STATE OF VERMONT
BEFORE THE
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 "Willow Road Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	))))))	**Case No. 17-5024-PET**

MOTION TO VACATE ORDER OF FEBRUARY 14, 2019, AND TO SCHEDULE ARGUMENT ON THE PFD

NOW COMES Chelsea Solar LLC ("Chelsea") and files this motion to vacate the order of February 14, 2019 (the "Order") issued by the Public Utility Commission ("PUC" or the "Commission") requesting further briefing on the definition of single plant and its application to the Willow Road Solar Project. Chelsea also moves the Commission to schedule oral argument on the proposal for decision expeditiously.

Argument

Chelsea moves the Commission to vacate the Order because as argued in Chelsea's opening brief in response to the Order, the "plant" issue raised has been sufficiently litigated, and as the hearing officer determined, it is meritless. The briefing requested will unjustifiably extend the extraordinary and unfair delay imposed upon Chelsea by this process.

The milestones set for the standard-offer program of one-year from contract execution to submit a CPG application and two-years from contract execution for commissioning, clearly contemplate the CPG process and construction of the facility should be accomplished within 12

months. With allowing the necessary time of at least 8-9 months to construct a facility, the milestones contemplate a 3-4 month CPG timeframe. The process here is now into its 57th month.[1]

The further investigation the Commission now seeks to undertake on the single plant issue is contrary to the prompt review promised by the Commission on October 12, 2017, more than 16 months ago, on which Chelsea relied in not only withdrawing its appeal to the Vermont Supreme Court but also ***continuing*** to make substantial expenditures to bring this project to completion.

Making matters worse, this newest attempt to extend the review of the project premised upon the new Willow Road access is directly contrary to the promise made by the Commission 16 months ago, in its October 12, 2017, Order, where the Commission invited Chelsea to present the project with access from Willow Road. *See*, Docket No. 8302, October 12, 2017 Order (the "2017 Order") at 5 (The Commission will "***promptly review a new Chelsea petition reflecting a new Willow Road [access] proposal.***") (emphasis added). Chelsea relied upon this promise of the acceptance of a Willow Road access and prompt review when it withdrew its appeal to the Vermont Supreme Court, and decided to continue to make substantial expenditures in the project and permitting process.

As argued in Chelsea's Opening Brief, the issue of the Apple Hill Solar Project and the Willow Road Solar Project being separate "plants" has been sufficiently litigated. The hearing officer properly dismissed the intervenors' unsupportable and unsupported claims. The issue was also raised in Case 17-4695 and overruled. The intervenors unsupported, off-the-cuff allegation that the projects are "functionally one 4MW solar array," simply ignores every electrical and legal standard. It is therefore more than surprising that the Commission would further delay the Willow Road project based upon such a meritless allegation. Any further litigation and delay causes more

[1] An abbreviated procedural history of this case is set forth in Chelsea's post-Proposal for Decision opening brief filed with the Commission today (the "Opening Brief").

unjustifiable costs to Chelsea, and continues to upset settled, investment-backed expectations *after* private industry has already committed to its investments.

As argued in Chelsea's Opening Brief, the definition of plant is well beyond the scope of the Apple Hill Homeowners Association and the Maru Leon intervention. More to the point, the issue of whether the Willow Road Solar Project is a separate plant is not an issue that is relevant to any section 248 criteria, and therefore beyond the scope of this case. To be sure, the economic criterion of section 248(b)(4) is waived for a standard-offer project, but it is undisputed that Chelsea has such a contract in place.

Furthermore, as argued in Chelsea's Opening Brief, the Commission's interconnection rules and recent precedent make it manifestly clear that a challenge to the Willow Road Solar Project's status as a separate plant would be utterly frivolous, as the hearing officer recognized. Commission Rule 5.502(20) expressly states that up to the point of interconnection, a project's interconnection facilities "are sole use facilities" and "shall not include System Upgrades" -- *i.e*, the distribution system of the interconnecting utility. *See id.*[2] By definition, the Interconnecting Facilities of Willow Road Solar Project and Apple Hill Solar Project do not extend to Green Mountain Power's distribution circuit on Willow Road. Each are separate "sole use facilities" and are not shared with each other or the utility, nor is the utility's distribution system "shared" or "used" by either generating facility. Moreover, both standard offer contracts require delivery of energy and transfer of title to VEPP at each project's respective (*and different*) points of

[2] "System Upgrades are "the additions, modifications, and upgrades to the distribution system and/or transmission system at or beyond the Point of Interconnection to facilitate interconnection of the Generation Resource. System Upgrades do not include Interconnection Facilities." Rule 5.502(32).

interconnection.[3] Thus neither project can be considered to be "sharing" or "using" something that it *does not use*.

The Federal Energy Regulatory Commission (the "FERC"), North American Electric Reliability Corporation ("NERC") and ISO-New England all require that each of the Willow Road and Apple Hill Solar Projects be reviewed separately and treated in all respects as separate independent facilities. Each *separate* project is its own certified and *separate* qualifying facility[4] under the Federal Power Act, and a separate interconnection agreement.

If the intervenors or other persons desire to challenge the validity of the Chelsea contract they must do so at the FERC, not here for the reasons stated in Chelsea's Opening Brief. However, the time to challenge the Chelsea standard offer contract has long past. The award to Chelsea was never challenged. The contract at issue in *In Re Programmatic Changes* was the Apple Hill contract, not the Chelsea contract. The Chelsea contract does not require or detail any specific point of interconnection ("POI") or interconnection arrangement. The description of the facility in the Chelsea contract states the "Project will be a 2 MW AC solar photovoltaic generation facility to be located at 1033 Willow Road on the northerly portion of a 27 acre parcel in Bennington, Vermont. The interconnecting utility is Green Mountain Power Corporation." The Willow Road project squarely fits within that description. All of that information is in the same public record as PC156. For the reasons detailed in the Opening Brief, a collateral attack on the contract to Chelsea at this point is improper, legally unsupportable, exceeds the Commission's jurisdiction and violates Chelsea's statutory and constitutional rights.

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[3] Section 3 of Chelsea's standard offer contract obligates Chelsea to deliver its energy to VEPP at the point of interconnection. "Delivered, in the context of Electricity, means delivered to the interconnection point." *See*, section 1(c).

[4] "[Q]ualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or "QFs" under regulations of the FERC, *see* 16 U.S.C. §796(17)(C); 18 C.F.R. §292.203.

Request for Relief

For the reasons set forth above and in Chelsea's Opening Brief, the Commission should vacate the Order, schedule oral argument on the proposal for decision expeditiously, and issue the CPG for the Willow Road Solar Project on an expedited basis.

Respectfully submitted,

/s/Thomas Melone
Thomas Melone
Bar No. 5456
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
Phone: (212) 681-1120
Email: Thomas.Melone@AllcoUS.com

Attorneys for Chelsea Solar LLC

Dated: February 19, 2019

Attachments
1. Opening Brief

STATE OF VERMONT
BEFORE THE
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 "Willow Road Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	))))))	**Case No. 17-5024-PET**

CHELSEA SOLAR LLC'S POST-PFD OPENING BRIEF ON THE DEFINITION OF A PLANT AND RELATED MATTERS

INTRODUCTION

The issuance by the Public Utility Commission ("PUC" or the "Commission") of request for further comments following a favorable proposal for decision to Chelsea Solar LLC ("Chelsea") is eerily familiar. The February 14, 2019 order (the "Order") asks for briefing on (i) whether the differences between PC156 and the Willow Road Project are consistent with the Vermont Supreme Court's decision in *In Re Programmatic Changes*, 2014 VT 29, (ii) whether the differences between what was proposed in said case and what is proposed here are so significant as to require an amendment to the standard-offer contract, (iii) whether said differences require any other filings by the parties, and (iv) whether said differences require any other determination by the Commission. Order at 4.

Chelsea will address those questions in turn, as well as the additional issues that would be raised if the Commission proposed to hold that the projects were not separate plants under 30 V.S.A. § 8002. At the outset it is critical to understand five facts.

First, Chelsea moved the access drive to off of Willow Road to accommodate the desires of intervenors Libby Harris and the Apple Hill Homeowners Association ("AHHA"). Principles of equitable estoppel prevent the intervenors from now complaining about that change. Moreover, 30 V.S.A. §8002 is well beyond the scope of the AHHA and Harris intervention. While Chelsea could amend the Project to

change the public point of access from Willow Road to Apple Hill Road, there is no legitimate reason to undertake such action at this point.

Second, there is no doubt that if the Willow Road Project and the Apple Hill project were owned by unrelated entities there would not even be a question as to whether the projects were separate plants. Neither State nor Federal law permit a person, in this case Chelsea, to be treated differently than would be a similarly situated unrelated party.

