

**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
2.00 MW solar electric generation facility to
be located off Willow Road in Bennington,
Vermont**

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Case No. 17-5024

PETITIONER’S POST-TECHNICAL HEARING REPLY BRIEF

Pursuant to the hearing officer’s instructions at the September 21, 2018, technical hearing in these proceedings, Chelsea Solar LLC (“Chelsea” or “Petitioner”) hereby submits this reply brief in response to the briefs and proposed findings of Apple Hill Homeowners Association and Mount Anthony Country Club (the “Intervenors”) and (ii) the Department of Public Service (“DPS” or the “Department”), each filed on October 19, 2018.

Chelsea’s opening brief already refutes everything contained in the Intervenor’s brief and the DPS’ brief that is relevant to a section 248 petition. Both the DPS’ brief and the Intervenor’s brief share a common element—no credible and reliable evidence. For their part, the Intervenor’s continue their multi-year repetition of conclusory statements. The Intervenor’s are making their closing argument where it began—with false allegations. All the Intervenor’s’ claims are wholly unsupported and their proposed findings of fact and conclusions must be completely ignored. So too with the Department. As argued in Chelsea’s opening brief, the testimony of David Raphael is unreliable and lacking in all credibility. Even the Department concedes that “the Project is sufficiently separated by topography and existing vegetation and is compatible with development patterns that are already present and visible in the area.” DPS Brief at 8. The Department’s

proposed findings of fact and conclusions—like those of the Intervenor—are wholly unsupported and also must be completely ignored.

I. Orderly Development Of The Region.

A. Section 248(b)(1) Looks at the Region, Not the Town.

As recognized in the *Final Order re Proposal for Decision and Order Issuing Certificate of Public Good*, September 26, 2018, Docket 8454 (the “AH Final Order”), the Town's position regarding the applicability of the language in the Town Plan regarding the rural conservation district (“RCON”) has changed as a result of the Town's engagement as a party in these proceedings over the last three years, its more in-depth understanding of the Apple Hill and Chelsea solar projects, and its participation in the amendment of such projects to overcome earlier perceived deficiencies in the site plans.¹ In statements regarding the similarly-situated neighboring Apple Hill Solar project, the Town’s counsel made it perfectly clear that the placement of a solar project, such as the 2.0MW Chelsea Solar Project (the “Project”), at that location is consistent with the 2010 Town Plan. *See*, Exhibit CS-BW-12, Transcript of August 14, 2017 Select Board meeting, at 38. That Town position was restated by the Town Planner, Mr. Dan Monks, in a deposition taken on September 29, 2017, in the offices of the Town attorney. *See*, Exhibit CS-BW-25 at 17 and 28. That evidence is sufficient on its own to completely refute the conclusory statements of the Intervenor and the DPS witness David Raphael.

The Project is, of course, on the same parcel of land and in the same zoning district as the Apple Hill project and there is no reason to apply the 2010 Town Plan any differently with respect to the Project, especially because Docket 8454 examined the cumulative impacts of both projects.

¹ *See* AH Final Order at 19.

The Town was well aware that they could not succeed in selectively enforcing the 2010 Town Plan RCON provisions and instead hung their proverbial hat on their newly enacted “10 acre” rule in the Town Plan which prohibits solar facilities in excess of 10 acres if not in preferred areas. That argument was properly quashed in the August 30, 2018 *Order Affirming the Hearing Officer Order on the Application of the Vested Rights Doctrine* (the “Vested Rights Order”). Having lost on the issue of vested rights and with full knowledge that the pre-filed testimony of Dan Monks submitted in these proceedings and since withdrawn (the “Monks Withdrawn PF Testimony”) was indefensible in light of the Town’s prior statements concerning the siting of the projects, the Town sought to settle with the Petitioner to allow the Project to proceed.

Not surprisingly, Maru Leon was quick to disparage the Town for its decision to allow the Project to proceed, alleging that “neither the developer nor the Town representatives can be seen as credible and objective evaluators of the Town Plan”. *See*, MACC PfSrt at 11. What is surprising is her and the Apple Hill Homeowners Association’s almost exclusive reliance on the Monks Withdrawn PF Testimony in arguing that the Project unduly interferes with the orderly development of the region. On the one hand, the Intervenor has labeled the Town as unfit and not credible to interpret the Town Plan, on the other hand they are relying on the Monks Withdrawn PF Testimony purportedly interpreting the Town Plan. Of course, the Monks Withdrawn PF Testimony is not evidence in this case, and even if it were it was contradicted by both Monks’ rule 30(b)(6) deposition and the Town Attorney’s statements, both of which *are* evidence in this case.

Putting aside the dichotomy of the Intervenor’s use of Monks Withdrawn PF Testimony, the Intervenor’s Brief on orderly development, like the testimony of DPS’ David Raphael, completely ignores the plain language of section 248(b)(1), which is the orderly development of

the *region*, not the Town of Bennington.² There are seventeen towns within the Bennington Region and this Project is located in only one of them. The site itself and the clearing required at the site for the Project is a mere 0.004% of the approximately 370,000 acres in the region.

