13-308

EXHIBIT MACC-AHHA-SP-8

ORIGINAL

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

Docket No. 2013-308

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

Appeal From:

Public Service Board
DOCKET NOS. 7873 & 7874

BRIEF OF APPELLANT
ECOS ENERGY LLC

Wesley M. Lawrence
Theriault & Joslin, P.C.
141 Main Street, Suite 4
Montpelier, VT 05602
Phone: (802) 223-2381
Fax: (802) 223-1461
wmlawrence@tjoslin.com

Thomas Melone (admitted *pro hac vice*)
Michael Melone (admitted *pro hac vice*)
Allco Renewable Energy Limited
14 Wall Street, 20th Floor
New York, NY 10005
Phone: (212) 681-1120
Fax: (801) 858-8818
thomas.melone@allcous.com
mjmelone@allcous.com

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1. Is the 2.0 Megawatt Apple Hill solar project an independent technical facility that generates electricity from renewable energy within the meaning of 30 V.S.A. §8002(14).

2. Did the Vermont Public Service Board err in determining that the Apple Hill solar project would be considered not as a separate "plant" within the meaning of 30 V.S.A. §8002(14), but as part of the same plant as the Bennington Solar project within the meaning of 30 V.S.A. §8002(14).

3. Did the Vermont Public Service Board err by concluding that the Apple Hill solar project was ineligible to receive a standard offer contract?

TABLE OF AUTHORITIES

<u>*Cases*</u>

<u>*Statutes and Regulations*</u>

Ecos Energy, LLC ("Ecos" or "Appellant") submits this brief in support of reversal of the Public Service Board's (the Board") May 16, 2013, and June 28, 2013, Orders in Public Service Board Docket Number 7873 and 7874 concluding that Ecos' Apple Hill solar project was ineligible to receive a standard offer contract.

<u>STATEMENT OF THE CASE</u>

On April 1, 2013, VEPP, Inc. ("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 ("MWs)[1].

On May 1, 2013, Ecos submitted three 2.0MW projects to VEPP in response to the SPEED RFP—the Bennington Solar 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 Board 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)[2]) as the

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[1] 30 V.S.A. §8002(15) 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.

[2] Pursuant to 30 V.S.A. §8002(14), a "plant" is:

Bennington Solar project, which would result in a single plant whose "plant capacity" would be 4.0MW, and thus exceed the 2.2MW eligibility cap.

The Board 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[3]. The Board 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 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 Board to reconsider and modify its May 2013 Order (the "Reconsideration Petition"). In its Reconsideration Petition, Ecos argued, among other things, that the Board's May 2013 Order was based upon *ex parte* communications and, from a procedural perspective, Ecos had not been given the opportunity to present evidence regarding the separate nature of the Bennington and Apple Hill solar projects. In the Reconsideration Petition, Ecos provided clear evidence that the Bennington Solar project and the Apple Hill solar project were separate "plants" within the meaning of 30 V.S.A. §8002(14) and that the "plant capacity" of the Bennington solar project would be 2.0MW and the plant capacity of the Apple Hill solar project would be 2.0MW. Specifically, Ecos provided clear evidence that the Apple Hill Solar project was an independent technical facility, with separate equipment,

> 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.

[3] *See*, May 2013 Order at p. 4. [PC 15].

separate access roads, separate interconnection facilities and separate everything else, and that it was as separate from the Bennington solar project as a solar plant located 20 miles away. The evidence submitted by Ecos established that the only common factor between the Bennington Solar plant and the Apple Hill Solar plant would be that they would lease land from the same landlord.