Third, Commission Rule 5.502(20) expressly states that up to the point of interconnection ("POI"), a project's interconnection facilities "are sole use facilities" and "shall not include System Upgrades" -- *i.e*, the distribution system of the interconnecting utility. *See id.*[1] By definition, the Interconnecting Facilities of Willow Road Solar and Apple Hill Solar do not extend to GMP's distribution circuit on Willow Road. Each are separate "sole use facilities" and are not shared with each other or the utility, nor is the utility's distribution system "shared" or "used" by either generating facility. Moreover, both standard offer contracts require delivery of energy and transfer of title to VEPP at the project's respective (and different) points of interconnection.[2] Thus neither project can be considered to be "sharing" or "using" something that it *does not use*.

Fourth, the time to challenge the Chelsea standard offer contract has long past. The award to Chelsea was never challenged. The contract at issue in *In Re Programmatic Changes* was the Apple Hill contract, not the Chelsea contract. Unlike a net metering situation where there is no contract until a Certificate of Public Good ("CPG") is issued, here there is. The Chelsea contract does not require or detail any specific POI or interconnection arrangement. The description of the facility in the Chelsea contract states the "Project will be a 2 MW AC solar photovoltaic generation facility to be located at 1033 Willow

[1] "System Upgrades are "the additions, modifications, and upgrades to the distribution system and/or transmission system at or beyond the Point of Interconnection to facilitate interconnection of the Generation Resource. System Upgrades do not include Interconnection Facilities." Rule 5.502(32).

[2] Section 3 of Chelsea's standard offer contract obligates Chelsea to deliver its energy to VEPP at the point of interconnection. "Delivered, in the context of Electricity, means delivered to the interconnection point." *See*, section 1(c).

Road on the northerly portion of a 27 acre parcel in Bennington, Vermont. The interconnecting utility is Green Mountain Power Corporation." The Willow Road project squarely fits within that description. No change to the standard contract is necessary. A collateral attack on the contract to Chelsea at this point is improper, legally unsupportable, exceeds the Commission's jurisdiction, and violates due process.

Fifth, any proposed termination of the Chelsea or Apple Hill ("AHS") contract (which appears to be the ultimate goal of the intervenors) would need approval of the Federal Energy Regulatory Commission ("FERC"), require a separate contested case proceeding and require a determination by the FERC that such action was in the public interest. *See generally, e.g., NextEra Energy, Inc. v. Pacific Gas and Elec. Co.*, 166 FERC ¶ 61,049 (2019).[3] *See also, In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) ("The regulatory system created by the Act . . . contemplates abrogation of these agreements only in circumstances of unequivocal public necessity").

The intervenors unsupported allegation that the projects are "functionally one 4MW solar array," simply ignores every electrical and legal standard. It is therefore more than surprising that the Commission would further delay the Willow Road project based upon such a meritless allegation.

The FERC and North American Electric Reliability Corporation ("NERC") guidelines for interconnection require that each of the Willow Road and Apple Hill projects be reviewed separately and treated in all respects as separate independent facilities. That has been done. Separate contracts for the sale of energy have been executed. Separate interconnection agreements have been executed. Each project is its own *separate* certified qualifying facility[4] under PURPA[5] and the Federal Power Act ("FPA"). Similarly the rules of ISO-New England treat each project as a separate 2MW project. *See, e.g.*, ISO New England Planning Procedure 5-1.

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[3] The Chelsea contract is a FERC-jurisdictional wholesale sale. *See, e.g., PJM Interconnection, LLC*, 123 FERC 61,087 (2008). Chelsea sells energy to VEPP Inc. who then re-sells it and wheels it to different Vermont utilities.

[4] "[Q]ualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or "QFs" under regulations of the FERC, *see* 16 U.S.C. §796(17)(C); 18 C.F.R. §292.203.

[5] The Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA").

The issue of whether the Willow Road project would constitute part of the same plant as the Apple Hill project was litigated in this proceeding, the intervenors raised the issue and the hearing officer properly dismissed the intervenors' unsupportable and unsupported claims. It was also raised by intervenor Harris in her opposition to the extension of Chelsea's standard-offer contract so it was litigated there as well. *See*, Harris Response To Request For Responses to Standard Offer Contract Extension, November 17, 2017, Case No. 17-4695-PET, *Petition of Chelsea Solar, LLC for relief from Standard-offer contract milestone* ("The applicant has submitted its amended plans for Apple Hill Solar and has issued its 45 day notice for Chelsea Solar. The amended plans show that the projects will share a common road, Willow Road. The application materials show that both projects are to be constructed, operated and maintained by the same road. Therefore, Harris contends that one of them should again be rejected as not complying with the requirements of the Standard Offer program as determined by the Vermont Supreme Court in its 2014 decision.") The Commission overruled Harris' objection by extending the Chelsea contract. *See*, Order of March 15, 2018, Case No. 17-4695-PET.

Moreover, the single plant issue under 30 V.S.A. § 8002(14) (2014) is not a section 248 criteria. For that reason, litigation of the single plant issue was never proper in this docket and certainly is not a basis for delaying the issuance of a CPG. Further, the issue exceeds the scope of the intervenors' intervention. By addressing the issue in the Order and requiring further briefing, the Commission has allowed the intervenors to *retroactively* intervene on an issue with respect to which the intervenors clearly have no standing because it (i) exceeds the scope of their intervention and (ii) exceeds what would be permissible under the Commission's rules because it is not a section 248 criteria.

I. BACKGROUND.

A. Prior Proceedings.

The Standard Offer Contract History.

On April 1, 2013, VEPP issued a request for proposals (the "SPEED RFP") seeking bids for projects eligible for a power purchase agreement ("PPA") under Vermont's Sustainably Priced Energy Enterprise Development program ("SPEED") created by 30 V.S.A. § 8005a. In order to be an eligible

project for the SPEED RFP, a project's "plant capacity" as defined under 30 V.S.A. § 8005a(b) needed to be no greater than 2.2 megawatts ("MW")[6].

On May 1, 2013, Ecos Energy LLC ("Ecos") submitted three 2.0 MW projects to VEPP in response to the SPEED RFP—the Bennington Solar project (later named the Chelsea project and now the Willow Road project), the Apple Hill Solar project and the Sudbury Solar project. The three projects were the lowest priced projects, and in accordance with the rules of the SPEED RFP, all three projects should have been selected to enter into a PPA with VEPP.

However, on May 16, 2013, the Commission issued an order (the "May 2013 Order") disqualifying the Apple Hill solar project on the basis that, if built, the Apple Hill solar project would be considered part of the same "plant" (as defined by 30 V.S.A. § 8002(14)[7]) as the Bennington Solar project, which would result in a single plant whose "plant capacity" would be 4.0 MW, and thus exceed the 2.2 MW eligibility cap.

The Commission rested its conclusion on the basis that the Bennington and Apple Hill solar projects would be located on the same parcel of land and have "similar" interconnection points.[8] No issue was raised with respect to the Chelsea contract. The Commission stated:

> [b]ecause 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

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[6] 30 V.S.A. § 8002(15) (2014) provides:

> "Plant capacity" means the rated electrical nameplate for a plant, except that, in the case of a solar energy plant that executes a standard offer contract under this chapter, the term shall mean the aggregate AC nameplate capacity of all inverters used to convert the plant's output to AC power.

[7] Pursuant to 30 V.S.A. § 8002(14) (2014), 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.

[8] *See* May 2013 Order at p. 4.

> 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.

On May 23, 2013, Ecos petitioned the Commission to reconsider and modify its May 2013 Order (the "Reconsideration Petition"). On June 28, 2013, the Commission issued an order (the "Rehearing Order") denying Ecos' request for reconsideration. With respect to the substance of the issue of whether the Bennington and Apple Hill solar projects would be separate "plants", the Commission stated "[w]hile the projects may be operationally independent, they are still being advanced by the same developer, located on the same parcel of land, and adjoining each other."[9] Once the Commission concluded that the Bennington and Apple Hill solar projects met the standards for separate plants under the plain meaning of 30 V.S.A. § 8002(14), the inquiry should have ended, as the Vermont Supreme Court subsequently agreed. Ecos appealed to the Vermont Supreme Court, which reversed the Commission's decision.

The Chelsea proceedings

The petition for a CPG for the Chelsea project was filed on June 19, 2014 (PUC Docket No. 8302) and the petition for the AHS project was filed on March 15, 2015. In each case, all surrounding neighbors were notified of the plans for each project, and the Town of Bennington (the "Town") received and reviewed the plans and made no objection or comment. But then in August 2015, after the technical hearing in the Chelsea docket, Libby Harris and members of AHHA and their cohorts convinced the Bennington Select Board (the "Select Board") to hold a meeting (of which neither Chelsea nor AHS received notice) at which false visual information was provided by area resident Richard Carroll and others to the Select Board,[10] resulting in the Select Board voting to oppose the Chelsea and Apple Hill projects. The Select Board

[9] *See* Rehearing Order at pp. 6-7.