In the section in the DPS brief concerning orderly development, there is not a single mention of a regional impact. The DPS position concerning orderly development (which is based exclusively on the testimony of David Raphael) is that the “Project conflicts with the Town’s intent for appropriate uses in the RCON District...”. DPS Brief at 7. But as argued in Chelsea’s opening brief, that conclusory statement is refuted by the evidentiary record, including the deposition testimony of Dan Monks, the statements made by the Town Attorney, the AH Final Order, the Town’s support for other commercial ground-mount solar projects in the RCON,³ and most recently, the Town specifically designating hundreds of acres of land in the RCON as preferred areas, nearly half of which is a short walk from the Project site and which would dwarf the Project in size.

DPS does not even address those facts in its brief. That is not surprising, however, as Raphael admitted at the technical hearing that he failed to consider, among other things, how the Town treated other commercial scale ground mounted solar project in the RCON and on land clearly identified in the Town Scenic Resource Inventory.

Q. Are you familiar with the -- where the ER Bennington solar project is which is Route 7 near the police?

A. No.

Q. You didn't review that?

² See *Rutland*, at ¶ 9 (“Under § 248(b)(1), a CPG may be issued for a facility if the [Commission] finds that the facility ‘will not unduly interfere with the orderly development of the region . . .’ We emphasize that the statutory requirement relates to the orderly development of the region, not to a particular municipality within the region.”).

³ See, e.g., Exhibit CS-BW-21 (Paper Mill Solar Project) and CS-BW-22 (ER Bennington Solar Project).

A. No.

Q. Okay.

A. That was not my charge to review those projects. My charge was to review this project.

Q. But you didn't consider how the town -- the town's position with respect to other solar development in the rural conservation district and how that may impact the town's view as to orderly development? You just -- you don't think that's a relevant inquiry to see how other like projects have been -- have been considered by the town with respect to orderly development?

A. I mean it certainly could be considered.

[2nd Tr. 40:7-23.]

The reality is that the Town Plan has a broad goal for the RCON district generally for certain uses but allows development of all kinds in the district on a case-by-case basis. Moreover, as the evidentiary records shows, the area surrounding the Project is really a *de facto* rural residential zone, and not an RCON zone. The Town Plan is, at most, akin to a zoning ordinance that is subject to a variance and is not a source for clear, written community standards.⁴ Just as in Docket 8454, the Town's interpretation of its own Town Plan changed as it became more informed about the Project and its other decisions supporting commercial solar development in the RCON District.

The DPS also argues that keeping the site intact is essential to keep consistent the land use patterns of the area because the site currently acts a boundary between the highway and the RCON. DPS Brief at 7. However, at the technical hearing, David Raphael made clear that this is simply not the case and confirmed that the Project site is not identified as a bright line, barrier, buffer, or land use boundary in Town Plan. 2nd Tr. 37: 1- 5. Moreover, as stated by Raphael, the Project is compatible with the development patterns that are already present and visible in the area. DPS

⁴ AH Final Order at 42-43.

Brief at 13. Lastly, the RCON makes up about 50% of the land in the Town of Bennington and solar generations facilities are a permitted land use within the RCON both in practice, as discussed above, as well as pursuant to the Bennington Land Use & Development Regulations, which implement the Town Plan. Exhibit CS-BW-27 at 54.

The Intervenor's Brief makes only two references to the Bennington region. *First*, they make the point that Bennington's "gateways" serve the region as a whole. Intervenor's Brief at ¶38.⁵ *Second*, the Intervenor's Brief make the point that there is undoubtedly both a regional and statewide need for additional renewable energy. Intervenor's Brief at 13. As to the first point regarding the argument that the Project is located within a "gateway", assuming *arguendo* that Bennington's "gateways" somehow serve the other sixteen towns in the Bennington Region, the Project is not located within a "gateway area". The term "gateway" as articulated in the 2004 Scenic Resource Inventory (SRI) (Exhibit CS-BW-24) for the Town of Bennington, as well as in the Town Plan (Exhibit CS-BW-81), is not described as an "area", but rather a "point". The SRI, which was included by reference into the Town Plan, defines gateways as "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." (Page 20). Two "gateway" locations are identified in the SRI—a point along the

⁵ The DPS Brief also makes the argument that the Project is located within a scenic gateway and, therefore, runs afoul of the Town Plan. DPS Brief at ¶38. This too is false as Chelsea has shown.

southbound lane of Route 7 and north of the Project site, and a point along Route 279 heading east to the west of the Project site.

