STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont	Hearings at Montpelier, Vermont September 20 and 21, 2018

Order entered: 06/12/2019

FINAL ORDER DENYING CERTIFICATE OF PUBLIC GOOD

For the reasons explained in the Commission discussion at the end of this order, the Vermont Public Utility Commission ("Commission") does not adopt the recommendation of the Hearing Officer that is contained in the following proposal for decision. Instead the Commission denies the Petitioner a certificate of public good.

PROPOSAL FOR DECISION

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I. INTRODUCTION

This case involves a petition filed by Chelsea Solar LLC ("Chelsea" or "Petitioner") with the Vermont Public Utility Commission ("Commission")[1] requesting a certificate of public good ("CPG") under 30 V.S.A. § 248 for the proposed construction and operation of a 2.0 MW solar electric generation facility on Willow Road, in Bennington, Vermont (the proposed "Willow Road Project").

In this proposal for decision, I recommend that the Commission approve the Willow Road Project and issue a CPG, subject to conditions.

II. PROCEDURAL HISTORY

On June 20, 2013, Chelsea executed a standard-offer contract for a 2.0 MW solar facility to be located in Bennington, Vermont.

The Willow Road Project petition is a significantly amended version of a petition previously filed by Chelsea in Docket 8302 (the "Chelsea Solar project"). The Chelsea Solar

[1] Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

project was filed on June 19, 2014, and was sited in approximately the same location as the Willow Road Project but was accessed from nearby Apple Hill Road. A neighboring project, filed on March 15, 2015, by Apple Hill Solar LLC was approved by the Commission on September 26, 2018 (the "Apple Hill Solar Project").[2] An approval of that decision is pending at the Vermont Supreme Court. The Chelsea Solar project was denied by the Commission on February 16, 2016.[3]

On September 8, 2017, Chelsea appealed the Commission's denial of the Chelsea Solar project to the Vermont Supreme Court. While the appeal was pending, Chelsea asked the Commission to reconsider its denial and allow Chelsea to amend the petition to reduce the project's size by using more efficient solar panels.[4] At the same time, Chelsea requested that the Vermont Supreme Court remand its appeal of the Chelsea Solar project to the Commission.[5] The Vermont Supreme Court denied Chelsea's remand request.[6]

On October 12, 2017, the Commission denied Chelsea's request for reconsideration because it lacked jurisdiction as a result of Chelsea's appeal. However, the Commission offered Chelsea the opportunity to file a new amended petition instead of pursuing its appeal.[7]

On October 20, 2017, Chelsea voluntarily dismissed its appeal of the Commission's February 16, 2016, denial decision.[8]

On November 9, 2017, the Vermont Supreme Court dismissed Chelsea's appeal.[9]

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[2] *Petition of Apple Hill Solar LLC*, Docket 8454, Order of 9/26/18.

[3] *Petition of Chelsea Solar LLC*, Docket 8302, Order of 2/16/16; *see also* Docket 8302, orders of 4/14/17 and 4/17/17 (denying reconsideration). The Commission's denial was based on its reading of the 2010 Bennington Town Plan, which was in effect at the time the Chelsea Solar petition was filed. Specifically, the Commission determined the Chelsea Solar project would violate three clear, written community standards in the 2010 Town Plan that sought to conserve the Rural Conservation district where the Chelsea Solar project was sited. The Commission determined that the 2010 Town Plan proscribed the following activities in the Rural Conservation district: (1) non-residential development; (2) development sited prominently on a hillside; and (3) development that did not minimize clearing of natural vegetation. The Chelsea Solar project was not residential, was visible on a hillside above the Vermont Welcome Center, and required clear-cutting 15 acres of trees.

[4] Docket 8302, Chelsea Motion for Reconsideration, dated 9/8/17.

[5] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Appellant's Motion for Remand of 9/9/17.

[6] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Entry Order of 9/11/17.

[7] Docket 8302, Order of 10/12/17; *see also* Case No. 17-5024-PET, Order of 5/17/18 (hearing officer order granting Chelsea vested rights in the 2010 Bennington Town Plan), and Order of 8/30/18 (affirming hearing officer's vested rights order).

[8] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Appellant's Assented To Motion for Voluntary Dismissal of 10/20/17.

On November 28, 2017, Chelsea filed a new petition for the Willow Road Project.[10]

On December 4, 2017, the Commission provided notice to Chelsea that the Willow Road Project petition was deemed administratively complete and initiated Case No. 17-5024-PET.

On February 12, 2018, the Vermont Division for Historic Preservation filed a letter with the Commission stating that it had reviewed the Project and concluded that the Project will have no adverse effect on any historic sites listed in or eligible for inclusion in the State Register of Historic Places (the "DHP Letter").[11]

On March 2, 2018, I conducted a prehearing conference with respect to the Project.

On March 21, 2018, I issued a prehearing conference order that set deadlines for the proceeding.

On April 17, 2018, I conducted a site visit and public hearing.

On May 17, 2018, I issued an Order granting Chelsea's request that the 2010 Bennington Town Plan (the "Town Plan") apply in this case under the vested rights doctrine.

On June 22, 2018, Chelsea filed a memorandum of understanding ("MOU") between Chelsea and the Vermont Agency of Natural Resources ("ANR") (the "ANR MOU").

On August 20, 2018, Commissioners Roisman and Hofmann visited the Project site.[12]

On August 30, 2018, the Commission issued an order affirming my May 17, 2018, vested rights order.

On September 19, 2018, Chelsea filed a settlement agreement that had been entered into by Chelsea and the Town of Bennington ("Bennington" or the "Town") in which the Town "having had an opportunity to fully review and assess" the Willow Road Project agrees "not to oppose" the Project (the "Bennington Agreement").[13]

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[9] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC*, Dismissal Order of 11/8/17.

[10] For clarity in this proposal for decision, the denied Docket 8302 petition is referred to as the Chelsea Solar project, the approved Docket 8454 petition is referred to as the Apple Hill Project, and the Case No. 17-5024-PET petition, which is recommended for approval, is referred to as the Willow Road Project.

[11] The DHP Letter is admitted into evidence in this proceeding subject to party objections made with their comments on this proposal for decision.

[12] This site visit was conducted as part of a post-hearing site visit of the neighboring Apple Hill Solar Project in Docket 8454. Commissioner Cheney had visited the site on November 13, 2015, as part of the Commission's review of the Chelsea Solar project in Docket 8302.

[13] Bennington Agreement at ¶ 1. The Bennington Agreement was admitted into evidence. Tr. 9/20/18 at 318 (Tousley).

On September 20 and 21, 2018, I conducted an evidentiary hearing in Montpelier, Vermont.

On October 19, 2018, Chelsea filed a post-hearing brief in support of the Project (the "Chelsea Brief") and separate proposed findings of fact. Also on October 19, 2018, the Apple Hill Homeowners Association ("AHHA") and Mt. Anthony Country Club (together, the "Intervenors") jointly filed a brief in opposition to the Project with proposed findings of fact (the "Intervenors' Brief"), and the Vermont Department of Public Service (the "Department") filed a post-hearing brief and proposed findings of fact in opposition to the Petition (the "Department Brief").

On November 2, 2018, the Intervenors, the Department, and ANR each filed reply briefs. Also on November 2, 2018, Chelsea filed a reply brief in response to the Intervenors' Brief and the Department's Brief.

The Department's Reply Brief responds to arguments made in the Chelsea Brief asserting that the Department's position in this case violates Chelsea's constitutional rights to due process and equal protection. I do not address these constitutional arguments in this proposal for decision. Resolution of these arguments was not necessary to my proposed findings of fact. The findings derive from the evidentiary record. These arguments were also irrelevant to my conclusions or recommendation that the Commission find that the Project is in the public good.

No other comments on the Project were filed by the parties.

III. PUBLIC HEARINGS AND COMMENTS

On January 26, 2018, Vermonters for a Clean Environment submitted a copy of a complaint for declaratory and injunctive relief that Chelsea had filed against the Town and others in Bennington in the civil division of the Vermont Superior Court. I do not recommend that the Commission take any action in response to this filing by Vermonters for a Clean Environment because it was meant to inform the Commission of these civil court actions that have since been dismissed.

At the April 17, 2018, public hearing, the Commission received comments from ten members of the public. They commented on:

(1) The nature of the Commission review process and the role of intervenors.

(2) The potential impact of construction traffic on Willow Road and its residents.
(3) The potential impact of the Project on the views from the Monument Drive area and the neighboring Mt. Anthony Country Club that had not been assessed by Chelsea.
(4) The landscaping maintenance plan for the Project site after construction.
(5) The Willow Road Project not being located on a preferred solar site under the most recent Town Plan and adversely affecting aesthetics because it would be visible from a gateway into the Town.
(6) The impact that clear-cutting acres of trees would have on the forest, watershed, air quality, sound, and aesthetics of the area.
(7) The impact of the Project on wildlife.
(8) The greenhouse gas impact of cutting down the trees.
(9) The appropriateness of allowing a commercial developer to profit from a solar project that would clear-cut acres of trees when there are non-profit renewable energy developers available to meet Bennington's energy needs using rooftop solar projects.

The issues addressed in the public comments have been mostly addressed in this proceeding and are reflected in the record. The one exception is the existence of non-profit alternative development that was not addressed by the parties and is not in evidence. Chelsea has a standard-offer contract for the Project approved by the Commission and there is no requirement for the Commission to assess alternatives to that contract as part of its review in this proceeding. I recommend that the Commission therefore take no further action in response to these public comments.

On June 28, 2018, the Commission received two public comments from former intervening parties stating that they were each withdrawing as parties because I had not acted in a timely way to protect them from being deposed by Chelsea. On June 29, 2018, I issued an order quashing their depositions because they were to have taken place more than 50 miles from their residences in violation of Vermont Rule of Civil Procedure 45(c)(3)(A). I recommend that the Commission note their comments but take no further action in response to them.

On October 15, 2018, Senator Brian Campion and Senator Richard Sears jointly filed comments with the Commission reminding the Commission that in 2016 the Town of

Bennington was the first community to put forward a renewable energy siting plan. The Commission has determined that Chelsea has a vested right to the 2010 Bennington Town Plan and the 2016 energy siting plan is inapplicable to the Willow Road Project.[14] The commenters also requested that the Commission review a constituent's disconcerting experience at the September 20, 2018, evidentiary hearing. Specifically, the Intervenors' were concerned about an inappropriate interaction between myself and the Intervenors' counsel. My attempt to control the proceeding was overly aggressive and I have apologized to the Intervenors' counsel. I regret my overly aggressive action and recommend that the Commission take no further action in response to these comments.

IV. FINDINGS

Based upon the petition and the accompanying record in this proceeding, I have determined that this matter is ready for decision. Based on the evidence of record, I report the following findings to the Commission in accordance with 30 V.S.A. § 8(c).

Description of the Project

1. Chelsea Solar LLC is a Vermont limited liability company with offices located at care of Allco Renewable Energy Limited ("Allco"), 1740 Broadway, 15th Floor, New York, New York 10019. Petition at 1.

2. Chelsea proposes to construct and operate a 2.0 MW AC solar electric generation facility on 9.64 acres of cleared area of an approximately 27.3-acre parcel of land located in the northern area of the Town of Bennington, Vermont. Brad Wilson, Chelsea ("Wilson") pf. at 6 and 7.

3. The Project parcel is situated just north of the Vermont Welcome Center and the interchange at the junction of U.S. Route 7 and VT Route 279, is accessed via Willow Road and is located at GPS coordinates 42.9083-73.2059. The Project site is currently vacant and has had no recent residential, commercial, or agricultural use. The Project site is bounded on the north by residential properties, on the south and west by state-owned property adjacent to the

[14] Case No. 17-5024-PET, Order of 8/30/18 at 6.

interchange at the junction of U.S. Route 7 and VT Route 279, and on the east by an old apple orchard no longer in commercial production. The southern boundary of the Project array is approximately 760 feet northwest of Willow Road. Wilson pf. at 6 and 7; Mark Kane, Chelsea ("Kane") pf. at 3-4; Ian Jewkes, Chelsea ("Jewkes") pf. at 3; exhs. CS-BW-2 and CS-MK-3.

4. The solar array would be set back approximately 250 feet from the northeastern edge of the interchange at the junction of US Route 7 and VT Route 279. Exhs. CS-MK-3 and CS-MK-28.

5. The Project will use passivated emitter and rear cell ("mono-PERC") crystalline silicon photovoltaic solar modules to convert solar radiation to electricity. The mono-PERC solar cells are placed in modules with a fixed tilt angle of 15 degrees. The design for the previously proposed Chelsea Solar project called for the use of less efficient solar cells fixed at a 30-degree angle. The use of mono-PERC technology will result in fewer solar cells, less area between the module rows, and a smaller Project footprint. Wilson pf. at 4-5, exh. CS-BW-3.

6. Through a grid interconnection, the electricity generated by the Project will be placed onto the distribution circuit of the local electric utility, Green Mountain Power Corporation ("GMP"). Exh. CS-BW-9.

7. The primary component of the Project is an array of mono-PERC solar modules. These modules convert solar radiation into direct-current ("DC") electricity. The mono-PERC solar cells in the modules have a dark black color, as opposed to the blue color seen in the more common polysilicon variety of solar cells. The solar modules are positioned above the ground and are held in place by a steel and aluminum racking system. Wilson pf. at 4.

8. The racking system groups the modules into multiple rows that will run west to east. The racking system orients the modules facing directly south at a tilt angle of 15 degrees. The racking system is "fixed-tilt," meaning that the modules are held in a fixed position and do not move during the course of a day. The racking system is supported above the ground by galvanized steel H-beams that are driven directly into the soil. The H-beams are designed to allow for 36 inches of clearance between the ground surface at the lowest edge of the solar modules. In this arrangement, the solar modules will reach a maximum height of approximately

6 to 7 feet above the ground surface at their highest edge. The majority of the Project footprint is comprised of the rows of racking and modules. Wilson pf. at 4.

9. The solar modules will be connected to a number of string inverters, located beneath the modules throughout the array. The inverters convert the DC power generated by the modules into the alternating current ("AC") power used in GMP's distribution circuit. Wilson pf. at 5.

10. Underground collection wiring connects the inverters to an equipment skid located near the southern boundary of the solar module array. The equipment skid will house the switchboard, transformer, and communications/monitoring equipment for the Project. The skid supports the equipment atop a pre-fabricated steel floor that includes a secondary transformer oil containment system built into the base. The major equipment cabinets on the skid, as well as the skid frame and floor, will be painted ANSI 61 dark gray. Wilson pf. at 5; exh. CS-IJ-2.

11. Underground cabling will connect the equipment skid to a set of pole-mounted utility equipment at the southeastern corner of the Project footprint where the interconnection equipment will redirect the cable above-ground. The above-ground cabling will connect with the GMP electric circuit that runs overhead along Willow Road.[15] That interconnection will occur within the Project boundaries. Wilson pf. at 5; Wilson pf. reb. at 2.

12. The Project includes a 14-foot-wide gravel private access drive that extends north approximately 850 feet from Willow Road to the Project equipment skid location. Wilson pf. at 5.

13. A 10-foot-high, chain-link security fence will surround the perimeter of the Project, covered in some locations with a partially-opaque black or dark-green mesh screening material for aesthetics purposes. Wilson pf. at 5; Wilson pf. reb at 42; exh. PSD-DR at 2.

14. A 6-inch gap will be left between the bottom of the fence and the ground surface to allow small wildlife to traverse the site. Exh. Joint-ANR-CS-1 at ¶ 21.

15. Within the Project footprint, groundcover will consist of mulch, periodically mown native grass mix, and existing brush vegetation. Wilson pf. at 5.

[15] The aesthetic and natural resource impacts of the GMP line extension that allows for interconnection of this Project were previously reviewed in Docket 8454 for the neighboring Apple Hill Solar Project. Therefore, this review does not address the GMP line extension.

16. The Project site is currently wooded and will be cleared of approximately 9.64 acres of existing vegetation before Project construction. Wilson pf. at 7.

17. Vehicles and equipment associated with the site clearing work will access the site via the vehicle access driveway off Willow Road. This traffic could reach a maximum of six heavy trucks and 30 passenger vehicles to and from the site per day. Average traffic per day over the course of the clearing phase will likely be substantially less than this. The clearing work will take one to two months to complete, depending on site and weather conditions. Construction of the vehicle access driveway will occur in tandem with site clearing activities because the driveway is required to access the site. Clearing activities will be limited to Monday through Friday between 8:00 AM and 5:00 PM, with no work on Saturdays, Sundays, or state or federal holidays. Wilson pf. at 7-8.

18. Once the site clearing work is complete, the Project site will be ready for construction of the solar facility. Project construction will take an estimated two to four months, depending on site and weather conditions. Construction activities for the Project that will use motorized machinery will be limited to between the hours of 8:00 AM and 5:00 PM Monday through Friday. Non-machinery construction activities will be limited to between the hours of 7:00 AM and 6:00 PM Monday through Friday and 8:00 AM to 5:00 PM on Saturday (although generally work on Saturdays is not anticipated). No construction activities will occur on state or federal holidays. There will also be no construction work done on Sundays with the possible exception of quiet, non-machinery work if such work is necessary for timely completion of the Project. Wilson pf. at 8.

19. Vehicles and equipment associated with the construction work will access the site via the vehicle access driveway off Willow Road. Vehicle traffic could reach a maximum of four heavy trucks and 40 passenger vehicles to and from the site per day. Average traffic per day over the course of the construction phase will be less than this. Most days will see no heavy truck traffic because it will be associated only with equipment deliveries to the site. Project construction will begin with the site grading activities to complete the gravel access driveway and to perform contour smoothing in the southeastern portion of the Project footprint. Once grading is complete, Project equipment will be physically installed, including pier supports,

racking, modules, equipment skids, wiring, security fence, and interconnection equipment. After the Project equipment is installed, the Project site will be cleaned up and landscaping work performed, which includes re-seeding disturbed areas with a native grass mix. Once all Project components are in place, the Project will be connected to the utility distribution grid and commissioned to begin full operation. Wilson pf. at 8-9.

20. Once Project construction and commissioning are complete, the Project will begin operation. The Project will operate 24 hours a day, 7 days a week, although it will only generate electricity during daylight hours. The Project is an unmanned facility and is designed to operate without personnel onsite. Maintenance personnel may visit the site approximately twice a month on average to perform equipment testing or repairs. Grounds-keeping personnel may visit the site approximately once every five weeks on average during the non-winter months to mow the ground cover. Vehicle traffic due to these visits would be limited to passenger vehicles with trailers, unless there is an unforeseen major equipment malfunction. Wilson pf. at 9.

