Murphy Road) and Kobelia. However, neither of those projects is located on a prominent hillside in this specific gateway area and both of those projects are located on fields that did not require extensive clearing of natural vegetation. Neither of those projects is visible from economically valuable and aesthetically important locations such as the Mount Anthony Country Club and Southern Vermont College.

The Project site is located at the intersection of Route 7 and Route 279 in a Gateway area that is specifically identified in the Town Plan as an important entry point to the Town with natural gateway scenes. Taken together with the Town Plan’s clear written standard that any use in the RCON area “shall” and “must” conform with, the Town has made its intention clear regarding the need to restrict development at the Project site. The Project violates the Town Plan’s clear written standard for the site.

The PUC previously found in Chelsea Solar the Petitioner’s expert’s testimony to be an inaccurate description of the Town Plan.

Because the Project violates the many provisions of the land conservation measures contained in the Town Plan as detailed above and as previously decided by the PUC in denying the CPG for Case No. 8302 for the same site in the same RCON subject to the same standards in the Town Plan, the Commission should find that the Project will unduly interfere with the orderly development of the region pursuant to Section §248(b)(1).

III. Shared Infrastructure

On May 16, 2013, the PUC issued an Order² that grappled with the question of how to treat two contiguous projects located on the same parcel of land that were the lowest bidders in the Standard Offer RFP process. At the time, the project now known as Chelsea Solar 2, which the PUC is now calling Willow Road Solar, was called Bennington Solar. The Order cites the relevant section of law.

Pursuant to Section 8002(14), a "plant" is:
an independent technical facility that generates electricity from renewable energy.
A group of newly constructed facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid.

The PUC denied Apple Hill Solar, one of the two projects, in a 2 to 1 decision that allowed Bennington Solar (then Chelsea Solar, then Chelsea Solar 2, now Willow Road Solar) to proceed,

Because both proposals are located on the same parcel of land and have similar interconnection points, we conclude that the Bennington Solar Project and the Apple Hill Solar Project constitute a single 4.0 MW plant for the purposes of Section 8002(14). However, since the two projects were submitted as separate bids, we conclude that the first project is a valid 2.0 MW project and that the addition of a second project on the same land would render the plant a single 4.0 MW facility. Therefore, we find that the second project does not comply with the statute or Board requirements, and we are removing the proposal with the higher price to adjust the scope of the project to comply with the 2.2 MW per plant limit set by Section 8005a(b). Accordingly, consistent with Section 8002(14), Section 8005a(b) and our Docket 7533 Order, we are accepting only the Bennington Solar Project, which has a lower price, as an eligible plant for the RFP consideration process.

In his dissent³ of May 22, 2013 Board Member Burke cites an October 16, 2009 Order in Docket 7533 which clarified the rules for Standard Offer projects:

I would have disqualified the Bennington Solar Project and the Apple Hill Solar Project proposals since both proposals are located on the same parcel of land

² <http://psb.vermont.gov/sites/psb/files/orders/2013/2013-05/78737874OrderReRFPSelection.pdf>

³ <http://psb.vermont.gov/sites/psb/files/orders/2013/2013-05/7873-7874BurkeOpinion.pdf>

and have similar interconnection points.

...any collection of generation components that meets the definition of a plant, and exceeds the 2.2 MW cap, shall be removed from the queue, although the generation components may reapply for the standard offer if the scope of the project is adjusted to comply with the 2.2 MW cap.

The applicant petitioned the PUC to reconsider, arguing the two projects were

independent technical facilities” because as proposed they would connect with the electric grid through separate three-phase lines, be separated by a fence, **have separate access roads**, use separate inverters, transformers and other equipment, and have different financing parties.⁴ [*emphasis added*]

On June 28, 2013, the Commission issued an Order⁵ again rejecting the two contiguous solar projects on one parcel exceeding the Standard Offer cap of 2.2 MW, stating, “we have made clear that proposed facilities must be sufficiently independent to constitute separate plants.”

Thomas and Michael Melone of Allco Renewable Energy appealed the PUC’s Order on behalf of Ecos Energy LLC. In its Opinion⁶ of March 28, 2014, the Vermont Supreme Court reversed the PUC, finding for the applicant based on the applicant’s representations of the project,

The projects **will not share common roads**, control facilities, or connections to the electric grid. Each of the projects will have a separate interconnection agreement with GMP and separate interconnection facilities designed and owned by GMP, which would limit the capacity of each to 2.0 MW. [*emphasis added*]

The procedural history in this case identifies the criteria necessary for two contiguous Standard Offer projects to be considered as separate plants under 30 V.S.A. 8002(14). The PUC found that “the projects must be sufficiently independent to constitute separate plants.” The

⁴ <http://law.justia.com/cases/vermont/supreme-court/2014/2013-308.html>

⁵ <http://psb.vermont.gov/sites/psb/files/orders/2013/2013-06/7873%267874OrderReEcosRequestForReconsideration.pdf>

⁶ <http://law.justia.com/cases/vermont/supreme-court/2014/2013-308.html>

SCOV reversed the PUC's rejection of one of the two projects, but agreed that the project must "not share common roads".