As characterized in the SRI, the primary visual foci from both gateways are regional terrain features such as Mount Anthony and the Green Mountains. The SRI acknowledges that from the Route 7 southbound gateway the “commercial buildings adjacent to the intersection at the bottom of the hill are not particularly attractive, although they do create an abrupt change from the rural to the developed landscape of Town.” (Page 21). The Project does nothing to change this visual context from this gateway, owing to its orientation on the Project site, the buffering towards the Route 7 corridor and preservation of intervening terrain. The Project does not impede or intercede in any observation of the Green Mountains, Mount Anthony or other regional terrain features. *See Kane Rebuttal at 2-3.* Most importantly, however, the Project is simply not in a “gateway” at all. A text search of the SRI document indicates no mention or reference to the Apple Hill area. *Id.*

Regarding the second point, Petitioner is in complete agreement with the Intervenors, there is undoubtedly both a municipal, region and statewide need for additional renewable energy which guides the section 248(b)(1) analysis. The Town Plan includes a *multitude* of statements and goals promoting local distributed solar resources, such as the Project. *See Exh. CS-BW-23* (pages 3, 7, 12, 14, 55, 83, 94, 95, 96). Moreover, the Bennington Town energy plan describes various goals encouraging solar resources, such as the Project. *See CS-BW-88* (pages 2, 38, 43, 45, 47). Indeed, municipal plans must “encourage the development of renewable resources.” 24 V.S.A. §4302(a). Similarly, the Bennington regional plan describes various goals which recognize the importance of solar energy resources, such as the Project. *See Exh. CS-BW-14* (pages 6 and 65). All of those goals support the Chelsea Project.

In addition, the Bennington County Regional Planning Commission (“BCRPC”) Regional Energy Committee’s comments on the Project, reinforced that from a regional perspective—the project site is “in an area of good solar resource potential, with no statewide environmental constraints.” Exhibit CS-BW-13 at 2. The BCRPC noted that given the smaller footprint, the Energy Committee recommended by consensus that its comments supporting the Project location be carried forward. *Id.* All evidence supports the Project at the regional level, which is the focus of section 248(b)(1).

B. The Town Plan

Given that (i) there is no actual evidence of a regional impact of the Project and (ii) a project’s conformance to the Town Plan is not the applicable standard in a §248 proceeding⁶, there is no need for the Commission to even consider the Project’s adherence to the provisions of the Town Plan. The Intervenor’s brief, however, solely relies on the Project’s purported non-conformance with the RCON district’s generalized goals to reach its manifestly erroneous conclusion concerning orderly development of the region. The insistence of the Intervenor that the Town RCON standards proscribe development of the Project is entirely unpersuasive, incorrect as a matter of law, and wholly ignore the facts. *First*, the Town “standards” are advisory only; they cannot be implemented as *de facto* zoning standards because section 248 preempts

⁶ 30 V.S.A. 248(b)(1) requires due considerations be given to the “recommendations of the municipal legislative bodies” and the “land conservation measures contained in the plan of any affected municipality”. Nothing in this provision requires adherence to or conformance with the provisions of a town plan in general.

municipal zoning.⁷ Town plans cannot “in any manner giv[e] single municipalities the power to subvert utility projects statewide in scope and broadly entrusted to a single planning and supervisory agency.”⁸ In fact, “[a]ny attempt at municipal regulation is pre-empted.”⁹

Second, it has now been firmly established that commercial scale solar facilities, such as the Project, are a permitted use in the Bennington RCON district. The Town has also confirmed that no land use standards either in the Town Plan or any regulation is violated by the Project. Claims by the Intervenor that the Town Plan contains development standards are belied by the evidence and the Town’s admissions. As discussed above, the Town conceded through the sworn deposition testimony of Daniel Monks, that such claims of the Intervenor are not even credible.¹⁰

Finally, the RCON goals are too vague to be enforced as standards, even if they did apply. The Vermont Supreme Court has clearly stated that restrictions on land use development are contrary to the common law and must be narrowly construed. *In re Willey*, 120 Vt. 359, 365 (1958) (restrictions on development of real property “are in derogation of the common law”). And as such, planning documents must contain clear, written, specific objective criteria. *In Re Kiesel*, 172 VT 124, 130 (2000) (“*Kiesel*”). Indeed, the Town makes no secret of its lack of standards and its

⁷ See *Rutland*, 2016 VT 50 at ¶ 36 (citing *City of South Burlington v. Vermont Elec. Power Co.*, 133 Vt. 438, 447-48, 344 A.2d 19, 25 (1975) (holding municipal zoning regulation of transmission line preempted by state regulatory authority).

⁸ *City of South Burlington*, 133 Vt. at 447-48, 344 A.2d at 25.

⁹ *Id.*; *In re Amended Petition of UPC Wind, LLC*, 185 Vt. 296, 305, 969 A.2d 145, 151 (2009).

¹⁰ See also, Exhibit CS-BW-12, Transcript, August 14, 2017, Select Board hearing at 21 (“the Town Plan [can]not [] credibly be construed to bar alternative energy projects in the rural [conservation] district because of the preceden[ts], because of the language of the plan, because of the way the zoning by-laws allow specific uses in that area and because of the planning that’s been underway for the future that includes a number of properties in that area for solar energy.”)

selective, *ad hoc* use of its purported goals and standards.¹¹ In any event, both the Town and the Commission¹² have rejected the Intervenor's position with regard to orderly development at the location of the Project, and it must be rejected here as well.