On June 28, 2013, the Board issued an order (the "Rehearing Order") denying Ecos' request for reconsideration. With respect to Ecos' procedural claims, the Board stated that Ecos' Reconsideration Petition constituted Ecos availing itself of dispute resolution procedures[4], and that Ecos' Reconsideration Petition had received the Board's full consideration.[5]

With respect to the substance of the issue of whether the Bennington and Apple Hill solar projects would be separate "plants", the Board accepted as true all Ecos' factual allegations and evidence submitted with the Reconsideration Petition. Notwithstanding, the acceptance of Ecos' factual allegations, the Board 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."[6] The Board further stated that

> "[u]nder Ecos' logic, any size facility could be constructed so long as it could be partitioned into 'technically independent' 2.2MW pieces by including redundant equipment and separating each piece by a mere fence. Such clustered development would also frustrate the Legislature's desire to distribute these small-to-moderate-sized facilities across the state's electric grid."

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[4] *See*, Rehearing Order at p.5 [PC 7](stating "[t]here is a process for resolving disputes regarding Board Orders and Eco has availed itself of it by filing a request for reconsideration.")

[5] *See*, Rehearing Order at p.4 [PC 6]. Because the Board accepted as true as all Ecos' factual allegations, Ecos is not appealing any of the procedural aspects of the Board's decisions.

[6] *See*, Rehearing Order at pp. 6-7 [PC 8-9].

As a result, despite admitting that Ecos had established that the Bennington and Apple Hill solar projects were separate plants within the plain meaning of Section 8002(14), the Board stated that it would "decline to adopt an interpretation of Section 8002(14) that would lead to a result that frustrates the Legislature's intent in this manner."[7]

Once the Board 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, and Ecos should have been awarded a PPA for both the Bennington and Apple Hill solar projects. Instead, the Board disregarded the plain language of the statute and read into the statute criteria that are not there. That additional criteria introduced by the Board consists of three factors—the projects are (1) located contiguous to each other, (2) developed by the same developer and (3) built within a generally contemporaneous timeframe, factors that are not only not in the statute, but were not, until now, relevant to the Board's analysis of whether separate projects were part of the same "plant".

The Board based its determination, and its injection of the additional criteria into the statute, based upon its notion that to not do so would frustrate the goals of the standard offer program created by the Legislature of "providing support and incentives to locate renewable energy plants of *small* and *moderate* size in a manner that is distributed across the state's electric grid." (emphasis in original).[8] The Board rested its conclusion on the policy enumerated in 30 V.S.A. §8001(a)(7), which is but one of the policies of the SPEED statute.

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[7] *See*, Rehearing Order at p. 7 [PC 9].

[8] *See*, Rehearing Order at p.6 [PC 8] citing 30 V.S.A. §8001(a)(7).

Section 8001(a)(7), however, was passed two years after the standard offer SPEED program was created, and was enacted in conjunction with the incentive credit provided for net metering. As a result, it can hardly provide the support the Board desires, but does illustrate that the reference to Section 8001(a)(7) is just a makeweight to support the Board's decision to substitute its judgment for that of the Legislature.

Moreover, as early as 2009, in the issuance of its original rules regarding the SPEED program, the Board stated that the fact that two projects were located on the same land and developed by the same developer did not necessarily mean those projects were part of the same "plant"[9]. Surely, if the Legislature disagreed with that determination, it could have easily changed the definition of plant. It chose not to do so.

STANDARD OF REVIEW

While this Court reviews *de novo* a lower court's decision interpreting a statute, *Wright v. Bradley*, 2006 VT 100, ¶ 6, 180 Vt. 383, 910 A.2d 893 (2006), this Court has traditionally been more deferential in its review of the Board's decisions, generally deferring to the Board's "expertise and informed judgment," and generally applying "a strong presumption of validity" to its orders. *In re Verizon New England Inc.*, 173 Vt. 327, 334, 795 A.2d 1196, 1202 (2002)("Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its particular area of expertise." *Id.* at 334-35, 795 A.2d at 1202.)

[9] *See*, Order dated October 16, 2009 at p. 8 [PC 27] (the "2009 Order").

