

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
REPLY BRIEF

The Vermont Department of Public Service (“Department”) submits to the Public Utility Commission (“Commission”) the following Reply Brief in response to Chelsea Solar LLC’s (“Chelsea”) Post-Technical Hearing Brief submitted on October 19, 2018. As discussed in the Department’s Initial Brief, the Department asserts that Chelsea has not met its burden under 30 V.S.A. §§ 248(b)(1) (orderly development) and (b)(5) (aesthetics) and should therefore be denied a Certificate of Public Good (“CPG”) for the proposed project (“Project”).

I. Equal Protection

Chelsea’s claim that the Department’s decision to oppose the Project violates Chelsea’s rights to due process and equal protection is incorrect because it has failed to show that the Department discriminated against Chelsea. The test for determining a violation of equal protection for a non-suspect class is two-fold. First, it must first be shown that a government action has created two or more classes of persons (including corporate persons) who are treated differently according to the class within which each falls. *Re Central Vermont Public Service Corporation*, Docket 5132, Order of 7/31/87 at 17. Second, it must be shown that any different treatment is “rationally related” to serving a legitimate state interest. *Id.* See also Tussman & tenBroeck, “The Equal Protection of the Laws,” 37 Cal. L. Rev. 341, 348-351 (1949).

a. Discrimination

Chelsea bases its equal protection violation claim on the fact that the Department has supported similar projects in the Town of Bennington's ("Town") Rural Conservation Zone and has failed to do so here based on political pressure from neighbors and former opposition of the Project by the Town. Chelsea states that this is discrimination by the Department amounting to "unconstitutional selective enforcement." Chelsea Post-Technical Hearing Brief at 11.

Chelsea has failed to establish that the Department's opposition to the Project has effectively classified Chelsea differently than other developers siting projects in the Rural Conservation Zone for one main reason: the Department previously supported the petition of Chelsea's affiliate, Apple Hill Solar LLC ("Apple Hill") in Docket 8454, a company under the same corporate control as Chelsea. Both the Fourteenth Amendment and the Common Benefits Clause of the Vermont Constitution prohibit unjustified disparities in the treatment of differing persons (including corporate persons). *See, e.g., Hadwen, Inc. v. Vermont Dept. of Transportation*, 139 Vt. 37, 42, 422 A.2d 255, 258 (1980). Chelsea, in contrast, alleges varied treatment of different *projects* supported by the same corporate parent of Chelsea and Apple Hill. Chelsea fails to explain why equal protection concerns about discrimination between differing persons should be raised by distinctions among proposed projects supported by the same person.

Chelsea cites to numerous cases from Vermont and foreign jurisdictions that have little or no relationship to the issues at hand, and its reliance on one case in particular is misplaced. In *In re Town Highway No. 20*, the Vermont Supreme Court recognized a pattern of conduct established over the course of 12 years where the Town of Georgia treated one property owner differently than similarly situated property owners. *Town Highway No. 20*, 2012 VT 17, ¶ 18, 191 Vt. 231, 245, 45 A.3d 54, 62 (2012). Such treatment included restricting the use of his property, delaying

considerations of his requests, taking an inordinate amount of time to consider his requests, and imposing limits on his requests that the town did not impose on other similarly situated landowners. *Id.* The Court concluded that such treatment violated the Common Benefits Clause.

While *Town Highway No. 20* is good law, it does not apply to the present facts. The Department has not imposed any restrictions, delays or limits upon Chelsea in its capacity as public advocate.

It is for the above reasons that Chelsea fails the first prong of the equal protection test.

b. Legitimate State Interest

Even if Chelsea succeeded in showing that the Department's actions resulted in discrimination against Chelsea, the Department's actions are rationally related to serving a legitimate state interest. The Department is charged by statute to "represent the interest of the people of the State," 30 V.S.A. § 2(b), and to analyze whether a proposed transmission project "will promote the general good of the State." 30 V.S.A. § 248(a)(2). In fulfilling its statutory duty, the Department utilizes an independent, case-by-case review process, which neither the Equal Protection Clause nor the Common Benefits Clause prohibit. A case-by-case process of specific evaluation of the facts of an individual case is rationally related to the legitimate state purpose of ensuring a project will promote the general good of the State.¹ It is for this reason the Department might oppose one project and support another located in the same area. Therefore, Chelsea fails the second prong of the equal protection test.

¹ Such an approach has been articulated by the Commission. *See, e.g.,* Docket 5132, Order of 7/31/87 at 21 ("The distinction between our treatment of [one project] and our treatment of other [projects] is rationally related to the legitimate state purpose of establishing just and reasonable rates for monopoly services through a case-by-case process of specific evaluations of the facts of individual cases.").

On a related note, while the Department will strongly consider the position of adjacent landowners in reviewing whether a proposed project will promote the general good of the State, that is just one part of the review process the Department conducts in determining whether or not a project is in the interest of *all* Vermont residents. Furthermore, where individuals are granted intervenor status in a proceeding pursuant to Commission Rule 2.209, they are permitted to represent their own interests before the Commission. In the current proceeding, six (6) adjacent landowners were granted intervenor status at one time or another. Chelsea's assertion that the Department has succumbed to political pressure by area residents fails because those residents are parties to this case and are able to represent their interests as they see fit.

II. Conclusion

For the foregoing reasons and the reasons set forth in the Department's Initial Brief, the Project 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 2nd day of November, 2018.

Vermont Department of Public Service

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cc: Service List