

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30)
and 209 into whether the petitioner initiated)
site preparation at Apple Hill in Bennington,)
Vermont, for electric generation in violation)
of 30 V.S.A. § 248(a)(2))

Case No. 20-1611-INV

**DEPARTMENT OF PUBLIC SERVICE RESPONSE TO APPLE HILL SOLAR LLC
MOTION TO VACATE PRELIMINARY INJUNCTION HEARING**

On July 1, 2020, Apple Hill Solar LLC (“Apple Hill”) filed a motion to vacate the Public Utility Commission’s (“Commission”) preliminary injunction hearing scheduled for July 9, 2020. Apple Hill argued that the Commission cannot issue a preliminary or permanent injunction because (1) Title 30 does not authorize it to do so; and (2) neither of the companies listed in the Commission’s June 26, 2020 Order Granting Temporary Restraining Order (“Order”) are a “company” under Title 30 over which the Commission has jurisdiction. On July 2, 2020, the Commission issued a procedural order postponing the injunction hearing and setting a briefing schedule for parties to address whether the Commission has jurisdiction to issue an injunction over the companies. For the reasons stated herein, the Commission has the authority to grant injunctive relief where such an extraordinary measure is merited.

Apple Hill correctly highlights that 30 V.S.A. § 9 gives the Commission “the powers of a court of record” regarding issues over which it has jurisdiction, and that “it may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this state.”¹ Apple Hill also rightly points out that the Commission has authority to restrain companies under its purview that violate the law under 30 V.S.A. § 209(a)(6). However,

¹ 30 V.S.A. § 9. See also *Grice v. Vermont Elec. Power Co., Inc.*, 184 Vt. 132, 147 (2008).

Apple Hill is wrong in asserting that the Commission's power to restrain companies under its jurisdiction does not include the authority to grant injunctive relief.

Under Vermont Rule of Civil Procedure 65, courts of record have the authority to issue temporary restraining orders ("TRO") and preliminary and permanent injunctions.² Under 30 V.S.A. § 9, the Commission is granted the same authority as a court of record, and therefore has the authority to also issue TROs and preliminary and permanent injunctions. Commission Rule 2.406 is analogous to Rule 65, and while less strict than Rule 65, it explicitly addresses both the procedure and the Commission's decision-making process for TROs and preliminary and permanent injunctions:

(C) Further proceedings after issuance of a temporary restraining order. A petition for a temporary restraining order, whether or not it is so designated, *shall also constitute a petition for a preliminary injunction and/or a permanent injunction.* Unless precluded by the existing scheduling of other matters, or unless the respondent does not object to longer scheduling, a hearing upon such preliminary or permanent injunction shall be held within forty-five days and a decision rendered within sixty days. Wherever possible, the Commission shall attempt to make a final disposition of the matter, but if the proceedings do not allow the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provisions of law, then only a preliminary injunction may be issued. If a temporary restraining order has previously been issued, it shall continue in force *until a decision is rendered on the preliminary injunction or the permanent injunction*, as the case may be, unless it is dissolved by its terms or by further order of the Commission. (emphasis added).

The rule makes clear that the Commission has the authority to render decisions regarding injunctions. Therefore, given the authority the Commission has under Section 9 and under its own rules, Apple Hill's assertion that it lacks jurisdiction to grant injunctive relief because such authority is not explicitly referenced in Title 30 is wrong.³

² Vt. R. Civ. P. 65.

³ Furthermore, as explicitly stated in the rule, a petition for a TRO also constitutes a petition for a preliminary or permanent injunction. Any assertions by Apple Hill to the contrary are thus incorrect.

The courts have recognized the Commission's authority to grant injunctive relief. In *Global NAPS, Inc.*, No. 2:09-CV-292, 2010 WL 11537869, the U.S. District Court for the District of Vermont explained that pursuant to Commission Rule 2.406(D), where a petitioner has met its burden of proof, a preliminary injunction should issue.⁴ The Court went on: "Regardless of which party should have brought the action, an action seeking enforcement and interpretation was in fact brought and is now currently pending before the [Commission]."⁵ The Court implicitly recognized both the Commission's powers of a court of record on all matters over which it has jurisdiction, including the ability to issue preliminary and permanent injunctions, as well as the ability of parties other than the Department to file motions for injunctive relief.