Further, the Intervenor's Brief relies extensively on the Commission's holding in Docket No. 8302 with respect to the application of the RCON design standards as they reiterate the claims that development in the RCON zone is limited to "limited residential development", the Project is "in prominently visible locations on hillsides and ridgelines" in the RCON zone and it violates the RCON criteria that "any development must minimize the clearing of natural vegetation." As discussed in further detail below in Section III B, each of these bases has been discredited and to the extent that the RCON design standards are even applicable, they are satisfied by the Project.

II. Shared Infrastructure

The Intervenor's next make the often-repeated, but manifestly erroneous, argument that because the Project and the Apple Hill project share the use of a *public* road (Willow Road) and interconnect at different locations and using different equipment to the GMP-owned power line extension, that the Project runs afoul of the March 28, 2014 Vermont Supreme Court case concerning the two projects in *In re Programmatic Changes*, 2014 VT 29¹³. The Intervenor's

¹¹ See, e.g., the Bennington selectboard meeting of September 14, 2015, discussing screening ordinances, available at: <https://youtu.be/7ZV-kxuqUNo?t=1h41m17s>. Daniel Monks concedes that the Town selectively applies the "material in the Town Plan and in the Scenic Resource Inventory" based upon how the selectboard feels about a particular project. Monks states: "We already have an immense amount of material in the Town Plan and in the Scenic Resource Inventory that does protect us, if we choose to argue that case. Now, *often times we choose not to because we think the project is okay*, but there's lots in there that gives us tools to work with as far as solar's concerned." (emphasis added.)

¹² AH Final Order at 17.

¹³ *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program* (2013-308); 2014 VT 29

arguments are irrelevant to this case. Whether facilities are part of the same “plant” under 30 V.S.A. §8002 is completely irrelevant to a section 248 proceeding. Even if the Intervenor’s arguments were relevant, as discussed numerous times in these proceedings, the projects will not share “common roads, control facilities or connections to the electric grid.”

When the Vermont Supreme Court wrote that the projects “will not share common roads”, they meant private access roads not public roads. Public roads are not “equipment or infrastructure” for purposes of 30 V.S.A. § 8002(14) and for good reason. Any alternative interpretation is nonsensical because where would one draw the line? Would the shared use of Route 279 be permitted? What about the shared use of Interstate 87? For purposes of § 8002(14), any test other than looking at only the shared common use of privately owned access driveways (which are a common characteristic of wind projects), does not make any sense.

As to the GMP line extension, the applicable test under § 8002(14) is “connection to the electric grid”. You do not look beyond the applicable interconnection points in a § 8002(14) analysis, otherwise you run into the same issue as you do with respect to the shared use of public roads. Namely, where does one draw the line? In addition to the projects “sharing” the GMP line extension, the projects also “share” every other electric transmission line, distribution line and substation in the State of Vermont in the same way they “share” the use of every public road in Vermont. But in any case, both § 8002(14) and the Supreme Court Case are very clear that the focus is on the “connections to the grid” and the two projects have separate interconnection agreements and separate interconnection points. They did five years ago and that remains true to this day.

III. Aesthetics

A. Quechee Test

With respect to aesthetics, both the DPS brief and the Intervenor's brief each discuss the *Quechee* test. The DPS brief concludes that the Project will have an adverse effect on the scenic and natural beauty of the area for two reasons. First, the Project is in the RCON and second, the clear cutting of 9.64 acres would purportedly have a significant impact on open space values. As to the first point, as discussed above and in Chelsea's opening brief, both in practice and in the Town Land Use & Development Regulations, the development of similarly-situated solar facilities within the RCON is specifically permitted, and the Town has acknowledged that fact. Indeed, as Chelsea has noted in its opening brief, the Town has conceded that taking a contrary position is simply not credible. As to the point regarding the purported impact on open space, the Town has a Park and Open Space Plan and the Project site is not in it. Exhibit CS-Cross-DPS-5 and CS-Cross-DPS-6. Mr. Raphael has fabricated an entirely new definition of "open space" for purposes of *only* this Project even though the "open space" is private.¹⁴ Mr. Raphael's broader "more holistic" concept of open space (2nd Tr. 71: 23-24) is impossibly vague and unsupported by law.

¹⁴ Raphael's methodology here is, as argued in Chelsea's opening brief, contradicted by his methodology in other cases, such as in the Thomas Dairy Solar report on file with the Commission in docket 18-2233-NMP, *Petition of Thomas Dairy Solar I LLC*, <https://epuc.vermont.gov/?q=downloadfile/276713/133521>, where he treats open space differently to suit his conclusion:

The Project will not result in the permanent loss of any meaningful open space. This is not an open space accessible to the public, nor is there any designated or official public use or access for this property, now or in the future. This is private property and a commercial dairy operation that is inappropriate for active, public open space uses.