[10] As part of the discovery process, the Vermont Department of Public Service requested a simulation without any vegetation in order to verify the location of the Chelsea project in relation to the Apple Hill project. The simulation was presented to the Select Board by the neighbors as an "as built" simulation, devoid of any vegetation, which was knowingly false. The actual color "as built" visual simulation of the Chelsea project from the Vermont Welcome Center, which was not shown during the meeting, shows that the Chelsea project could not be seen, a conclusion with which the Commission agreed with in the Chelsea Motions Order.

followed up that meeting with a letter to the Commission expressing its generalized (falsely-based) opposition to the Project (the "Town Letter"). It was the Town's (falsely-based) Town Letter that triggered the cascading events that led, on February 16, 2016, to the PUC rejecting the hearing officer's favorable proposed decision regarding aesthetics and orderly development and denying a CPG for the Chelsea project (the "Chelsea CPG Order".) The Commission conceded that its review of the Bennington Town Plan was triggered by the generalized (falsely-based) opposition Town Letter. *See* Chelsea CPG Order, n.23.

In March 2016, Chelsea filed several motions with the Commission and also filed an amendment to its CPG application reconfiguring the project into a smaller footprint. AHS did the same with respect to the Apple Hill project. On April 14, 2017 (as corrected by an order of April 17), the Commission denied Chelsea's motions (the "Chelsea Motions Order") (the Chelsea CPG Order and the Chelsea Motions Order are collectively referred to as the "Chelsea Orders".)

The Commission's denial of the CPG in the Chelsea Orders hinged on its reading of the Bennington Town Plan as containing a clear, written community standard prohibiting commercial ground-mount solar projects from the zoning district in which the project site is located—the rural conservation ("RCON") zone. The Commission reiterated that rationale in the Chelsea Motions Order. *See*, Chelsea Motions Order at 11-12 ("The Town Plan does not, however, permit commercial energy generation facilities in the Rural Conservation District, because it has been set aside for limited residential development and certain rural commercial activities.") An appeal to the Vermont Supreme Court ensued. Shortly thereafter, the Commission took a different approach with the AHS project and issued an order accepting AHS' motion to revise its footprint and engage in further discovery.

Even while the Chelsea appeal was pending, the developer continued to engage the Town and neighbors to reconfigure both projects. Long story short, in August 2017, the Bennington Select Board held a hearing to consider both reconfigured projects. At that hearing, the Town Attorney for Bennington publicly stated that the legal basis of the two unfavorable rulings in the Chelsea CPG Order *was simply not credible*. *See* Exhibit CS-BW-12, Transcript, August 14, 2017, Select Board hearing at 21:

> the Town Plan I do not think can 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.

In September 2017, the Town re-affirmed that position in its rule 30(b)(6) deposition. *See* Exhibit CS-BW-25 at 5-6.

> Q: …the basic question right now is, is there anything that would not allow the development of a commercial scale solar facility, in general?
>
> A. … the answer is no.

Also during the Town's rule 30(b)(6) deposition, the Town confirmed that neither the Chelsea project nor the AHS project would be prominently visible, *see* Exhibit CS-BW-25 at 18, and that the Town Plan contained no clear written standard violated by the Project. *See*, Exhibit CS-BW-25 at 9.

Further, the appropriateness of the site for solar (and thus its lack of adverse regional or local impact) was further highlighted in an email by Bennington Select Board Vice Chair, Don Campbell, who is also works for the Vermont Land Trust:

> the lot is small, there is no river or lake to protect, the forest is in terrible condition (basal area is so low it barely qualifies as forest in many places and it is rife with invasives), it does not connect to other conserved lands, it is not part of an animal corridor, it does not provide significant public access, it is not high quality farm land nor is it suitable for low-income housing, and is not tribal or cultural heritage land.
>
> Exhibit CS-BW-17.

Last, but certainly not least, was the stunning public admissions by the Town Planner that the Select Board treats purported "standards," as merely *ad hoc* rules to be applied only when the Select Board does not like a proposal, or as in this case, when there is political pressure from neighbors,[11] a practice the

[11] *See, e.g.*, the Select Board meeting of September 14, 2015, discussing screening ordinances in response to the Chelsea project, 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 Select Board 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.)

Vermont Supreme Court has unqualifiedly condemned as a violation of the Vermont Constitution. *See, e.g., In Re Handy*, 171 Vt. 336, 349 (2000) ("Flexibility cannot be a synonym for *ad-hoc* decision making that is essentially arbitrary.")

While the Chelsea appeal was still pending in the Vermont Supreme Court, on September 8, 2017, Chelsea filed a Rule 60(b)(6) motion, which the Commission denied on jurisdictional grounds in an October 12, 2017, Order. In so doing the Commission invited Chelsea to withdraw its Supreme Court appeal, and in return the Commission would "*promptly review a new Chelsea petition reflecting a new Willow Road [access] proposal* and would be responsive to a request from Chelsea to further extend the operational deadline of its standard-offer contract." Docket No. 8302, October 12, 2017 Order (the "2017 Order") at 5 (emphasis added). Chelsea did so. As per and on reliance on the Commission's invitation, Chelsea dismissed its appeal, and brought the reconfigured Chelsea project petition reflecting a new Willow Road access back to the Commission. The Commission subsequently held that its "October 12 Order was thus 'akin to a denial without prejudice' that permitted Chelsea the opportunity to submit the new Willow Road petition. This allowed for the reconsideration and continued review of the development project foreseen in Chelsea's standard-offer contract and implied the application of the vested rights doctrine and 1 V.S.A. § 213 in this case." August 30, 2018 Order at 5-6. *See also*, Order of May 17, 2018 at 5 (the Commission's October 12, 2017 Order "was clearly intended to allow Chelsea to refile its petition and have that petition treated as a continuation of the previous petition, and Chelsea took actions in reasonable reliance on that Order.")

After the filing of the petition, intervenor Harris filed an objection to the extension of the Chelsea standard-offer contract claiming that the access off Willow Road made the Willow Road project and the Apple Hill project a 4MW plant. *See*, Harris Response To Request For Responses to Standard Offer Contract Extension, November 17, 2017, Case No. 17-4695-PET, *Petition of Chelsea Solar, LLC for relief from Standard-offer contract milestone* ("The applicant has submitted its amended plans for Apple Hill Solar and has issued its 45 day notice for Chelsea Solar. The amended plans show that the projects will share a common road, Willow Road. The application materials show that both projects are to be constructed,

operated and maintained by the same road. Therefore, Harris contends that one of them should again be rejected as not complying with the requirements of the Standard Offer program as determined by the Vermont Supreme Court in its 2014 decision.") The Commission overruled Harris' objection by extending the Chelsea contract. *See*, Order of March 15, 2018, Case No. 17-4695-PET.

To address Harris' new concern with the Willow Road access, Chelsea filed an amendment to provide for northerly access to the project. Chelsea filed the amendment as part of its effort to continue, where possible, to accommodate intervenors' concerns. *See* Exhibit CS-BW-28. Chelsea subsequently withdrew the amendment on July 6, 2018, because Harris and the AHHA subsequently stated in their April 17, 2018, filing that they would not want access to be from Apple Hill Road.[12] Further, Chelsea did not want to slow down the Commission's prompt review, just to address the possibility that the intervenors would flip-flop yet again.

II. Are the differences between PC 156 and the Willow Road Project consistent with the Vermont Supreme Court's decision in *In Re Programmatic Changes*, 2014 VT 29?

Short Answer: Yes.

Under the plain meaning of the statute the Apple Hill and the Willow Road solar projects are separate plants within the meaning of 30 V.S.A. § 8002(14), and that conclusion is consistent with the Vermont Supreme Court's decision in *In Re Programmatic Changes*, 2014 VT 29.

The Supreme Court understood that the projects had similar interconnection points. Indeed, as the Supreme Court explained, that is, one of the reasons the Commission did not provide a contract to Apple Hill. *See, In Re Programmatic Changes*, ¶ 7. ("The Board issued an order on May 16, 2013 in which it ruled that the Bennington and Apple Hill projects consisted of a single 4.0 MW plant '[b]ecause both proposals are located on the same parcel of land and have similar interconnection points.'").

[12] *See* Harris and AHHA Motion to Strike a Portion of Second Supplemental Prefiled Direct Testimony of Brad Wilson, dated April 17, 2018.