Section 32 of Title 30 is consistent with Apple Hill's assertion that the Department is required to seek injunctive relief in Superior Court where the Department is of the opinion that a company under its supervision is violating the law. However, this section is specific to the Department as an executive branch agency and is not the same avenue through which parties other than the Department may seek injunctive relief on matters under the Commission's purview. While injunctive relief is an extraordinary measure that is not routinely granted and specific criteria must be met in order to grant such relief,⁶ the Commission has a long history of holding hearings on the motion of parties other than the Department regarding injunctions.⁷

⁴ *Glob. NAPS, Inc. v. Vermont Pub. Serv. Bd.*, No. 2:09-CV-292, 2010 WL 11537869, at *3 (D. Vt. Feb. 24, 2010).

⁵ *Id.*

⁶ *See, e.g. Petition of Global NAPS, Inc.*, Docket 7556, Order of 11/24/09 at 6.

Injunctive relief is an extraordinary remedy and is not granted routinely. In evaluating whether to grant a request for a preliminary injunction, the Board has set forth the following criteria to be considered: (1) the likelihood of success on the merits; (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted; (3) whether the issuance of an injunction will substantially harm other parties; and (4) the location of the best interests of the public.

⁷ *See, e.g., Application of Green Mountain Power Corp. for A Certificate of Pub. Good for an Interconnected Grp. Net-Metered Wind Turbine.*, No. NM-1646, Order of 7/11/13 (Where petitioners requesting preliminary injunction

Furthermore, the Commission's jurisdiction to hear a party's motion is established by statute.⁸ Such authority was affirmed by the Vermont Supreme Court in *In Re Bloch*, 133 Vt. 326, 327 (1975): "The [Public Utility Commission] has general superintendence of law to relating public service corporations." Hearing motions for TROs or injunctions is not exclusive to the Superior Court, nor is the filing of such motions exclusive to the Department. Apple Hill continues to avail itself to the jurisdiction of the Commission with an active petition in Docket 8454 and therefore, the Commission has the authority to issue an injunction against it where certain criteria is met.

Finally, the Order in fact does not apply to PLH Apple Hill Solar LLC and PLH Chelsea Solar LLC because neither is an existing company subject to the Commission's 30 V.S.A. § 209 jurisdiction. However, as the petitioner in Docket 8454 from which this investigation stemmed, Apple Hill Solar LLC is a company subject to the Commission's Section 209 authority. Further, Apple Hill's sister company PLH LLC as the project parcel landowner falls under the Commission's purview,⁹ as do all other affiliated entities that share common ownership under their presumptive parent company Allco Renewable Energy Limited.¹⁰ The Department

were adjacent landowners). *See also Vermont Legal Aid Request for Moratorium on Util. & Telecommunications Shutoffs During State of Emergency*, Case No. 20-0703-PET, Order of 3/18/20 (Where petitioner requesting temporary relief under Commission Rule 2.406 was Vermont Legal Aid). It is also worth noting that where circumstances call for it, the Commission has waived the procedural requirements of Rule 2.406. *See* NM-1646, Order of 7/11/13 at 11. ("While they have not termed it as such, the Mammolitis' request is properly treated as a motion for preliminary injunction pursuant to [Commission] Rule 2.406(A)(2)"). *See also* Case No. 20-0703-PET, Order of 3/18/20 at 2 ("While Rule 2.406(B) ordinarily requires affidavits or a verified petition, we waive this requirement in light of the emergency situation presented to us today.")

⁸ 30 V.S.A. §§2, 11, and 203.

⁹ PLH LLC as the parcel landowner submitted itself to the jurisdiction of the Commission upon the filing of its sister company Apple Hill's petition for a Certificate of Public Good to install and operation a solar facility on the same parcel. *See* 30 V.S.A. § 201(a) ("[T]he word "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.") (emphasis added). *See also* 10 V.S.A. § 6001(14)(A)(iii) ("Person"...includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land...").

¹⁰ *See Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 6/12/19 at 56 n. 70, 71.

therefore recommends that the Order be amended to reflect the correct petitioner name(s) over which the Commission has regulatory authority.

Dated at Winooski, Vermont, this 15th day of July, 2020.

Vermont Department of Public Service

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cc: Service List