[W]hile the solar site is currently an open field, it does not contribute to any notable or specified open space views. It is located along a very busy US Highway on the edge of an urban and built up portion of the road. A short view of the Project, which will appear as an extension of the main dairy complex and operation, will

The Intervenor's brief makes the same argument as the DPS brief with respect to the first prong of the *Quechee* test. Namely, the Project's location within the RCON causes it to have an adverse effect on the scenic and natural beauty of the area. This argument too should be dismissed as Chelsea has argued here and in its opening brief because solar facilities are contemplated and allowed uses with the RCON.

The Intervenor's brief also argues that because the Petitioner did not include a detailed acoustic analysis of temporary construction activity, the Project fails the first prong of the *Quechee* test. As discussed in further detail in Section III E. below, Mr. Haac (the Petitioner's noise expert) testified that for similar solar projects, conducting an acoustic impact analysis related to construction is not done and typically deemed unnecessary. 1st Tr. 60:16-18. The noise generated by the Project construction will be of limited duration and will be similar to the noise generated by typical light construction equipment. Jewkes pft at 6.

As to the second prong of *Quechee*, even Mr. Raphael and DPS agree with the Petitioner's experts that the Project meets the aesthetics criteria under section 248(b)(5) if the Petitioner's proposed mitigation measures and Commission Rule 5.800 are implemented (which they will be, as discussed further in Section III D. below). DPS Brief at 15. The Intervenor's brief, however, alleges that the Project will be shocking and offensive, and in violation of a clear, written community standard intended to preserve the aesthetic or natural scenic beauty and that the

not interrupt or diminish the visual quality of the area, and it will not be visible from more important and critical viewsheds identified in the Town Plan, such as those along Prospect Hill Road. Therefore, if this Project is developed, there will not be any permanent, detrimental or adverse impacts on open space, or open space views.

Petitioner has failed to take generally available mitigating steps to improve the harmony of the Project with its surroundings. Each of these three arguments is false.

First, as to the Project being “shocking” or “offensive”, the Project site is bordered by extensive and high-speed highway infrastructure, beyond which lies commercial and residential development that is part of Bennington's urban core. The Project will be new but not be out of context with the electric infrastructure elements otherwise located in the RCON. The Project will be generally screened from nearby views from the Welcome Center, the highways, and the dispersed residences in the neighborhood. The Petitioner is enhancing that screening by adding mitigation planting and conducting a post-construction aesthetics review to allow for additional screening from nearby views if necessary. Although the Project *site* will be visible from more than a mile away across the valley at the Mt. Anthony Country Club that view will not shock or offend the average person. From these locations the Project will appear as an opaque rectangle of a handful of acres that will be part of the broader vista of highway and developed urban landscape otherwise visible from these distant viewpoints.

In addition, the Project is not a new type of development in Bennington, and the Town has not challenged other similarly-situated commercial solar projects in the RCON. The *Quechee* test does not guarantee that the aesthetic qualities of an area will not change. However visible, the Project will not be a dominant element in the landscape, but rather, will be seen as a land use consistent with the other urban, highway, and electric infrastructure development that dominates any view of the Project site. Further, the Petitioner has considerably mitigated the possible impact of the Project on scenic views by reducing its size and visibility through new technology and enhanced buffers.

With respect to the “clear, written community standard”, even Mr. Raphael agrees with Petitioner’s expert that there is no clear, written community standard in the Bennington Town Plan that is violated by the Project. Exhibit PSD-DR-2 at 24. But as argued in Chelsea’s opening brief, there is no clear, written community standard in the Bennington Town Plan that is violated by the Project. Furthermore, the Commission has already ruled that is the case in the AH Final Order.

As to whether or not the Petitioner has failed to take generally available mitigating steps to harmonize the Project with its surroundings, the Petitioner has gone above and beyond what would be reasonably required, including taking the following steps:

- (i) The Petitioner has chosen a site which is not identified for conservation or open space protection. While identified as Rural Conservation by the Town, the land use allows a variety of low density uses with due consideration of aesthetic impacts. Additionally, the nature of this Project, upon its decommissioning, will allow the site to be restored to an undeveloped condition.
- (ii) The Petitioner has chosen a south-facing site with a very low slope that does not dominate the surrounding landscape, function as a ridgeline or otherwise feature prominently from offsite vantage points.
- (iii) The Petitioner has placed the arrays comprising the solar field on slim mounting brackets that follow the natural terrain of the land to minimize its profile. These slight variations in terrain help break up and limit the perceived scale of the Project.
- (iv) The form of the power poles (wooden) to interconnect the Project to the grid is very common in the broader landscape and the position of the structures against the backdrop of retained vegetation will soften and limit their appearance.
- (v) The Petitioner has chosen darker tones for supporting structures, such as the inverter skid to minimize their appearance. The placement of the inverter skid lower (south) on the site allows the large wooden buffer further south to effectively screen it. This placement also puts these components over 650 feet away from the nearest residential structure.
- (vi) The photovoltaic surfaces of the panels are low-reflective and do not create problematic glare. The use of “Mono PERC” modules have a darker black coloring as compared to the typical “blue”; helping it recede from view. Glare modeling suggest a potential for low-impact glare along Route 7 north in the immediate

vicinity of the Project site. This impact, relegated to a narrow window of time in the early am during the summer will be even further mitigated by the presence of existing (and proposed) landscaping. Additionally, the area of this low-level impact is along the highway meaning the duration of impact is fleeting. Glare is not expected at any stationary points nearby. None of this modeling accounts for the screening of natural vegetation; which intervenes.