21. Washing of the solar modules is not anticipated in the Vermont environment, but if module washing is needed, it would be performed with water that is trucked in from offsite. No solvents would be used. Other than some cooling fans within the equipment skids, there are no moving parts during Project operation. Project operation generates no waste of any kind. Wilson pf. at 9.

22. The Project includes monitoring, metering, and communications equipment. All aspects of Project equipment operation will be monitored via an internet connection from a remote location, and any equipment problems will result in immediate alarms being sent to maintenance personnel. The Project site will be monitored by a set of infra-red, motion-sensitive video security cameras that will alert maintenance personnel to any unauthorized persons trespassing within the Project site area. Wilson pf. at 9-10.

Discussion

1. Working on Sundays

The Petitioner requests the option of doing quiet, non-machinery work on Sunday, if necessary, to meet the Project's contracted operational deadline. I recommend that the CPG

issued in this proceeding allow this option after only Chelsea provides notice to the parties and neighbors and no complaints are filed by anyone.

2. Conditional Waivers

As required by 30 V.S.A. § 8007(b), the Commission has implemented procedures governing the application and review of renewable energy projects with a plant capacity that is greater than 150 kW and is 2.2 MW or less by adopting standards and procedures for such projects that include the conditional waiver of several Section 248 criteria.[16] Because the Project is a renewable energy project with a plant capacity not to exceed 2.2 MW, the Project meets the requirements for conditional waivers of certain Section 248 criteria pursuant to 30 V.S.A. § 8007(b) and the Commission's Section 8007(b) Order. These criteria are identified in the findings below.

3. Shared Infrastructure

The Intervenors assert that because the Willow Road Project and the neighboring Apple Hill Solar Project are both accessed from Willow Road and are both connected to the electric distribution grid via the same GMP line extension, the two contiguous projects share infrastructure and therefore are functionally a single 4 MW solar array. The Intervenors further assert that the projects do not qualify as separate plants under "30 V.S.A. § 8002(14)."[17] The Intervenors therefore argue that the Willow Road Project "does not meet the requirements to find the Project is in the public good."[18]

Chelsea responds that "the Intervenors' arguments are irrelevant to this case."[19] Chelsea contends that this is both because the criteria for a standard-offer contract do not apply in a Section 248 permitting case and because the Willow Road Project and the Apple Hill Solar

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[16] *In Re: Simplified Procedures for Renewable Energy Plants with a Capacity Between 150 kW and 2.2 MW*, Order of 8/31/10 ("Section 8007(b) Order").

[17] The statutory definition for a "plant" in 30 V.S.A. § 8002 is now located at Section 8002(18). The definition applicable here in Section 8002(14) of the previous version of Section 8002 reads:

> "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.

[18] Intervenors' Brief at 18.

[19] Chelsea Reply Brief at 10-11, citing *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*, 2014 VT 29.

Project factually meet the requirements set in 30 V.S.A. § 8002 as interpreted by the Vermont Supreme Court.

I am not persuaded by the Intervenors' argument. The fact that both projects are accessed by way of Willow Road and interconnect via the GMP line extension does not make them a single plant under Section 8002. The Willow Road Project, like the Apple Hill Solar Project, will be an independent technical facility with a separate access road from Willow Road and a separate point of interconnection with the new GMP line.

I recommend that the Commission conclude that the Willow Road Project is in the public good having been reviewed under the Section 248 criteria and that it remains in factual conformity with the Supreme Court's guidance regarding the criteria for a standard-offer contract.

Review of Project Under the Section 248 Criteria

Orderly Development of the Region

[30 V.S.A. § 248(b)(1)]

23. The Project will not unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. This finding is supported by findings 24 through 37, below.

24. There are extensive public and conservation land holdings in the Town of Bennington, including portions of the Green Mountain National Forest, as well as significant areas of private conservation easements and recreation parks. Exhs. CS-BW-49 at 4 and CS-BW-81 at 28-31.

25. The Project site is identified in the Town Plan as part of a Rural Conservation District. Rural Conservation Districts are located in valley areas outside the urban growth area and have retained their rural and open space character. Exhs. CS-BW-81 at 26 and CS-MB-2 at 32.

26. The purpose of the Rural Conservation Districts is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development. Exhs. CS-BW-81 at 25-26, 29 and PSD-DR-2 at 32.

27. The interchange at the junction of U.S. Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District. The area immediately to the west of Route 7 is in an Industrial Use District. The area immediately to the south of the interchange is a Mixed Residential District. The areas east of the Project site are in Rural Residential, Rural Conservation, and Agricultural Districts, as identified by the Town Plan. The interchange highway complex thus serves as a boundary in the Town Plan between minimally developed rural and agricultural areas in northeastern Bennington and developed urban and industrial areas in western, central, and southern Bennington. Exh. CS-BW-81 at 31.

28. The Town Plan cautions that renewable energy development requires a balance and "[d]evelopment of renewable energy resources should consider both the need for locally produced energy and the need to protect natural and scenic resources." CS-BW-81 at 45.

29. The Town Plan also articulates energy policies and recommendations including: (1) supporting development of renewable energy resources; (2) supporting facilities that provide stable, affordable, and clean renewable sources of energy including solar; and (3) pursuing renewable energy projects. Exh. CS-BW-81 at 92.

30. The Town Plan includes a Parks and Open Space Plan (2007) that articulates Bennington's policy for its use of its undeveloped open spaces – forests, fields, and parkland – now in use for recreational activity. The property on which the Project site is proposed is not a candidate for open space protection. Exh. CS-BW-81 at 91.

31. The Town Plan designates two scenic gateways in the vicinity of the Project. The first is the view of the Bennington Battle Monument and Mt. Anthony directly visible while traveling south on Route 7 near the Project site. This long-range gateway view will not include the Project, which is located above and to the left of Route 7 while traveling south. The second scenic gateway is located 0.75 mile from the Project site along VT Route 279 west of its interchange with Route 67. This scenic gateway includes long-range views of the Green

Mountains to the east and will not include the Project site. Exhs. CS-MB-2 at 9, PSD-DR-2 at 7-8, and CS-MK-2 at 9.

32. The Town of Bennington has determined "not to oppose" the Willow Road Project. Bennington Agreement at ¶ 1.

33. Other commercial-scale solar projects have been approved and are operating in the Rural Conservation District. Wilson pf. reb. at 7-12; exhs. CS-BS-BW-20, CS-BW-21, and CS-BW-82.

34. The Bennington Regional Plan (2007) considers the future land use of the region and advances regional goals. It states that "rural development must not be widely scattered throughout the countryside but should occur as relatively compact and cohesive units that serve to reinforce, rather than replace the region's rural character." Exh. CS-BW-79 at 56.

35. The Regional Plan also has an energy policy with ten goals. Among others, these goals include: (1) assuring a safe and reliable supply of energy to meet reasonable consumer demands; (2) decreasing reliance on non-local energy sources; (3) making energy choices that maintain or improve environmental quality; (4) encouraging the development of renewable energy resources; and (5) assuring diversity in energy sources. Exh. CS-BW-79 at 65.

36. The Bennington Regional Energy Plan (2009) encourages both residential and commercial renewable energy using photovoltaic arrays to convert solar energy to electricity. Exh. CS-BW-80 at 34, 36, 51, and 52.

37. The Bennington County Regional Commission Regional Energy Committee commented that the Willow Road Project "was in an area of good solar resource potential, with no statewide environmental constraints." Exh. CS-BW-13 at 2.

Discussion

Section 248(b)(1) provides that, before the Commission may issue a CPG for an in-state facility, the Commission shall find that the facility:

> will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative

> bodies, and the land conservation measures contained in the plan of any affected municipality.

The Department, through its aesthetics consultant, Mr. Raphael, argues that the Project would unduly interfere with orderly development. In his assessment, Mr. Raphael argues that "orderly development is not just about whether or not the land can be conserved or has impacts to already conserved space."[20] Instead he asserts that a review of the Project's impact on orderly development of the region must assess what the community and the neighbors envision for the Project site as reflected in the Town and Regional plans. And, in this case Mr. Raphael concludes that the Project site was envisioned by the Town and Regional plans as protected from developments like the Project:

> It is clear from the language of the older town plan that this project footprint and the intensely developed clustering of the arrays over that acreage was not what was envisioned in this district. The basic language set forth in the plan, which hasn't changed since 2010, makes it clear that "distinctive rural character" and "very low density residential" comprise the key qualities of the district. The maintenance of large blocks of productive forest lands – also a town, and indeed state goal, is another principle which this project does not support.[21]

Therefore, from the Department's perspective, the Project would unduly interfere with orderly development.

I am not persuaded by Mr. Raphael's conclusion regarding orderly development for two reasons.

First, Mr. Raphael goes beyond the "due consideration" standard in Section 248(b)(1). Instead, he treats the language describing the Rural Conservation District of the Town Plan as embodying rigid standards that give the Town Plan a veto power over the Project. This overriding treatment is inconsistent with the latest Vermont Supreme Court guidance regarding the Commission's review under Section 248(b)(1),[22] which Mr. Raphael acknowledged he was

[20] Exh. PSD-DR-2 at 34.

[21] *Id*. at 35.

[22] *See In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 12 (requiring that the Commission find an undue regional rather than localized impact to disapprove a project under Section 248(b)(1)); *see also* (Robinson, J. concurring) (concluding that Section 248(b)(1) does not require that the Commission give deference to town plans).

not familiar with.[23] Section 248(b)(1) requires that the Commission give due consideration to the Town Plan as well as to the statements of municipal officials, but the Commission is not restricted by the language of the Town Plan as Mr. Raphael asserts.[24]

Second, both the Department in its brief and Mr. Raphael in his testimony do not consider the lack of Town opposition to this Project or the Town's own more expansive interpretation of its Town Plan's restrictions in the Rural Conservation District. Specifically, Mr. Raphael stated only that the fact that the Town does not oppose this Project did not alter his orderly development conclusion.[25] Further, Mr. Raphael stated that in developing his opinion he did not consider the fact that the Town had approved several other commercial solar development projects in the Rural Conservation District.[26]

The Intervenors also argue that the Project would interfere with orderly development of the region because it violates the Town Plan. Specifically, the Intervenors assert that the Project violates a clear, written community standard limiting development in the Rural Conservation District and Town Plan language stating that the Project is in a scenic gateway. I am not persuaded by these arguments for two reasons. First, the Intervenors have not shown that the Project is located in a gateway area as defined by the Town Plan.[27] Second, I gave due consideration to the Town's conclusion that the Project did not violate the Town Plan and thus did not violate a clear, written community standard.

The Intervenors further assert that the Commission is bound by its decision in the Final Order in Docket 8302 that denied the Chelsea Solar project on the grounds that the project would unduly interfere with orderly development.[28] The Intervenors acknowledge that the Town changed its position in this case but do not address the Commission's decision in the neighboring

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[23] Tr. 9/21/18 at 19 (Raphael).

[24] Mr. Raphael appears to be inappropriately giving the Town Plan "substantial deference." Section 248 (b)(1)(C) requires that the Commission give "substantial deference to the land conservation measures and specific policies contained in a duly adopted regional and municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352." The "older" Town Plan used for the review in this case is the 2010 Town Plan. The 2010 Town Plan did not receive an affirmative determination of energy compliance under 24 V.S.A. § 4352. Therefore, Section 248(b)(1) requires only that the Commission give "due consideration" to the Town Plan rather than the "substantial deference" required by Section 248(b)(1)(C).

[25] Tr. 9/21/18 at 43 (Raphael).

[26] Tr. 9/21/18 at 41 (Raphael).

[27] Finding 31.

[28] Intervenors' Brief at 12-13, Intervenors' Reply Brief at 2.

Apple Hill Solar case that gave due consideration to the Town's revised position in that case regarding the Town Plan and its non-opposition to the Apple Hill Solar Project. In Apple Hill, new facts led the Commission to reject its conclusion in Chelsea Solar that that project unduly interfered with orderly development, and the Commission reversed its position regarding the impact of the Town Plan language on orderly development:

> The Town's position regarding the applicability of restrictive language in the Town Plan has changed as a result of the Town's engagement as a party in these proceedings over the last three years, its more in-depth understanding of the Project, and its participation in the amendment of the Project to overcome earlier perceived deficiencies in the Project plan.
>
> . . .
>
> We are not bound by our denial decision in Docket 8302, which by its own terms was limited to the facts of that case. In this case, there is evidence that the Town has selectively applied the Town Plan's design standards for the Rural Conservation District by approving other large-scale commercial solar projects in the District.[29]

Both the Intervenors and the Department also argue that the Commission must consider the cumulative impact of the Project with the neighboring Apple Hill Solar Project.[30] I have considered the cumulative impact of the two sites and am not persuaded that the Willow Road Project would unduly interfere with orderly development. The location of this Project next to the Apple Hill Solar Project does cumulatively increase the presence of solar development in this part of Bennington. However, the Town determined that the Apple Hill Solar Project would not unduly interfere with orderly development despite the potential cumulative impact of its location and the Town did not oppose this Project despite that cumulative impact.[31] I agree with the Town's position.

Based on the foregoing and having given due consideration to the Town's non-opposition to both this Project and the neighboring Apple Hill Solar Project, I recommend that the

[29] Docket 8454, Order of 9/26/18 at 19 and 62.
[30] Intervenors' Brief at 14 and 43 and exhibit DPS-DR-2 at 25, 30, and 36.
[31] *See* Docket 8454, Order of 9/26/18 at 6, 20, and 62.

Commission conclude that the Willow Road Project will not unduly interfere with orderly development.

Municipal Screening Requirements
[30 V.S.A. § 248(b)(1)(B)]

38. The 2010 Bennington Town Plan, which is applicable in this proceeding, does not include municipal screening requirements. Exh. CS-BW-81.

Need for Present and Future Demand for Service
[30 V.S.A. § 248(b)(2)]

39. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Impact on System Stability and Reliability
[30 V.S.A. § 248(b)(3)]

40. The Project will not have an adverse impact on system stability and reliability. GMP has completed a system impact study that investigated the impacts of the Project's interconnection to the GMP distribution system and identified the system upgrades necessary to maintain stability and reliability. The completion of the upgrades identified in GMP's system impact study (at the Petitioner's expense) is a requirement of the interconnection agreement with GMP. Wilson pf. at 12; exhs. CS-BW-9 and CS-BW-10.

Economic Benefit to the State
[30 V.S.A. § 248(b)(4)]

41. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Discussion

The Intervenors propose findings of fact based on their testimony that the views in and around the Town of Bennington are a significant economic asset that will be diminished by the

Project. The Intervenors argue, therefore, that testimony has been presented that warrants rescinding the conditional waiver of this criterion. I am not persuaded. While there has been testimony from the Intervenors making the argument that the Project will have a negative economic impact in the area, that testimony can readily be characterized as the speculative conclusions of lay witnesses opposed to the Project.

I recommend that the Commission not rescind the conditional waiver because testimony has not been presented to warrant the rescission.

Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment, the Use of Natural Resources, and Public Health and Safety
[30 V.S.A. § 248(b)(5)]

42. Subject to the conditions described below, the Project will not have an undue adverse effect on aesthetics, historic sites, air (including sound and wind) and water purity, the natural environment, the use of natural resources, or public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), and greenhouse gas impacts. This finding is supported by findings 43 through 128, below, which give due consideration to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K).

Discussion

In the ANR MOU, the stipulating parties agree to a proposed condition in the CPG for the Project requiring a 6-inch gap to be left between the bottom of the fence and the ground surface to allow for small wildlife to traverse the site. The stipulating parties agree that the condition is necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the condition in the CPG.

Outstanding Resource Waters
[10 V.S.A. § 1424a; 30 V.S.A. § 248(b)(8)]

43. The Project will not cause an undue adverse impact on outstanding resources waters because there are no designated outstanding resource waters on or near the Project site. Dori

Barton, Chelsea ("Barton") pf. at 3, 5; exhs. CS-BW-36 at 4-5, CS-BW-50 at 3, CS-BW-73 at 4, and CS-BW-59 at 3.

Air Pollution, Sound, Wind, and Greenhouse Gas Impacts
[30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)]

44. The Project will not result in undue air pollution, sound, wind, or greenhouse gas emissions. This finding is supported by findings 45 through 56, below.

Air Pollution

45. The proposed secondary transformer oil containment system will protect the groundwater and air from potential contamination. The Project has no other components that have potential for releasing harmful water or air pollutants. Jewkes, pf. at 7.

46. Any air emissions from the Project will be related to limited vehicle and equipment emissions and dust and will be present mostly during construction of the Project. The Project will not produce air pollutants during operation. Exhs. CS-BW-36 at 6 and CS-BW-59 at 3.

Discussion

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not result in undue adverse impacts to air pollution."[32] They argue that Chelsea had a duty to consider and present evidence about the air pollution mitigation value of the forest that will be cleared at the Project site. I am not persuaded by their argument.

Chelsea presented evidence by a qualified witness that potential dust is the only pollutant anticipated and the Project will not result in undue air pollution.

The Intervenors argue that the clear-cutting of trees at the Project site will serve to increase the existing ambient air pollution because the trees will no longer absorb air pollutants. The Intervenors filed opinion testimony by non-expert lay witnesses to support this argument. I was not persuaded that this evidence substantiated their argument that clearing the existing trees creates an undue adverse impact on air pollution. The Intervenors also argue that Chelsea should have done more studies of the passive value of trees on pollution but similarly did not provide a sufficient evidentiary basis for the conclusion that Chelsea needed to do more.

[32] Intervenors' Brief at 39.

The prefiled testimony of Chelsea's expert that the only air pollutant that might be created by the Project would be dust was admitted without objection, and the Intervenors did not seek to cross examine the witness to challenge that opinion. Given the unchallenged testimony of Chelsea's witness, I am not persuaded by the Intervenors' argument, which is based on speculative lay opinion.

I therefore recommend that the Commission conclude that the Project will not result in undue air pollution.

Sound

47. Sound generated by Project construction will be of limited duration and will be similar to the noise generated by typical light construction equipment. The construction activities for this Project using motorized construction machinery will be limited to the hours between 8:00 AM and 5:00 PM Monday through Friday. Non-machinery construction activities will be limited to the hours between 7:00 AM and 6:00 PM Monday through Friday and 8:00 AM to 5:00 PM on Saturdays. Generally, any work on Sundays is not anticipated and will only occur after notice and no complaints from the neighbors. No construction activities will occur on state or federal holidays. Jewkes pf. at 6; Wilson pf. at 8; *see* Discussion at 12.