ARGUMENT

The Board's interpretation of the statute and its application to Ecos' Apple Hill solar project is erroneous, an abuse of discretion and not entitled to deference and should be reversed because:

1. its interpretation is contrary to the plain meaning of the statute,
2. even if the statute had some ambiguity (which it does not), the Board's interpretation is not permissible as a matter of statutory construction and is not supported by the legislative history of the statute;
3. even if the Board's interpretation would be permissible as a matter of statutory construction, its retroactive application to the SPEED RFP is arbitrary and capricious and an abuse of discretion; and
4. the factors used to disqualify the Apple Hill solar project are not within the area of any unique expertise of the Board, thus the Board's decision is not entitled to any deference.

I. UNDER THE PLAIN MEANING OF THE STATUTE THE APPLE HILL AND BENNINGTON SOLAR PROJECTS ARE SEPARATE PLANTS WITHIN THE MEANING OF 30 V.S.A. §8002(14).

In construing a statute, this Court attempts to discern the intent of the Legislature. *Barnet Hydro Co. v. Pub. Serv. Bd.*, 174 Vt. 464, 466 (2002). This Court looks first at the language of the statute, "with the presumption that the Legislature intended the plain, ordinary meaning of the language." *Id.; see also, In re Verizon New England*, 173 Vt. 327, 335, 795 A.2d 1196, 1202 (2002)(explaining that to give effect to the Legislature's intent, the plain meaning of the statute must first be examined).

This Court has stated that its "paramount goal in statutory construction is to give effect to the Legislature's intent, and we apply the plain meaning of a statute where the language is clear and unambiguous." *Id.* (internal citations omitted.)

This Court assumes that undefined terms retain their plain and commonly accepted meaning and that unnecessary limitations should not be read into statutory language. *In re Handy,* 171 Vt. 336, 341-341, 764 A.2d 1226, 1233 (2000).

30 V.S.A. §8002(14) defines "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.

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 Apple Hill 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 through interconnection facilities specifically designed and required for each separate project by the transmission owner (in this case Green Mountain Power ("GMP")). The amount of electricity that a single project (such as Apple Hill) can inject into the electric grid at any one time is limited by the interconnection agreement with the transmission provider (in this case GMP), which in the case of the Apple Hill solar project would be 2.0MW

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), and infrastructure that supports that electrical function, such as roads. If it is a technically stand-alone facility then it is a separate plant under 30 V.S.A §8002(14).

Central Vermont Public Service ("CVPS") recognized as much in their comments recited by the Board in the 2009 Order in Docket No.7533 where the Board 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."[10] That is exactly what Apple Hill Solar plans to do.

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 Bennington Solar and Apple Hill Solar. The application of the Federal Energy Regulatory Commission's ("FERC's") "but for" approach for determining the responsibility of generators for interconnection costs can result in significant costs differences for projects that are next to each other in the queue[11]. The FERC and North American Electric Reliability Corporation ("NERC") guidelines for interconnection require that each of the Bennington and Apple Hill projects be reviewed separately, and treated in all respects as separate independent facilities.

The evidence presented by Ecos, and accepted by the Board, clearly establishes that the Bennington solar project and the Apple Hill solar project each separately constitute "an

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[10] *See*, 2009 Order at pp. 7-8 [PC 26-27].

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

independent technical facility that generates electricity from renewable energy" with a plant capacity of 2.0MW.

Whether two independent generating facilities are located on different parts of the same tax assessor parcel of land is not a relevant factor to the issue of whether each plant is an independent technical facility that generates electricity from renewable energy. With separate equipment, separate access roads, separate interconnection facilities and separate everything else, the Bennington and Apple Hill solar plants are just as separate as a solar plant located 20 miles away. The only common factor between the Bennington 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). While the physical tax assessor parcel location may have been a factor that the Legislature could have considered in the definition of "plant", the Legislature chose not to do so.

In addition, the evidence presented by Ecos, and accepted by the Board, clearly establishes that the Bennington 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 <u>and</u> (B) uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid.

The Bennington and Apple Hill solar projects do not use "common equipment and infrastructure such as roads, control facilities, and connections to the electric grid." That fact was accepted by the Board.