- (vii) The Petitioner is retaining large buffers of existing roadside vegetation that limit views into the site from the public right-of-way to the west. In an abundance of caution to assure effectiveness at all times of the year, the design includes additional plantings along this western boundary. A total of 223 individual plantings (mixed deciduous and coniferous) are proposed along the western edge (See Plant List on Figure CS-03).
- (viii) New landscaping is proposed along the edge of the parcel to the north and east of the Project including 142 mixed deciduous and coniferous trees and shrubs.
- (ix) New evergreen screening trees are proposed along the northern area of the array to provide even greater screening to an adjacent residential property.
- (x) A 10-foot-tall chain-link fence is proposed around publicly-facing segments of the Project fence. This fencing will be fitted with an 85% black mesh fabric material to improve its screening function and further lessen the potential for any direct or unfiltered view of the Project from offsite locations.

As such, there is more than sufficient evidence to conclude that Chelsea has taken generally available mitigating steps. The final amended form of the Project reflects the Petitioner's substantial efforts to address purported concerns of the neighbors and mitigate the impacts of the Project and eliminate its visibility. Moreover, if a CPG is issued for the Project, the landowner of the adjoining apple orchard parcel has agreed with the Town to not develop that parcel into a different use. Furthermore, Chelsea has agreed to do a post-construction review and adhere to PUC rule 5.800.

B. Long-Range Views.

The DPS brief accurately describes the Project from long-distance viewing locations, such as, White Rocks lookout and the Bennington Battle Monument. Specifically, "the viewing angle,

scale, size and distance of the Project will be so small and minor in the wide panorama view rendering it insignificant. DPS Brief at 8-9. The Intervenor's brief, however, is filled with mischaracterizations and conjecture on purported aesthetic issues, all of which have been repeated numerous times before and none of which are credible or supported by any evidence.

The Intervenor also claim that the Petitioner has failed to provide sufficient simulations from any long-range points and that their aesthetic experts ignored such long-distance views. As explained by Mr. Kane during the evidentiary hearing, not preparing visual simulations for long-range locations is not the equivalent of "ignoring" such locations and each of such locations was visually assessed.¹⁵ Visual simulations were prepared for the locations with the greatest sensitivity with regional significance.¹⁶ Moreover, there is no mystery as to what the Project will look like from these long-range views. *First*, with respect to the State in general, solar facilities have become ubiquitous in the Vermont landscape. Flying into Burlington from any direction one can view dozens of solar facilities from a distance that blend seamlessly into the landscape. *Second*, everyone that participated in the site visit saw the Maple Leaf Solar LLC project¹⁷ first-hand from the Southern Vermont College and the Southern Vermont Orchards and saw that it is indistinguishable from a pond or lake at such distances. Now, rather than looking a hole in the trees where the Harris house is, visitors to these long-range locations will see what may appear as a house on a lake. Having seen what a solar facility from a distance actually looks like, it is of no surprise that the Intervenor has never even paid lip service to the appearance or existence of the

¹⁵ 1st Tr. 174:10-20.

¹⁶ *Id* 175:12-25.

¹⁷ Docket No. 16-0002-NMP.

Maple Leaf Solar LLC project in Bennington and have focused instead on their “black box” rhetoric and meritless conjecture.

The DPS brief also accurately dispels of the Intervenor’s “big black box” myth stating:

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.

DPS Brief ¶16.

The Intervenor’s brief then claims that “The project is visible from the Bennington Battle Monument”. This statement is not accurate. Mark Kane discusses the Project site visibility from the Battle Monument beginning on Page 10 of his *Exhibit CS-MK-2*. Kane concludes that the Project site is not visible from the grounds of the Battle Monument and that the potential visibility of the Project *site* from the observation windows in the Battle Monument is slight. Special and unusual steps must be taken to have any view whatsoever of the Project *site* from the Battle Monument as the Project is not in any direct line of sight. Wilson rbt at 33-34. As discussed above and as explained in the DPS brief and in Mr. Raphael’s report, any potential view of the Project from the Battle Monument is insignificant:

While it is possible that the Project will be visible from important long-distance

viewing locations like White Rocks lookout or the Bennington Battle Monument, the viewing angle, scale, size and distance of the Chelsea Project will be so small and so minor in the wide panorama view so as to be insignificant. It will just be another land use element among many that are visible from here (e.g. the highway, Bennington commercial district, etc.).¹⁸

The same conclusion applies to with respect to the views from the Mount Anthony Country Club (*i.e.*, the Project will “just be another land use element among many that are visible from here”) as there are no views of the Project site from anywhere within the MACC that do not also include views of the industrial and commercial areas to the north (*e.g.*, the Walmart) and/or the Route 279/Route 7 highway infrastructure.

