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**

REPLY OF APPLE HILL SOLAR LLC TO THE RESPONSES OF THE DEPARTMENT OF PUBLIC SERVICE, THE AGENCY OF NATURAL RESOURCES AND THE INTERVENORS

"[A] petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board."
~*Georgia Mountain*, Docket No 7508, Order of January 5, 2012

On June 24, 2020, this matter was opened up by the Vermont Public Utility Commission (the "Commission") on its own motion in response to a complaint by Annette Smith filed in docket 8454. Apple Hill Solar LLC ("AHS") is the "petitioner" in docket 8454. On June 26, 2020, the Commission issued a temporary restraining order (the "TRO") in the above-captioned matter, in order to avoid purported damage that might occur to the white-arrow leaved aster and the Nimblewill, the latter of which is classified by the USDA as a noxious aggressive weed[1] whose fate is normally a dose of Roundup. On July 1, 2020, AHS moved the Commission to vacate the preliminary injunction hearing that was scheduled for July 9, 2020. On July 15, 2020, the Department of Public Service ("Department"), the Agency of Natural Resources ("ANR") and the Intervenors filed responses opposing the motion (collectively, the "Responses").

[1]*See*, https://plants.usda.gov/core/profile?symbol=MUSC. The Nimblewill is present in all New England States. *See*, https://gobotany.nativeplanttrust.org/species/muhlenbergia/schreberi/. Across the Vermont border in Massachusetts it is classified as S5-"widespread."

A. The Albatross.

There is an albatross around the necks of the proponents of Commission jurisdiction—it is section 248(b)(6) ("With respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least-cost integrated plan.") The Department claims that AHS is a "***company*** subject to the Commission's Section 209 authority." DPS Resp. at 4 (emphasis added.) Yet *every* section 248 application submitted by an independent developer has not been required to meet the criteria of section 248(b)(6) because it is beyond cavil that such an applicant is not a company under section 201 or 209. Making matters worse, the Responses assert that a landowner is also a company purportedly because of a connection between the landowner and AHS.

There is simply no support for the Responses' position that either AHS or the landowner is a company. Neither one files a least-cost integrated plan. Neither one provides any product or service to the public. Neither one conducts a public service business. Neither one owns any property used in connection with the conduct of a public service business.

The Responses' only claim for jurisdiction is that the filing of a section 248 application by a non-company somehow turns it into a company. But as this Commission has previously held, that position is vacuous. The filing of a section 248 application is not the operation of a public service business. The filing of a section 248 application does not constitute the owning of any property used in connection with the conduct of a public service business. Indeed section 248 itself lays bare the lack of merit in the Responses' position. Section 248(a)(2)(A) provides that "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." (emphasis added.) The language that expands the site preparation and construction prohibition to "persons" would be superfluous under the Department's view that the filing of a CPG application turns the applicant and all "related" entities into section 201 and 209 regulated companies because the first part of section 248(a)(2)(A) would do the job without the additional language referencing "persons."

The Responses' position is truly extraordinary. They not only toss out and ignore decades of precedent under section 248 (and the statute) as to who is, and who is not, a "company," but they also claim that any party "related" or somehow connected to the applicant is also subject to the Commission's jurisdiction under section 209 as a company. The result is massive expansion of the Commission's jurisdiction to regulate entities inside and outside of Vermont. Thus, under the Department's new expansive view of jurisdiction of related companies, the Commission would have supervision over Green Mountain Power's parent companies that sell natural gas in parts unknown and could regulate "(1) the purity, quantity, or quality of [that] product furnished or sold by any [such related entity because it would be a] company subject to supervision under this chapter." When NextEra submits its applications for CPGs for its standard-offer projects, under the Department's new view of related-party jurisdiction, the Commission could now regulate Florida Power and Light, and a host of other related companies both inside and outside of Vermont.

The reality is that none of that will fly, but yet that is precisely the logical result from the Department's assertion that certain persons that have overlapping indirect ownership or that have some profit connection (like a landowner that leases its land for a project), all then become subject to the Commission's jurisdiction over any and all businesses and activities they conduct.