48. Once operational, the Project will be capable of generating a maximum sound level of 79 dBa from the string inverters and transformer on the equipment skid, which is located near the southern boundary of the Project. The highest estimated sound level generated by the Project at the nearest residence, located approximately 865 feet north of the edge of the array, is 28 dBa. The highest estimated sound level generated by the Project at a property line is at the northern property line, where the Project is estimated to generate a maximum of 32 dBa. These projections do not account for any ambient background sound, including traffic sound, or the attenuating effect of any vegetation located between the sound source and the study points. Also, these projections assume that all pieces of Project equipment are operating simultaneously at their maximum sound level, which will be an infrequent, rather than regular, occurrence. Ryan Haac, Chelsea ("Haac") pf. at 2-3; exh. CS-RH-2 at 6.

49. The Town of Bennington has a noise ordinance that sets forth property line decibel level standards. The Project complies with the applicable local noise standards. Exh. CS-RH-2 at 4.

50. At the request of the Project's neighbors, Chelsea assessed the potential effect on highway sound at their residences that might result from the removal of trees at the Project site. This assessment concluded that removing trees could cause an increased highway sound level of less than 3 dBA at all residences in the area. A 3 dBA change in broadband sound levels is just perceptible by most people and is not considered a substantial increase by the Vermont Agency of Transportation ("VTrans") Noise Analysis and Abatement Policy. Haac pf. at 4-5; exh. CS-RH-3 at 14.

51. Based on results from background sound monitoring and sound propagation modeling, post-construction background sound levels in the residential neighborhood, which are principally from the nearby highway complex, will not experience a substantial increase due to the Project and will remain well below the level at which VTrans would consider providing noise abatement measures if this were a highway project. Exh. CS-RH-2 at 1.

52. The conclusion that the Project will not create an undue adverse impact on aesthetics with regard to noise also applies to the cumulative impact of the Willow Road Project and the neighboring Apple Hill Solar Project. Tr. 9/20/18 at 65 (Haac).

Discussion

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not create an undue adverse aesthetic impact regarding noise."[33] Their argument is based on their conclusion that the sound assessments conducted by Chelsea were insufficient.

Chelsea presented evidence indicating that the highest potential operational sound generated by the Project will be 32 dBa at the northern property line of the Project and 28 dBA at the nearest residence. Chelsea's expert witness also assessed the potential highway sound at the neighbors' residences that might result from the removal of trees at the Project site and found that the removal of trees would have a negligible impact on the existing highway sound levels at

[33] Intervenors' Brief at 29.

the neighbors' residences. Chelsea also presented evidence concerning construction noise that was unrebutted.

Chelsea has presented evidence by a qualified witness that the Project will not result in undue sound. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

I recommend that the Commission conclude Chelsea that the Project will not result in undue sound impacts.

Wind

53. At the request of the Project's neighbors, Chelsea assessed the potential effects on wind levels that could result from the removal of trees at the Project site. Chelsea used historical wind data, wind behavior formulas, and computational fluid dynamics models to evaluate possible wind speed conditions at the site, with and without the planned tree clearing. Scott Reynolds, Chelsea ("Reynolds") pf. at 2-3.

54. Chelsea's wind assessment concluded that only the residence of Ms. Harris, the Project's closest residential neighbor, may experience a measurable difference in wind speeds because of the Project. However, that difference would be both minor and infrequent, and likely imperceptible to a person, and therefore an insignificant change. Reynolds pf. at 3.

Discussion

The Intervenors argue that the Project "will create an undue adverse impact regarding wind."[34] Their argument is based on the conclusion that the wind assessment conducted by Chelsea indicated that the Project will increase the wind at Ms. Harris's home in the Apple Hill neighborhood.

Chelsea presented evidence by a qualified witness that any increase in the wind will be so minimal as to be insignificant and likely imperceptible, and therefore the Project will not result in undue wind. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

[34] Intervenors' Brief at 30.

I recommend that the Commission conclude that the minor potential increases to the wind speed created by the Project cutting down trees will not result in undue wind.

Greenhouse Gases

55. Chelsea performed a greenhouse gas ("GHG") life cycle analysis by determining the potential change in GHG emissions to the atmosphere in metric tons of carbon dioxide. The Project will result in a substantial net benefit regarding greenhouse gases when compared to the current baseload scenario. Harnoor Dhaliwal, Chelsea ("Dhaliwal") pf. at 3; exh. CS-HD-2 at 9.

56. Chelsea has agreed to provide ANR with the Project's "as-built" annual electric generation design estimate within 60 days of the commissioning date of the Project to assist the Agency with compiling and analyzing greenhouse gas impacts. Exh. Joint-ANR-CS-1 at ¶ 6.

Discussion

In the ANR MOU, the stipulating parties identify conditions to be included in the CPG for the Project that require Chelsea to provide ANR with post-construction and annual information to assist ANR with compiling and analyzing greenhouse gas impacts. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on air purity. I agree and recommend that the Commission include the conditions in the CPG.

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not result in an undue adverse aesthetic impact due to" GHG emissions.[35] Their argument is based on their conclusion that the GHG life cycle study conducted by Chelsea "did not consider the [GHG] mitigation values of the forest on Apple Hill or the carbon sequestration of the forest proposed to be cut."[36]

Chelsea has presented evidence by a qualified witness that the Project will not result in undue GHG emissions, including a GHG life-cycle analysis, contrary to the Intervenors' assertions. The GHG life-cycle analysis compared the negative impact of the lost-trees carbon sequestration with the positive impact of non-carbon-sourced electricity for the lifetime of the Project and determined that there would be a net GHG-reduction benefit created by the Project.

[35] Intervenors' Brief at 39.
[36] *Id.*

The Intervenors did not take the opportunity to cross-examine Chelsea's GHG expert about his testimony or otherwise present evidence in support of their argument. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

I recommend that the Commission conclude that the Project will not result in undue GHG emissions.

Water Pollution
[10 V.S.A. § 6086(a)(1)]

57. The Project will not result in undue water pollution. This finding is supported by findings 58 through 81, below.

Headwaters
[10 V.S.A. § 6086(a)(1)(A)]

58. The Project will not result in an undue adverse impact on any of Vermont's headwaters. This finding is based on findings 59 through 61, below.

59. The Project is located within a headwater as defined by 10 V.S.A. § 6086(a)(1)(A) because the Project site is in a drainage area of less than 20 square miles. However, the Project is not characterized by other features that define headwaters. It is not characterized by steep slopes or shallow soils, is not above 1,500 feet in elevation, is not in a watershed of a public water supply as designated by ANR, and is not in an area supplying significant amounts of recharge water to aquifers. Barton pf. at 5-6.

60. ANR Geographic Information System databases and site observations show that runoff from the site drains to a VTrans storm system network at the interchange at the junction of U.S. Route 7 and VT Route 279. This water eventually discharges to an unnamed tributary of Furnace Brook, which eventually flows into Furnace Brook roughly a quarter mile from the Project. Furnace Brook then flows into the Walloomsac River. This headwater sub-watershed is less than one square mile at the point where the Project runoff would discharge to the VTrans storm system network. Barton pf. at 6.

61. Despite the size of the sub-watershed, the Project will meet any health and Vermont Department of Environmental Conservation ("DEC") regulations regarding the reduction of the

quality of ground or surface waters flowing through lands defined as a headwater. The conditions contained in DEC's Stormwater Construction General Permit 3-9020, under which the Project will be covered, would ensure that ground- and surface-water quality are not affected by the Project's construction activities. Exh. CS-BW-36 at 7.

Waste Disposal
[10 V.S.A. § 6086(a)(1)(B)]

62. The Project will meet all applicable health and DEC regulations regarding the disposal of any generated waste. This finding is supported by findings 63 through 66, below.

63. Some solid waste will be generated during construction. All waste will be recycled or disposed of in accordance with all applicable health and environmental conservation regulations regarding the disposal of waste. Also, there will be no injection of waste materials or any harmful or toxic substances into the groundwater. Jewkes pf. at 11; exh. CS-BW-36 at 8.

64. Materials accumulated from clearing will be ground on site and used for erosion prevention and sediment control or removed from the site to an appropriate local disposal/recycling facility. Grubbing of the site is not planned; all stumps will be cut flush with existing grade and left in place. If stumps interfere with Project installation or site grading in a specific location, they will be ground in place or removed and disposed of in an approved stump dump off-site. No on-site stump dump is proposed. Jewkes pf. at 4.

65. The Project will have one pre-fabricated equipment skid. The equipment skid will house a 2,000-kVA medium voltage transformer. The transformer will use Envirotemp FR3, a bio-based coolant, as the cooling oil. This fluid would biodegrade in the environment if accidentally spilled. Further protection against spill is provided by including secondary transformer oil containment in the design of the equipment skid. The base floor of the equipment skid will contain a hollow chamber with open grates surrounding the transformer and leading into the chamber. Spilled transformer oil would be captured and held by this chamber. Jewkes pf. at 6-7.

66. The spill containment basin will be sized to hold 110% of the transformer oil volume plus five inches of freeboard for rain. Jewkes pf. at 7; exh. Joint ANR-CS-1 at ¶ 22.

Discussion

In the ANR MOU, the stipulating parties agree to a proposed condition in the CPG for the Project requiring Chelsea's operations and maintenance contractor to perform periodic inspections of the secondary oil containment system and maintain the system in good working order for the life of the Project. The stipulating parties agree that the condition is necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the condition in the CPG.

Water Conservation
[10 V.S.A. §§ 6086(a)(1)(C)]

67. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Floodways
[10 V.S.A. § 6086(a)(1)(D)]

68. The Project will not result in an undue adverse impact on floodways. The Project site is not located in a floodway or a floodway fringe. Barton pf. at 4 and 6; exhs. CS-DB-2 at 4 and CS-BW-36 at 10.

Streams
[10 V.S.A. § 6086(a)(1)(E)]

69. The Project will not result in an undue adverse impact on streams. There are no streams on the Project site. The closest stream is approximately 230 feet to the south of the Project area; no impacts are expected to occur to this watercourse as a result of the Project. Barton pf. at 6; exhs. CS-DB-2 at 4 and CS-BW-36 at 11.

Shorelines
[10 V.S.A. § 6086(a)(1)(F)]

70. The Project will not result in an undue adverse impact on shorelines. The Project is not located on or adjacent to a shoreline. Barton pf. at 7; exhs. CS-BW-36 at 11 and CS-BW-74 at 4.

Wetlands
[10 V.S.A. § 6086(a)(1)(G)]

71. The Project will not have an undue adverse effect on wetlands. This finding is supported by findings 72 and 73, below.

72. There are no Class II wetlands on the Project site. Barton pf. at 7; exh. CS-DB-2 at 5.

73. Chelsea has agreed to demarcate all wetlands, and their buffers with visible flagging before site preparation or construction and instruct all work crews to avoid those areas. Exh. Joint-ANR-CS-1 at ¶ 8.

Discussion

In the ANR MOU, the stipulating parties agree to proposed conditions in the CPG for the Project to avoid disturbance to wetlands and wetland buffer zones during construction, including GMP's construction of the line extension, operation, and decommissioning. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on wetlands. I agree and recommend that the Commission include them as conditions in the CPG.

Sufficiency of Water and Burden on Existing Water Supply
[10 V.S.A. §§ 6086(a)(2) and (3)]

74. Pursuant to the Commission's Section 8007(b) Order, these criteria are conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

75. In response to concerns from the neighbors, Chelsea conducted an investigation to determine whether the Project would exacerbate the presence of perfluorooctanoic acid ("PFOA") contamination of the drinking water wells uphill from the Project in the Apple Hill neighborhood. The PFOA investigation concluded that the Project would not exacerbate the Apple Hill drinking water well PFOA contamination. Miles Waite, Chelsea ("Waite") pf. at 2-3; exh. CS-MW-2 at 6.

Discussion

The Intervenors argue that "the PUC cannot make a finding the Project will not result in unduly adverse water pollution."[37] The drinking water wells serving the AHHA residences have been found to be contaminated by PFOA. The Intervenors contend that Chelsea has a duty to conduct groundwater testing and analysis because the "limited review of [Chelsea]'s expert reveals numerous uncertainties and variables that may influence migration of contaminants into the air or groundwater or result in changes to groundwater as a result of clear-cutting nearly 10 acres of forest."[38]

Chelsea has presented evidence by a qualified witness that the Project would not exacerbate the Apple Hill drinking water well PFOA contamination. The soil at the Project site does not contain PFOA at levels that could cause an impact to human health through exposure to the soil or dust during construction or operation of the Project.[39]

The Intervenors made no evidentiary showing that the asserted "many unknowns"[40] might enhance the impact of PFOA on the AHHA wells.

I recommend that the Commission conclude that no evidence was presented that would warrant rescinding the waiver of this criterion in this proceeding. There is no evidence that the Project will cause an increase in PFOA-tainted groundwater flowing to the AHHA wells located uphill from the Project.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

76. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result. This finding is supported by findings 77 through 81 below.

77. The implementation of erosion prevention and sediment control measures consistent with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control

[37] Intervenors' Brief at 39.
[38] *Id*. at 38.
[39] Waite pf. reb. at 3.
[40] *Id*.

during construction and the establishment of vigorous permanent vegetative ground cover will ensure that the Project's lands will retain the ability to hold water. Jewkes pf. at 7-8.

78. By clearing existing vegetation at ground level but leaving stumps in place, ground disturbing activities will be avoided during site clearing and the resulting site will be better equipped to manage soil erosion and stormwater runoff. Materials accumulated from clearing will be ground on site and used for erosion prevention and sediment control on site or removed from the site to an appropriate local disposal/recycling facility. Jewkes pf at 4.

79. Approximately 9.64 acres of existing vegetation will be cleared before Project construction. All of the areas that will be cleared are outside of any Class II wetlands or associated wetland buffers. Jewkes pf at 4; exh. CS-IJ-2.

80. Chelsea will apply for a 3-9020 State of Vermont General Permit for Stormwater Runoff from Construction Sites before beginning site clearing work. The 3-9020 permit will include a site-specific Erosion Prevention and Sediment Control Plan that conforms to the Vermont Standards & Specifications for Erosion Prevention and Sediment Control. Jewkes pf. at 8-9.

81. Chelsea has agreed that for any tree clearing activities associated with the Project's site preparation or construction that are not covered by the Construction General Permit 3-9020 or other applicable construction stormwater permit, Chelsea will perform tree clearing in accordance with the acceptable management practices for maintaining water quality on logging jobs in Vermont. Exh. Joint-ANR-CS-1 at ¶ 7.

Discussion

In the ANR MOU, the stipulating parties agree to conditions in the CPG for the Project requiring Chelsea to prevent undue soil erosion impacts, including stormwater discharge impacts during both construction and operation of the Project. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the conditions in the CPG.

Transportation
[10 V.S.A. § 6086(a)(5)]

82. The Project will not cause unreasonable congestion or unsafe conditions with respect to transportation systems. The Project will be accessed via a private access driveway connecting to Willow Road. The proposed private access driveway will be constructed in accordance with state and local standards and will not interfere with the regular operation of Willow Road. Additional traffic generated by the Project during construction and operation periods will be of a low volume and will not cause congestion or otherwise adversely affect existing traffic patterns. Wilson pf. at 28.

Educational Services
[10 V.S.A. § 6086(a)(6)]

83. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Municipal Services
[10 V.S.A. § 6086(a)(7)]

84. The Project will not cause an unreasonable burden on the ability of the Town of Bennington to provide municipal or governmental services. The Project will not require any municipal sewer or water services. The Project will not require above-average use of municipal police, fire, rescue, or maintenance services. The Project will be designed and installed in accordance with all applicable safety codes and will not be a risk to public health and safety. Wilson pf. at 28.

Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas
[10 V.S.A. § 6086(a)(8)]

85. The Project will not have an undue adverse impact on aesthetics or on the scenic or natural beauty of the area, nor will the Project have an undue adverse effect on historic sites or rare and irreplaceable natural areas. This finding is supported by findings 86 through 114, below.

Aesthetics

86. The Project site is almost entirely wooded with northern hardwood species and slopes down at an 8% grade from the northeast corner to the southwest corner, falling approximately 80 feet over this distance. The topography also exhibits some slight undulations along the slope. Wilson pf. at 6; Jewkes pf. at 3; exhs. CS-IJ-2 and CS-MK-2 at 4, 6 and 44.

87. The area to the south and west of the site is dominated by extensive highway infrastructure, including the Vermont Welcome Center, as well as nearby industrial and commercial development, which defines the western edge of the Project. The area to the north and east of the site is wooded. It includes well-spaced residential properties and agricultural and undeveloped areas. The site sits within a broader valley terminated to the west by the foothills of the Green Mountains and to the east by rolling hillsides. Exhs. CS-MK-2 at 6 and 12 and CS-MB-2 at Figure 2.

88. The roadways associated with the interchange at the junction of U.S. Route 7 and VT Route 279 are heavily traveled. The VTrans route logs indicate that approximately 10,000 vehicles pass through the interchange each day. Exhs. CS-BW-45 at 4 and CS-MB-2 at 9.

89. The Bennington Battle Monument is approximately 1.1 miles south of the Project site. The Monument's observation level is 200 feet above the ground and has four long, narrow openings oriented north, south, east, and west. The Project site will be minimally visible from the northern window. Visibility of the Project site from the Monument grounds is also highly limited due to the presence of structures and trees in the foreground. Exhs. CS-BW-45 at 12, MACC-ML-1 at 6, CS-MB-2 at 12, and CS-MB-4b at B-45; tr. 9/20/18 at 163-166 (Buscher).

90. The Project will be visible approximately one mile away from the Mt. Anthony Country Club. Leon pf. at 4; Kane pf. reb. at 15-17; exh. MACC-ML-1 at 1, 5, 12, and 13.

91. The Project will be visible from Southern Vermont College and its public trails approximately two to three miles away. Leon pf. reb. at 4; Kane pf. reb. at 17-18; exhs. CS-MB-2 at 13 and MACC-ML-3 at 6-10; tr. 9/20/18 at 215 (Kane).

92. The Project site is identified in the 2010 Bennington Town Plan as part of a Rural Conservation District. Kane pf. at 3; exhs. PSD-DR-2 at 5 and CS-BW-81 at 31.