30 V.S.A. §8002(14) (2014) defines "plant" as:[13]

> 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.

As the Supreme Court explained, the second sentence relates to technical features of the project itself. The project does not include the GMP grid or any extension thereof. *Id*., ¶ 10. ("The second sentence makes clear that electrical generation facilities are not independent if they share technical features such as equipment and infrastructure. The logical corollary of the second sentence is that facilities that are not part of the same project and do not share equipment and infrastructure should be considered separate plants.").

Proximity of interconnections points, access roads or project location are simply not relevant factors as the Supreme Court held:

> The statute makes no mention of physical proximity or common ownership as relevant factors in determining whether facilities are separate plants. The Legislature could easily have included these factors if it had intended them to be considered, as it has elsewhere. For example, 30 V.S.A. § 219a(a)(4), which was added in 2011, states that "[a] group of structures or pieces of equipment shall be considered one facility" for purposes of determining eligibility for net metering "if it uses the same fuel source and infrastructure and is located in close proximity." The statute goes on to state that "[c]ommon ownership shall be relevant but not sufficient to determine that such a group constitutes a facility." Id. When the Legislature enacted this provision, it simultaneously made various modifications to § 8002. 2011, No. 47, § 7. Notably, it did not choose to alter the definition of a "plant" in § 8002(14).

Id., ¶ 11.[14]

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[13] For purposes of this case, the proper definition of plant is that in effect in 2014 as a result of Chelsea's vested rights. The current definition of plant is found in 30 V.S.A. §8002(18):

> (18) "Plant" means an independent technical facility that generates electricity from renewable energy. A group of 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. Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project.

[14] Notably the amendments to the statute in response to the Supreme Court's decision added factors for consideration but did not make them determinative in deciding whether separate facilities are part of the same project. *See* 30 V.S.A. § 8002(18) ("Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project.")

Thus the fact that the interconnection study process has led to a separate POI (*see*, pole number 22 on the attached plan) for the Chelsea project that is closer to the separate POI for Apple Hill (*see*, pole number 21 on the attached plan) than originally expected is irrelevant. Under the applicable definition of plant, Section 8002(14) (2014), proximity of interconnections points, or in the language used by the Commission in 2013—"similar" interconnection points—is not a factor. If each project has a separate POI (which the Willow Road and Apple Hill projects do), then they are separate. Similarly, the fact that the access road (at the request of neighbors) for the Willow Road project is proximate to the access road for the Apple Hill project is irrelevant. What matters is that they are separate, which they are. *See id*., ¶ 12:

> Under the plain language of the statute, then, as proposed, the Bennington and Apple Hill projects would qualify as "independent technical facilities." 30 V.S.A. § 8002(14). 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. Each project must obtain a separate certificate of public good pursuant to 30 V.S.A. § 248. As independent plants, both should have been awarded standard-offer contracts under the terms of the RFP because they were the lowest and second-lowest priced projects, respectively.

The capacity of a solar project, like any electric generating facility, is defined by its electric generation components and its interconnection agreement. A solar project, such as the Willow Road Solar Project, is a collection of direct current generating photovoltaic panels, which are wired together in strings. The electricity produced by those strings are combined and fed into inverters that convert the direct current electricity to the alternating current electricity of the electrical grid. The output from a project's inverters is then fed into the electric grid at the project's POI, which is *separate for each project*. The amount of electricity that a single project (such as Willow Road) can inject into the electric grid at any one time is limited by the interconnection agreement with the transmission owner (in this case GMP), which in the case of the Willow Road solar project would be 2.0MW.

As the Supreme Court stated, the definition of "plant" focuses on the technical, *i.e*., electrical, aspects of a plant equipment (such as generation equipment, control facilities, and connections to the electric grid). If it is a technically stand-alone facility then it is a separate plant under 30 V.S.A §8002(14). *Accord*, *Programmatic adjustments to the standard-offer program*, Docket 8817, Order of October 20, 2017

at 14 ("for the purposes of awarding standard-offer contracts, the Supreme Court of Vermont has held that the technical independence of facilities is sufficient to render such facilities separate plants and that the proposal of a certain number of contiguous plants is consistent with the State's renewable energy goal of locating plants of a moderate size in a distributed manner.").

Central Vermont Public Service ("CVPS") recognized as much in their comments recited by the Commission in the 2009 Order in Docket No.7533 where the Commission noted that with respect to projects that were contiguous: "CVPS states that separate projects would each need to enter into a separate interconnection agreement with the interconnecting utility, enter into separate standard contracts and obtain separate certificates of public good pursuant to 30 V.S.A. § 248, or other necessary permits."[15] That is exactly what each of the Willow Road and Apple Hill projects have done.

Independent of the Supreme Court's very clear guidance, the Commission's own interconnection rules require this same interpretation and result. "We will enforce the plain meaning of the statutory language where the Legislature's intent is evident from it,' but where not evident from the plain meaning, we will construe intent from consideration of 'the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law.'" *Judicial Watch, Inc. v. State*, 2005 VT 108, ¶ 14. What constitutes shared interconnection facilities under Vermont law turns on the guidance provided by the Commission's Interconnection Rule, Rule 5.500, which makes a bright-line demarcation between generator-owned facilities and grid facilities. Specifically, Rule 5.502(20) defines a project's "Interconnection Facilities" as

> *all facilities and equipment between the Generation Resource and the Point of Interconnection*, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generation Resource to the Interconnecting Utility's distribution or transmission system. *Interconnection Facilities are sole-use facilities and shall not include System Upgrades*.

Rule 5.502(20) (emphasis added). The Rule expressly states that up to the POI, a project's Interconnection Facilities "are sole use facilities" and "shall not include System Upgrades" -- *i.e*, the distribution system of

[15] *See*, 2009 Order at pp. 7-8.

the interconnecting utility. *See id.*[16] By definition, the Interconnecting Facilities of Willow Road Solar and Apple Hill Solar do not extend to GMP's distribution circuit on Willow Road. Each are separate "sole use facilities" and are not shared with each other or the utility, nor is the utility's distribution system "shared" by any generating facility.

In addition, as CVPS' comments recognized, the requirement under the open access transmission tariff ("OATT") to study separate projects in queue order can result in significantly different interconnection costs even for separate facilities that are contiguous, such as Willow Road Solar and Apple Hill Solar. The application of the FERC's "but for" approach for determining the responsibility of generators for interconnection costs can result in significant cost differences for projects that are next to each other in the queue.[17]

The evidence presented by Ecos, and accepted by the Commission, in 2013 clearly established that then Bennington solar project and the Apple Hill solar project each separately constitute "an independent technical facility that generates electricity from renewable energy" with a plant capacity of 2.0MW. The reconfigured Willow Road project and the Apple Hill project similarly each separately constitute "an independent technical facility that generates electricity from renewable energy" with a plant capacity of 2.0MW.

With separate equipment, separate access roads and separate interconnection facilities, the Willow Road and Apple Hill solar plants are just as separate as a solar plant located 20 miles away. The only common factor between the Willow Road solar plant and the Apple Hill solar plant is that they will lease land from the same landlord. That common factor cannot be reasonably said to have anything to do with each plant being an "independent technical facility that generates electricity from renewable energy" under Section 8002(14), as the Vermont Supreme Court stated.

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[16] "System Upgrades" are "the additions, modifications, and upgrades to the distribution system and/or transmission system at or beyond the Point of Interconnection to facilitate interconnection of the Generation Resource. System Upgrades do not include Interconnection Facilities." Rule 5.502(32).

[17] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶61,019 (2009).

Apple Hill And Willow Road Are Not Part of The Same Project

The evidence presented by Ecos then, and by Chelsea and Apple Hill now, clearly establish that the Willow Road solar project and the Apple Hill solar project are not "the same project" within the meaning of the second sentence of Section 8002(14). The second sentence of the definition of "plant" states that a group of *newly* constructed facilities will be considered one plant if the group (A) is part of the same project and (B) uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid. The second sentence provides for a two-prong test for different facilities to be treated as a single plant. They must be part of the same "project" *and* they must use common equipment and infrastructure. *Accord*, *Investigation into programmatic adjustments to the standard-offer program for 2018,* Case No. 17-3935-INV (July 20, 2018) ("We have previously explained that facilities are a single plant if they are 'part of the same project *and* share common equipment and infrastructure,'" citing *Programmatic adjustments to the standard-offer program*, Docket 8817, Order of 10/20/17 at 14. (emphasis in original).