For example, as shown on plan included with the Reconsideration Petition[12], each project would separately interconnect to the electrical grid owned by GMP. Each project has its own equipment (none of which, contrary to the Board's off-the-cuff remark, is redundant), and shares no facilities, or access roads with the other. As separate plants, each of the Bennington solar and Apple Hill solar projects has a separate "plant capacity" within the meaning of 30 V.S.A. §8002(15) that is 2.0MW. The aggregate alternating current ("AC") nameplate capacity of all inverters for the Bennington solar project will be 2.0MW. The aggregate AC nameplate capacity of all inverters for the Apple Hill solar project will be 2.0MW. Each of the Bennington and Apple Hill solar projects will have separate interconnection agreements with GMP and separate interconnection facilities designed by, and owned by, GMP, which will limit the amount of electricity that each plant may inject into the grid to 2.0MW.

Here, none of the connections stated in the statute apply. There is no common equipment, no common infrastructure, no common roads, no common control facilities, and no common connections to the electric grid. Bennington solar and Apple Hill solar will be separate projects in all respects.

The plain meaning of the statute language is clear, and the statute should be enforced according to its express terms. *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 529, 496 A.2d 154, 162 (1985). As a result, the Board's Orders should be reversed.

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[12] *See*, PC 155-156.

II. <u>EVEN IF THE STATUTE HAD SOME AMBIGUITY, THE BOARD'S INTERPRETATION IS NOT PERMISSIBLE AS A MATTER OF STATUTORY CONSTRUCTION AND IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY OF THE STATUTE.</u>

The Board asserts that Ecos' plain meaning application is overly technical and at odds with the overall reason and spirit of the law. *See, e.g., Wright v. Bradley*, 180 Vt. 383, 2006 VT 100, ¶ 7, 910 A.2d 893 (2006) (explaining that in cases where the statute's plain meaning is not readily apparent, this Court will examine the entire statute and look to the overall purpose of the law).

For that reason, the Board introduced additional factors into the definition of a plant, resulting in Ecos (and only Ecos) being prevented from building a separate solar project next to its Bennington solar project.

Those additional factors are that the projects would be (1) located contiguous to each other, (2) developed by the same developer, and (3) presumably built within a generally contemporaneous timeframe.

The Board explained its view in the Rehearing Order as follows:

> "Even accepting all of Ecos' representations, we do not conclude that the projects in question are separate plants. The Standard-Offer Program was created to support the Legislature's goal of "providing support and incentives to locate renewable energy plants of *small and moderate* size in a manner that is distributed across the state's electric grid." [30 V.S.A. 8001(7)(emphasis added.)] The Legislature further defined energy plants of a "small or moderate size" by limiting the capacity of standard-offer projects to no more that [sic] 2.2 MW. While 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. Based on our review of the site plans provided by Ecos with its request for reconsideration, it is reasonable to infer that they are a single plant. Adopting Ecos' highly-technical interpretation of Section 8002(14) would thwart the Legislature's intent to encourage the development of small or moderate sized plants. Under Ecos' logic, any size facility could be constructed so long as it could be partitioned into "technically independent" 2.2 MW pieces by including redundant equipment and separating each piece by a mere fence. Such clustered development would also frustrate the Legislature's desire to distribute these small-to moderate-sized facilities across the state's electric grid.

> Furthermore, the Legislature directed the Board to implement a streamlined review for such projects under Section 248 because of the reduced environmental impacts associated with small- and medium-sized plants. [30 V.S.A. 8007(b).] The simplified procedures developed for standard-offer projects are not appropriate for larger plants and their more significant environmental impacts. We decline to adopt an interpretation of Section 8002(14) that would lead to a result that frustrates the Legislature's intent in this manner.

The Board's three-factor test introduces factors not included in the statute and is not a permissible interpretation of the statute. In addition, the Board's three factor test also results in discriminatory treatment solely against the developer of the neighboring project when the developer of both projects is the same.