93. The existing visual character of the site is dominated by the extensive highway infrastructure and nearby commercial and industrial development. The Project would expand the extent of development across Route 7 into the Rural Conservation District. Kane pf. at 4-5; exhs. PSD-DR-2 at 8-9, CS-BW-45 at 4, CS-MK-2 at 10-11, and CS-MB-2 at 14-15 and Figure 2.

94. The Project site would require clearing 9.64 acres of trees, will convert existing woodlands to a different land use, and will alter the open-space "character" of Apple Hill. The Project site is not identified as open space in either the Town Plan or the Town's Open Space Plan, which states that Bennington has a wealth of conserved open space. Wilson pf. reb. at 3; exhs. PSD-DR-2 at 11, CS-MB-2 at 14, and CS-BW-49 at 8.

95. The Project will not contribute to a long-term loss of open space. The components of the Project (panels, inverter structures, and transformers) will, following the useful life of the Project, be removed and the land restored to an undeveloped condition. Exhs. PSD-DR-2 at 11, CS-MB-2 at 14, CS-BW-45 at 14, CS-MK-2 at 26-27, and CS-BW-8 at ¶ 2.

96. The Project will be minimally visible to the public on nearby heavily traveled highways and will be shielded by the forest buffer and the topography. Wilson pf. at 36-37; Kane pf. at 4; exhs. CS-MK-2 at 19-20, PSD-DR-2 at 8, and CS-MB-2 at 9.

97. The low height of the Project (7-8 feet), its ability to follow the natural grade, and the retention of significant existing vegetation on the periphery of the site reduce the adverse visual impacts from the Project. Wilson pf. at 4; Kane pf. at 4; exhs. CS-MK-2 at 24, PSD-DR-2 at 9, and CS-MB-2 at 2 and 9.

98. The nearest neighbor is approximately 300 feet north of the Project fence. Exhs. CS-IJ-2 and CS-RH-2 at 3.

99. The Project will be adjacent to the Apple Hill Solar Project, which will also clear-cut 9.67 acres of trees in order to construct a similar 2.0 MW solar project. Exhs. CS-MB-2 at Figure 2, PSD-DR-2 at 12, CS-IJ-2, CS-MK-2 at 35.

100. While the Project requires clearing of the land and further extends a newer land use in the area, this type of land use has been contemplated and permitted elsewhere within the Rural

Conservation District. Wilson pf. at 33-34; exhs. CS-MB-2 at 22, CS-BW-20, CS-BW-21, and CS-BW-22.

101. The materials and forms used for the Project aid in helping the Project to blend into the landscape. The black color of the solar panels is less visible given this dark color. The surfaces of the solar panels are nonreflective. The use of a 10-foot tall fence with affixed earth-tone mesh fabric, which is 85% opaque, helps to further shield the Project from view through existing vegetation or new landscaping. The Project does not require any exterior lighting. Wilson pf. at 3 and 5; Wilson pf. reb. at 31-32; exhs. CS-MK-2 at 5, 16, 25, and 43, CS-MB-2 at 2, 13, and 24, and PSD-DR-2 at 2 and 10, CS-BW-94, and CS-BW-95; tr. 9/20/18 at 97-111 (Buscher); tr. 9/20/18 at 282 (Wilson).

102. The visibility of the Project site would be limited by the nature of the terrain, the preservation and addition of landscaping on the periphery of the site, and by the fact that the surrounding land area is used primarily by people in vehicles. Along with the Vermont Welcome Center, other areas within the viewshed are accessible only by vehicle. In fact, the nature of the roadways – on/off ramps, merge lanes – makes it a highly fluid, mobile visual environment. The view duration would be low; nonetheless the number of potential observers would likely be high, given the location. The extent of visibility would not be large, but the clearing associated with the Project would be noticeable. Exhs. CS-MK-2 at 8-10, CS-MB-2 at 9-11, and PSD-DR-2 at 11.

103. The Project, and the neighboring Apple Hill Solar Project, introduce a new element into the landscape that is not commonly seen, but will be minimally visible in the viewshed panorama from various locations, thus creating an adverse aesthetic impact. Exh. PSD-DR-2 at 9.

104. The Project will not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. The Regional Plan and the Town Plan and their various sub-plans provide strong encouragement to protect scenic resources, but none of these plans specifically address the Project site or provide mandatory requirements to preserve the scenic quality of the site. Exhs. CS-MK-2 at 28, CS-MB-2 at 22, PSD-DR-2 at 20, CS-BW-79, CS-BW-80, CS-BW-81, CS-BW-49, CS-BW-24, CD-BW-88, and CS-BW-27.

105. The Town of Bennington has determined "not to oppose" the Willow Road Project. Bennington Agreement at ¶ 1.

106. Other commercial-scale solar projects have been approved and are operating in the Rural Conservation District. Wilson pf. reb. at 7-12; exhs. CS-BS-BW-20, CS-BW-21, and CS-BW-82.

107. The Project is designed with mitigating elements including:

a. A 10-foot perimeter fence, covered with an 85%-opaque earth-tone mesh screening fabric to be installed as agreed upon by the parties after a post-construction aesthetic review;
b. Burial of the electrical lines within the Project boundaries;
c. Location of the inverter skid in an area screened by existing vegetation;
d. Retention of existing vegetative screening around the Project that has been expanded by the reduction in the Project's footprint;
e. Additional landscape plantings at strategic locations to fill in the gaps in the screening. These plantings occur in three landscape mitigation zones. The first zone is along the western edge of the array between the Project and the Route 7 corridor. This zone would consist of 223 individual trees and shrubs (including cedars). The second area is along the northern edge of the Project, approximately in the center of the array. In this zone, about 10-12 large (20-24 feet) conifers will bolster natural vegetation in screening the Project from the most proximate residential neighbor to the north. The last area is along Apple Hill Road, separating that parcel from the intervening remnant apple orchard. In this location, 142 mixed deciduous shrubs and trees are planned to strengthen the screening provided by the remnant orchard.

Bennington Agreement ¶ 9 and exh. B; exhs. PSD-DR-2 at 2, 26, CS-MK-3 at CS-3, CS-BW-28, and CS-BW-3; tr. 9/20/18 at 97-98 (Buscher).

108. The Petitioner has agreed to:

a. Maintain the landscape mitigation plan described in exhibit B of the Bennington Agreement and to conduct post-construction review with all parties of all proposed mitigation plantings and to add additional plantings if necessary;

b. Fully comply with Commission Rule 5.800 that establishes the requirements related to the installation and maintenance of aesthetic mitigation measures.

Bennington Agreement ¶ 9 and exh. B; tr. 9/21/18 at 282 (Wilson).

109. The Town Plan designates two scenic gateways in the vicinity of the Project. The first is the view of the Bennington Battle Monument and Mt. Anthony directly visible while traveling south on Route 7 near the Project site. This long-range gateway view will not include the Project, which is located above and to the left of Route 7 while traveling south. The second scenic gateway is located 0.75 mile from the Project site along VT Route 279 west of its interchange with Route 67. This scenic gateway includes long-range views of the Green Mountains to the east and will not include the Project site. Exhs. CS-MB-2 at 9, PSD-DR-2 at 7-8, and CS-MK-2 at 9.

110. The Project is set on a site which retains natural vegetated areas on its periphery and has a relatively gentle slope with slight undulations that tend to break-up the mass of the array. The Project will not permanently degrade or diminish areas of noted or high scenic qualities and will allow continued visibility of regional landscape forms from residential properties higher in elevation, while still maintaining adequate and effective screening. Exh. CS-MK-2 at 44.

111. The Project will not be shocking or offensive to the sensibilities of the average person but will appear to be an extension of the nearby highway complex and the commercial and industrial development beyond the highway buffered by existing and enhanced vegetation. Exhs. PSD-DR-2 at 24, CS-MK-2 at 43-44, and CS-MB-2 at 24.

112. While the Project will be adverse, it will not have an undue adverse impact on aesthetics as mitigated in accordance with Commission Rule 5.800. Exhs. PSD-DR-2 at 29, CS-MK-2 at 45, and CS-MB-2 at 24; tr. 9/21/18 at 139 (Raphael).

Discussion

Chelsea, through its first aesthetics consultant, Mr. Kane, asserts that "[t]he design has taken considerable steps to effectively limit its visibility to the public nearby."[41] Mr. Kane concludes that the Project will not create an adverse aesthetic impact on the scenic resources.[42] Through its second aesthetics consultant, Mr. Buscher, Chelsea further contends that:

> Although the Project will have some limited visibility from nearby private properties, the site is not located in a prominent location and the retained vegetation around the Project would prevent visibility from public areas. For these reasons, the Project would not result in an adverse impact to the aesthetics and scenic and natural beauty of the area.[43]

The Intervenors disagree with Chelsea and argue that the Project will have an adverse impact on aesthetics and scenic and natural beauty "because the industrial siting of the array threatens the high scenic qualities and bucolic nature of this highly prominent hillside landscape which serves as an important gateway to the community, region, and state."[44]

Similarly, the Department and its aesthetics consultant disagree with Chelsea. The Department asserts that:

> [T]he Project will have an adverse effect on the scenic and natural beauty of the area in which it is located for two reasons. First, the Project is located in a Rural Conservation District, the purpose of which is to preserve the distinctive rural character of the area. It can be surmised that development of a solar array in a Rural Conservation District does not preserve the rural character of the area. Second, clear cutting 9.64 acres of vegetation and forest will have a significant impact on open space values, including visual and aesthetic buffering, that the forest currently provides from the north and east portions of the Project site.[45]

And, as Mr. Raphael states:

> While the Project has limited to no visibility from most public vantage points, it will have an adverse impact on neighboring properties, particularly with respect to impact on open space and its lack of fit with the surrounding context. Therefore,

[41] Kane pf. at 3.
[42] *Id.* at 4.
[43] Exh. CS-MB-2 at 15.
[44] Intervenors' Brief at 31.
[45] Department's Brief at 12.

> the second prong of the Quechee Test is conducted to determine if the adverse impacts are undue.[46]

Like the Intervenors and the Department, I also disagree with Chelsea. While I recognize that the Project as amended includes significant mitigating measures that reduce its visual impact, I do not agree with Chelsea's assessment that the Project will not be adverse to aesthetics and natural beauty. Chelsea's conclusion has relied on mitigating strategies that are more appropriately addressed in determining whether the Project has an *undue* adverse impact, rather than in making the threshold determination that the Project has an adverse impact. I also disagree with Chelsea's assertion that the Project will be "virtually invisible to all except those hunting for it."[47]

I recommend that the Commission conclude that, while Chelsea has engaged in several mitigating steps to limit the Project's visibility, the Project will have an adverse impact because the Project will be visible from various public and private views. Further, the 9.64-acre clear-cut of the forest required for the Project will be out of context with the currently wooded view of Apple Hill and the less developed Rural Conservation District beyond it.

Having concluded that the Project will have an adverse impact, I nonetheless recommend that the Commission conclude that the Project will not have an *undue* adverse impact on aesthetics or on the scenic or natural beauty of the area.

In determining whether a proposed project would have an undue adverse impact on aesthetics, the Commission is guided by the Quechee test,[48] which provides in relevant part:

> . . . [the next step] is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:
>
> 1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

[46] Exh. PSD-DR-2 at 18.

[47] Chelsea's Brief at 58.

[48] *See In re Rutland Renewable Energy, LLC*, 2016 VT 50 (observing that the Commission uses a modified Quechee test in exercising its regulatory power over project siting).

> 2. Have the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?
>
> 3. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?[49]

In addition to this guidance from the Quechee test, the Commission's consideration of aesthetics under Section 248 is "significantly informed by overall societal benefits of the project."[50]

My analysis below answers these three Quechee test questions and leads me to conclude that the Project will not have an undue adverse impact.

Does the Project Violate a Clear, Written Community Standard Intended to Preserve the Aesthetics or Scenic Beauty of the Area?

Chelsea contends that the standards for the Rural Conservation District ("RCON") in the Bennington Town Plan applicable in this case are "not a clear community standard"[51] and argues that "[t]he insistence of Mr. Raphael and the Intervenors that the Town RCON standards proscribe development is entirely unpersuasive and incorrect as a matter of law."[52] Chelsea asserts that this is because "solar facilities are contemplated and allowed uses within the RCON."[53]

The Intervenors assert that "the Project as proposed, fails to conform with the Town Plan; thus, is violative of the clear, written community standard articulated therein."[54] The Intervenors argue that "the law of the case settles the issue of whether there is a clear, written community standard contained in the Town Plan; thus, [Chelsea] is precluded from arguing that the Town Plan does not contain a clear, written community standard."[55]

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[49] *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 8/8/07, at 64–65.
[50] *In Re: Northern Loop Project, Docket 6792*, Order of 5/16/03 at 28.
[51] Chelsea's Brief at 3 and 19.
[52] *Id*. at 5.
[53] Chelsea's Reply Brief at 13.
[54] Intervenors' Brief at 34.
[55] Intervenors' Reply Brief at 1.

The Department argues that while "the various regional and municipal plans indicate an intent to preserve rural character, scenic views, and important landscapes in the region through broad goals and policies, . . . the proposed Project does not per se violate a clear, written community standard."[56]

Unlike zoning ordinances that are subject to variances depending on the individual circumstances of a permit application, municipal and regional plans have been found to be sources of clear and consistent statements of a community's policies or standards. Unlike Act 250 cases that require compliance with zoning limitations, the Commission has found that it is more appropriate to rely on town plans as the primary source of clear, written community standards.[57] The Commission has also determined that the version of the Bennington Town Plan that applies in this case has been used like a zoning ordinance, has been subject to varied application by the Town, and therefore cannot serve as the source of a clear, written community standard as contemplated by the Commission's application of the Quechee test.[58]

The Intervenors' position is not supported by the limited Commission precedent regarding the law of the case doctrine.[59] The doctrine "posits that when a court decides upon a rule of law, the decision should continue to govern the same issues in subsequent stages in the same case."[60] The doctrine is a "rule of practice" from which a court may depart "in a proper case."[61] The Commission, after becoming more fully aware of the Town's inconsistent application of the Town Plan standards, has departed from its determination in Chelsea Solar in the Apple Hill case. I recommend that the Commission do so here as well.

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[56] Department's Brief at 13 n.13.

[57] Docket 8454, Order of 9/26/18 at 42 (citing *Petition of New Cingular Wireless PCS, LLC*, Docket 8160, order of 12/5/13 at 8).

[58] Docket 8454, Order of 9/26/18 at 62 (holding that the Town Plan language does not serve as a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area).

[59] *See, e.g., In re Vermont Elec. Power Co., Inc.*, Docket 7121, Order of 12/5/06 at 46 (law of the case doctrine did not apply to prior hearing officer ruling in the case and did not limit Commission's reassessment of property rights).

[60] *Morrisseau v. Fayette*, 164 Vt. 358, 364 (1995) (citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988)).

[61] *Id*. (citing *State v. Cain*, 126 Vt. 463, 469-70 (1967)).

There can be no "law of the case" in the absence of a final determination establishing that law.[62] The Intervenors argue that the Commission is bound by its determination in Chelsea Solar because the Willow Road Project is simply an amended version of the ongoing Chelsea Solar project and therefore part of the same case. But, the law of the case doctrine cannot apply under the Intervenors' argument because under that argument there has not been a final determination in a final order that the Town Plan contains a clear, written standard. That final determination would still pend the review being conducted here.

Further, even if the Chelsea Solar determination were the "law of the case," it would be proper for the Commission to depart from it in this case. The Commission's decision was based on an incomplete knowledge of the facts. The Town of Bennington has similarly gained a more complete knowledge of the facts and does not oppose this Project.

I am not persuaded by the Intervenors' argument and recommend that the Commission conclude that the law of the case doctrine does not require applying the Commission's determination in the Chelsea Solar case that the 2010 Town Plan includes clear, written community standards.

After taking into account: (1) the Town's revised application of the Town Plan to the Project as currently proposed; (2) the Town's resulting lack of opposition to the Project; (3) the Town's previous selective application of the Town Plan such that the Town approved other commercial solar developments in the Rural Conservation District; (4) the Commission's precedent rejecting zoning bylaws as sources of clear, written community standards due to their varying application; and (5) the Commission's decision in Apple Hill to similarly reject the Town Plan as the source of a clear, written community standard, it is my recommendation that the Commission conclude that that there is no clear, written community standard in the Town Plan intended to preserve the aesthetics or scenic, natural beauty of the area that would prohibit development of the Project at the proposed site.

[62] *In re Chittenden Solid Waste Dist.*, 2007 VT 28, ¶ 29 (citing *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir.1999)) (law of the case, like res judicata, "limits relitigation of an issue once it has been decided").

Has the Applicant Failed to Take Generally Available Mitigating Steps that a Reasonable Person Would Take to Improve the Harmony of the Proposed Project with Its Surroundings?

The Intervenors argue that Chelsea has not met its burden to take generally available mitigating steps because it: (1) did not provide simulations of the site from Mt. Anthony Country Club and Southern Vermont College; (2) did not provide simulations showing the impact of the dark mesh on the fence in snow conditions; (3) has not established a budget for the vegetative screening; and (4) cannot guarantee the integrity of the remaining forest once the Project site is clear cut.[63]

The Department asserts that Chelsea must observe the mitigation measures described in Finding 107 above and ensure the implementation of those measures in accordance with Commission Rule 5.800 in order to meet the requirements of this element of the Quechee test.

I am not persuaded by the Intervenors' various arguments. The Intervenors refer to the hearing officer's finding that the project in CPG No. NM-6691[64] had an adverse impact because of its visibility eight-tenths of a mile away at Mt. Philo and infer from this that Chelsea should have done more mitigation simulations from the distant Mt. Anthony Country Club and Southern Vermont College. I disagree. The hearing officer's recommendation of adverse aesthetic impact in the Mt. Philo case was not adopted by the Commission, which denied that petition on other grounds. The Intervenors' other assertions of mitigation shortfalls are similarly unsupported by any evidence or precedent. Further, these arguments do not address both Chelsea's agreement to install the opaque mesh with the parties' input after a post-construction aesthetics review and its agreement to comply with the mitigation maintenance requirements of Commission Rule 5.800.

There is sufficient evidence to conclude that Chelsea has taken generally available mitigating steps in proposing to site the Project at this location. The Project reflects Chelsea's reasonable efforts to mitigate the impacts of the Project and to reduce its visibility within the viewshed. Findings 97, 101, 102, and 107, above, summarize many of the available mitigating steps taken by Apple Hill to improve the harmony of the proposed Project with its surroundings.