All the evidence in the record establishes that the Willow Road project is not part of "the same project" as Apple Hill. The Commission has treated them as separate projects. The Town of Bennington has treated them as separate projects. The Vermont Supreme Court has treated them as separate projects. In the final order in docket 8454 the Commission held that the Apple Hill project was a separate plant. *See* Order of 9/26/18 at 47 ("Apple Hill is not Chelsea"); *see id*. at 58 (The Apple Hill Solar project "is a non-utility renewable energy project with a plant capacity greater than 150 kW and no more than 2.2MW."); *see also id*. at 65 ("Like this Project, Chelsea's new petition in Case No. 17-5024 is accessed from Willow Road and we refer to it as the Willow Road project.").

Because the Willow Road facility and the Apple Hill facility are not part of *the same project* the statutory inquiry ends. At that point it is irrelevant whether the projects share roads, control facilities, or connections to the electric grid, which they do not.

The Apple Hill Project And The Willow Road Project Do Not Use Common Equipment And Infrastructure Such As Roads, Control Facilities, And Connections To The Electric Grid.

Although the inquiry should end because the Apple Hill facility and the Willow Road facility are not part of the same project, the evidence also establishes that the Willow Road and Apple Hill solar projects do not use "common equipment and infrastructure such as roads, control facilities, and connections to the electric grid." In each case,[18] each project would *separately* interconnect to the electrical grid owned by GMP. Each project has its own equipment (none of which is redundant), and shares no facilities, or access roads with the other.[19]

The Apple Hill Project And the Willow Road Project Do Not Use Common Connections to the Electric Grid.

Each of the projects will have a separate interconnection agreement with GMP and separate interconnection facilities designed by GMP, which would limit the capacity of each to 2.0 MW. Each project is separately metered as well. The "interconnection" or "connection *to* the electric grid" stops at the point at which the project connects to GMP-owned assets—that is the POI, *see* poles 21 and 22 on the attached. Anything beyond the POI is not part of the Interconnection Facilities, and not part of a facility's "connection *to* the electric grid". Like any interconnection, those for the projects may, and here one does, require System Upgrades. As already established under Rule 5.500, whether the System Upgrades are for the extension of a three phase line, reconductoring an existing line, or replacing an existing line with a higher voltage, those upgrades are owned by the interconnecting utility and are not part of the Interconnection Facilities of either project.[20]

[18] *See*, PC 155-156. *See*, attached plan.

[19] Notably, by definition two projects that sit side by side are almost certain to have POIs that are close. Yet when the Legislature made changes to the definition of plant in response to the Supreme Court's decision in *In Re Programmatic Changes*, the Legislature did not aggregate plants that sit side-by-side.

[20] Shared interconnection facilities means just what it says—actual interconnection facilities to the POI are shared. By definition that only occurs when projects *have the same POI and share equipment for the interconnection.* Here it would apply if the interconnection agreement was 4.0MWs, and then the two projects shared that POI interconnection and interconnection equipment. It does not mean that different POIs to the distribution grid constitute a shared facility, no matter how close those POIs are.

Because of the three-phase line improvement to its distribution system that would be built by GMP in order to accommodate one of the projects, other landowners along the route and in the neighborhood would be able to interconnect their own solar systems—up to 150kw under Bennington's new Act 174 energy plan. Chelsea's project of course has vested rights that preceded the Bennington changes so it has the right to exceed Bennington's changes. But the principal applies equally—Willow Road Solar's interconnection is no different, and legally cannot be treated differently, than another project along the GMP distribution system that connects to the grid.

The Willow Road Project Does Not Use the GMP Extension.

The intervenors simply misunderstand the functioning of the electric grid and the standard offer contract. The Willow Road project delivers its energy to the POI (which is separate from even though near the Apple Hill POI). Title to the energy transfers to VEPP at the POI. Thus the Willow Road project does not use any of the GMP lines—extensions or otherwise. It is VEPP that then takes the energy at the POI and re-sells it to Vermont utilities. Once the energy is delivered to VEPP at the POI the electrons take only milli-seconds to travel through Vermont's entire distribution network travelling from Bennington to Burlington faster than you can read these words. To say that the Willow Road project "uses" or "shares" the GMP extension line is simply incorrect, both electrically and legally—even apart from the standard offer program. Such a conclusion would also mean that every electrical generating facility uses common infrastructure with every other facility, disqualifying every project from qualification under the standard offer program—an absurd result to be sure.

Apple Hill And Willow Road Do Not Use common access roads

The Commission has already correctly held that public roads are not "access roads" within the meaning of the statute. *See Applications of Westman GLC Solar, LLC and Cambridge GLC Solar, LLC for a certificate of public good,* Case Nos. CPG NMP-6045 and NMP-6046, Order of 11/10/15, 2015 WL 7348715 at 9 ("The use of a public road by two projects is not a shared use of infrastructure"). In that case the Commission found that although the two adjacent projects at issue in that case each had access points

off of a public, the fact that each project was "located at different points along the road and [would] use different access points from that road" meant that they did not share any infrastructure.

The same conclusion applies here. Willow Road—a class 4 public road—*is not an access road.* Thus, the fact that both the Willow Road Project (as the neighbors' requested) and the Apple Hill project would use Willow Road, a public road, is immaterial. Each project has its own separate access off of Willow Road.

The Commission is obligated to treat the Willow Road Solar Project the same as it treated the Westman GLC Solar and Cambridge GLC Solar projects. Article 7 of the Vermont Constitution, the "Common Benefits Clause", prohibits government from discriminately applying regulation when exercising its powers in the land-use permitting context. *See In re Town Highway No. 20*, 2017 VT 17, ¶¶ 30, 32 (2012) ("Article 7 expresses a similarly fundamental right: that the government is created to benefit all of the people and that preferential treatment for "any single person, family, or set of persons" is prohibited."). There, the Court highlighted the seminal United States Supreme Court ruling in *Village of Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), which held that a permit applicant could sue the government as a "class of one" if government attempts to impose a land-use restriction it had not required of other similarly situated landowners:

> In *Village of Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam), the U.S. Supreme Court recognized that a landowner could sue a municipality for imposing a condition on a land-use permit that it had not required of other landowners, in violation of the Equal Protection Clause. Although the landowner did not allege that she was part of a "suspect class" or denied a fundamental right, the high court held that she could sue as a "class of one" by showing that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id. at 564, 120 S.Ct. 1073. In its per curiam opinion, the Court noted that the landowner had alleged that the municipality's permit requirement was "irrational and wholly arbitrary" and motivated by what the circuit court had characterized as "ill will" and a "spiteful effort to 'get' [the landowner] for reasons wholly unrelated to any legitimate state objective." Id. at 563, 564, 120 S.Ct. 1073.

Id., ¶ 39.

Another recent example of what would be disparate treatment under the single plant factor, is the approval of three adjacent rooftop solar projects in *Application of Solar 32 LLC*, Case No. 18-1767-NMR,

Application of BOC SOLAR, LLC, Case No. 18-1768-NMR, and *Application of Lakeside Avenue Solar, LLC*, Case No. 18-1769-NMR. There, the Commission held that three net metering facilities were "not a single plant because they do not share any common equipment or infrastructure." Order of September 27, 2018 at 2. In those cases, the points of interconnection were in close proximity and all three projects were accessed off one common private driveway. Of course, all three connected to the same distribution circuit and the POIs were very proximate, if not on the same pole. The *Olech* and *In re State Highway No. 20* decisions compel the conclusion that this Commission cannot single out the Willow Road Solar Project and "treat[] [it] differently from others similarly situated", because there is "no rational basis for the difference in treatment" *Id.*. Treating the Willow Road Solar Project less favorably than those three projects would be a violation of due process and equal protection under both the Vermont and United States Constitutions. *See also, In re Programmatic Changes to the Standard-Offer Program*, 2014 VT 29, ¶ 16 ("[a]lthough we give deference to the construction of a statute by an agency responsible for administering it, statutory interpretation is a question of law, and we cannot affirm an unjust or unreasonable interpretation of a statute.").

In addition to these constitutional protections, "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike." *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3 at ¶ 21 (quoting *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007)) (reversing the Commission for abusing its discretion where it failed to treat like cases alike). Thus, the Court has and will reverse the Commission "when a regulation is interpreted or applied in a way that exceeds the statutory mandate under which the regulation was promulgated" or "when a regulation is inconsistently applied" by the agency itself. *Id.* at ¶ 21. *In re Petition of Green Mountain Power Corp*., 2018 VT 97, ¶ 13.

Even aside from the undeniable unconstitutional and statutory violations that would result if the Commission were to find that Apple Hill Solar and Willow Road Solar were considered to "share" Willow Road, the proposition is simply illogical and leads to absurd results. If projects were deemed to be sharing a road every time maintenance or other personnel drive on the same public road to get to a project, the inquiry regarding common road use would spiral out-of-control. Soon projects would need to insure that

no other project's personnel used interstate highways or other thoroughfares. Indeed it is likely that maintenance personnel of every solar project in southeastern Vermont uses at one point or another the Route 279 and Route 7 interchange which received so much attention in this docket. Such an interpretation would be absurd and not enforceable. *See, In re Programmatic Changes to the Standard-Offer Program,* 2014 VT 29, ¶ 16.