The Board has acknowledged that it is only interested in identifying projects on the same parcel of land or contiguous parcels of land proposed by the same developer.[13] As result, if a developer beside Ecos proposed a project on the Apple Hill site, the Board would conclude that the project, with the same setup (including a mere fence separating the projects) as proposed by Ecos for the Apple Hill solar project, was a separate plant within the meaning of the statute. Thus, the application of the new three factor test is discriminatory against Ecos because Ecos is being treated differently than any other person that wanted to develop a project on an adjoining piece of land. Such a test, targeting only the developer of the neighboring project, is not a reasonable interpretation of the statute.

Similarly, the Board's factor relative to the time each project is constructed is not a reasonable interpretation of the statute. The Board has already acknowledged that in determining whether a project is a separate plant, it would _not_ aggregate a project, such as Apple Hill, with an

[13] *See*, 2009 Order at p. 8 [PC 27].

already existing plant even if they were on the same piece of land and developed by the same person. *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 Board's discussion with respect to locating new plants next to existing plants is inconsistent with the Board's approach here. The Board has no difficulty with the same project owner having an existing plant next to a new 2.2MW plant. Yet that position undercuts its rationale under Section 8001(a)(7). If its rationale under Section 8001(a)(7) were appropriate then it would not matter when the contiguous plants are, or were put in service, or whether they are owned or developed by the same developer. They would still be generation plants that were, in the aggregate, greater than 2.2MW and not sufficiently disbursed.

That results in the inescapable conclusion that the Board in this case is 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. However, the Board's conclusion that an existing plant is not treated as part of a new addition to that same plant undercuts the Board's rationale that the legislative purpose would be frustrated by having two projects next two each other.

If an existing plant was 2.0MW, the Board would be fine with an increase in generation by another 2.0MW (even if common access roads or other common facilities were used), resulting in a combination of 4.0MW. That result, which the Board has concluded is permissible under the statute, is contrary to the Board's makeweight argument here that the Legislature would only permit a maximum of 2.2MW of generation facilities at any particular location.

In addition, the Board's new approach would inject confusion into an otherwise clear statute. For the Board's 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 Board has not proposed such a rule, and has no intention of proposing such a rule, which illustrates how its legislative policy argument is a mere makeweight.

The inherent flaw of the Board's rationale can 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 Board's position in this case, 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.

A comparison of three additional examples illustrates the irrational and discriminatory result that would be produced by the Board's new rule.

Case #1-A project that existed before SPEED and the owner/developer wants to build another project next to it and place it under the SPEED program. The Board stated those were separate plants (even if they use common facilities).

Case #2-Two projects such as Bennington and Apple Hill Solar are contiguous and have separate interconnections but are owned and proposed by independent parties that are not working together. The Board considers those two independent plants.

Case #3-is Case #2 except that the owner is the same. Case #3 is also Case #1 except the plants are proposed and built relatively contemporaneously (although in Case #3 there are no common facilities).

Case #3 differs from Case #2 only in that the owner is the same. There are no different characteristics of the two plants. Case #3 differs from Case #1 only in that the plants are proposed and developed relatively contemporaneously, as opposed to being separated by some undefined amount of time.

The Board has concluded that the differences between Case #3 on the one hand, and Cases #1 (undefined time separation) and #2 (different developer/owner), on the other are the deciding factors under the statute. A plain reading of the statute results in a contrary conclusion.

Moreover, the Board's allegation that the Legislature's policy of having projects dispersed across the state would be frustrated in Case #3, is completely undercut by its treatment of the identical electric generating facilities in Cases #1 and #2. As a result, the Board's conclusion is not a permissible interpretation of the statute.

In addition, a review of the legislative history of the SPEED statute also shows that the Board's rationale is unsupported. The Board has conceded that the Apple Hill Solar project is, based upon the evidence, a separate plant. But the Board concluded that two plants that are contiguous (and proposed by the same developer) would in the aggregate be larger in size than the "moderate" sized plants that the Legislature wanted to promote, as evidenced by 30 V.S.A. §8001(a)(7). The Board's reference to 30 V.S.A. §8007(b) must result in the conclusion that projects greater than 2.2MW are contrary to the Legislature's goals and purposes in 30 V.S.A. §8001(a)(7).