Finding 108 also observes that Chelsea has agreed to:

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[63] Intervenors' Brief at 27.

[64] *Application of Peck Electric, Inc. for a certificate of public good for a 144.90 kW interconnected group net-metered photovoltaic electric power system in Charlotte, Vermont;* CPG No. NM-6691, Order of 7/21/17 at 19.

a. Maintain the landscape mitigation plan described in exhibit B of the Bennington Agreement and to conduct post-construction review with all parties of all proposed mitigation plantings and to add additional plantings if necessary;
b. Fully comply with Commission Rule 5.800 that establishes the requirements related to the installation and maintenance of aesthetic mitigation measures.

Further, the Willow Road Project mitigates the aesthetic impact of the previously proposed Chelsea Solar project by using different solar panel technology that will result in fewer solar cells, less area between the module rows, and a smaller Project footprint.

I recommend that the Commission approve these findings and accept my recommendation that Chelsea has taken generally available mitigating steps that a reasonable person would take.

Does the Project Offend the Sensibilities of the Average Person? Is it Offensive or Shocking Because It Is out of Character with Its Surroundings or Significantly Diminishes the Scenic Qualities of the Area?

The Intervenors argue that the Project "would offend the sensibilities of the average person because it would be offensive or shocking and because it would significantly diminish the scenic qualities of the area."[65]

The Department asserts that Chelsea must comply with the mitigation measures addressed above in order to avoid offending the sensibilities of the average person.

When determining whether a project would be considered shocking or offensive, the Commission has concluded that the scenic qualities of an area are "important to its residents and that there would always be some resistance to any change in the landscape . . . however . . . the Quechee test [does] not guarantee that the aesthetic qualities of an area would not change."[66] The Commission has concluded that the greater the distance a viewer is from a project the less overwhelming the project. Consequently it is less likely "an average viewer would find its observation shocking or offensive" even if the distant project "may be seen as 'out of character'

[65] Intervenors' Brief at 32.
[66] *In re UPC Vermont Wind*, 185 Vt. 296, 309 (2009).

with the surrounding area."[67] After reviewing the findings of fact, considering the opinions of the expert and lay witnesses, and reflecting on the relevant precedent, my conclusion and recommendation are that the Commission find that the Project would not shock or offend the sensibilities of the average person.

The Project will clear nearly ten acres of trees out of the long-range views of this area of Bennington. The Project site is also at the edge of the Rural Conservation District and is bordered by extensive highway infrastructure, beyond which lies commercial and residential developments that are part of Bennington's urban core.

While the Project site is located on a hillside above the Vermont Welcome Center, it will be generally screened from nearby views from the Welcome Center, the highways, and the dispersed residences above the Project on the hillside. Chelsea is enhancing that screening by adding mitigation planting and conducting a post-construction aesthetics review to allow for additional screening from nearby views if necessary.

The Project will be visible from more than a mile away across the valley at the Mt. Anthony Country Club and residences along Monument Drive. But that view will not shock or offend the average person. From these locations the Project will appear as an opaque rectangle of several acres cut into the hillside above the highway that will be part of the broader vista of highway and developed urban landscape otherwise visible from these distant viewpoints.

The Project is not a new type of development in Bennington, and the Town has not challenged other commercial solar projects in the Rural Conservation District. This includes the neighboring Apple Hill Solar Project. The Quechee test does not guarantee that the aesthetic qualities of an area will not change. While visible, especially in conjunction with the neighboring Apple Hill Solar Project, the Willow Road Project will not be a dominant element in the landscape. Chelsea has considerably mitigated the adverse impact of the Project on scenic views by reducing its size and visibility through new technology and enhanced landscaping buffers.

It is my conclusion that an average person observing the Project from the nearby residences and longer-range views will not be shocked or offended. Based on the foregoing, I

[67] *Id.* at 311.

recommend that the Commission conclude that the Project will not be shocking or offensive to the sensibilities of the average person.

Having answered all three questions in the second prong of the Quechee test, my recommendation is that the Commission find that while the impact of the Project on aesthetics is adverse, it is not unduly adverse.

I recommend that the Commission include conditions in the CPG agreed to by Chelsea to ensure that the Project does not have an undue adverse impact on aesthetics.

Historic Sites

113. The Project will not have an undue adverse effect on historic sites. DHP has reviewed the Project's potential effects on above-ground historic structures and has identified any potential precontact and historic archaeological resource areas and concluded that the Project will not have an undue adverse effect on historic sites. DHP Letter.

Rare and Irreplaceable Natural Areas

114. The Project will not have an undue adverse impact on rare and irreplaceable natural areas ("RINA"). The Project will not destroy or significantly imperil rare and irreplaceable natural areas because none of these resources are located at the Project site or near the proposed construction. Barton. pf. at 3; exh. CS-DB-2 at 6.

Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)(A)]

115. The Project will not have an undue adverse impact on rare, threatened, and endangered species or necessary wildlife habitat. This finding is supported by findings 112 through 117, below.

116. Arrowwood Environmental conducted a rare, threatened, and endangered plant survey of the Project area on August 14, 2014, and a follow-up survey on October 12, 2017. The arrow-leaved American aster *(Symphyotrichum urophyllum*), a rare species, was found during the inventory. Barton at 8; exhs. CS-DB-2 at 7-9 and CS-DB-3 at 2-3.

117. Arrowwood Environmental worked with ANR and Chelsea to develop a mitigation strategy that would minimize impacts from the Project on the arrow-leaved American aster on the site. This strategy involved the establishment of two conservation areas centered around the largest concentrations of rare plants found on the site. Permission from ANR was obtained to transplant the arrow-leaved American aster plants in the fall of 2014 into the conservation areas. On October 15, 2014, two Arrowwood Environmental personnel conducted the transplanting. The 2017 plant species inventory documented an additional 11 locations of this species. These plants were transplanted to the conservation areas in the fall of 2017. Exh. CS-DB-3 at 2-3.

118. In response to the presence of these rare, threatened, and endangered plants, Chelsea established two plant conservation area and has agreed to follow a detailed protocol in the ANR MOU to mitigate Project impacts so that these impacts are not unduly adverse. Exh. Joint-ANR-CS-1 at ¶ 14.

119. The Project site contains no rare, threatened, and endangered wildlife species. Barton pf. reb. at 4.

120. At the request of ANR, Arrowwood Environmental conducted an acoustic bat survey of the combined area of both the Project site and the Apple Hill Solar Project site in August 2018. The Project area is not a habitat of the Northern Long Eared Bat (a federally listed endangered species). Barton pf. at 4; exh. CS-DB-6.

121. The Project site contains neither necessary wildlife habitat nor any corridors between wildlife habitats. Barton pf. reb. at 2-3.

Discussion

The Intervenors argue that because wildlife is present at the Project site the Project will have an undue adverse impact on necessary wildlife habitat.

Chelsea admitted evidence from a qualified expert that the Project site did not contain necessary wildlife habitat or endangered species. "Necessary wildlife habitat," as defined by 10 V.S.A. § 6001(12), means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life, including breeding and migratory periods.

The Intervenors presented no evidence to show that the Project site is in fact necessary wildlife habitat as contemplated by 10 V.S.A. § 6086(a)(8)(A). I am not persuaded that the presence of some wildlife demonstrates the existence of a necessary wildlife habitat. Therefore, I recommend that the Commission conclude that the Project will not have an undue adverse impact on necessary wildlife habitat or endangered species.

In the ANR MOU, the stipulating parties agreed to proposed conditions in the CPG for the Project related to the rare, threatened, or endangered plant conservation areas. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include them as conditions in the CPG.

Development Affecting Public Investments
[10 V.S.A. § 6086(a)(9)(K)]

122. The Project would not unnecessarily or unreasonably endanger any public or quasi-public investment in any facility, service, or lands, and it would not materially jeopardize the function, efficiency, or safety of, or the public's use or enjoyment of, or access to any facility, service, or lands. This finding is supported by the findings under 10 V.S.A. § 6086(a)(5), above, and finding 123, below.

123. Existing adjacent public investments are limited to the interchange at the junction of U.S. Route 7 and VT Route 279, including the Vermont Welcome Center, Willow Road, and GMP's nearby overhead distribution circuit.[68] There are no Project impacts that would endanger or interfere with the highway complex and the Vermont Welcome Center. Vehicles and equipment associated with the site clearing work will access the site via the vehicle access driveway off Willow Road. This traffic could reach a maximum of six heavy trucks and 30 passenger vehicles to and from the site per day. Per the system impact study performed by GMP, there would be no adverse effects on GMP's distribution system as a result of the Project's

[68] I observe that none of the parties address the Bennington Battle Monument as a public investment affected by the Project under this criterion. I conclude that this is appropriate, because, as addressed in finding 89 above, the visibility of the Project site from the Monument grounds is highly limited.

interconnection, provided certain system upgrades are implemented. Wilson pf. at 8 and 29; exh. CS-BW-9.

Public Health and Safety
[30 V.S.A. § 248(b)(5)]

124. The Project will not result in an undue adverse effect on the health, safety, or welfare of the public and will not unnecessarily or unreasonably endanger the public or adjoining landowners. The Project does not create any waste or other emissions that would be harmful to public health and safety. The Project will be designed to follow all applicable safety codes and will include safety and security measures designed to discourage access to the site by unauthorized or untrained members of the public. Wilson pf. at 22.

Primary Agricultural Soils
[30 V.S.A. § 248(b)(5)]

125. The Project will not have an undue adverse impact on primary agricultural soils. This finding is supported by findings 126 through 128, below.

126. There is approximately one-fifth of an acre of Stockbridge loam soils, rated as prime farmland, in the Project area. This mapped soil is located on the northeast edge of the Project footprint. Alex DePillis, AAFM ("DePillis") pf. at 5; exh. CS-IJ-2.

127. No solar array construction will occur within the area where primary agricultural soils are located. Activities will be limited to the installation of fence posts and to removal of the existing vegetation. DePillis pf. at 5; exh. CS-IJ-2.

128. The soils at the Project site will be preserved so that upon decommissioning the site will be returned to the pre-Project soil condition as required by 10 V.S.A. § 6001. DePillis pf. at 5; exh. CS-BW-8.

Consistency With Company's Least Cost Integrated Plan
[30 V.S.A. § 248(b)(6)]

129. The Commission has not required non-utilities to have a least-cost integrated resource plan. Therefore, this criterion is inapplicable.

Compliance with Twenty-Year Electric Plan
[30 V.S.A. § 248(b)(7)]

130. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Waste-to-Energy Facility
[30 V.S.A. §248(b)(9)]

131. The Project does not involve a waste-to-energy facility; therefore, this criterion is not applicable.

Existing or Planned Transmission Facilities
[30 V.S.A. § 248(b)(10)]

132. The Project can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers. Any required system upgrade costs will be paid by the Petitioner rather than the utility or utility customers pursuant to the interconnection agreement. Wilson pf. at 25; exhs. CS-BW-9 and CS-BW-10.

Woody Biomass Facilities
[30 V.S.A. § 248(b)(11)]

133. The Project will not produce electric energy using woody biomass; therefore, this criterion is not applicable.

Minimum Setback Requirements
[30 V.S.A. § 248(s)]

134. The Project is set back 195 feet from the nearest public highway and at least 50 feet from the nearest property line. Wilson pf. at 30; and exh. CS-IJ-2.

V. DECOMMISSIONING PLAN AND FUND

135. At the end of the Project's useful life, the Project shall be decommissioned. Decommissioning involves the removal of Project equipment from the site, revegetation, and restoration of the Project site to a natural state. During decommissioning, all above-ground

electrical equipment shall be removed from the site and taken to the appropriate nearby materials recycling facility. This includes solar modules, racking, foundation posts, combiner boxes, and equipment skids. The access road, fence, and all underground infrastructure will be removed as part of the decommissioning process. Wilson pf. at 10-11; exh. CS-BW-8.

136. The decommissioning plan for the Project provides details and a cost estimate for removal of the solar facility and rehabilitation of the Project property back to its pre-project condition. The power purchase agreement ("PPA") for the Project has a term of twenty-five years. At the end of the PPA term, the Petitioner would determine whether: (1) it is financially viable to continue to operate the Project as is; or (2) a Section 248 amendment should be filed to repower the Project with new solar modules and equipment at that time; or (3) the Project should be decommissioned. Wilson pf. at 10-11; exh. CS-BW-8.

137. The decommissioning fund would initially be funded either by an irrevocable standby letter of credit that includes an auto-extension provision (an "evergreen clause"), and would be issued by an A-rated financial institution solely for the benefit of the Commission, or by a security deposit to be held in a federally insured bank in the United States. No other entity, including Chelsea, shall have the ability to demand payment under the letter of credit or withdraw funds from the deposit without the consent of the Commission. Documentation that demonstrates the establishment of the fund would be filed with the Commission before commencement of construction. Exh. CS-BW-8.

138. Chelsea proposes to establish the fund in the amount of $126,000 based on a cost estimate that it prepared. The amount represents the full estimated cost of decommissioning in 2017 dollars and does not net out salvage value. Exh. CS-BW-8.

139. Upon completion of decommissioning, Chelsea would seek a certification of completion from the Commission. The certification would be provided to the entity issuing the letter of credit or holding the security deposit with instructions to release and terminate the letter of credit or security deposit account. Thereafter, Chelsea or its successor or assignee would be entitled to the remainder of the decommissioning fund. Exh. CS-BW-8.

140. The Commission would have the right to draw on the letter of credit or the security deposit to pay the costs of decommissioning in the event that Chelsea is unable or unwilling to

commence decommissioning within a reasonable period of time, not to exceed ninety days, following issuance of a Commission order requiring decommissioning of the Project. Exh. CS-BW-8.

Discussion

Commission Rule 5.900 establishes standard requirements for the decommissioning of electric generation, electric transmission, and natural gas facilities. Rule 5.904(B) requires that non-utility-owned generation facilities greater than 500 kW in capacity be removed once they are no longer in service and that the site be restored, to the greatest extent practicable, to the condition it was in before installation of the facility. Commission Rule 5.904(B)(2) also requires that requests to construct these facilities include a draft irrevocable standby letter of credit in an amount sufficient to fund the estimated decommissioning and site restoration costs.

Chelsea has submitted a plan for decommissioning the Project and estimates that it will cost $126,000 to decommission the Project. Chelsea has also submitted a form escrow agreement and a draft irrevocable standby letter of credit from an A-rated financial institution that names the Commission as the sole beneficiary, includes an auto-extension provision or "evergreen clause," and is bankruptcy remote.

Chelsea's plan for decommissioning and the draft letter of credit and drawing certificate submitted with the plan are consistent with the requirements of Commission Rule 5.904(B). Therefore, I recommend that the Commission include in the CPG for the Project conditions requiring compliance with the terms and conditions of the proposed decommissioning plan and relevant provisions of Commission Rule 5.904(B).

VI. MEMORANDUM OF UNDERSTANDING

141. ANR and Chelsea executed and filed a memorandum of understanding ("MOU"). Exh. ANR-CS-1.

142. The MOU provides that if the Commission does not approve the MOU in its entirety, then the agreements contained in the MOU may terminate. Exh. Joint-ANR-CS-1 at ¶ 28.

Discussion

The ANR MOU includes conditions related to the GMP line extension that is attached to the Project's interconnection point. The Section 248 impacts of the GMP line extension were reviewed by the Commission as part of its approval of the petition in Docket 8454 for the neighboring Apple Hill Project, which also interconnects with the GMP line extension. The CPG for the Apple Hill Project[69] includes conditions related to the GMP line extension that are repeated in the ANR MOU in this case. Because the GMP line extension was reviewed as part of the petition in Docket 8454 and its CPG included ANR's recommended conditions for Apple Hill Solar LLC related to the GMP line extension, I recommend that the Commission approve these conditions a second time in this case to the extent they similarly apply here.

I recommend that the Commission accept the ANR MOU with all of its provisions, updates, and conditions and require Chelsea to comply with the terms and conditions of the MOU, as a condition of the Commission's approval of this Project.

VII. CONCLUSION

Based upon the evidence in the record, I recommend that the Commission conclude that the Project, subject to conditions:

(a) will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, and the recommendations of the municipal legislative bodies;

(b) is a non-utility renewable energy project with a plant capacity greater than 150 kW and no more than 2.2 MW and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(2) is conditionally waived;

(c) will not adversely affect system stability and reliability;

(d) is a standard-offer project and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(4) is conditionally waived;

[69] *Petition of Apple Hill Solar LLC*, Docket 8454, CPG dated 9/26/18.

(e) will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), and greenhouse gas impacts;

(f) is a non-utility project and criterion 30 V.S.A. § 248(b)(6) is therefore not applicable;

(g) is a renewable energy project with a plant capacity greater than 150 kW and no more than 2.2 MW and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(7) is conditionally waived;

(h) does not involve a facility affecting or located on any segment of the waters of the State that has been designated as outstanding resource waters by the Secretary of Natural Resources;

(i) does not involve a waste-to-energy facility;

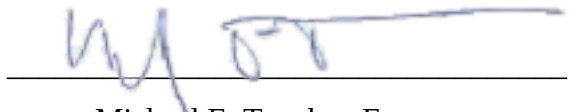
(j) can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers; and

(k) does not involve an in-state generation facility that produces electric energy using woody biomass.

To the extent the findings of fact and conclusions of law in this proposal for decision are inconsistent with any proposed findings of fact or conclusions of law submitted by any party, such proposed findings or conclusions of law, having been considered, are rejected.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 2nd day of January, 2019.