Apple Hill And Willow Road Do Not Use Common Control Facilities.

As separate plants, each of the Willow Road solar and Apple Hill solar projects has a separate "plant capacity" within the meaning of 30 V.S.A. § 8002(15) that is 2.0 MW. The aggregate alternating current ("AC") nameplate capacity of all inverters for the Willow Road solar project will be 2.0 MW. The aggregate AC nameplate capacity of all inverters for the Apple Hill solar project will be 2.0 MW. Each of the Willow Road and Apple Hill solar projects will have separate interconnection agreements with GMP and separate interconnection facilities designed by GMP, which will limit the amount of electricity that each plant may inject into the grid to 2.0 MW. Each of the Willow Road solar and Apple Hill solar projects will have separate metering and control facilities.

III. Are the differences between what was proposed in PC 156 and the Willow Road Project so significant as to require an amendment to the standard-offer contract?

Short Answer: No.

As explained above Chelsea's standard-offer contract contains no point of interconnection, nor does it describe or specify public road access or the location of the access drive to be built between a public road and the array. Paragraph 9 of the standard-offer contract addresses "Project Location, Design, Construction and Interconnection." It states in pertinent part: "Producer shall construct the Project at the location and in a manner substantially consistent with the description set forth in Attachment A." There is no reference to Project CPG plans. Attachment A simply provides: "Project will be a 2 MW AC solar photovoltaic generation facility to be located at 1033 Willow Road on the northerly portion of a 27 acre parcel in Bennington, Vermont. The interconnecting utility is Green Mountain Power Corporation."

The CPG Permitting process is separate and apart from the standard offer contract, and the scope of the standard offer contract is not at issue in this Section 248 proceeding. The difference in the POI of the Willow Road project as compared to the proposed POI for the Bennington Solar project from PC156 is immaterial from a contractual and statutory perspective.

IV. Do the differences between what was proposed in PC 156 and the Willow Road Project require any other filings by the parties?

Short Answer: No.

As explained above the differences between what was proposed in PC 156 and the Willow Road Project do not alter the conclusion that the Willow Road project is a separate plant.

V. Do the differences between what was proposed in PC 156 and the Willow Road Project require any other determination by the Commission?

Short Answer: No.

As explained above the differences between what was proposed in PC 156 and the Willow Road Project do not alter the conclusion that the Willow Road project is a *separate* plant, and as a result do not require any other determination by the Commission. That said, however, if the Commission proposes to conclude that the Willow Road project is not, *or may not be, a separate plant*, then due process would require a separate contested case, yet another evidentiary hearing, allowing Chelsea to amend the project to address the perceived (even if unsupportable) deficiency with respect to either the interconnection or the access, and would require a complaint proceeding at the FERC.

VI. Even if the statute had some ambiguity, the Intervenors' proposed interpretation is clearly erroneous.

The intervenors seek to impose on an *ad hoc* basis here, nonstatutory eligibility criteria into the definition of a plant, something the Supreme Court has already stricken down in *In re Programmatic Changes*:

> The Board's decision in this case effectively imposed additional nonstatutory eligibility criteria on potential SPEED project developers without prior notice. Although the Board stated in its 2009 order that it would consider on a case-by-case basis whether projects located on the same parcel of land were separate plants, it did not offer any guidelines or promulgate any rules regarding what criteria it would consider in making this decision. Nor does the RFP indicate that projects proposed by the same developer or on the same parcel

> of land will be considered to be a single plant even if they otherwise comply with the statute. While the Board is ordinarily entitled to deference in its interpretation of a statute within its area of expertise, we cannot uphold its decision in this case because it was clearly erroneous. *See In re Sleigh ex rel. Unnamed Motorists*, 2005 VT 45, ¶ 10, 178 Vt. 547, 872 A.2d 363 (mem.) ("Although we give deference to the construction of a statute by an agency responsible for administering it, statutory interpretation is a question of law, and we cannot affirm an unjust or unreasonable interpretation of a statute.").

In re Programmatic Changes to Standard-Offer Program, 2014 VT 29, ¶ 16.

The intervenors' multi-factor test introduces factors not included in the statute and is not a permissible interpretation of the statute. In addition, the intervenors' multi-factor test would result in discriminatory treatment solely against the developer of the neighboring project when the developer of both projects is the same—clearly violating the Common Benefits Clause of the Vermont Constitution, and the FPA's and PURPA's prohibition against discrimination.

The intervenors, like the Commission in 2014,[21] are only interested in identifying projects on the same parcel of land or contiguous parcels of land proposed by the same developer. As result, if a developer besides Chelsea proposed a project on the Willow Road site, the intervenors would conclude that the project, with the exact same setup was a separate plant within the meaning of the statute. In other words, Chelsea could sell the Willow Road project to another developer and that developer could build the same project without issue. Thus, the application of the new multi-factor test is patently discriminatory against Chelsea because Chelsea is being treated differently than any other person that would want to develop a project on that same piece of land. Such a test, targeting only the developer of the neighboring project, is not a reasonable interpretation of the statute.

Similarly, the intervenors' approach would introduce yet another variable into the statute that was not there in 2014 but is there now—the time each project is constructed. The Commission has already acknowledged that in determining whether a project is a separate plant, it would <u>not</u> aggregate a project, such as Willow Road, with an already existing plant, such as Apple Hill even if they were on the same piece

[21] *See*, 2009 Order at p. 8.

of land, developed by the same person and using common infrastructure so long as they were independent technical facilities. *See*, 2009 Order at p. 8 (stating with respect to adding

> incremental generation to an existing plant, the definition of plant specifically refers to 'newly constructed' plants using common infrastructure. There does not appear to be any statutory barrier to existing facilities building a new qualifying SPEED resource at the site, and we direct the SPEED Facilitator to allow such projects in the queue, provided that they meet all other requirements.

The Commission's discussion with respect to locating new plants next to existing plants is inconsistent with the intervenors' approach here. The Commission (and the Legislature) have no difficulty under the 2014 statute with the same project owner having an existing plant next to a new 2.2MW plant. That results in the inescapable conclusion that were the Commission to side with the intervenors, the Commission would be applying some vague time continuum as to when it is not acceptable for an adjoining plant to be treated as a separate plant under Section 8002(14) when developed by the same developer.

In addition, the intervenors' new approach would inject confusion into an otherwise clear statute. For the intervenors' rationale to make sense it must, by definition, result in a rule that any proposed SPEED project (regardless of the identity of the proponent) must be separated by an unspecified minimum distance from any other SPEED project. As a result, entire areas of the State of Vermont would be off-limits to a SPEED project. The Commission has not proposed such a rule, and has no intention of proposing such a rule, so the imposition here on a retroactive basis would violate due process and the Common Benefits Clause.

The inherent flaw of the intervenors' rationale can also be illustrated by a simple example. Assume a landowner had two contiguous pieces of land. The landowner leases portion A to Developer A and portion B to Developer B. Unknown to each other, both Developer A and Developer B submit proposals in response to the SPEED RFP. Developer A's price is the lowest and Developer B's price is the next lowest. Both projects are technically independent and have separate interconnections to the electrical grid. Under the intervenors' position, either Developer A's project or Developer B's project would need to be disqualified. However, there would be no statutory basis for the disqualification.

The post-2014 changes to the statute confirm as much. Those changes added: "Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project." Those factors cannot be made a *retroactive* part of the statute. The post-2014 changes also eliminated the "newly" modifier that existed in the statute. In 2014 the statute defined "plant" as:

> 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.

Whereas now the statute defines "plant" as:

> an independent technical facility that generates electricity from renewable energy. A ***group of 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. Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project

The application of the "newly" modifier requires that the Willow Road project be considered "newly constructed" which it will be when it is built, but it also requires that the Apple Hill project also be considered "newly constructed" *at that same time* the Willow Road project is completed. Yet if Apple Hill is constructed earlier, it would not be "newly" constructed at that later time. The "newly" in the 2014 statute clearly allows a new project—*e.g.,* the Willow Rad project—to share common equipment and infrastructure with an "existing" project, as the Commission concluded in its 2009 Order. Additionally, the statute would require a conclusion that the Willow Road project and the Apple Hill project were part of the same "group" of facilities, like a wind turbine array. The term "group" is not defined.