Chelsea Solar 2 plans to clear the site, construct the project, interconnect with the electric grid and decommission the project utilizing Willow Road, infrastructure shared by the contiguous PUC-approved Apple Hill Solar project. "There are two projects on the same parcel of land." Brad Wilson Tr. p. 315 line 25. "The projects do share infrastructure, and they are under the control of the same parent entity." INT Cross 1 p.6 line 8

The Chelsea Solar "project is accessible by a single public road, Willow Road." Brad Wilson, Tr. p. 263, line 3. Chelsea Solar 2's connection to the electric grid depends entirely on a mile long power line extension along Willow Road which is shared by Apple Hill Solar. Chelsea Solar 2 stretches the definition of "separate plants" by creating two driveways off of Willow Road to access the two projects. "Chelsea and Apple Hill both have private access driveways that connect to Willow Road." Wilson, Tr. p. 281 line 2.

The facts in Cases 8454 and 17-5024 clearly show that both projects are on the same parcel of land owned by the same entity, share the same road, Willow Road, for development of the plant and share the same mile-long power line extension for interconnection to the grid. Apple Hill Solar and Chelsea Solar 2 are functionally one 4 MW solar array. The SCOV based its reversal of the PUC's decision to deny Apple Hill Solar on the representation by Petitioner that the two projects "will not share common roads" or other infrastructure. Now that the PUC has issued a CPG for Apple Hill Solar that utilizes Willow Road as its sole point of access and interconnection, the PUC must find that Chelsea Solar 2 is not independent of Apple Hill Solar and therefore does not meet the requirements to find the Project is in the public good.

IV. Aesthetics

1. Aesthetics, Scenic and Natural Beauty - Findings of Fact

52. The project is being placed within a wooded area. Wilson, Tr. p. 13 line 13
53. The cleared area is 9.64 acres. Wilson Tr. p. 17 line 16
54. The cumulative effect of Chelsea and Apple Hill solar with a clearing of over 19 acres is a concern regarding undue adverse impact. Raphael Tr. p. 130 line 12
55. The clearing of the site which is a “Hillside”, will open up more extensive views from the Country Club and other public areas such as the hiking trails, Lonnie’s Lookout and the Everett Mansion on the campus of Southern Vermont College, as well as Southern Vermont Orchards. MACC PfSrt. P. 4 A8
56. The Chelsea Solar project is not a good fit at this site. Raphael Tr. p. 136 line 23
57. From the golf course you can see the project in its entirety Raphael, Tr. p. 59 line 9
58. Views from Mt. Anthony Country Club are important, it is an important vantage point.
Raphael Tr. p. 128 line 7
59. The views presented by Maru Leon are valid representations of the views of the area.
Raphael Tr. p. 129 line 13
60. The simulations provided by Mr. Kane are not an accurate representation given that they do not use the real landscape that’s present, but created the landscape to simulate the entire landscape and then simulate the changes to the landscape. Raphael Tr. p. 130 line 2
61. Mark Kane’s simulations are not fully accurate simulations of actually what’s there, using model trees, not the real trees that are there, for instance. Raphael Tr. p. 63 line 2

62. Mr. Buscher's simulations looked in two different directions but not straight ahead. Raphael

Tr. p. 129 line 24

63. The distance does not ease the aesthetic effect; it is seen from MACC and farther away.

MACC Pft. P. 5 A12

64. The loss of that green space, that open space, that rural landscape to a project of this scale
will be noticeable and will make a difference and will have a change that will be substantial.

Raphael Tr. p. 59 line 10

65. You don't have to have visibility to find that a project is going to affect your sense of well
being and to that extent your quality of life. Raphael Tr. p. 67 line 3

66. We have to consider all of the senses including your sense of well being and your sense of
place. Raphael Tr. p. 59 line 13

67. The project has the potential to appear as a big black mass. Raphael Tr. p. 117 line 7

68. There are portions of a distribution line that will be installed where there currently is not a
distribution line. Buscher Tr. p. 112 line 18

69. There will be visibility of the new distribution line where there currently is not distribution
line. Buscher Tr. p. 114 line 25

70. The new distribution line would be a new element in the landscape. Buscher p. 115 line 7

71. In winter with snow on the ground there's no question that the project and the array will
stand out more prominently. Raphael Tr. p. 6 line 16