Michael E. Tousley, Esq.
Hearing Officer

VIII. COMMISSION DISCUSSION

Having considered the parties' comments about the proposal for decision, the parties' briefing of the single-plant issue, and the parties' oral argument, we do not adopt the hearing officer's recommendation of approval of the Petition. Specifically, we disagree that the Willow Road Facility and the neighboring Apple Hill Facility are separate plants as contemplated by 30 V.S.A. § 8002.[70] Therefore, the Petition is disapproved without prejudice to the Developer's ability to file an amendment to the Petition reflecting our determination.[71]

The Single-Plant Issue

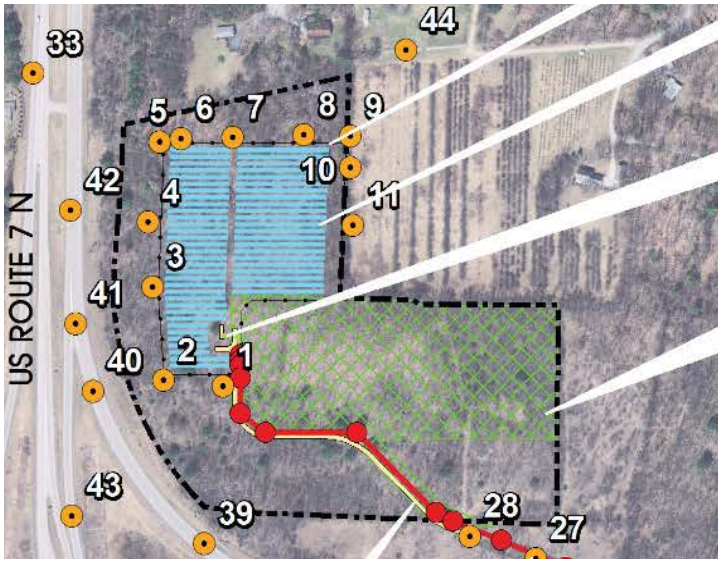
The Mt. Anthony Country Club and the Apple Hill Homeowners Association (together, the "Intervenors") assert that the Willow Road Facility and the neighboring Apple Hill Facility are a single 4.0 MW plant according to the statutory definition as interpreted by the Vermont Supreme Court. They argue that because the two 2.0 MW facilities both rely on the same infrastructure (the one-mile GMP Line Extension and the improved Willow Road), the two facilities are a "single" 4.0 MW plant and exceed the 2.2 MW cap on standard-offer projects.[72]

[70] As explained in detail below, our conclusion is that these two facilities are in fact part of the same "project," and we therefore (unless quoting others) use the phrase "Willow Road Facility" instead of "Willow Road Project" and the phrase "Apple Hill Facility" instead of "Apple Hill Project" throughout the Commission discussion. Also, PLH LLC, Chelsea Solar LLC, Apple Hill Solar LLC, Allco Renewable Energy Limited ("Allco"), and Ecos Energy LLC ("Ecos") are corporate entities controlled by Thomas and Michael Melone, who also serve as counsel of record in both the Apple Hill Facility and the Willow Road Facility cases, and will be referred to as the "Developer" in this Commission discussion. Allco and Ecos appear to be used interchangeably in filings. For example, Allco filed the original request for two standard-offer contracts with the Commission and then Ecos filed the appeal with the Vermont Supreme Court of the Commission's determination to only grant a single standard-offer contract. All of the Developer's filings in both the Willow Road Facility and the Apple Hill Facility cases are signed by one, if not both, of the Melones. We observe that in the Bennington Agreement at 1, PLH LLC, Allco, Chelsea, and Apple Hill Solar LLC are jointly defined as "the Developer" by the Developer and we will similarly refer to these entities as the "Developer."

[71] The Developer may seek to amend the Petition either (1) by formally merging the Apple Hill Facility and the Willow Road Facility as a single project and seeking authorization for a 4.0 MW plant unsupported by either standard-offer contract, or (2) demonstrating that the Willow Road Facility does not share equipment or infrastructure with the Apple Hill Facility.

[72] Intervenors' PFD Brief at 21 and Intervenors' Single-Plant Brief at 1.

The single-plant issue arises because these two facilities are designed to fit together:



Exh. CS-MB-2 (Figure 2): Detailed aerial photo of Project site and surrounding area (cropped and zoomed).

In the above exhibit, the "Project site" shows the Willow Road Facility in blue and the Apple Hill Facility in green. As discussed below, we agree that the proposed Willow Road Facility is part of a single plant, as defined in 30 V.S.A. § 8002, with the neighboring Apple Hill Facility, which we approved on September 26, 2018. Specifically, we find that, like a wind installation with two turbines, these two solar facilities are part of the same project and share the common equipment and infrastructure of a new mile-long interconnection line to the existing electric grid. That line is funded by the Developer of the two facilities.

We look to the plain language of the statutory definition of "plant" as it existed when the Developer first filed for a standard-offer contract in 2013:

> "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.[73]

[73] Section 8002(14). The statutory definition of a "plant" in 30 V.S.A. § 8002 is now located at Section 8002(18) and has been expanded to include the following language: "Common ownership, contiguity in time of construction, and proximity to each other shall be relevant to determining whether a group of facilities is part of the same project." This new language, whether favorable or unfavorable to Chelsea, is inapplicable here because it came into effect after a complete application was filed, and Chelsea has asserted—and been found to have—vested rights in the laws in effect at the time of its initial complete application. *See In re Times & Seasons, LLC*, 2011 VT 76, ¶ 11, 190 Vt. 163, 27 A.3d 323 ("[A]n applicant on reconsideration may not simultaneously take advantage of

These two facilities, unlike what was presented to the Vermont Supreme Court in 2014, use common equipment and infrastructure to connect to the electric grid. The interconnection of both facilities requires the construction of a new, mile-long distribution line that would be owned by GMP but paid for by the facilities' common developer.[74] But for the existence of this shared distribution line, neither facility could connect to the electric grid. We conclude that this shared line makes the two facilities a single plant as defined in 30 V.S.A. § 8002.

At paragraph 13 of *In re Programmatic Changes*, the Vermont Supreme Court opined that:

> We disagree that interpreting the statute according to its plain meaning will permit "any size facility [to] 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," as the Commission warned in its June order. As a practical matter, the facility would still have to be cost-effective to build. Although it was economically feasible for applicant to install separate roads, equipment, and infrastructure and obtain separate permits and contracts for these two projects, it will not always be cheaper or more efficient for plants to be located next to each other. As the Commission itself noted, there is no evidence that the prices proposed by applicant were artificially low due to any economies of scale gained by having two facilities side by side.[75]

As a practical matter, we observe that the economic benefit of building solar facilities in close proximity outweighs the cost of building redundant infrastructure, and this has been borne out by subsequent practice in the industry.[76] The Developer has itself proposed other standard-offer projects in close proximity to each other.

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the laws in effect at the time of the initial application and those in effect at the time of the reconsideration application."). In any event, even if we were to apply this new language, we would reach the same conclusion that these two facilities are part of the same project and plant.

[74] Exh. CS-BW-9. This exhibit is the joint system impact study prepared by GMP. This study assessed the impact on the electric grid of both the Willow Road Facility and the Apple Hill Facility and required the construction of a new, mile-long distribution line, the "GMP Line Extension," to be shared by the two facilities for their safe interconnection with the electric grid.

[75] *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*, 2014 VT 29, 195 Vt. 175, 95 A.3d. 999 ("*In re Programmatic Changes*"), at ¶ 13.

[76] *See, e.g.*, *Petition of Otter Creek Solar LLC, requesting a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.2 MW solar electric generation facility in Bennington, Vermont*, Case No. 19-0516-PET (proposing a 2.2 MW facility next to an approved 2.2 MW facility); *Application of Westman GLC Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, for a 500 kW*

This practice creates economic advantages for developers because it preserves the financial incentives and size limitations associated with the standard-offer program and the net-metering program, while at the same time achieving the economies of scale gained by having facilities in close proximity. Such a practice deviates from the policy goal of distributing small renewable energy projects around the state using the incentives offered by the standard-offer and net-metering programs.

Contrary to this State policy, the Developer's Willow Road Facility and Apple Hill Facility would benefit from the economies of scale available to a large 4.0 MW project while receiving the incentives of the standard-offer program – but without incurring the costs of installing separate infrastructure. The definition of "plant" in Section 8002 was written to ensure that large projects do not take advantage of incentives intended for small projects. Projects can gain economies of scale based on their large size, or they can obtain incentives based on their small size, but not both.

The Commission has observed that large projects that would otherwise not be eligible for the net-metering or the standard-offer program have commonly been split into smaller neighboring facilities but with separate, parallel infrastructure to meet the statutory definition of separate plants. This is what the Developer originally proposed to do with its two facilities on Apple Hill – each facility had an entirely separate line connecting it to the existing electric grid.

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group net-metered photovoltaic electric generation facility in Cambridge, Vermont, CPG No. NMP-6045, and *Application of Cambridge GLC Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, for a 500 kW group net-metered photovoltaic electric generation facility in Cambridge, Vermont*, Case No. NMP-6046, Order of 2/2/17 (two neighboring 500 kW net-metering facilities merged into single net-metering group); *Request of Troy Minerals, Inc. for amendment to CPG #18-2178-NMP*, Case No. 19-0605-PET (proposing to merge an approved 150 kW facility with an approved neighboring 350 kW facility)*; Application of Granview Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW group net-metered solar electric generation facility in Barre Town, Vermont*, Case No. 18-2722-NMP and *Petition of Beckley Hill Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW group net-metered solar electric generation facility in Barre Town, Vermont*, Case No. 18-2341-NMP (proposals to build two 500 kW facilities 900 feet from each other); *Petition of Integrated NRG L.L.C. for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 150 kW net-metered solar electric generation facility in Franklin, Vermont*, Case No. 18-2775-NMP (proposing a 150 kW net-metering facility adjacent to an existing 15 kW net-metering facility); *Petition of Norwich Technologies, Inc. for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing construction of a 500 kW (AC) solar net-metering system in St. Johnsbury, Vermont*, Case No. 18-2120-NMP (proposing a 500 kW net-metering facility adjacent to another 500 kW net-metering facility); *Petition of Eddy Road Solar LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 8010 and 248, to install and operate a 500 kW net-metered solar array in Chester, Vermont*, 18-1136-NMP (proposing installation of 500 kW facility next to an existing 150 kW facility).

When the Intervenors noted that the Developer now planned to *share* a mile-long line connecting both facilities to the existing grid, we were compelled to closely examine the Vermont Supreme Court's decision in *In re Programmatic Changes* and compare what the Developer had proposed in 2013 with what was approved in the Apple Hill case and what is being proposed in this neighboring case in 2019.

As noted elsewhere in this Order, unlike the proposal in *In re Programmatic Changes*, where "it was economically feasible for applicant to install separate roads, equipment, and infrastructure,"[77] here the two facilities share common infrastructure and are a single plant.

Additional Procedural History

On May 16, 2013, the Commission issued an Order in Dockets 7873 and 7874, in which the Commission determined that two proposed facilities offered by the Developer in response to the 2013 request for standard-offer proposals, the Bennington Solar Project and the Apple Hill Facility, constituted a single "plant" under 30 V.S.A. § 8002(14). Further, "since the two projects were submitted as separate bids, we conclude[d] that the first project [was] 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."[78] The result was that our May 16, 2013, Order denied a standard-offer contract to the Developer for the Apple Hill Facility and granted a standard-offer contract for the neighboring facility, then called the Bennington Solar Project.

On May 21, 2013, the Developer filed a motion seeking the Commission's reconsideration of the May 16, 2013, decision in Dockets 7873 and 7874. Attached to that motion were diagrams of the facilities proposed for the two standard-offer contracts by the Developer on Apple Hill in Bennington (now labeled as PC 155 and PC 156).

On June 20, 2013, the Developer executed a standard-offer contract for a 2.0 MW solar facility to be located in Bennington, Vermont. This facility was previously referred to as the

[77] *In re Programmatic Changes*, 2014 VT 29, at ¶ 13.

[78] *Programmatic Changes to the Standard-Offer Program*, Docket 7873, and *Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development ("SPEED") Program*, Docket 7874, Order of 5/16/13, at 4.

Bennington Solar Project by the Developer. This is the standard-offer contract that is applicable in this case.

On October 18, 2013, the Developer filed PC 155 and PC 156 with the Vermont Supreme Court as part of the Developer's printed case seeking a reversal of the Commission's single-plant decision of May 16, 2013.

On March 28, 2014, the Vermont Supreme Court reversed the Commission's decision.[79]

On May 12, 2014, the Developer executed a standard-offer contract for a second 2.0 MW solar facility on Apple Hill in Bennington, Vermont.

On June 19, 2014, the Developer filed a petition with the Commission requesting a CPG under 30 V.S.A. § 248 to install and operate a 2.0 MW AC solar electric generating facility at 500 Apple Hill Road, in Bennington, Vermont (Docket 8302, the "Chelsea Solar Facility").

On March 15, 2015, the Developer filed a petition for a certificate of public good authorizing the construction and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont (Docket 8454, the "Apple Hill Facility").

On February 16, 2016, the Chelsea Solar Facility was denied by the Commission.[80]

On November 28, 2017, the Developer filed the petition for the Willow Road Facility. The Willow Road Facility petition is a significantly amended version of the petition filed by the Developer on June 19, 2014, in Docket 8302.[81] The Willow Road Facility would be sited in approximately the same location as the Chelsea Solar Facility but would have a smaller footprint and be accessed from Willow Road rather than Apple Hill Road.

On September 26, 2018, the Commission approved the Apple Hill Facility.[82]

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[79] *In re Programmatic* Changes, 2014 VT 29.

[80] *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, Order of 2/16/16. The Commission determined that the Chelsea Solar Facility would violate three clear, written community standards in the 2010 Town Plan that sought to conserve the Rural Conservation district where the Chelsea Solar Facility was proposed to be sited. Our denial decision was appealed, but the appeal was later withdrawn by the Developer. *See also* n.3 in the proposal for decision, above.

[81] *Id*.

[82] Libby Harris (an adjoining landowner) and the Apple Hill Homeowners Association have jointly appealed the Commission's approval of the Apple Hill Facility to the Vermont Supreme Court.

On October 19, 2018, the Intervenors filed a brief arguing that the Willow Road Facility and the Apple Hill Facility are a single 4.0 MW plant because they share a common road and "the same mile-long power line extension for interconnection to the grid."[83]

On January 2, 2019, the hearing officer issued a proposal for decision in this case recommending that the Commission approve the Willow Road Facility, with conditions. In the proposal for decision, the hearing officer dismissed the Intervenors' single-plant argument and recommended that the Commission conclude that the Willow Road Facility is "an independent technical facility with a separate access road from Willow Road and a separate point of interconnection with the new GMP line" that "remains in factual conformity with the Supreme Court's guidance."

On January 31, 2019, the Intervenors and the Developer filed comments on the proposal for decision (the "Intervenors' PFD Comments" and the "Developer's PFD Comments," respectively). The Intervenors commented on, among other things, the issue of whether the Willow Road Facility was a single plant with the Apple Hill Facility, pursuant to 30 V.S.A. § 8002, and requested oral argument.

No other comments on the proposal for decision were filed.

On February 14, 2019, the Commission issued an Order directing the parties to file legal briefs further addressing the applicability of the definition of a single plant in this case, specifically in the context of exhibits PC 155 and PC 156, because:

> The standard-offer project proposed by [the Developer] that was reviewed by the Vermont Supreme Court as the Bennington Solar Project in exhibit PC 156 is substantially different from both the Chelsea Solar [Facility] petition denied in Docket 8302 and the Willow Road [Facility] petition being reviewed in this case. These differences include the relocation of the interconnection line for the Project from the north to the south, in a way that the Intervenors describe as "the same mile-long power line extension for interconnection to the grid," and the improvements to Willow Road to facilitate the construction and operation of both [Facilities].[84]

On February 19, 2019, the Developer filed its brief on the single-plant issue (the "Developer's Single-Plant Brief") and filed a motion requesting that we vacate our February 14

[83] Intervenors' Brief at 18.
[84] 17-5024-PET, Order of 2/14/19 at 4 (quoting the Intervenors' Brief of 10/19/18 at 18).

Order because additional briefing was not necessary (the "Developer's Motion to Vacate"). We denied the Developer's Motion to Vacate on February 21, 2019.

On March 1, 2019, the Intervenors and the Department filed additional briefs as directed (the "Intervenors' Single-Plant Brief" and the "Department's Single-Plant Brief," respectively).

On March 8, 2019, the Intervenors, the Developer, and the Department filed reply briefs.

On March 13, 2019, we granted the Intervenors' request for oral argument.

On March 29, 2019, we heard oral argument, which, along with other issues, addressed the single-plant issue.

On April 1, 2019, the Developer and the Intervenors each filed comments referencing evidentiary sources in the record for statements made during the oral argument.

On April 2, 2019, the Developer filed comments complaining about the Intervenors' counsel's statements during oral argument on the status of Willow Road.

Factual Differences Between the 2013 and 2019 Proposals

The Commission is focused on the differences between what the Developer proposed in its application for a standard-offer contract in 2013 and what the Developer now asks us to approve in its Petition for a CPG for the Willow Road Facility. This is crucial to our analysis because the Vermont Supreme Court has already held that the Developer's 2013 proposal involved two separate plants. Thus, if the Developer now proposed the same projects, we would find that they involved two separate plants. However, the Developer did not petition to build the Willow Road Facility (or the Apple Hill Facility) as illustrated in PC 155 and PC 156. As the record for those two cases indicates, the plans for the two facilities have been significantly amended since the Developer's 2013 petitions for standard-offer contracts. In particular, PC 155 and PC 156 show separate access roads and interconnection facilities, and do not reflect GMP's current requirement for a mile-long interconnection facility that would be *shared* by both facilities.

The Intervenors argue that the Willow Road Facility is part of a single 4.0 MW solar plant with the Apple Hill Facility. We agree, and we begin our discussion by comparing PC 155

and PC 156 with the exhibits in the record that describe how both the Willow Road Facility and the Apple Hill Facility are now proposed to be built.

What was proposed in the Developer's petition for a standard-offer contract at the Willow Road Facility site is illustrated in what is marked as PC 156. It is marked as PC 156 because it was part of the Developer's "paper case" filing with the Vermont Supreme Court in its 2014 appeal. That diagram had previously been prepared for submission to the Commission as part of the Developer's request that the Commission reconsider its determination to deny a standard-offer contract to the neighboring Apple Hill Facility. The Developer had also filed a similar diagram, PC 155, in its appeal to the Vermont Supreme Court. PC 155 reflects what was then proposed for the Apple Hill Facility. Both PC 155 and PC 156 illustrate the differences between the Apple Hill Facility and the Willow Road Facility before us now and the projects for which the Developer sought standard-offer contracts in 2013.

Here is PC 155:

PC 155

PC 155 shows that the Apple Hill Facility would be accessed from the south. An access drive would begin at the center of the facility, where the facility's equipment skid would be

located, and head south for approximately 400 feet where it would meet Willow Road at the property line for the Apple Hill Facility. Willow Road then proceeds south and east into the Willow Road residential neighborhood.

The electrical interconnection of the Apple Hill Facility (yellow line above), as illustrated in PC 155, would occur via an overhead distribution line that would begin at the equipment skid and then head south and east along Willow Road for approximately 2,000 feet to a point of interconnection on the existing grid servicing the residences on Willow Road.