VII. The Chelsea Contract Is Not Subject To Collateral Attack In This Proceeding.

This proceeding is a petition for a CPG for the Willow Road project. While it is true that one criterion is waived if a project has a standard offer contract, 30 V.S.A. §248(b)(4) (economic benefit to the State), the project does have such a contract, regardless of the intervenors' attempts to collaterally attack it.

Even if the project did not have such a contract, it would still be entitled to a CPG, as it clearly satisfies the criterion that was waived.[22]

Chelsea received and was entitled to receive, as the Commission ruled in 2013, a contract regardless of where its POI was and regardless of where its access was. Chelsea's bid was first in line. The Commission awarded the contract, VEPP and Chelsea executed the contract, and the contract did not have any restrictions or requirements with respect to access or a required interconnection. The only requirement as to interconnection is that it be done in accordance with Federal and State law and ISO-NE rules, which has been followed. In *In re Programmatic Changes* the only requirement as to interconnection is that it be separate and stand-alone, which continues to be satisfied by the Willow Road project. *See id*. at ¶ 12 ("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… As independent plants, both should have been awarded standard-offer contracts under the terms of the RFP because they were the lowest and second-lowest priced projects, respectively.").

While proximity may be relevant for the plant determination under the net-metering rules, it is not relevant under 30 V.S.A. §8002(14) (2014). Indeed, as the Supreme Court noted in *In re Programmatic Changes* the Legislature omitted any such requirement, and such omission must be considered intentional. *Id*. at ¶ 11 ("The statute makes no mention of physical proximity or common ownership as relevant factors in determining whether facilities are separate plants. The Legislature could easily have included these factors if it had intended them to be considered, as it has elsewhere.").

The time to have challenged the Chelsea contract was in 2013, not in 2019. Even considering the issue in this docket upends hornbook law on government procurements, and upsets settled, investment-backed expectations *after* private industry has already committed to its investments, violating Chelsea's

[22] *See*, *e.g.,* the testimony of Chris Little in docket 8797 regarding the section 248(b)(4) criteria for a non-standard-offer plant. If the Commission is prepared to accept PC155/6 into the record as evidence because it is in the public record, then it must accept the testimony of Chris Little on section 248(b)(4) from the same public record.

rights to due process and equal protection rights and its constitutional rights under the Contracts Clause and the right to property.

Even under State law the Commission has no jurisdiction to terminate the contract outside of the express provision of 30 V.S.A. § 8005a(j). Once the SPEED procurement was concluded, and the contract awarded, the Commission's jurisdiction to terminate the contract or upend the results of the procurement ended, except for the Legislature's express delegation under the provisions of 30 V.S.A. § 8005a(j).

VIII. A Termination of The Chelsea Contract Cannot Occur Without FERC Approval.

The presumed end-game for the intervenors is to convince this Commission to terminate the Chelsea contract based upon the intervenors' spurious claims. But even if the Commission had jurisdiction to consider the issue at this late date, because the contract is for the wholesale sale of energy, no termination can occur without the approval of the FERC and a determination by the FERC that such action was in the public interest. *See generally, e.g., NextEra Energy, Inc. v. Pacific Gas and Electric Co.*, 166 FERC ¶ 61,049 (2019).[23]

The FERC's jurisdiction to regulate wholesale contracts is broad, and it expressly includes not only rates but also "all rules and regulations affecting or pertaining to such rates," any "rate, charge, classification or service," and "any rule, regulation, or contract relating thereto." *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 773-74 (2016) ("FPA delegates responsibility to FERC to regulate . . . wholesale rates and the panoply of rules and practices affecting them…. FERC has the authority—and, indeed, the duty—to ensure that rules or practices 'affecting' wholesale rates are just and reasonable" (citation omitted)); *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446 n.1 (D.C. Cir. 1988) ("*Tennessee Gas*") (a "rate" includes "contractual provisions, methodologies for allocating costs, restrictions on availability of the [service] as well as quantity and price terms").

The U.S. Supreme Court has confirmed that the FPA grants the FERC "an opportunity in every case to judge the reasonableness of the rate." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981). PURPA

[23] The Chelsea contract is a FERC-jurisdictional wholesale sale. *See, e.g., PJM Interconnection, LLC*, 123 FERC 61,087 (2008).

created an exception, used here, to allow the PUC to determine the initial rate for the contract, subject to FERC's ultimate jurisdiction. *Wheelabrator Lisbon, Inc. v. Conn. DPUC*, 53 F.3d 183, 188 (2d Cir. 2008) ("under the PURPA regulatory regime, FERC—and not state agencies—[are] responsible for regulating the rates charged by qualifying facilities in power purchase agreements.") But States have the authority, subject to FERC's review under the FPA, to implement the FERC's rules requiring utilities to purchase from QFs, 16 U.S.C. §824a-3(f)(1), including compelling the entry into long-term contracts.

FERC's broad and exclusive authority over rates has led to the "filed rate doctrine." *See, e.g.*, *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246 (1951). This doctrine recognizes that the FERC "alone is empowered to make that judgment [of reasonableness], and until it has done so, no rate other than the one [approved by the FERC] may be charged." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963-64 (1986) (first alteration in original) (quoting *Ark. La. Gas Co.*, 453 U.S. at 581-82)). Once the FERC accepts or approves a filed rate as just and reasonable, as it does under the PUC's exercise of authority under PURPA, the filed rate has the force of law and is the "equivalent of a federal regulation." *See California Ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (citation omitted). In other words, "the filed rate . . . is to be treated as though it were a statute, binding upon the seller and purchaser alike." *Bos. Edison Co. v. FERC*, 856 F.2d 362, 372 (1st Cir. 1988). When there is a duty to comply with the terms and conditions of the contract that arises "not from the private law of contract" but from the FERC's authority itself. *Pa. Water & Power Co. v. Fed. Power Comm'n.*, 343 U.S. 414, 423 (1952); *see Blumenthal v. NRG Power Mktg. Inc.*, 104 FERC ¶ 61,211 at P 54 (2004) ("*Blumenthal*") (the FERC's authority under the FPA "is independent of authority arising from the contract").

Because the FERC's authority to regulate jurisdictional contracts under the FPA extends to all terms and conditions in wholesale contracts, it prohibits the termination of a wholesale contract without FERC's approval. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) ("The regulatory system created by the Act . . . contemplates abrogation of these agreements *only in circumstances of unequivocal public necessity*"). (emphasis added.) The FPA's "just and reasonable" standard is a broad and flexible standard that "is obviously incapable of precise judicial definition." *Morgan Stanley Capital Grp.*

Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 532 (2008). This standard requires the FERC to apply its specialized regulatory expertise and evaluate "all factors bearing on the public interest." *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 785 (D.C. Cir. 1974) (citation omitted). An important public interest considered by the FERC is the policy goal of promoting the development of new energy supplies including renewable resources, which is advanced by providing rate certainty to energy suppliers. *See also Blumenthal*, 104 FERC ¶ 61,211 at P 33 (quoting *United States Gas Pipe Line Co. v. Mobile Gas Service Corp*., 350 U.S. 332, 244 (1956)) ("By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the … industry.").

Wholesale electricity contracts may be filed directly with the Commission under the FPA, they may be negotiated under a filed and approved market-based rate tariff that does not require the utility to separately file the individual agreement or under a State's limited authority under PURPA. But in all cases, FERC's authority to regulate cannot be infringed by other agencies.

IX. The Time For Issuance Of The Chelsea CPG Is Now.

As has been recounted before, at the time the Commission was considering the hearing officer's proposed decision to approve the first Chelsea CPG, there was a backlash against the Commission for what was perceived in various corners as trampling on municipalities with respect to siting solar projects. The Vermont Supreme Court has stated that the atmosphere at the time created a "backlash that persuaded the Legislature to amend § 248 to give towns greater control over solar generation facilities." *In re Petition of Rutland Renewable Energy, LLC*, at P10. *See also, id*. at P42 (Robinson, J. concurring) (referring to the situation as a "political maelstrom" noting "frustrated municipalities all around the state that feel 'ignored' and 'steamrolled' by the PUC.")

In the case of the Chelsea/Willow Road petitions, the unjustified and excessive delays imposed by the permitting process has already delayed the CPG more than 4 years. The milestones set for the standard-offer program of one-year from contract execution to submit a CPG application and one more year for CPG issuance and construction clearly contemplate a CPG process of 3 to 4 months at most. The process here is now into its 57th month.