72. There is no mention of the effects of the construction and seasonal views. Raphael Tr. p. 63
line 8

73. There is an important aspect of preserving Vermont's scenic qualities and making sure from public vantage points those views are preserved and at least evaluated. Kane Tr. p. 208 line 2
74. Petitioner did not provide a photo simulation from Southern Vermont College or the Mt. Anthony Country Club. Buscher Tr. p. 172 lines 15 and 18, p. 173 line 4
75. The project is visible from the Bennington Battle Monument. MB-42, p. 20
76. It is very easy to take a photograph from the Bennington Battle Monument, you stick your camera out of the monument. MACC Tr. p. 234 line 8
77. Everybody sticks their cameras out the window of the Bennington Battle Monument, that's the first thing people do. MACC Tr. p. 245 line 8
78. The project would be very visible from many fairways, tee boxes, greens throughout the golf course. MACC PfSrt p. 5 A9
79. The clearing for the solar project and the addition of an industrial element into the view cannot be fixed and will be there for at least 40 years, which is the Petitioner's testimony regarding the project life. MACC PfSrt p. 6 A9
80. The overall effect for visitors, except for the Wal-Mart clearing, is that of natural beauty which is consistent with the Town Plan's Land Use Districts. MACC PfSrt p. 7 A9
81. The Petitioner has submitted no simulations into the record that show what the Project would look like from the Mt. Anthony Country Club or Southern Vermont College. MACC PfSrt p. 7 A10
82. The best views from Southern Vermont College are about 200 yards due North of the mansion and offer a long view North up the valley that do not show much of the

development of downtown Bennington that is visible in a more Westerly or Easterly direction. MACC Pft. p. 5 A8 referring to deposition Exhibit MACC-ML-3, pp. 6-7

83. The view from Southern Vermont College changes a great deal during the winter when the trees are bare. And so that would be a matter of concern. I think at this time of year the views are constrained by the trees a lot, but much less so during the winter.” MACC-ML-3 p. 18

84. The view to the proposed site for the Chelsea Solar arrays is visible from the time you enter the Country Club property. It is seen from multiple angles and locations throughout the golf course. MACC Pft. P. 4 A9

85. Country Club patrons love the views and many times request or book a golf cart to drive around the golf course even though they are not golfers, just to see the views. MACC Pft. P. 4 A10

86. Wedding groups take golf carts to different locations in the golf course to take photographs. MACC Pft. p. 5 A11

87. It is alarming to see that this view from our country club which is over 100 years old will be forever changed, and with the project that goes against our town plan. MACC Tr. p. 255 Line 23

88. While we are concerned with the public realm and the public view it does not mean we exclude consideration of private properties and in particular when they comprise neighborhoods. Raphael Tr. p. 126 line 10

89. There is a clear, written community standard that is applicable to this case that is contained in the 2010 town plan with regard to the rural conservation district. Buscher Tr. p. 155 line 21

90. There is a risk that this project will indeed violate that community standard and undermine the gateway area. Raphael Tr. p. 10 line 11
91. There is some landscaping mitigation that has been proposed on the orchard lot with the view of an adjacent landowner in mind. Wilson Tr. p. 270 line 14
92. That orchard lot is not owned by the Petitioner. Wilson Tr. p. 263 line 23
93. Currently Chelsea Solar, LLC has no rights or control over the orchard lot. Wilson Tr. p. 264 line 11
94. The orchard lot is part of AHHA and AHHA deeds contain a clear restriction against commercial development. Exhibit LB-AHHA1
95. The specific locations for the mesh – opaque mesh screening – has not been finalized or specifically identified. Buscher Tr. p. 99 line 4
96. The mesh screening was an attempt to look at potential mitigation that could or could not be implemented. Buscher Tr. p. 100 line 5
97. The mesh could actually make the fence more apparent. Buscher Tr. pl 100 line 24
98. The views would be assessed post construction and where a mesh would make the project more visible, the mesh wouldn't be used. Where the mesh could be helpful in screening the project it would help mitigate the visual impact of the project. Buscher Tr. p. 100 line 9
99. The western edge may or may not benefit from the fence; the mesh. Buscher Tr. p. 103 line 4
100. Potential visibility would be assessed after the project is constructed. Buscher Tr. p. 103 line 19

101. The mitigation plan of tree and shrub planting cannot camouflage the development; the simulations alleging this are not adequate and are only simulations, not based on actual photographs. AHHA Pft. P. 6 line 7
102. There have been a number of instances in Vermont where large clearings or project areas have been opened up and the consequent degrading of surrounding vegetation that might or might not be relied on for screening it can result in things that we thought weren't going to be seen are now being seen. Raphael Tr. p. 10 line 11
103. The establishment of effective screening is much more of a challenge for any number of reasons. Raphael Tr. p. 113 line 21
104. As evidenced in some instances and cases, a project was approved with mitigation screening required and that mitigation screening either has taken too long to establish, has not established itself effectively, or has failed because of circumstances which aren't always considered. Raphael Tr. p. 113 line 23
105. It is wonderful to say trees are going to block the view, but it does not always take into account how those mitigation plantings are going to be installed and managed and maintained over time. Raphael Tr. p. 114 line 5
106. The mitigation plantings in this project are proposed in areas where there's going to be a lot of shading and so their establishment and growth could be affected by that. Raphael Tr. p. 114 line 12
107. Relying on the mitigation measures of the surrounding buffer is a double-edged sword. Raphael Tr. p. 114 line 16

108. The buffer being relied on could be greatly impacted by conditions beyond the control of the applicant. Raphael Tr. p. 114 line 22