Here is PC 156:

PC 156

PC 156 shows that the facility on the site of the Willow Road Facility, then called the Bennington Solar Project, would be accessed from the north. This facility's access would be approximately 1,500 feet to the northwest of the Apple Hill Facility access. The Bennington Solar Project's access drive would also begin at its equipment skid in the middle of that facility.

That facility's access drive would head north for approximately 800 feet, where it would link with a cul-de-sac at the southern end of Russett Drive in the Apple Hill residential neighborhood.

The electrical interconnection for the Bennington Solar Project (yellow line above) would also proceed via a proposed distribution line beginning at the equipment skid. The distribution line would then head approximately 800 feet north along the access drive until it reached a point of interconnection with the existing residential electric grid located at the cul-de-sac at the bottom of Russett Drive.

Here is what the Developer now proposes for the Willow Road Facility:

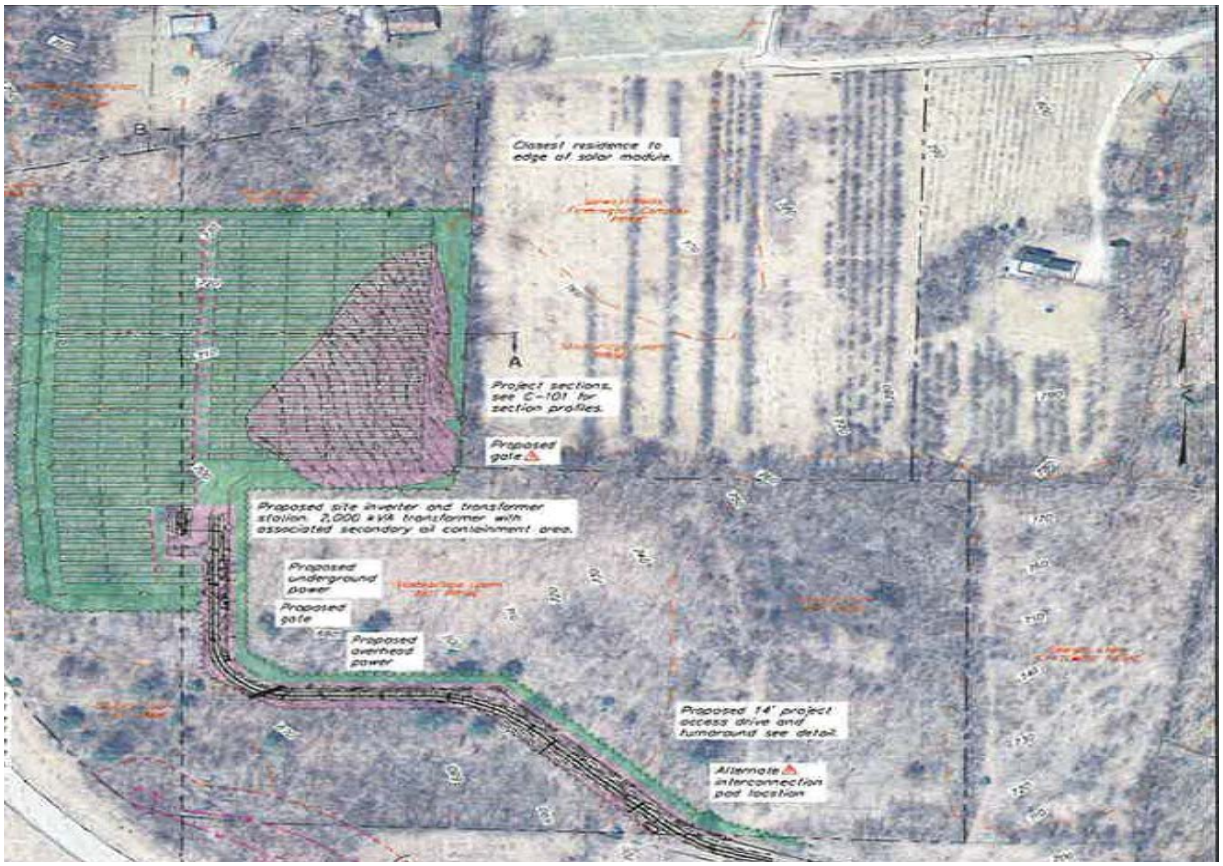


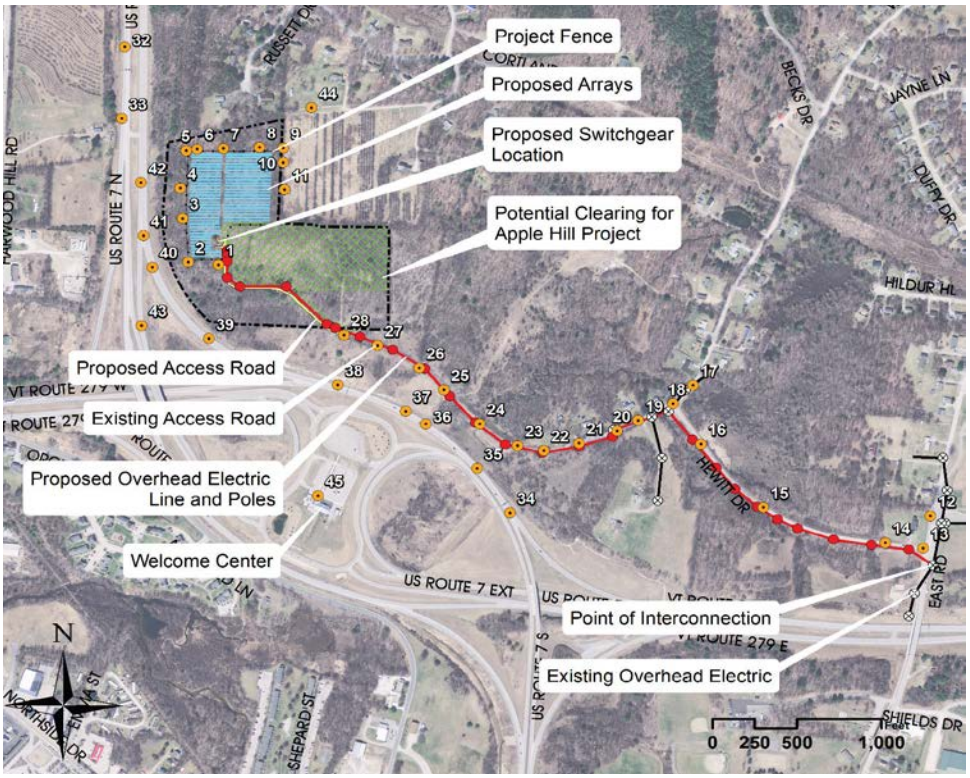
Exhibit CS-BW-28 Willow Road Project Site Plan

Exhibit CS-BW-28 and exhibit CS-MB-2 (Figure 2) are different representations of the site map for the Willow Road Facility. Exhibit CS-BW-28 reveals a number of changes to the Willow Road Facility from the Bennington Solar Project depicted on the Willow Road Facility site in PC 156. Exhibit CS-MB-2 (Figure 2) was prepared for use in conducting the Willow

Road Facility's aesthetic review and not only illustrates the Facility site, but also shows the cumulative aesthetic relationship of the Willow Road Facility with the Apple Hill Facility and the extent of the aesthetic impact of the GMP Line Extension.

These two exhibits show something very different from what the Vermont Supreme Court saw in PC 156. The access drive for the Willow Road Facility begins at the equipment skid located on the southeastern edge of the facility (in pink above), rather than the center of the facility as proposed in PC 156. The PC 156 access drive heads north via Russett Drive into the Apple Hill residential neighborhood. The access drive in this case extends south and east for approximately 600 feet, when it would begin to run in parallel with the Apple Hill Facility's access drive. The two access drives then run in parallel for approximately 300 feet until they would meet just beyond the point where Willow Road meets the property line.

Here is another view of both facilities and their shared interconnection line:



Exh. CS-MB-2 (Figure 2): Detailed aerial photo of Project site and surrounding area

The electrical interconnection of the Willow Road Facility begins near the solar array at the facility's point of interconnection with the GMP Line Extension. The PC 156 point of

interconnection is north of the facility at the Russett Drive cul-de-sac. In this case, by contrast, the GMP Line Extension (red line above) begins at the southern part of the Willow Road Facility, connects with the Apple Hill Facility, and then proceeds for approximately one mile along Willow Road and Hewitt Road until it ties into the grid at the intersection of Hewitt Drive and East Road.

The Apple Hill Facility is also different from what the Vermont Supreme Court reviewed in PC 155. Some of these differences are due to the reduction of the facility's footprint caused by the use of new technology.

More relevant to this discussion is Apple Hill's shared use with the Willow Road Facility of the GMP Line Extension and access via Willow Road.

Positions of the Parties

The Developer argues that:

1. The hearing officer appropriately dealt with the single-plant issue in the proposal for decision, and the Commission's review of the Petition has taken too long.
2. The single-plant determination is irrelevant to the Commission's Section 248 review of the Petition.
3. The differences between PC 156 and the Willow Road Facility are consistent with the Supreme Court's decision because:
   a. Apple Hill and Willow Road are not part of the same project;
   b. The Apple Hill Facility and the Willow Road Facility do not use common equipment and infrastructure such as roads, control facilities, and connections to the electric grid; and
   c. The Willow Road Facility does not "use" the GMP Line Extension because it is GMP's line.

The Intervenors argue that:

1. The Willow Road Facility is part of a 4.0 MW single plant with the Apple Hill Facility.
2. Both the Apple Hill Facility and the Willow Road Facility are tainted by material misrepresentations of fact and/or fraud.
3. The Willow Road Facility petition should be denied because with the Apple Hill Facility, the single 4.0 MW plant exceeds the standard-offer capacity limit of 2.2 MW.

The Department (with ANR and AAFM) argues that "the differences between PC 156 and the Willow Road Project are consistent with the Vermont Supreme Court's decision in 2014 VT 29" and that the Willow Road Facility and the Apple Hill Facility continue to qualify as separate, independent plants.[85]

Response to the Developer's Single-Plant Arguments

Delay

In the Developer's Motion to Vacate and in the argument in its single-plant brief, the Developer asserts that we are wasting time by addressing the single-plant issue. The Developer complains that review of this standard-offer project should have been completed within one year rather than the nearly five years that its request for approval has been pending.[86] The Developer asserts that this issue was already litigated and that the hearing officer got it right in the proposal for decision.[87]

The Developer claims that our request for additional briefing is "eerily familiar."[88] In so doing, the Developer suggests that the Commission is targeting it a second time for unreasonable further litigation after it has received a favorable proposal for decision. We do not believe that our request for additional briefing on the single-plant issue was unreasonable here. Nor was it unreasonable in Docket 8302 when we asked the parties to brief the Town Plan issue that was brought up after the proposal for decision had been issued in that case.[89]

In both Docket 8302 and in this case, the Intervenors brought up a legal issue that had not been thoroughly litigated by the parties before our review of the proposals for decision. In both

[85] Department's Single-Plant Brief at 1-2.

[86] Developer's Motion to Vacate at 1-2. The delays referred to in the Developer's motion are all in response to issues created at least in part by the Developer. Further, the Commission has granted three requested extensions of the Developer's standard-offer contract operational deadline applicable to the Willow Road Facility. *See Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 17-4695-PET, Order of 3/15/18.

[87] Developer's Single-Plant Brief at 4. The Developer asserts that the Commission ruled on the issue in favor of the Developer when it approved the Developer's request to extend its standard-offer contract's operational deadline in Case No. 17-4695-PET. The Developer argues that the Commission did so "when it overruled [Libby] Harris' objection." Ms. Harris was not a party in that case and made public comments complaining that the Developer had not acted in good faith or due diligence in creating the delays that pushed the contract beyond the operational deadline. The single-plant issue was neither litigated nor ruled upon in that case. Case No. 17-4695-PET, Order of 3/15/18 at 4.

[88] *Id.* at 1.

[89] Docket 8302, Order of 1/6/16.

cases we sought to ensure our full understanding of the issues before responding to them in our final decisions. We disagree with the Developer's implication that we are targeting the Developer and delaying the process. Rather, in both cases we provided the Developer with an additional opportunity to respond to an issue brought up by opponents of its petitions. And in both cases, the Developer's response was insufficient to overcome the issue brought up by opponents.

Irrelevance

We do not agree with the Developer that "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."[90] Rather, we conclude that the single-plant determination is necessary to our review of the Petition under Section 248 for two reasons.

First, all of the evidence submitted in this case is for a 2.0 MW solar plant, not a 4.0 MW solar plant. Because we find the Willow Road Facility to be part of a 4.0 MW solar plant with the Apple Hill Facility, the evidence in this case is now defective and cannot meet the Developer's burden of demonstrating compliance with Section 248.

Second, the Developer ignores the fact that it took advantage of the conditional filing waivers available to it as a standard-offer contract holder. Because we find that the Willow Road Facility is part of a 4.0 MW single plant with the Apple Hill Facility, it cannot proceed under the 2.2 MW limits of its standard-offer contract and the Petition does not meet the burden of production under all the Section 248 criteria. As the Developer itself notes, having a standard-offer contract results in the conditional waiver of the Section 248(b)(4) economic benefit criterion. If a project does not meet the single-plant definition, then it would not be eligible for a standard-offer contract and the conditional waiver of the economic benefit criterion derived from our Section 8007(b) Order would not be available.[91] Further, it can no longer take advantage of the other conditional waivers provided by the Section 8007(b) Order. These include conditional waivers of the criteria in Section 248(b)(2) (need for the project), Section 248(b)(5) (water

[90] Developer's Single-Plant Brief at 3.

[91] *Order re Simplified Procedures for Renewable Energy Plants with a Capacity Between 150 kW and 2.2 kW*, 8/31/10 ("Section 8007(b) Order").

conservation, sufficiency of water and burden on existing water supply, and educational services), and Section 248(b)(7) (compliance with the electric energy plan).

The Developer has relied on these Section 8007(b) Order waivers and has not sought to admit evidence that would allow for our review of these criteria. If the Willow Road Facility is not a separate plant, and we find that it is not, then the Petition is incomplete and must be denied as we have done here without prejudice to the Developer's ability to file an amendment to the Petition that is consistent with our determination.

Consistency with the Supreme Court Decision

The Willow Road Facility is not consistent with the Vermont Supreme Court's decision in *In re Programmatic Changes*. As the Developer recognizes, there are factual differences between what was presented to the Court, as illustrated in PC 155 and PC 156, and what the Developer actually seeks permission to build, as illustrated in the site plan, exhibit CS-BW-28, and in the site plan used for aesthetic review of the facility, exhibit CS-MB-2 (Figure 2).[92] The Willow Road Facility now shares a mile-long interconnection facility, the GMP Line Extension, with the neighboring Apple Hill Facility. We therefore conclude that the Willow Road Facility is part of single plant, as defined in 30 V.S.A. § 8002, and thus does not conform to the standards set by the Court.

The Court, interpreting the diagrams in PC 155 and PC 156, concluded:

> 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.[93]

[92] Tr. 3/29/19 at 45-46 (Developer responds "That's correct" when Commission staff noted that "there wasn't a new shared line in what was before the Vermont Supreme Court the way there is in the proposal we have in front of us").

[93] *In re Programmatic Changes*, 2014 VT 29, ¶ 12 (emphasis added).

The Developer asserts that its proposal is consistent with this language because: (1) Apple Hill and Willow Road are not part of the same project; (2) Apple Hill and Willow Road do not use common equipment and infrastructure such as roads, control facilities, and connections to the electric grid; and (3) the Willow Road Facility does not "use" the GMP Line Extension because it is GMP's line.

The Developer also argues that these two solar facilities are not part of the same project because the Commission and others have treated them as separate projects:

> 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.[94]

The Willow Road Facility and the Apple Hill Facility have been treated as separate projects because that is how the Developer petitioned for their standard-offer contracts and for their approval with the Commission. The treatment of the Willow Road Facility and the Apple Hill Facility as separate projects was thus defined by the Developer before filing the requests for separate standard-offer contracts and without regard to the substance of their later petitions. After reviewing the petitions for both the Willow Road Facility and the Apple Hill Facility, it is our conclusion that together they are a single 4.0 MW solar project because they are a single plant that uses common electrical infrastructure agreed to by a common developer as part of a common development scheme. The Willow Road Facility and the Apple Hill Facility are not independent technical facilities.

In fact, the Developer itself has submitted the following exhibit, which outlines the combined footprint of *both* facilities, with the title of "Project Parcel":

[94] Developer's Single-Plant Brief at 15.

Exh. CS-BW-7: Project Parcel

Exhibit CS-BW-7 illustrates the 27.3 acres upon which both the Willow Road Facility and the Apple Hill Facility are proposed to be sited. The Developer acknowledges that the two facilities "share the same landlord."[95]

That landlord is PLH LLC, which, like Chelsea Solar LLC and Apple Hill Solar LLC, are subsidiaries of the Developer.[96]

The Developer determined that the development of 4.0 MW of solar electric generation on Apple Hill in Bennington would best be accomplished with two individual proposed facilities when it filed two petitions for separate standard-offer contracts. That was followed up by the Developer's decision to file separate petitions for the Apple Hill Facility and the Willow Road Facility to accomplish the development of 4.0 MW of solar electric generation on Apple Hill in Bennington. By filing separate petitions, the Developer was able to obtain two standard-offer contracts that guarantee payments for this 4.0 MW facility, even though the Legislature has explicitly limited the size of standard-offer projects to 2.2 MW.