C. The RCON Design Standards.

The Intervenor’s brief argues that the Project allegedly violates the RCON design standards in the Town Plan because (i) development in the RCON zone is limited to “limited residential development”, (ii) it is sited “in prominently visible locations on hillsides and ridgelines” in the RCON zone and (iii) it fails the criteria that “any development must minimize the clearing of natural vegetation.” As comprehensively argued in Chelsea’s opening brief, the Intervenor’s claims are meritless.

D. The Landscape Mitigation Plan.

The Intervenor’s brief argues that the Petitioner’s landscape mitigation plan is inadequate because (i) the orchard lot is not owned by the Petitioner, (ii) there is allegedly no plan for ongoing maintenance of trees and shrubs and (iii) the integrity of the remaining forest to serve as a visual buffer after the clear-cut is allegedly not assured. Each of these arguments also fails.

¹⁸ See Exhibit PSD-DR-2 at 13.

As to the first point, the orchard lot is owned by PLH LLC, a company that shares a common owner with the Petitioner. PLH has already agreed in the settlement with the Town that the orchard lot would not be developed into a different use.

As to the second and third points, there is, of course, a plan for ongoing maintenance of trees and shrubs in the landscape mitigation plan, which directly addresses any concern regarding the integrity of the remaining vegetative buffer. Specifically, Chelsea has agreed to do a post-construction review and adhere to PUC rule 5.800 concerning ongoing maintenance. Even Mr. Raphael's expressed concerns regarding ongoing maintenance were assuaged after he read at evidentiary hearing (for the first time) the Rule 5.800 mitigation maintenance requirements. *See* 2nd Tr. 139:14-25.

In addition, the Intervenor's expressed concerns regarding landscape mitigation from the home of Libby Harris¹⁹ are 100% contrived. At a recent Bennington selectboard meeting, former intervenor Libby Harris and AHHA member was asking the selectboard to have Petitioner *eliminate* much of the proposed screening.²⁰

E. Noise.

The Intervenor's state that Petitioner's study shows that noise in Apple Hill will increase if existing vegetation is removed in accordance with the Project plan. Intervenor's Brief at ¶115. What the Intervenor's conveniently omit from their brief is the fact that the increase in noise (i) will be at the closest residence to the Project only (not the Apple Hill neighborhood), (ii) will be barely

¹⁹ *See* Intervenor's brief at 33.

²⁰ <https://youtu.be/sZYGQf9zhpo?t=2225> (link to video recording of comment begins at timestamp 37:05)

perceptible to humans, and (iii) will not be adverse, let alone unduly adverse. Haac pft. at 5 and rpft. at 1, lines 19-21.

Much of the Intervenor's brief on noise seems to have been written by someone that was not in attendance at the evidentiary hearing or, if in attendance, was not paying attention to the testimony of the witnesses. For example, the Intervenor's criticize the Petitioner's noise analysis for not assuming snow cover. *See* Intervenor's Brief at ¶119. However, as explained by Ryan Haac at the evidentiary hearing, snow absorbs sound and would decrease the Project generated noise. 1st Tr. 57:17-23. The Intervenor's also criticize the Petitioner's noise analysis for not including the cumulative impacts of both the Project and the Apple Hill project. *See* Intervenor's Brief at ¶121. However, Ryan Haac testified to such cumulative impacts at the evidentiary hearing and stated clearly that his overall conclusions are the same (*i.e.*, no adverse effect). 1st Tr. 65:8-15. As to the potential for the mesh screening to somehow increase the level of sound (*see* Intervenor's Brief at ¶127), Mr. Haac testified that he has no reason to believe that such material would create any additional sound than the sound of the wind through the trees. 1st Tr. 62:11-14.

Regarding construction noise, Mr. Haac testified that for similar solar projects, conducting a full-blown acoustic analysis related to construction is typically not done and typically deemed unnecessary. 1st Tr. 60:16-18. Mr. Haac's personal preferences regarding the scope of a noise impact analysis if he were living in the neighborhood is irrelevant because construction noise analysis for solar facilities in Vermont is simply not done because the sound impacts are temporary, known from experience to be minor and, thus, studies are deemed unnecessary. Of course, a sound expert will always like to see the most robust sound analysis possible performed. That's like asking a home security specialist if he or she would prefer additional locks on doors. The bottom

line is that the noise generated by the Project construction will be of limited duration, not be adverse, and will be similar to the noise generated by typical light construction equipment. Jewkes pft. at 6.