109. Forests in the valley of Vermont or the Champlain Valley are all fighting invasives.
Raphael Tr. p. 115 line 3

110. The buffer contains quite a few ash trees which are under threat. Raphael Tr. p. 115 line 12

111. The integrity, efficacy and longevity of the buffer is a factor that has to be considered.
Raphael Tr. p. 115 line 18

112. Screening in winter is going to be less effective. Raphael Tr. p. 115 line 22

113. Buffers left after clearing don't last because once you remove a forest cover no matter what the integrity or health of that forest is you create gaps that other trees rely on.
Individual trees in a forest, particularly taller ones, rely on each other for support. Raphael Tr. p. 115 line 25

114. The minute you do a large clearcut like is being proposed in this project, you are exposing some of those newly opened up trees to things like sun scald, wind throw, more susceptibility to pests. Raphael Tr. p. 116 line 4

Discussion

Petitioner's 2017 amended Project would be visible on a prominent hillside and requires clear-cutting 9.6 acres of a densely forested and undeveloped 27 acre parcel in a gateway area in the Rural Conservation District of Bennington.

Petitioner's aesthetics expert's minimal number of simulations are drawings that do not accurately portray the views of the site from many of the important vantage points from which

the Project would be visible.

Though Petitioner's aesthetics experts have received a large sum of money for work on CS2, the record contains very few photographic simulations, and the drawings misrepresent the views from Libby Harris's home. Petitioner's aesthetics experts have chosen to focus only on the close-up views from the Welcome Center and have ignored the longer distance views from the hills across town such as the Mount Anthony Country Club and Southern Vermont College.

The record does not contain a single image that simulates what the completed project(s) would look like from the Mount Anthony Country Club one mile away. The PUC denied issuance of a CPG in Case No. NM-6691 (a much smaller project, 144.9 kW), even though the project was proposed to be located 8/10ths of a mile from Mount Philo. The PUC Hearing Officer found that "the record establishes that the Project would be visible within the immediate viewshed looking west from Mount Philo and that the Project would have an adverse aesthetic effect on that view from Mount Philo." Order CPG NO. NM-6691 re: Significant Issue, 7/21/17, P. 10. The full PUC concurred: "we find that the Project would, if built, violate 30 V.S.A. § 248(b)(5) by having an undue adverse effect on the natural resource that is Mount Philo State Park." Order at Page 19. In this case, the much larger Project (alone or in conjunction with Apple Hill Solar) would have an undue adverse effect on one of the business jewels of Bennington, the Mountain Anthony Country Club located about a mile away from which the Project(s) site is prominently visible and is an important vantage point.

Petitioner's aesthetics expert did not consider or provide simulations showing the contrast between the black fence and black solar array and white snow in winter.

Petitioner's aesthetics expert presents an unrealistic view of the Project site from a small

number of vantage points, making it impossible to understand how the Project would look if constructed as shown in the plans.

Some screening is proposed to be placed on the orchard lot, yet Petitioner's testimony is that the orchard lot is not owned by the Petitioner and currently Chelsea Solar, LLC 2 has no rights or control over the orchard lot. No screening budget has been supplied in testimony, nor is there a plan for ongoing maintenance of trees and shrubs. In the only Project constructed by Petitioner in Vermont to date, Sudbury Solar, Petitioner has failed to implement the screening plan required by the CPG. Petitioner proposes to use existing forest and ground cover to screen the project but the integrity of the remaining forest after the Project site is clear-cut is not assured and will likely not remain as it exists today due to natural forces.

Petitioner has not met its burden of proof to show that the Project's amended plan would not cause an unduly adverse aesthetic impact. For all these reasons, a CPG should be denied.

2. Aesthetics, Noise - Findings of Fact

115. Once the interchange for Route 279 was constructed there has been a vast increase in traffic noise, particularly truck traffic. Pft. AHHA, p. 3 line 14

116. Petitioner's study shows that noise in Apple Hill will increase if the forest is cut. Pft. AHHA p. 4, line 1

117. The Route 279 interchange has already increased our traffic noise, especially from trucks, and it will be made worse by clearcutting for the solar project, which is not acceptable.

AHHA Pft. p. 4 line 3

118. Petitioner did not ask RSG to do a technical acoustic modeling exercise regarding construction noise. Brad Wilson Pft. P. 294 line 21

119. The assumption was that there was not snow cover. Haac, Tr. p. 57 line 17
120. There is not a specific assumption about leaf on or leaf off. There is a forest that has foliage that absorbs sound. Haac, Tr. p. 58 line 1
121. The combined clearing for Chelsea and Apple Hill solar was not included in what was submitted for this project. Haac, Tr. p. 59 line 2
122. There is a larger impact when looking at Chelsea and Apple Hill Solar combined than looking at only a single one. Haac, Tr. p. 59 line 18
123. It did not incorporate truck and car trips during the construction phase of the project. Haac Tr. p. 59 line 24
124. Temporary construction noise will generate a lot of sound levels associated with the project. Haac Tr. p. 60 line 4
125. Construction noise was not factored into this analysis. Haac Tr. p. 60 line 13
126. Personally I would prefer that construction noise was studied. Haac Tr. p. 61 line 3
127. The manufacturer of the plastic mesh to cover the fence could not provide information about possible sound impacts. Haac Tr. p. 62 line 2
128. If both projects are constructed simultaneously with two sets of equipment, that would generate more noise than a single project. Haac Tr. p. 63 line 15
129. If both projects were not done simultaneously then there would be a longer duration of construction noise compared to a single project. Haac Tr. p. 63 line 23
130. Construction noise should be included in a comprehensive sound analysis. Haac Tr. p. 71 line 19

