

belong only to the Department, and others belong only to the Commission. *See, e.g., id.* § 2(a)(5) (authorizing Department to act as state's representative in purchasing electricity from out-of-state producers); *id.* § 9 (granting Commission authority to act as court of record in proceedings under its jurisdiction). Other powers the Commission and the Department share. *See, e.g., id.* § 18 (authorizing Commission and Department to “examine the books, accounts, and papers of any company ... operating any line, plant, or property, subject to the Commission's or the Department's jurisdiction”).

With regard to investigations, in various sections throughout Title 30 the Legislature has authorized the Department to petition the Commission to open an investigation, and it has also authorized the Commission to open investigations on its own initiative. *See, e.g., id.* § 218(a) (authorizing Commission to open investigation and make findings and judgment regarding rates, tolls, charges, or schedules); *id.* § 227a(c) (authorizing Commission to investigate whether to reimpose regulatory requirements for telecommunications services, either upon Department's petition or upon its own initiative); *id.* § 4002a(b)(1) (authorizing Commission to investigate certain contracts if Department opposes contract or upon Commission's own motion).

The Legislature has invested the Commission with “the powers of a court of record,” *id.* § 9, but the Commission “is not a court in the strict sense.” *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 8, 20 A.2d 117, 120 (1941). Rather, the Commission is an administrative agency that possesses quasi-judicial powers. *See id.* at 7-8, 20 A.2d at 120 (describing Commission as “an administrative body, clothed in some respects with *quasi* judicial functions” and holding that Commission's jurisdiction is “of a supervisory nature, to be exercised in the interest and for the welfare of the general public”); *see also Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 146, 375 A.2d 975, 979 (1977) (recognizing that “the combination of administrative and adjudicative responsibilities of the [Commission] does demand an exacting balance” (quotation omitted)). In its quasi-judicial role, the Commission oversees many different types of proceedings, such as: consumer complaints regarding utility services, *see, e.g., Kettle Brook Condo. Owners' Ass'n*, Nos. 7552, 7568, 2013 WL 6442690 (Vt. Pub. Serv. Bd. Dec. 4, 2013) (addressing consumer complaints alleging unauthorized sale of water services); petitions for condemnation of private property, *see, e.g., Vt. Elec. Coop., Inc.*, No. 7680, 2011 WL 917018 (Vt. Pub. Serv. Bd. Mar. 11, 2011) (addressing petition to condemn private property to facilitate electricity distribution line and telephone lines); filings for approval of rate schedules, *see, e.g., Establishing Rates for Power Sold*, No. 8010, 2015 WL 777935 (Vt. Pub. Serv. Bd. Feb. 9, 2015); and petitions for CPGs, *see, e.g., Burlington Sch. PV, LLC*, No. 7646, 2010 WL 5139218 (Vt. Pub. Serv. Bd. Dec. 9, 2010) (addressing petition for CPG for electric-generation facility).

Section 248(a)(2) states that “(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility ... within the State that is designed for immediate or eventual operation at any voltage ... unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.”¹

The TRO concludes that “[t]he petitioner’s [tree-clearing] activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2).” While AHS disagrees with that legal conclusion, even assuming *arguendo* that conclusion is correct and that this investigation was validly opened,² the question is what is the Commission’s authority to address that alleged violation.

¹ 10 V.S.A. 6001(14) provides:

(A) "Person":

(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;

(ii) means a municipality or State agency;

(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land;

(iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse;

(B) The following individuals and entities shall be presumed not to be affiliated for the purpose of profit, consideration, or other beneficial interest within the meaning of this chapter, unless there is substantial evidence of an intent to evade the purposes of this chapter:

(i) a stockholder in a corporation shall be presumed not to be affiliated with others, solely on the basis of being a stockholder, if the stockholder and the stockholder's spouse, and natural or adoptive parents, children, and siblings own, control or have a beneficial interest in less than five percent of the outstanding shares in the corporation;

(ii) an individual shall be presumed not to be affiliated with others, solely for actions taken as an agent of another within the normal scope of duties of a court-appointed guardian, a licensed attorney, real estate broker or salesperson, engineer or land surveyor, unless the compensation received or beneficial interest obtained as a result of these duties indicates more than an agency relationship;

(iii) a seller or chartered lending institution shall be presumed not to be affiliated with others, solely for financing all or a portion of the purchase price at rates not substantially higher than prevailing lending rates in the community, and subsequently granting a partial release of the security when the buyer partitions or divides the land.