Ecos respectfully disagrees and the evidence supporting that disagreement is overwhelming.

First, the Board's interpretation must lead to the conclusion that a moderate sized plant is capped at 2.2MW[14], and that a small plant must be something less. Throughout the United States, there are two general regimes that govern the concept of a small generator. One is the general dividing line for interconnection to the transmission and distribution systems. Anything over 20MW is considered large. Conversely, anything 20MW or under is considered "small"[15]. Within the "small" category there are further dividing lines that relate to projects that are based upon their size, and determine whether or not a project is eligible for "fast track" interconnection to the electrical grid, or whether either a supplemental review or more in-depth system impact study is required to connect the small generator. The current FERC requirement is that 2MW or less is a small generator eligible for fast track. FERC has issued a notice of proposed rulemaking raising that to 5MW.

Second, if the Board's statement as to what Section 8001(a)(7) meant were true, then the Board should not authorize the construction of any renewable energy plant in Vermont in excess of 2.2MW, or count toward a utility's renewable portfolio standard requirements of 30 V.S.A. §8004, any plant or renewable energy tradeable credits from plants in excess of 2.2MW. Such

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[14] The Board's reasoning as to the cap on "moderate" sized plants leaves a huge difference between moderate plants and large plants, such as Vermont Yankee which is over 2000MW.

[15] *See*, *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh 'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order on clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006) (Order No. 2006). Although not controlling as to interconnections subject to state jurisdiction, the Federal Energy Regulatory Commission notes that one of the intended purposes for the small generator interconnection regulations set forth in Order No. 2006 was to serve as a guide for state interconnection procedures. *See* Order No. 2006, FERC Stats. & Regs. ¶ 31,180 at P 4, 8.

plants as the recently built 63MW Kingdom Community Wind project on Lowell Mountain do not fit within the moderate sized type of plant the Board urges that 30 V.S.A. §8001(a)(7) restricts itself to. Certainly energy from Hydro Quebec could not count as renewable energy under 30 V.S.A. §8001(a)(7), and thus not for any other purpose of Title 30, Chapter 89, if the Board's position is adopted. Similarly the 45MW Deerfield Wind (Board Docket 7250), the 35MW Beaver Wood Energy biomass plant (Board Docket 7679), and the 12MW Georgia Mountain wind project (Board Docket 7508) would be too large to be considered SPEED resources. However, as shown on in the Board's Biennial Report to the Legislature [PC 131-132] all those plants are SPEED resources.

Moreover, it is clear that the Board does not believe that the legislative purpose enumerated in Section 8001(a)(7) limits SPEED resources to a specific size. *See, e.g.*, Board Docket No. 7508, Final Order approving the 12MW Georgia Mountain wind project, June 11, 2010, p. 3, citing 30 V.S.A. §8001 stating

> [a]s we have noted in previous Orders, wind generation facilities provide a benefit to Vermont by providing renewable generation (a state policy goal), a potentially stably priced power resource, and increased jobs and tax revenues."

see also, id. at p. 21, stating

> [t]he addition of the wind facility would also help the State meet the qualifying SPEED resource objectives under 30 V.S.A. §§ 8001-8005, provided that GMCW enters into a long-term stably priced contract with a Vermont utility for a substantial portion of the Project's output. These factors lead us to conclude that the Project would contribute to both Vermont's and the region's need for power generally and renewable power specifically, needs that cannot be met through energy efficiency, conservation, or load-management measures.

see also, id. at pp. 24-25, stating

> The Sustainably Priced Energy Enterprise Development ("SPEED") program encourages Vermont utilities to contract for power with in-

> state renewable resources. Such contracts do not necessarily have to be stably priced to derive the SPEED benefit, but without a contract with Vermont utilities, the Project cannot contribute to the goals of the SPEED program as described by the Legislature . . . The Project can have an economic benefit without a long-term stably priced contract. The Project would include other positive economic factors that are not attributed to increased employment and tax benefits to the host towns. These attributes include greenhouse gas emission offsets and the ability of the utilities to meet the statutorily mandated SPEED resource requirements.