131. Petitioner's noise expert undertook an analysis of construction impact and potential construction impact noise in the last month or two but petitioner did not submit it into the record. Haac Tr. p. 72 line 22

132. The noise impacts from the construction should have been reported to provide a comprehensive and adequate study of all the noise impacts from the project. Haac Tr. p. 74 line 19

Discussion

Petitioner calculated noise from project operations and hired a noise expert to monitor and model traffic noise. Cumulative noise impacts were not evaluated.

Petitioner predicts that site clearing work will take 2 to 4 months, and construction will take 4 to 6 months. Noise from clearing and construction was not considered at all.

Petitioner's noise expert did not evaluate noise from traffic on Willow Road during clearing and construction phases, and did not take into consideration noise issues associated with the 10 foot tall poly fence. Noise level predictions assume cleared soft ground.

The Apple Hill residential area located above the Project site has already experienced increased noise levels due to the highway construction of Route 279, plus the Welcome Center traffic with trucks speeding up and slowing down as they enter and exit the site. CS2 proposes to make a large clearing in the forest that will make an already bad situation worse. The amended plans change the tilt angle to make the panels flatter, not steeper, which increases the potential for noise to impact Libby Harris's home and the homes in AHHA.

AHS has not met its burden of proof to show that the Project will not create an undue adverse aesthetic impact regarding noise.

3. Aesthetics, Wind - Findings of Fact

134. The petitioner's own wind study showed wind will increase. AHHA Pft. P. 4, line 13.

Discussion

Petitioner hired a noise expert who did no monitoring and used data from the Bennington airport. If Petitioner cuts the forest for the Project, impacts to Libby Harris's home in AHHA may include increased heating expenses and damage to the home, for which Petitioner will take no responsibility.

The Project will create an undue adverse aesthetic impact regarding wind.

4. AESTHETICS – Application of the QUECHEE TEST

Having reviewed the record and considered the parties' positions, the Commission should find that the Project, if built, would also have an undue adverse effect on the aesthetics and scenic and natural beauty of the area in violation of 30 V.S.A. § 248(b)(5).

Legal Standard - In determining whether a project raises a significant issue with respect to the aesthetics criterion, the Commission is guided by the two-part *Quechee* test:

First, a determination must be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural beauty. In order to find that it will have an adverse impact, a project must be out of character with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

- a. Does the project offend the sensibilities of the average

person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

- b. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
- c. Have the petitioners failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?⁷

Analysis of whether a particular project will have an “undue” adverse effect on aesthetics and scenic or natural beauty is also significantly informed by the overall societal benefits of the project.⁸

The Quechee Test

(1) First Prong - Adverse Impact - Utilizing the two-step Quechee Lakes test⁹ as the standard of review, there is no doubt that the introduction of approximately 7 acres (in addition to Apple Hill Solar’s more than 9 acres) of solar panels into what is otherwise an extraordinary scenic resource and gateway area to the Town, will have an adverse impact on the aesthetics and the scenic and natural beauty of this area because such an industrial land use is in conflict with the natural surroundings of this lush hillside setting in the Rural Conservation District. This primary adverse question of Quechee Lakes is inarguable because the industrial siting of the array therein threatens the high scenic qualities and bucolic nature of this highly prominent hillside landscape which serves as an important gateway to the community, region and state. Moreover, with regard to noise

⁷ *Quechee Lakes Corp.*, 154 Vt. 543 (1990).

⁸ Commission Rule 5.109(A).

⁹ *Quechee Lakes Corp.*, 154 Vt. 543 (1990).

impacts, the Applicant has failed to provide a scintilla of evidence by which to even determine the noise impacts for the 4-6 months of construction. Therefore, they have failed to meet their threshold burden of production to enable the Commission to make affirmative findings.

(2) Second Prong – Is the Adverse Impact Undue? - Having concluded that the impact of the project would be adverse, we must proceed to apply the three subparts of the second prong of the *Quechee* test to determine whether the adverse impact will be “undue” and ultimately determines if the plan to site the solar array on this prominent hillside in this highly visible and scenic location should be denied by the Commission. An affirmative answer to any one of the three subparts means the Project would have an unduly adverse impact.¹⁰

(a) Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Having reviewed the record, the Commission should find that the Project would offend the sensibilities of the average person because it would be offensive or shocking and because it would significantly diminish the scenic qualities of the area.

The CS2 project will clearly offend the sensibilities of any reasonable person when viewed objectively from the long duration views from many public roads, private properties, businesses and educational facilities in the area.