² See, *In re Investigation Into Solarcity Corporation*, 2019 VT 23, P12 discussing the powers of the Commission to *sua sponte* open an investigation. *Id.* (“it has also authorized the Commission to open investigations on its own initiative. See, e.g., *id.* § 218(a) (authorizing Commission to open investigation and make findings and judgment regarding rates, tolls, charges, or schedules); *id.* § 227a(c) (authorizing Commission to investigate whether to reimpose regulatory requirements for telecommunications services, either upon Department's petition or upon its own initiative);

30 V.S.A. § 9 provides that the “Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.” “[T]he Commission is a body of special and statutory powers, as to which nothing is presumed in favor of its jurisdiction. ... Its powers include only those expressly granted by the Legislature and such incidental powers as are necessarily implied to carry out its express grant.” *In re Petition of Swanton Wind LLC*, 2018 VT 141, P9 (internal quotations and citations omitted.) “The Legislature has invested the Commission with ‘the powers of a court of record,’ ..., but the Commission ‘is not a court in the strict sense.’” *In re Investigation Into Solarcity Corp.*, 2019 VT 23, P13.

Title 30 of Vermont Statutes Annotated provides for the issuance of a temporary restraining order in limited circumstances. The authority of the Commission to issue a restraining order is limited to its authority under 30 V.S.A. §209(a)(6) “to restrain any company subject to supervision under this chapter from violations of law, unjust discriminations, usurpation, or extortion.” Even assuming *arguendo* that authority to “restrain” includes the issuance of a preliminary injunction or a permanent injunction, none of AHS nor any of the other entities listed in the TRO are a “company” under Title 30. 30 V.S.A. § 201 states:

"Company" or "companies" means and includes individuals, partnerships, associations, corporations, and municipalities owning or conducting any public service business or property used in connection therewith and covered by the provisions of this chapter. The term "company" or "companies" also includes electric cooperatives organized and operating under chapter 81 of this title, the Vermont Public Power Supply Authority to the extent not inconsistent with chapter

id. § 4002a(b)(1) (authorizing Commission to investigate certain contracts if Department opposes contract or upon Commission's own motion).”)

84 of this title, and the Vermont Hydroelectric Power Authority to the extent not inconsistent with chapter 90 of this title.

Thus, none of the persons defined in the TRO as “Allco” are a company,³ and as a result none are subject to the Commission’s authority under §209(a)(6) to “restrain.”

The other provision of Title 30 that references a restraining order is 30 V.S.A. §10(e). It states: “Notwithstanding any other provision in this section, the Commission or a single member may grant temporary restraining orders in the manner provided by and subject to limitations prescribed by the Vermont Rules of Civil Procedure.” 30 V.S.A. § 10(e) does not expand the Commission’s jurisdiction beyond what it is otherwise granted. In any case, there is no provision of section 10 that gives the Commission the authority to issue a preliminary injunction or permanent injunction.

Even assuming *arguendo* that 30 V.S.A. §10(e) provided the Commission authority to issue the TRO, there is no provision of Title 30 that gives the Commission the authority to issue a preliminary injunction or permanent injunction against AHS or the other entities listed in the TRO.

Injunction proceedings under Title 30 are governed by under 30 V.S.A. §32, which only applies to a “company” and which provides that the Department of Public Service is required to seek injunctive relief in Superior Court, not before the Commission. There is no authorization for injunction proceedings before the Commission in the case of a company, and certainly not in the case of a person that is not a company.