Indeed, the addition of 30 V.S.A. §8001(a)(7), which is what the Board relies on for its rationale as to the legislative purpose that would be frustrated by allowing two separate 2.0MW plants to be built next to each other, had nothing to do with the SPEED standard offer program 2.2MW size.

The SPEED program standard offer and the 2.2MW plant definition were enacted in 2009. It was not until 2011 in Act 47 that 30 V.S.A. §8001(a)(7) was added. In 2012, Section 8001(a)(7) was amended to read as it does now.

Section 8001(a)(7) was added by Section 6 of Act 47 and it provided:

> (7) Supporting and providing incentives for small, distributed renewable energy generation, including incentives that support locating such generation in areas that will provide benefit to the operation and management of the state's electric grid.

Act 47 added this provision in conjunction with the incentive credit required for solar net metering. It had nothing to do with the enactment of the standard offer and the definition of a plant, both of which were enacted in 2009.

However, it is the official summary of Act 47 that eviscerates the Board's rationale. The official summary of Act 47 states that it "[m]akes changes to the Sustainably Priced Energy Enterprise Development (SPEED) program, <u>*including making unused capacity from the standard*</u>

offer component of that program available to existing small hydroelectric projects (Secs. 6-10.)"[16]. (emphasis added.)

Act 47 describes existing hydroelectric plants up to 5.0MW in size as "small" for purposes of the SPEED standard offer program. As a result, the Board's position that two 2.0MW neighboring projects frustrate the Legislature's purpose for the SPEED standard offer program is clearly contradicted by the Legislature's own statement in the Act enacting Section 8001(a)(7), on which the Board relies.

III. EVEN IF THE BOARD'S INTERPRETATION WOULD BE PERMISSIBLE AS A MATTER OF STATUTORY CONSTRUCTION, ITS RETROACTIVE APPLICATION TO THE SPEED RFP IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

The Board had the question of contiguous projects squarely before it as early as 2009. The discussion is set forth below in full. In the 2009 Order at pp. 7-8 [PC 26-27], the Board stated:

> **Definition of Plant**
>
> The SPEED Facilitator raised the issue of how a plant is defined for purposes of implementing the 2.2 MW cap on qualifying SPEED resources that can participate in the standard-offer program. In particular, the SPEED Facilitator stated that the tenor of some questions it had received from developers indicated that at least some developers were anticipating construction of multiple plants at a single location that, collectively, exceed the 2.2 MW cap.
>
> Participants' Comments
>
> 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.

16 http://www.leg.state.vt.us/docs/2012/Acts/ACT047sum.htm

> The Department states that its primary concern is that the definition of plant not provide an opportunity to exceed the 50 MW ceiling on program participation.
>
> REV states that the statute is clear that "separate plants that share common infrastructure and interconnection should be considered as one plant and held to the 2.2 MW cap." REV requests that the Board clarify that adding incremental generation of 2.2 MW or less to an existing plant can qualify for the standard offer, regardless of the size of the existing plant.
>
> Discussion and Conclusions
>
> Section 8002(12) defines Plant as any 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.
>
> To the extent that any generation components share common infrastructure, we direct the SPEED Facilitator to consider these components as a single plant. We direct the SPEED Facilitator to identify any developer of projects on the same parcel of land, or contiguous parcels of land that, collectively, would exceed the 2.2 MW cap, and inform the Board of such applications. To the extent required, the Board will make case-by-case determinations as to whether projects constitute a single plant for purposes of Section 8002(12).
>
> Further, any collection of generation components that meets the definition of a plant, and exceeds the 2.2 MW cap, shall be removed from the queue, although the generation components may reapply for the standard offer if the scope of the project is adjusted to comply with the 2.2 MW cap.
>
> With respect to REV's comments regarding 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 Board did not, as it could not, conclude that two projects proposed by the same developer which were contiguous were, by definition, one plant. But that is what the Board has done here. Faced with the precise question at issue in this case, the Board stated that it would "make case-by-case determinations as to whether projects constitute a single plant for purposes of Section 8002(12)." That is markedly different from what the Board has done here. Here, it is creating a *per se* rule that plants that are contiguous and proposed by the same developer at the same time are *per se* part of the same plant regardless of the fact that each is an independent technical facility that generates electricity from renewable energy, and that neither share any common infrastructure or other common attributes (other than the identity of the developer and the identity of the landowner).