F. Wind.

The Intervenor's brief states that the Petitioner's "own wind study showed wind will increase". Intervenor's Brief ¶134. Again, the Intervenor intentionally omit the fact that any such increase will not be perceptible to human beings. Reynolds rpft at page 1 lines 14-21. The Intervenor also criticize Mr. Reynold's use of wind data from the Bennington airport but offer no explanation as to why that is problematic. Intervenor's Brief at 30. As explained in his rebuttal testimony, the airport data set provides an accurate representation of the wind conditions that would have been experienced at Harris' home. Reynolds rpft. at 2, lines 21-22. The Intervenor elected not to cross-examine Mr. Reynolds and offer no data of their own to support their completely unfounded claims of an undue adverse effect with respect to wind.

G. Wildlife.

Along the same lines as wind, the Intervenor make unfounded claims that the Project site is a "necessary wildlife corridor" and that the construction of the Project would result in a danger to those traveling the highway. Intervenor's Brief at 36. As Dori Barton has testified, the Project site does not contain any necessary wildlife habitat or corridors. Barton rpft. at 1, lines 18-22 and at 2, lines 1-17. Barton also makes it clear that the existing wildlife will continue to use the surrounding woods and such use will not introduce any public safety problems on nearby roadways. *Id.* Just because Ms. Block believes something to be true does not make it a fact. Even

Ms. Block's counsel recognized that Ms. Barton is an accomplished scientist and chose not to question any of her conclusions related to wildlife corridors or public safety. 1st Tr. 94:18-19.

H. PFOA.

The Intervenor's brief alleges that Petitioner's expert on soil contamination did not look into the impacts of clear-cutting the forest on PFOA contamination of groundwater. Intervenor Brief at 38. That statement is completely false. The entire purpose of hiring Mr. Waite was to determine what, if any, possible effects there would be from the construction of the Project (including vegetation removal) on the PFOA in the Apple Hill neighborhood. Based on Mr. Waite's analysis, construction of the Project will not cause any change in PFOA contamination or mobilization of PFOA that might impact the soils at the site, or the underlying bedrock aquifer and the drinking water wells that draw from it. Waite rpt. at 3, lines 9-13. The combined impacts of both the Project and the Apple Hill solar project would not have any material change to the level of PFOA in the drinking water in the Apple Hill wells. *See* 1st Tr. 41:3-14. It was also noted that the homeowners in the Apple Hill neighborhood have water filtration systems that remove any PFOA from their drinking water, which further demonstrates that the Project would not have any effect of the PFOA in the water neighbors use. *Id.* 54:2

I. Economics.

In the May 30, 2018 Order granting intervenor status to Ms. Leon, the hearing officer wrote:

Permitting Griffin and Leon and Ms. Caslin to present information regarding the economic benefit of the Project is the first step in determining whether evidence has been submitted sufficient to warrant rescinding the conditional waiver. It is not a rescission of the waiver. Should evidence be admitted that warrants rescission of the waiver, the determination to rescind the waiver would be duly noticed, and

Chelsea and the other parties would have the opportunity to present additional information for admission on this criterion.

Ms. Leon failed to present *any* evidence regarding the economic impact of the Project. Unsubstantiated hearsay regarding the inspiration of local painters is not evidence. Intervenor's Brief at ¶147. The Intervenor's brief also states that "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." Intervenor's Brief at 42. The Intervenor is conflating aesthetic impact and economic impact without any evidence indicating any correlation between the two, even when they have been specifically asked to do so in this case. Although asked in discovery to provide information concerning the alleged economic impact that the development on the Walmart had on her business, Ms. Leon produced nothing. If the numbers supported her claims, Ms. Leon certainly would have presented them in this case. She did not, instead opting to just repeat unsupported and baseless conclusory allegations. She also failed to sponsor testimony from a single local artist to corroborate her claims concerning potential impacts to their economic livelihood due to the development of the Project north of the Walmart and the highway interchange.

Certain views (not including views which include the Walmart and the highway interchange) from the MACC are certainly beautiful and those views will remain for patrons to enjoy. It is unlikely that those attending weddings or other events at the MACC are electing to take photos with the Walmart or the highway interchanges in the background when there is a plethora of other fantastic views available. In any case, given that no evidence was provided by the Intervenor on the topic of economic impact, the waiver of the review of economic benefit under 30 V.S.A. § 248(b)(4) remains in place.

CONCLUSION

Potential increases to wind, noise and PFOA from the clearing of the trees at the site are not properly before the Commission under a section 248 analysis. Nonetheless, the Petitioner spent tens of thousands of dollars hiring experts to analyze these potential impacts and each study showed that the possible impacts would be non-existent, negligible and/or not perceptible (wind and noise) or very unlikely (PFOA). In Docket 8454, the Commission found that the Apple Hill solar project satisfied the applicable section 248 criteria. The vast majority of the Petitioner's evidence in the Apple Hill docket reflected the combined impacts of both the Apple Hill project and the Chelsea project. As such and based on the additional evidence submitted to the Commission in these proceedings and at the evidentiary hearing, the Commission should find that the Project satisfies the applicable section 248 criteria and issue a CPG with all deliberate speed.

Respectfully submitted,

/s/Michael Melone

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