¹⁰ *In re McShinsky*, 153 Vt. 586, 593 and 572.

The Public Utility Commission has also stated that the Quechee test “require(s) that reasonable consideration be given to the visual impacts on neighboring landowners.”¹¹ The Vermont Supreme Court has recognized that all vantage points, including from private property, be considered by the Commission and specifically ruled that:

In determining whether there has been an undue adverse impact, considering the sensibilities of the average person, the Board can and should consider all vantage points, including from private property. Here, the Board did consider neighbors’ perspective and required extensive screening to mitigate that impact. Under our standard of review, we affirm the decision. We acknowledge that, in addition to considering neighbors’ interest, the Board ruled that the test definition of an average person meant “the average member of the viewing public who would see a particular project from the vantage point of the public;” that is, while the Board must consider all vantage points, it does so from an objective, as opposed to subjective and neighborly, perspective.¹²

The record of the CS2 case shows that in addition to the many public views of the project: (1) the Project would be clearly visible from private properties in the area; (2) landscape mitigation would not satisfactorily mitigate views of the Project particularly from Libby Harris’s house and other Apple Hill homeowners, the Bennington Battle Monument, the Mount Anthony Country Club and Southern Vermont College; (3) there is no other solar array within this viewshed in the RCON; and (4) as viewed from most of the surrounding properties and portions of public roads, the Bennington Battle Monument, Mount Anthony Country Club, Southern Vermont College and its public hiking trails, the Project would be out of context with its surroundings and would significantly diminish the scenic qualities of the Apple Hill viewshed. The Project would degrade the viewshed for professional photographers who earn a living selling photographs of this view and value the natural scenic beauty that would be marred by many acres

¹¹ *In re Petition of Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 20 (2015).

¹² *Id.* (emphasis supplied).

of solar panels. Given these factors, the Commission should be persuaded that the average person would find the Project offensive or shocking and that the Project's presence would significantly diminish the scenic qualities of the area. Therefore, the Commission should find that the Project would offend the sensibilities of the average person because it would be offensive or shocking and because it would significantly diminish the scenic qualities of the area.

(b) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

In order for a provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.¹³ A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."¹⁴

As described in our findings on Orderly Development *supra*, any reasonably in-depth examination of the Town Plan leads directly to the conclusion that the Project as proposed, fails to conform with the Town Plan; thus, is violative of the clear written community standard articulated therein.

(c) Have the petitioners failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its

¹³ *Chelsea Solar LLC*, Docket No. 8302, Order of 7/16/15 at 56, citing *In re Halnon*, NM-25, Order of 3/15/01 at 22.

¹⁴ *Chelsea Solar LLC*, Docket No. 8302, Order of 7/16/15 at 56, citing *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11 at 83.

surroundings?

The next part of the “undue” evaluation from the Quechee Lakes test is whether the applicant has failed to take reasonable mitigating steps to improve the harmony of this proposed solar project with the surrounding highly scenic rural landscape. With regard to the CS2 Project, one can easily conclude that the Petitioner, by choosing to site the array in a newly created clearing of a highly prominent forested hillside which is a focal point of the viewshed, has failed to take reasonable mitigating steps to improve the harmony of his proposed solar project with the surrounding scenic rural landscape. The Applicant’s landscaping plan will never adequately screen the monolithic appearance of 7 acres of solar array panels rising up the slope of the hill and surrounded by 10 foot tall black fencing. The cumulative effect of CS2 in addition to the PUC-approved Apple Hill Solar will not be mitigated by the buffer forest, which may or may not remain intact after clearing approximately 19 acres of surrounding forest. Mitigation plantings required for Petitioner’s only other constructed Vermont project have never been implemented, leaving parties wondering if the same failure will occur in this case.

Moreover, with the numerous options in industrial and disturbed sites in Bennington, alternative sites exist that would have provided natural screening or allowed plantings that would effectively screen the site. As such, the project fails to take the mitigating steps to harmonize itself with its surroundings and the Commission should not believe that the project, as proposed, can be properly mitigated. If the project is approved at the proposed location, the CS2 solar project will have an undue adverse impact to what is

otherwise a quintessential Vermont scene and gateway area to Bennington.¹⁵

Because the proposed site cannot be adequately screened to accomplish effective screening of the project, the Commission should find that Applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings.

Therefore, the CS2 Project violates 30 V.S.A. 248(b)(5) because it poses an adverse and undue impact to the scenic or natural beauty of the area because it is shocking and offensive, violates clear written community standards contained in the Town Plan, and because Applicant has failed to take reasonable mitigation measures.

V. Wildlife Findings of Fact

135. The construction of the highway and interchange have caused the wildlife to use these woods as a necessary wildlife corridor and habitat. AHHA Pft. P. 7 line 1

Discussion

Petitioner denigrates the mature, urban forest and downplays the importance of the wildlife habitat contained in the Project site. The proposal to erect a 10 foot tall fence around the site raises great concerns for neighbors and people who travel on the surrounding highway. If the wildlife, especially deer and bear, are excluded from such a large forested area full of wildlife trails, they will have to go somewhere else to an undetermined location. The options are the road or the residential neighborhood up above.