The Board's 2009 Order underscores the unfairness of the Board's attempt to retroactively change the rules mid-stream even if it had the authority to do so. Moreover, while the Board may have been able to add a condition to the SPEED RFP that would have prohibited a developer from submitting contiguous projects, it did not do so.

In Docket No. 7533, in the 2009 Order at p. 8 [PC 27], the Board stated:

> To the extent that any generation components share common infrastructure, we direct the SPEED Facilitator to consider these components as a single plant.

Here, the Apple Hill and Bennington solar generation components do not share any common infrastructure, which the Board accepted.

In Docket No. 7533, in the 2009 Order at p. 8 [PC 27], the Board stated:

> We direct the SPEED Facilitator to identify any developer of projects on the same parcel of land, or contiguous parcels of land that, collectively, would exceed the 2.2 MW cap, and inform the Board of such applications. To the extent required, the Board will make case-by-case determinations as to whether projects constitute a single plant for purposes of Section 8002(12).

The Board's statement is consistent with the notion that it would pay closer attention to projects that were contiguous to see if they were indeed independent technical facilities. Here, however, the Board accepted Ecos' evidence as establishing that the Bennington and Apple Hill projects were separate independent technical facilities that generate electricity from renewable energy.

Rather than accepting those facts as determinative for purposes of the SPEED RFP, the Board reversed its long-standing position to create a *per se* rule and applied it retroactively. Even if permissible, the retroactive application of such a rule to the completed SPEED RFP is arbitrary and capricious and an abuse of discretion and should be reversed.

IV. CONCLUSION

For the reasons set forth above, Appellant requests that this Court reverse the May 2013 and the Rehearing Order and rule that

1. The 2.0 MW Apple Hill solar project an independent technical facility that generates electricity from renewable energy within the meaning of 30 V.S.A. §8002(14);

2. the Board erred in determining that the Apple Hill solar project would be considered not as a separate "plant" within the meaning of 30 V.S.A. §8002(14), but as part of the same plant as the Bennington Solar project within the meaning of 30 V.S.A. §8002(14);

3. the Board erred by concluding that the Apple Hill solar project was ineligible to receive a standard offer contract;

and order the Board to direct VEPP to enter into a 25-year PPA for the Apple Hill solar project.

Respectfully submitted,

Thomas Melone (admitted *pro hac vice*)
Michael Melone (admitted *pro hac vice*)
Allco Renewable Energy Limited
14 Wall Street, 20th Floor
New York, NY 10005
Phone: (212) 681-1120
Fax: (801) 858-8818
thomas.melone@allcous.com
mjmelone@allcous.com

Wesley M. Lawrence
Theriault & Joslin, P.C.
141 Main Street, Suite 4
Montpelier, VT 05602
Phone: (802) 223-2381
Fax: (802) 223-1461
wmlawrence@tjoslin.com

Dated: October 17, 2013

Certificate of compliance with V.R.A.P. 32(a)(7)(D).

I hereby certify that this brief complies with the word-count limit of V.R.A.P. 32(a)(7).

Thomas Melone (admitted *pro hac vice*)
Allco Renewable Energy Limited
14 Wall Street, 20th Floor
New York, NY 10005
Phone: (212) 681-1120
Fax: (801) 858-8818
thomas.melone@allcous.com