But the further investigation the Commission now seeks to undertake on the single plant issue would effectively act as a stay on the CPG for an even greater and likely extended period of time. These excessive delays are contrary to Legislature's directive in 30 V.S.A. § 8007 that the Commission employ simplified and efficient procedures for these small renewable energy facilities.[24] As the Supreme Court has already instructed the Commission, "Section 8007, which is entitled "Small renewable energy plants; simplified procedures,' states that renewable energy plants of 2.2 MW or less are entitled to streamline approval procedures."[25]

This newest attempt to extend the review of the project premised upon the new Willow Road access is directly contrary to the promise made by the Commission 16 months ago, in its October 12, 2017, Order, where the Commission invited Chelsea to withdraw its Supreme Court appeal, and in return the Commission would "***promptly review a new Chelsea petition reflecting a new Willow Road [access] proposal***." Docket No. 8302, October 12, 2017 Order (the "2017 Order") at 5 (emphasis added). Chelsea relied upon this promise of the acceptance of a Willow Road access and prompt review when it withdrew its appeal to the Vermont Supreme Court, and decided to continue to make substantial expenditures in this permitting process and the Willow Road project.

Conclusion

As the Boston Globe reported last month, Vermont has been going in the wrong direction with climate results. *See,* "In Vermont, a progressive haven, emissions spike forces officials to consider drastic action." Boston Globe, January 28, 2019[26] ("A report released last year found that emissions had actually increased 16 percent over 1990 levels, a startling divergence from the goal. 'It wasn't just disappointing and ironic, it was surprising,' said Sandra Levine, a senior attorney based in Vermont for the Conservation

[24] *See* 30 V.S.A. § 8007 (entitled: "Small renewable energy plants; simplified procedures").

[25] *In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, ¶ 14 (quoting 30 V.S.A. § 8007).

[26] https://www.bostonglobe.com/metro/2019/01/28/vermont-perhaps-nation-most-progressive-state-spike-emissions-forces-officials-consider-drastic-action/l0lUjXlilrkXyyz7uRwLMJ/story.html?event=event12.

Law Foundation. 'Many thought we were at least moving in the right direction. But we weren't just missing the target, we were moving backward.'")

For the reasons set forth above, the Willow Road and Apple Hill projects are separate plants, and the differences between the Willow Road project and that shown in PC 155/6 are immaterial both electrically and legally. Moreover, the time to challenge the Chelsea contract has long passed. The Commission should so rule and issue the CPG for the Willow Road project on an expedited basis.

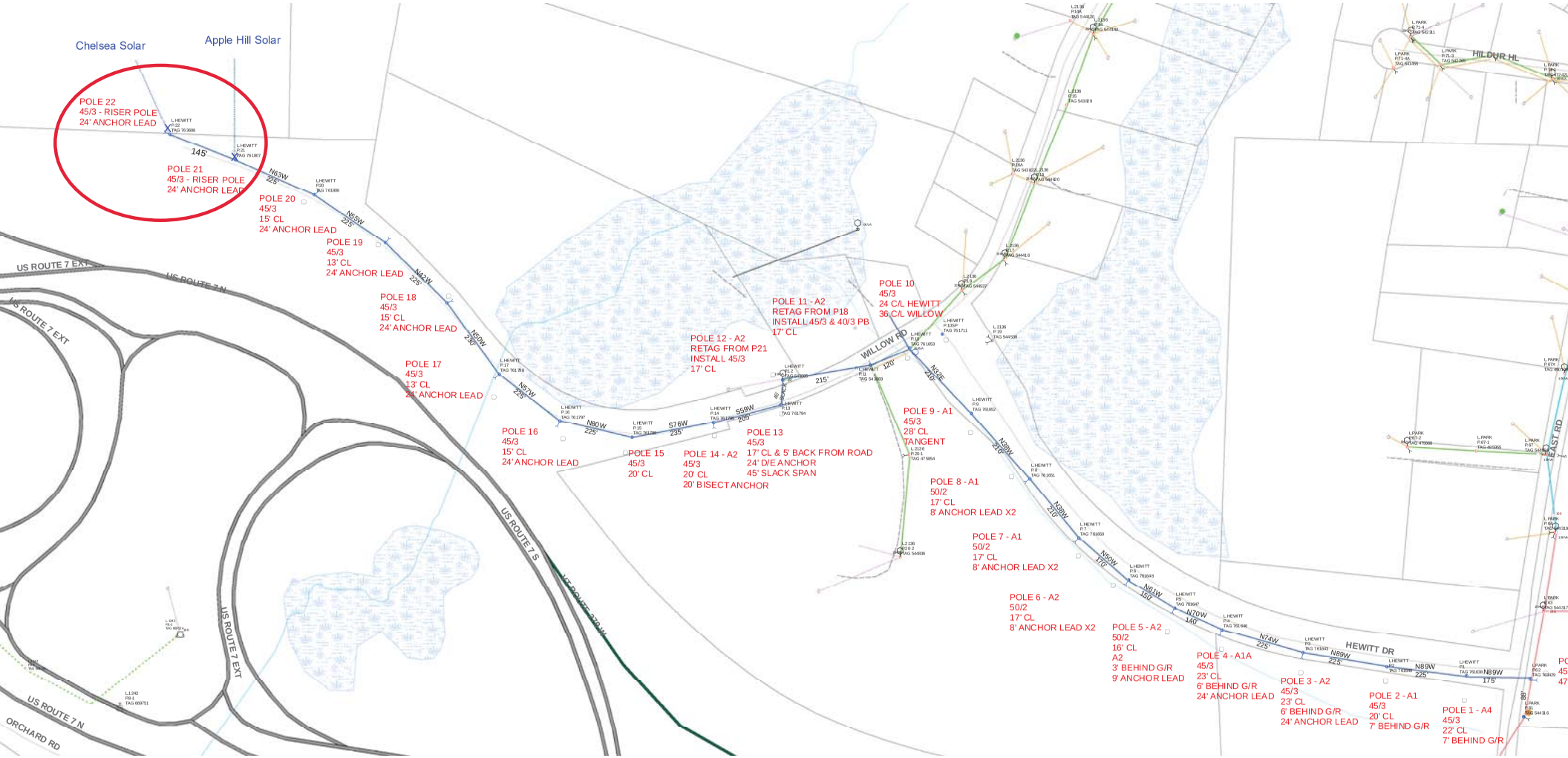
Respectfully submitted,

/s/Thomas Melone
Thomas Melone
Bar No. 5456
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
Phone: (212) 681-1120
Email: Thomas.Melone@AllcoUS.com

Attorneys for Chelsea Solar LLC

Dated: February 19, 2019

Attachments
1. POI plan


Chelsea Solar
Apple Hill Solar
POLE 22
45/3 - RISER POLE
24' ANCHOR LEAD
145'
POLE 21
45/3 - RISER POLE
24' ANCHOR LEAD
N63W
225
POLE 20
45/3
15' CL
24' ANCHOR LEAD
N65W
225
POLE 19
45/3
13' CL
24' ANCHOR LEAD
N42W
225
POLE 18
45/3
15' CL
24' ANCHOR LEAD
N60W
230
POLE 17
45/3
13' CL
24' ANCHOR LEAD
N57W
225
POLE 16
45/3
15' CL
24' ANCHOR LEAD
N80W
225
POLE 15
45/3
20' CL
S76W
235
POLE 14 - A2
45/3
20' CL
20' BISECT ANCHOR
S59W
205
POLE 13
45/3
17' CL & 5' BACK FROM ROAD
24' D/E ANCHOR
45' SLACK SPAN
POLE 12 - A2
RETAG FROM P21
INSTALL 45/3
17' CL
POLE 11 - A2
RETAG FROM P18
INSTALL 45/3 & 40/3 PB
17' CL
215'
POLE 10
45/3
24 C/L HEWITT
36 C/L WILLOW
WILLOW RD
120'
N32E
210
POLE 9 - A1
45/3
28' CL
TANGENT
N89W
210
POLE 8 - A1
50/2
17' CL
8' ANCHOR LEAD X2
N89W
210
POLE 7 - A1
50/2
17' CL
8' ANCHOR LEAD X2
N89W
210
POLE 6 - A2
50/2
17' CL
8' ANCHOR LEAD X2
N80W
170
POLE 5 - A2
50/2
16' CL
A2
3' BEHIND G/R
9' ANCHOR LEAD
N61W
150
N70W
140
POLE 4 - A1A
45/3
23' CL
6' BEHIND G/R
24' ANCHOR LEAD
N74W
225
POLE 3 - A2
45/3
23' CL
6' BEHIND G/R
24' ANCHOR LEAD
N89W
225
HEWITT DR
POLE 2 - A1
45/3
20' CL
7' BEHIND G/R
N89W
225
POLE 1 - A4
45/3
22' CL
7' BEHIND G/R
N89W
175
HILDUR HL
EAST RD
US ROUTE 7 EXT
US ROUTE 7 N
US ROUTE 7 S
US ROUTE 7 EXT
US ROUTE 7 N
ORCHARD RD