CS2 will have an undue adverse impact on necessary wildlife habitat at the Project site.

VI. Water Pollution Findings of Fact

¹⁵ *Quechee Lakes Corp.*, 154 Vt. 543 (1990).

136. The AHHA neighborhood has suffered through years of drinking water contaminated by PFOA and we cannot afford to have it made worse. AHHA Pft. P. 5 line 5
137. There was a perceived conflict of interest doing work for Ecos and doing work at the Apple Hill neighborhood, Waite, Tr. p. 33, line 1
138. Witness accepted the engagement with the Petitioner prior to telling DEC that they were engaged by the Petitioner. Waite Tr. p. 34 line 2
139. The ground water is moving under this property to the south-southwest. Waite Tr. p. 38 line 3
140. Petitioner's expert considered Chelsea Solar (not in addition to Apple Hill Solar). Waite, Tr. p. 41 line 2
141. The way phytoremediation works is that trees and shrubs and vegetation can uptake contaminants from the water. Waite Tr. p. 42 line 3
142. If the trees take up PFOA and are chipped and left onsite, it could reintroduce PFOA. Waite Tr. p. 43 line 17 and p. 44 line 8
143. When forests are cut, the water table can rise up and there can be more infiltration depending on the condition of the soil. Waite Tr. p. 49 line 15

Discussion

The most important circumstance that has changed for AHHA since CS2's original petition of 2014 and before the CS2 amended plan filing of 2017 is learning that most of the groundwater wells upon which AHHA residents rely is contaminated with PFOA, a toxic chemical that causes health issues.

Petitioner hired an expert who evaluated soil contamination but did not look into impacts of clear-cutting the forest on PFOA contamination of groundwater. The limited review of Petitioner's expert reveals numerous uncertainties and variables that may influence migration of contaminants into the air or groundwater, or result in changes to groundwater as a result of clear-cutting nearly 10 acres of forest. The total proposed clear-cut when combined with Apple Hill Solar was not evaluated.

The existing forest may be taking up PFOA which could be released into the air during the proposed chipping, or could leach back into the groundwater if the chipped wood is left in place to decompose as planned. Many unknowns exist regarding PFOA in the AHHA neighborhood, including the source – is it the landfill? – the potential for the groundwater flowing from north of AHHA through the AHHA residential wells and under the Project site to move more contamination through the groundwater and into residential wells, and changes that may occur if so much existing forest is clear-cut.

For the residents of AHHA, the PFOA problem is of paramount importance. The company that has taken responsibility for extending water lines on the western side of Route 7 is disputing that its operation is the cause of the groundwater contamination on the eastern side, including AHHA. Some, but not all, Residents of AHHA have carbon filtration systems but that is not a long term solution and it is unknown if or when AHHA may get municipal water. The company has recently agreed to pay for the design of the water line extension in the AHHA neighborhood, but the actual construction timetable and who will pay for it is unknown. In the meantime, any potential to increase in the PFOA levels is a serious concern for AHHA residents.

Given the available information, the PUC cannot making a finding that the Project will not result in unduly adverse water pollution.

VII. Air Pollution Findings of Fact

144. Their expert testimony has not addressed how the trees are providing benefit to our community by absorbing air pollutants. Block Pft. P. 4 Line 22

Discussion

AHHA is located uphill from a very high traffic area that includes the Welcome Center with trucks entering and exiting, an on-ramp to Route 7, with prevailing winds from the direction of the highway towards AHHA. Urban forests are increasingly valued for their ability to mitigate air pollution from vehicle exhaust, as well as their ability to sequester carbon and reduce global warming.

CS2 is aware that the potential for increasing air pollution is an issue for AHHA, however chose not to address it. CS2 commissioned a Greenhouse Gas evaluation that did not consider the air pollution mitigation values of the forest on Apple Hill or the carbon sequestration of the forest proposed to be cut.

CS2 has not met its burden of proof to show that the Project will not result in undue adverse impacts to air pollution.

VIII. Economics Findings of Facts

145. No where does Chelsea Solar guarantee that employees working on construction would be local Vermont employees. Wilson Tr. p. 289 line 11

146. Painters, Watercolorists and Photographers that reside in the region have been photographing the area and views for decades. It is one of our biggest assets and the

erosion of the scenery will change the way these artists make a living and the way

Bennington has been trying to recover from the downturn in the economy. MACC Pft. P.