From the case citations in the Responses it is clear that no court of competent jurisdiction has endorsed the position taken by the Department, ANR and the Intervenors. The only case cited is *Global Naps v. Vt. Pub. Serv. Bd.*, Case No. 2:09-cv-292, 2010 U.S. Dist. LEXIS 159081 (D. Vt. February 24, 2010), a case involving the Telecommunications Act of 1996 (47 USCS § 252-253). But that case provides no support for the Department's position. First, the issue present here was never decided. Second, no party apparently raised the issue of whether the Commission had jurisdiction to issue preliminary or permanent injunctive relief. Third, Judge Sessions referenced Rule 2.406(D) merely in connection with his observation that Rule 2.406(D), like the federal rules, places the burden of proof on the party seeking the injunction. *Global Naps* at *6-7 ("Under the PSB's rule, therefore, Global bore the burden of establishing that a preliminary injunction should issue. This is consistent with federal case law and Supreme Court precedent.") Fourth, no part of that opinion can be viewed as an implicit recognition of the Commission's jurisdiction to issue preliminary or injunctive relief. Rather, the issue of whether the Commission had the jurisdiction to issue a preliminary injunction was irrelevant as the Commission denied the request. The Federal District Court did not disagree with the Commission's conclusion that the movant had not met the required burden, thus jurisdiction was irrelevant and never raised or argued.[2]

On the other hand, the Vermont Supreme Court has stated that "[i]t is manifest that the Public [Utility] Commission cannot grant this [injunctive] relief." *West Rutland v. Rutland R.R. L. & P. Co.*, 98 Vt. 379, 383 (1925).

[2] The other case cited by the Department, *In re Bloch*, 133 Vt. 326, 327 (1975) dealt with public service companies and did not involve injunctive relief.

B. A Commission Rule Cannot Expand Its Jurisdiction; Commission Jurisdiction Is Limited By The Statutory Grant Of Authority.

The Responses rely heavily on Rule 2.406(C) which references temporary restraining orders as well as preliminary injunctions and permanent injunctions. But a Commission Rule cannot give the Commission jurisdictional authority that it does not possess under the statute.

In terms of statutory authority, the Responses reference 30 V.S.A. § 9 and § 209 as the sources of the Commission's jurisdiction to issue TROs and preliminary injunctions and permanent injunctions. But section 9 does not *expand* the Commission's jurisdiction. The Vermont Supreme Court so stated in *In re Investigation Into Solarcity Corporation*, 2019 VT 23, P11, where it noted that section 9 "grant[s] Commission authority to act as court of record in proceedings *under its jurisdiction*." (emphasis added.) If the Responses' position were correct that would mean that the Commission could issue an injunction in the full range of cases as the superior court.[3]

C. Section 32 Provides The Path For Injunctions.

The Department correctly acknowledges that section 30 V.S.A. § 32 requires the Department to seek injunctive relief in Superior Court. Section 32 reads:

> 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.

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[3] The Department's citation of proceedings where the Commission has entertained motions for preliminary injunctions similarly does not establish that the jurisdiction exists or existed. Rather it means only that the issue was either never raised and/or never adjudicated by a court of competent jurisdiction.

Notwithstanding that express statutory provision dealing with seeking injunctions, the Responses argue that every other person (except the Department of course) has the ability to use the Commission as a venue to seek injunctive relief and can simply by-pass the more onerous path of going to Superior Court.

It would certainly be an odd result for the Legislature to have required the Department to be required to seek injunctive relief in Superior Court (and waive sovereign immunity) when a company is allegedly violating section 248 or an order of the Commission, but otherwise allow every other agency or person the ability to obtain the same injunctive relief from the Commission. Such an interpretation runs head-first into the Supreme Court's long-standing rule that when a specific provision addresses the issue—here injunctive relief for alleged violations of section 248—then that is the path that must be followed. *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, P19. It also runs head-first into the fundamental jurisdictional rule that the Commission "is a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction." *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 20 A.2d 117, 120 (1941).

Nor do any of the Responses explain how their view is remotely consistent with section 7061, which is the only provision of Title 30 that authorizes the Commission to take action to pursue injunctive relief. Section 7061 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." That statute would be superfluous if the Commission had the authority to issue injunctive relief on its own accord.

Nor do any of the Responses explain how their view is consistent with the multiple provisions in Title 30 that would be rendered superfluous, such as, §10(e), §32, §209(a)(6), §7061 § 218(a), § 227a(c), § 4002a(b)(1).

D. The Filing Of A Section 248 Application Does Not Create Section 209 Jurisdiction.

The nub of the Responses seems to be the assertion that once a person *submits* an application for a certificate of public good, the applicant and the landowner become "companies" under 30 V.S.A. § 201(a) and thus subject to general regulation under section 209 (which in the Responses' view includes unlimited power to order injunctive relief). The Department makes that point on page 4 with respect to AHS and in footnote 9 of its Response with respect to the landowner. ANR and the Intervenors make the same point but without citing any legal authority.

That assertion is clearly wrong. Neither AHS nor the Landowner file a least-cost integrated plan. Neither one provides any product or service to the public. Neither one conducts a public service business. Neither one owns any property used in connection with the conduct of a public service business.