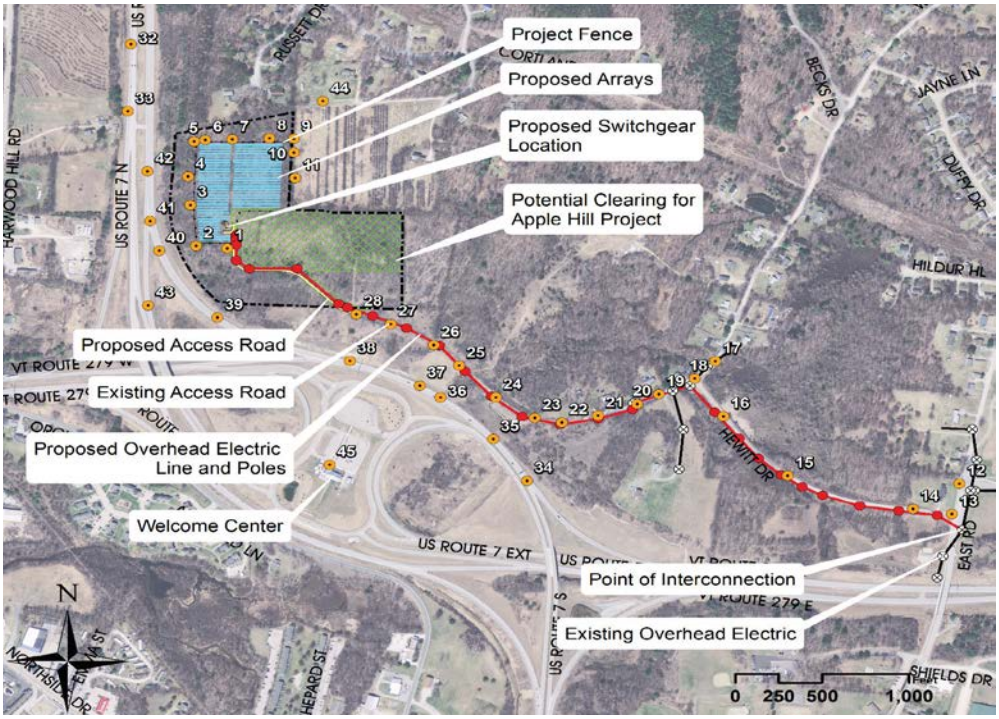
In asserting that the Willow Road Facility is not part of a single plant with the Apple Hill Facility, the Developer relies upon the Section 30 V.S.A. § 8002 definition of a "plant," which states that "[a] group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project" and shares common infrastructure. Although the applicable

[95] Developer's Single-Plant Brief at 14.
[96] *See* the Bennington Agreement, at 1.

version of Section 8002 does not define a "project," the dictionary definition of a "project" is "a plan or proposal; a scheme" or "an undertaking requiring a concerted effort."[97]

Here the Developer had a plan to put 4.0 MW of solar electric generation capacity on the 27.3-acre property that PLH LLC purchased on Apple Hill in Bennington. Because of the 2.2 MW limit on the size of standard-offer contracts, the Developer made a concerted effort to file two petitions rather than one.

The Developer financed the joint system impact study for the Apple Hill Facility and the Willow Road Facility. The Developer then adopted GMP's conclusion that the combined 4.0 MW solar field should connect to the existing electric grid by means of the one-mile-long GMP Line Extension. This is a single 4.0 MW plant, resulting from a single plan for developing the 27.3 acres on Apple Hill in Bennington. The result is the single plant illustrated in Exhibit CS-MB-2 (Figure 2), below, in which the "Project site" encompasses both the Willow Road Facility in blue and the Apple Hill Facility in green:



Exh. CS-MB-2 (Figure 2): Detailed aerial photo of Project site and surrounding area.

[97] THE AMERICAN HERITAGE COLLEGE DICTIONARY 1114 (4th ed. 2007).

The GMP Line Extension, shown as a red line above in exhibit CS-MB-2 (Figure 2), is new infrastructure needed for both the Willow Road Facility and the Apple Hill Facility to connect to the electric grid. It is being funded by the Developer. This makes the two facilities a single plant under 30 V.S.A. § 8002.

Shared Use

The Developer asserts that the Willow Road and the Apple Hill facilities do not use or share the GMP Line Extension because the line, although funded by the Developer, will be owned by GMP.[98] We agree that once constructed, the Willow Road Facility will deliver energy to GMP that will travel along the GMP Line Extension. We do not agree that GMP's final ownership of this line somehow means that the Willow Road and Apple Hill facilities are not using and sharing that new, common electrical infrastructure. And the Developer recognizes that because of the facts presented via PC 156, the Vermont Supreme Court focused on "independent technical facilities " but "did not address" whether final ownership made a difference.[99] But for the GMP Line Extension, the Willow Road Facility and the Apple Hill Facility could not exist. And, but for the Willow Road and Apple Hill facilities, the GMP Line Extension would not exist.

The Developer contends that "[e]ach 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."[100] This assertion does not comport with the system impact study or the statutory requirements that the facilities not share common infrastructure, including a connection with the existing electric grid.

The Developer accurately asserts that Commission Rule 5.500 states that "a project's interconnection facilities 'are sole use facilities' and 'shall not include System Upgrades."[101] The context of this conclusion is the interconnection rule's regime for the interconnection process, which guides the relationship between utilities and power generators seeking to interconnect to the grid. The interconnection rule allocates responsibilities and duties, as well as

[98] Developer's Single-Plant Brief at 17.
[99] Tr.3/29/19 at 45.
[100] Developer's Single-Plant Brief at 2.
[101] *Id.*

costs and ownership, between the interconnecting parties. In this case, the rule determined that the Developer is responsible for paying for the interconnection facility that the Apple Hill Facility and the Willow Road Facility would share the benefit of, but which would be owned by GMP pursuant to the rule. Under Rule 5.500, a point of interconnection establishes the line between what is owned by the utility and what is owned by the power generator. This language of the rule is not dispositive as to whether two interconnecting facilities are a single plant as defined in 30 V.S.A. § 8002.

The Developer filed a joint system impact study, Exhibit CS-BW-9, that addressed both the Apple Hill Facility and the Willow Road Facility. The joint system impact study concluded that the two facilities could not be interconnected as originally proposed in PC 155 and PC 156:

> The existing circuit topology does not support interconnection of the facilities. As detailed in this report, utilizing existing GMP facilities from the substation to the initial [points of interconnection were] determined not to be the best path. Instead, constructing a primary voltage three phase connecting line along Hewitt Drive is being pursued.[102]

Rather than two separate interconnection facilities attached to residential distribution lines, one to the north for the Bennington Solar Project (now the Willow Road Facility) and one to the east for the Apple Hill Facility, as the Developer had presented to the Vermont Supreme Court, GMP proposed a single interconnection facility of more than a mile in length to be shared by both facilities.[103] Exhibits CS-BW-11 and CS-MB-2 (Figure 2) illustrate the extent of this GMP Line Extension as reviewed in both cases.

The Developer, the Department, and the hearing officer were focused on the fact that the facilities have separate points of interconnection. The two facilities do have separate points of interconnection, but they do not have "separate interconnection facilities designed and owned by GMP, which would limit the capacity of each to 2.0 MW." [104] There is a single interconnection facility for both the Willow Road Facility and the Apple Hill Facility. Sharing that new

[102] Exh. CS-BW-9 at 5-6.

[103] The Developer had not planned for the construction of the GMP Line Extension. A considerable delay was granted by the hearing officer in the Chelsea Solar case to allow for the Developer's and the state agencies' consultants to complete aesthetic and environmental review of the mile-long line. Docket 8302, Order of 3/16/15.

[104] *In re Programmatic Changes*, 2014 VT 29, ¶ 12.

interconnection facility, paid for by the Developer as part of the common scheme of development, makes the two facilities a single plant.

The Intervenors also argue that the two facilities are a single plant because they share Willow Road. We need not reach that issue, as the GMP Line Extension in itself is shared equipment and infrastructure, and it is thus irrelevant whether additional infrastructure is shared.

Response to the Intervenors' Other Comments on the Proposal for Decision[105]

The Intervenors recommend that the Commission deny the Developer's request for a CPG for the Willow Road Facility because:

> This project is slightly reduced in size from the first iteration which the [Commission] denied, but the decrease of forest clearing of less than an acre is minimal and insufficient to address the issues that resulted in the Commission's denial the first time. It is still in the [Rural Conservation District], on a highly visible prominent hillside that has important economic, aesthetic and pollution-mitigating values. The record is deficient in giving any idea of what the finished project would look like, either alone or in conjunction with the already-approved contiguous Apple Hill Solar project. Both projects together combine to create a de facto 4 MW solar array that will be shocking and offensive to the average person, if built, and do not conform to the requirements other developers must follow for standard-offer projects.[106]

Specifically, the Intervenors also contend that the Commission should deny the Developer's request for a CPG for the Willow Road Facility because:

1. It would unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated by the Project.
2. It would have an undue adverse effect on aesthetics.
3. The evidence does not adequately address the Project's impacts to wildlife, increased air pollution, sound and wind, public health and safety, including groundwater contamination by perfluorooctanoic acid ("PFOA"), and greenhouse gas emissions created by cutting down more than nine acres of trees.[107]

[105] While these arguments in opposition to the Project are rendered moot by our disapproval of the Petition, we nonetheless address them because they were otherwise reviewed and considered.

[106] Intervenors' PFD Comments at 25-26.

[107] Intervenors' PFD Comments at 12-16.

Along with their specific substantive comments addressed below, the Intervenors also expressed dismay with the hearing officer's management of the proceedings and the hearing officer's conduct during the evidentiary hearing. The Intervenors' comments reiterate concerns that we were aware of from the hearing officer himself, the hearing transcript, the proposal for decision, and the public comments filed in this case.

We took timely and appropriate internal action with the hearing officer to address the Intervenors' concerns about his management of the proceeding and conduct in the hearing room. We do not, however, conclude that the hearing officer failed to provide effective due process or that his recommendations are tainted by a personal bias, as the Intervenors assert.

We have reviewed the proposal for decision in light of the Intervenors' concerns and have the following response to the Intervenors' other substantive comments.

Orderly Development[108]

First, the Intervenors ask that we consider the negative economic impact on orderly development that the Willow Road Facility would create because it would change the aesthetic landscape of the Town of Bennington to its detriment. To support this argument, the Intervenors filed several photos by professional photographers in exhibit MACC-ML-1. The Intervenors complain that the proposal for decision "contains no reference to Exhibit MACC-ML-1" and argue that "nobody, especially the [hearing officer], seems to have read our filings."[109]

The hearing officer did examine the photographs in exhibit MACC-ML-1 and referenced that exhibit in making proposed findings 89 and 90 under the aesthetics review criterion. These photographs show where the Willow Road Facility would be located in panoramic vistas using inserted arrows, but they do not provide proper simulations superimposing the Willow Road Facility onto the photographs. Unlike simulations, these photos also fail to account for the facility's height and appearance, distance from the point of view, topography, and vegetation. Further, the Intervenors did not put into evidence the source of the photographs, when they were taken, the camera focal length for each shot, or the points of view from which they were taken.

[108] Our comments here respond to the Intervenors' arguments regarding the Petition for a 2.0 MW facility, as filed, not to a 4.0 MW plant.

[109] Intervenors' PFD Comments at 12.

Because they do not have the same evidentiary value as simulations, the photos in exhibit MACC-ML-1 do not persuade us that the Willow Road Facility will have an undue adverse impact on aesthetics.

In the proposal for decision's discussion of the economic benefit criterion, the hearing officer addressed the Intervenors' argument that the views in and around the Town of Bennington are a significant economic asset that will be diminished by the Willow Road Facility. The hearing officer was not persuaded by the Intervenors' argument and found it was based on the speculative conclusions of the Intervenors' lay witnesses, who uniformly oppose the Willow Road Facility. We are also not persuaded that the evidence put forward by the Intervenors, including exhibit MACC-ML-1, is sufficient to show that the Willow Road Facility would have the negative economic impact on the area that the Intervenors allege.

Second, the Intervenors assert that we are bound by our determination in Docket 8302 that the Town Plan contains land conservation measures that would prohibit the Willow Road Facility. We are not bound by our denial decision in Docket 8302, which by its own terms was limited to the facts of that case. Rather, we are following our determination in Docket 8454 for the neighboring Apple Hill Facility, in which we found that the Town did not treat the conservation measures in the Town Plan as restricting the development of solar projects like this one in the Rural Conservation District.[110]

The Intervenors assert that we should disregard the Town's decision to withdraw as a party from this case and to not oppose the Willow Road Facility because the Town's decision was prompted by "undue financial distress inflicted on the Town by [the Developer]," as reflected in the settlement agreement between the Town and the Developer.[111] In that agreement, among other things, the Developer agreed to pay the Town $202,250 to reimburse the Town for its legal fees and staff costs incurred in response to the Developer. In return, the Town agreed to withdraw as a party in this case and agreed to not oppose the Willow Road Facility and several other projects in the Bennington area. The settlement agreement was approved by the

[110] Discussion at 18-19, above (citing Docket 8454, Order of 9/26/18 at 19 and 62).
[111] Intervenors' PFD Comments at 8.

Bennington Selectboard by a vote in a public session despite disagreement with this decision voiced by members of the Apple Hill Homeowners Association in attendance.[112]

The Intervenors now ask that we disregard the Town's position as reflected in the settlement agreement because it was made "under duress" and "should be given no weight."[113] Though we are troubled by the possibility that financial pressure may have played a role in the settlement agreement, we are not persuaded to give the Town's position no weight. Instead, we look to the settlement agreement and give the Town's position to not oppose the Willow Road Facility the due consideration called for in Section 248(b)(1).

We therefore agree with the hearing officer's recommendation that, given the Town's non-opposition to the Willow Road Facility, and consistent with our determination regarding the Apple Hill Facility, the Willow Road Facility will not unduly interfere with orderly development.

Aesthetics[114]

Here the Intervenors also argue that the Commission is bound by the decision in Docket 8302 and therefore must conclude that the Willow Road Facility would have an undue adverse impact on aesthetics. As we did in our final decision in the Apple Hill Facility, we disagree.[115]

We are not bound by our denial decision in Docket 8302, and we adopt the hearing officer's recommendation that we find that the Town Plan does not constitute a clear, written community standard. We adopt the hearing officer's conclusion that the Intervenors' argument is not supported by the law of the case doctrine.[116]

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[112] Tr. 9/20/18 at 320.

[113] Intervenors' PFD Comments at 8, 9.

[114] Our comments here respond to the Intervenors' arguments regarding the Petition for a 2.0 MW facility, as filed, not to a 4.0 MW plant.

[115] Docket 8454, Order of 9/26/18 at 62.

[116] *See* proposal for decision at 43, above. The Intervenors argue that the Commission is bound by its determination in Chelsea Solar because the Willow Road Facility is simply an amended version of the ongoing Chelsea Solar Facility and therefore part of the same case. But the law of the case doctrine cannot apply under the Intervenors' argument because under that argument there has not been a final determination in a final order that the Town Plan contains a clear, written standard. That final determination is being conducted here.

During the oral argument the Intervenors also renewed the position that the Commission should review this case in light of the Town Plan in effect when this Petition was filed.[117] We had previously determined that it was appropriate for the hearing officer to grant the Developer vested rights in having the Willow Road Facility reviewed under the rules in effect when the first Chelsea Solar case was filed, and we reiterate our previous ruling that:

> For purposes of 1 V.S.A § 213 and the vested rights doctrine, the Willow Road petition is a continuation of the development process that began with [the Developer]'s standard-offer contract, continued with the review and denial of Docket 8302, was maintained in our October 12 Order, and resumed with the ongoing review of Case No. 17-5024-PET. Therefore, pursuant to *Jolley*, [the Developer] has a vested right to review of the Willow Road petition under the version of the Town Plan in effect when Chelsea I was filed.[118]

We are not persuaded by the Intervenors' various arguments that the Willow Road Facility would have an undue adverse impact on aesthetics. Rather, we adopt the hearing officer's recommendations that we conclude that: (1) the Developer has taken generally available mitigating steps that a reasonable person would take; (2) the Willow Road Facility would not be shocking or offensive to the sensibilities of the average person; and (3) as conditioned, the Willow Road Facility would not have an undue adverse impact on aesthetics.

Inadequate Evidence

We are also not persuaded by the Intervenors' arguments that the Developer has not adequately addressed the impacts of the Willow Road Facility on wildlife, increased air pollution, sound and wind, public health and safety, including groundwater contamination by PFOA, and greenhouse gas emissions created by cutting down more than nine acres of trees. The Intervenors presented limited evidence to support their arguments or to rebut the substantial expert and lay witness testimony provided by the Developer that has been admitted into evidence and is reflected in the hearing officer's findings and recommendations.

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[117] Tr. 3/29/19 at 14.

[118] 17-5024-PET, Order of 8/30/18 at 6 (citing *In re Jolley Associates*, 2006 VT 132, 181 Vt. 190, 915 A.2d 282); *see also* 1 V.S.A § 213 ("No act of the General Assembly shall affect a suit begun or pending at the time of its passage, except acts regulating practice in court, relating to the competency of witnesses, or relating to amendments of process or pleadings").

Response to the Developer's Other Comments on the Proposal for Decision[119]

The Developer had two other comments.

The first comment addressed a proposed modification to the hearing officer's comments at page 53 regarding the decommissioning plan. Specifically, the Developer proposed that the language be modified for completeness to reflect the fact that it has submitted both a form letter of credit and a form escrow agreement. That modification has been made to the language of the proposal for decision.

The second comment requests that we issue our Final Order by February 19, 2019, so that the Developer need not conduct an updated survey of rare, threatened, or endangered plant species. This request was overcome by the event of our Order requiring the parties to provide additional briefings of the single-plant issue that extended the schedule for the proceeding beyond February 19 and by our denial of the Petition here.

Additional Public Comments

On April 1, 2019, the Commission received a public comment from Rick Carroll.

On April 2 and 12, and May 7, 2019, the Commission received public comments from Vermonters for a Clean Environment ("VCE").

On May 13, 2019, the Developer responded to VCE's May 7 public comments.

On May 30, 2019, VCE filed additional public comment.

The Commission reviewed these public comments and the Developer's response comment.

Conclusions

Having considered the parties' comments on the proposal for decision, the parties' briefing of the single-plant issue, and the parties' oral argument, we do not adopt the hearing officer's recommendation that we approve the Willow Road Facility. Specifically, we disagree that the Willow Road Facility and the neighboring Apple Hill Facility are separate plants as contemplated by 30 V.S.A. § 8002. Therefore, the Petition is disapproved without prejudice to

[119] Our comments respond to the Developer's comments regarding the proposal for decision for a 2.0 MW facility, as issued, not to a 4.0 MW plant.

the Developer's ability to file an amendment to the Petition that is consistent with our determination.[120]

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are hereby adopted, except as modified above.

2. The Petition of Chelsea Solar LLC for a certificate of public good pursuant to 30 V.S.A. § 248 is denied without prejudice to the Developer's ability to file an amendment to its Petition that is consistent with our determination.

[120] See n.71, above.

Dated at Montpelier, Vermont, this 12th day of June, 2019.

Anthony Z. Roisman) PUBLIC UTILITY
)
Margaret Cheney) COMMISSION
)
Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: June 12, 2019

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 17-5024-PET - SERVICE LIST

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