6 A15

147. Many of our local photographers and artists depend on the beautiful views of our valley

heading north to serve as inspiration for their work. MACC Pft. P. 3 A7

148. Ann Smith is a local photographer who sells her photographs in town. MACC Tr. p. 23

line 9

149. The photographs are all vehicles for local photographers, artists residing in Bennington,

to make a living. MACC Tr. p. 231 line 13

150. Professional photographers sell photos that include the prominently visible Apple Hill

and they profit from the sale of those photos. MACC Pft. P. 4 A8

151. These are professional photographers who do this for a living and sell in local stores as

cards and postcards. MACC Tr. p. 236 line 13

152. The subject of the photographs is the key part of how artists that reside in Bennington

make a living and are supporting themselves. MACC Tr. p. 255 line 4

153. The subject matter will change by this proposed project, and it will change forever.

MACC Tr. p. 255 line 8

154. This view holds high financial value not only to the Country Club, but to the greater

community as well. MACC Pft. P.4 A8

155. The President of Southern Vermont College “would be concerned if it infringes on the

view, because the view is one of our major marketing advantages....It would have to be

invisible or extremely well concealed, visually comparable to other things that are visible from up here.” MACC-M-3 p. 14

156. Southern Vermont College’s president says “when it comes to The Orchard House, the views are its raison d’etre.” MACC-ML-2

157. The Southern Vermont College hiking “trails are both part of our marketing and one of our key kind of enterprises for community relations.” MACC-ML-3 p. 20

158. Southern Vermont College’s hiking trails are public trails that are very popular in town. MACC Tr. p. 247 line 15

159. Mount Anthony Country Club has lots of weddings. MACC Tr. p. 247 line 10

160. The views from the golf course are very important to the business, for weddings. MACC Tr. p. 247 line 15

161. MACC’s scenic views cannot absorb more degrading. Leon Pft. P. 6 A14

162. This project will forever change the views of Bennington that have been enjoyed not only by the Bennington monument, which is the most visited historic site in the state with over 34,000 visitors a year that take those pictures when they stick their camera out the wind. All these artists that I have very easily documented sell their photographs in Bennington in many places in forms of postcards, not cards, book marks. MACC Tr. p. 245 line 14

163. The damage that this development will do to our views from the Country Club will have a permanent negative effect in the aesthetics and how we are perceived by the tourism industry. We would become less attractive as a tourist destination in the very competitive fall foliage billion dollar industry. MACC PfSrt p. 12 A18

Discussion

30 V.S.A. § 248 (b)(4) requires that the PUC find that a Project will result in an economic benefit to the State and its residents in order to issue a CPG.

The testimony in this case is that the Project site has economic value to the Town of Bennington's business and educational community as well as to the region and state. The Project would be visible from the Bennington Battle Monument which is the most visited historic site in the state, and Southern Vermont College's Everett Mansion which is on the National Historic Register and has public hiking trails. The site is prominently visible from numerous locations on the golf course of the Mount Anthony Country Club. One tree clearing done by Wal-Mart provides a preview of the potential damage that can be done to the aesthetics of the MACC when its natural scenic views are harmed. Bennington is a community facing many challenges, some of which are the subject of national attention such as the opioid crisis.

Bennington needs all the help it can get to support its economy during this time of economic transition that has caused many factories and related jobs to close in recent years. This Project and the other projects proposed by this Petitioner have placed tremendous economic burdens on the Town of Bennington, as evidenced by the withdrawal of the Town from this case due to excessive litigation by Petitioner. Petitioner should not be rewarded by being able to profit from the further degradation of Bennington's economic health by winning a CPG for CS2.

CS2 will not result in an economic benefit to the State and its residents and therefore the PUC should deny issuance of a CPG.

IX. Conclusion

CS2 proposes to construct two contiguous 2 MW solar projects, CS2 and Apple Hill Solar. Both projects submitted amended plans to the PUC that reduce the forest clearing but still require clear-cutting of more than 14 acres of forest and are otherwise located on the same parcel of land in the same Rural Conservation District that is referenced in the Town Plan and for which the PUC has already denied a CPG. Chelsea Solar was denied a CPG by the PUC for violating the clear written standard in the Town plan. Nothing has changed regarding the Town Plan language or the Project site to enable CS2 to receive a CPG. Apple Hill Solar has received a CPG from the PUC to clearcut a large amount of vegetation on a prominent hillside in the Rural Conservation District at a gateway to Bennington that is valued for its visual natural beauty. CS2 would add to and compound the degradation of the values that the Town Plan and related guidance documents seek to protect.

Residents of Apple Hill who live above the Project site have consistently expressed concerns about the aesthetic impact of the Project, including an increase in wind and noise impacts. AHHA has new concerns about air pollution from highway traffic and groundwater contaminated with PFOA that has been found in many homeowners' wells during the time period between the first Petition and the amended plan submission. CS2 has not met its burden of proof to show that there will be no undue adverse impacts on noise, wind, air and water pollution. Clearing the forest and fencing the site will exclude wildlife from necessary habitat and may result in public safety issues. CS2's evaluation of wind, noise, air pollution and water pollution does not consider the cumulative impacts of the two projects combined, and are therefore inadequate.

Mount Anthony Country Club depends on the natural beauty and scenic views of Bennington for its economic health. MACC has already experienced the degradation of a portion of its viewshed and understands the potential for the further diminution of economic value if CS2 is permitted along with AHS.

For all of the above reasons, a CPG for CS2 must be denied.

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

Respectfully submitted,



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