Notably, the Legislature provided a clear check on the issuance of injunctive relief in utility matters in section 32 by providing for the waiver of sovereign immunity if the injunctive relief

³ See also, section 248(b)(6).

requested was not justified. Here, the Commission seeks to place AHS and the other persons included in the TRO's sweep in a worse position than if they were in fact a company.

To the extent that there is an alleged violation of section 248 by a "person" as alleged here, the Legislature provided for the path that must be followed and that is laid out in 30 V.S.A. § 30(h). Section 30(h) provides: "In accordance with the process set forth in this subsection, the Department may issue an administrative citation to a person the Department believes after investigation violated section 246, 248, 248a, or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections."

Here the allegation is that some entity has violated section 248's prohibition on site preparation. That allegation falls squarely within 30 V.S.A. §30(h). The Vermont Supreme Court has consistently held that the more specific provision governing conduct applies, which here is 30 V.S.A. §30(h). *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, P19 ("when two statutes appear to apply to the same situation in conflicting ways, and one statute is enacted later and is more specific than the other statute, we construe the later-enacted and more-specific statute as controlling.") In any case, 30 V.S.A. §30(h) does not authorize DPS or the Commission to issue a TRO. 30 V.S.A. §30(h) does authorize DPS to seek remedial retrospective relief, but not injunctive relief.

Even in the case of a company subject to the jurisdiction of the Commission or DPS that is alleged to have violated section 248, the law commits to the DPS under 30 V.S.A. §32 the authority

to initiate injunction proceedings *in Superior Court* if there is an alleged violation.⁴ Only the Superior Court is vested with the jurisdiction to issue injunctive relief in those circumstances.

The only provision of Title 30 that authorizes the Commission to take action to pursue injunctive relief is section 7061 which authorizes the Commission to “file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter.”

Finally, no certificate of public good “CPG”) has been issued to AHS or Chelsea Solar LLC for the site in Bennington. The Commission only attains jurisdiction over the operation of those facilities and the petitioners once the CPG is issued.

⁴ 30 V.S.A. §32: Injunction proceedings

Whenever the Department of Public Service is of the opinion that a company subject to its supervision is failing or omitting or is about to fail or omit to do anything required of it by law or by order of the Commission or is doing anything or permitting anything or is about to do anything or to permit anything to be done contrary to or in violation of law or of any order of the Commission, the Department of Public Service may commence an action or proceeding in the Superior Court for the purpose of having such violations or threatened violations stopped and prevented by injunction. Such action or proceeding shall begin by a petition alleging the violation complained of and praying for appropriate relief by way of injunction. It shall thereupon be the duty of the court to specify the time, not exceeding 21 days after service of a copy of the petition, within which the company complained of must answer the petition, and the court may grant a temporary injunction in accordance with the laws of the State and rules in such case made and provided. The obtaining of a temporary injunction shall constitute a waiver by the State of its sovereign immunity to pay the person enjoined damages as such person may sustain by reason for such injunction if the court shall eventually decide that the State was not equitably entitled thereto and the State shall be liable to pay to the person enjoined such sums as would be payable by any other person in the premises. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court directs without other or formal pleadings and without respect to any technical requirement. Such other persons or corporations as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment, or writs effective may be joined as parties upon application of counsel to the Department. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that an injunction be issued as prayed for in the petition or in such modified form as the court may determine will afford appropriate relief.

The Commission's attempt to place itself in the position of a tribunal that could issue injunctive relief against AHS and the other entities described in the temporary restraining order would render multiple provisions in Title 30 superfluous, such as, §10(e), §32, §209(a)(6), §7061 § 218(a), § 227a(c), § 4002a(b)(1), to name a few.

Further, as the caption of this case states, the Commission is relying on 30 V.S.A. §30 and 30 V.S.A. §209. Section 209 simply has no applicability to AHS or any of the other entities that the TRO seeks to sweep within its scope as none of them are a "company." Under section 30, the investigation must proceed under section 30(h), and to the extent injunctive relief is sought, it must be done so in Superior Court.

For the foregoing reasons, AHS asks the Commission to vacate the preliminary injunction hearing scheduled for July 9, 2020.

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Respectfully submitted,

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