But clearly unable to point to a statutory grant of jurisdiction over this matter, the Responses reframe their claim into a more generic claim that a section 248 applicant submits itself to the jurisdiction of the Commission when it files a CPG application, and that the landowner submitted itself to the jurisdiction of the Commission by entering into a lease for the one parcel when a solar facility is proposed and by agreeing to let the section 248 applicant plant trees on a sliver of a second parcel.

It is axiomatic that parties or litigants cannot confer jurisdiction on an agency or a tribunal. In the case of an administrative agency, subject matter jurisdiction and jurisdiction over the person

must come from its enabling statutes. *See*, *Trybulski* 112 Vt. at 7 ("It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.")

Here the Responses cite no statute as the source of Commission jurisdiction over the landowner. With respect to AHS, the Department asserts that "Apple Hill Solar LLC is a company subject to the Commission's Section 209 authority." DPS Resp. at 4. That is plainly incorrect, and the Department offers no analysis to support its barebones assertion.

The first part of section 209 provides that "the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under this chapter." That sentence does not apply because (i) there is nothing at issue under either AHS' and the landowners' charter or articles of incorporation, (ii) neither AHS nor the landowner operate any plant, line or property subject to the supervision of the Commission under Title 30, Chapter 5, and (iii) neither AHS nor the landowner own any plant, line or property subject to the supervision of the Commission under Title 30, Chapter 5.

The filing of section 248 application does not provide the Commission general jurisdiction over either the applicant, connected persons, or the land. The Commission's jurisdiction is limited to making a decision on the application itself. Only if a CPG is issued might there attach conditions to the use of the land on which the solar facility sits, but until then the Commission has no

jurisdiction and no authority to issue an injunction to prevent a landowner from using its land for farming.[4]

E. The Linchpin of The TRO Is Not Based Upon An Inaccurate Recollection of the Testimony.

Factual finding #5 states:

> The sheep grazing is being done "primarily" to control vegetative growth at the petitioner's planned solar projects at the site. Melone Testimony of June 26, 2020.

Factual finding #5 is the linchpin of the TRO's conclusion that PLH's proposed activities are not farming. *See* TRO at 4 ("The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location 'primarily' to serve the proposed solar projects. This does not qualify as farming.")

As an evidentiary matter, the TRO's finding misstates what was said. Set forth below is the entire unedited relevant question and answer:

> CHAIRMAN ROISMAN: It sounds like the sheep that you're proposing here is primarily sheep to be used to graze at solar projects and that it, maybe you want to use this area as a, as a way station for sheep that you would be transporting around to sites that have solar projects already built and that need sheep to graze there. Is that a fair characterization?
> MR. MELONE: Yeah, I think that's, that's the primary aspect. Let me just see. I mean, I think it, the, the plan that the sheep farmer has given to us, I think, does contemplate also the wool being sold as a commodity, and some of the, and I guess some of the sheep as well would be sold. I guess, to the extent that there are new sheep that are born and that are more than we need, then she has that in the business plan, too, as far as a revenue stream. So, I mean, so it really would be while we're getting into the business because of all the solar farms that we operate in the northeast. The business plan does also contemplate the normal sheep operations

[4] In the Act 250 context, farming does not constitute a development. Similarly, even if a parcel is subject to an active Act 250 permit, farming does not require an amendment or trigger amendment jurisdiction. *See*, 10 V.S.A. 6081(s)(1) ("No permit amendment is required for farming that: (A) will occur on primary agricultural soils preserved in accordance with section 6093 of this title; or (B) will not conflict with any permit condition issued pursuant to this chapter. (2) Permits shall include a statement that farming is permitted on lands exempt from amendment jurisdiction under this subsection.")

> and income of selling the wool and selling some of, of the sheep, you know, if it's more than we need in terms of sheep there.
>
> Tr. 93-94.

PLH's proposed activities clearly constitute farming under Vermont law. The AAFM web page cited by the Commission provides the following definition of farming, which definition follows 10 V.S.A. § 6001(22):

> Section 2.16 of the Required Agricultural Practices (RAPs) states that "farming" means:
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> (a) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural, viticultural, and orchard crops; or
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> (b) the raising, feeding, or management of livestock, poultry, fish, or bees; or
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> (c) the operation of greenhouses; or
>
> (d) the production of maple syrup; or
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> (e) the on-site storage, preparation, and sale of agricultural products principally produced on the farm; or
>
> (f) the on-site storage, preparation, production, and sale of fuel or power from agricultural products or wastes principally produced on the farm; or
>
> (g) the raising, feeding, or management of four or more equines owned or boarded by the farmer, including training, showing, and providing instruction and lessons in riding, training, and the management of equines.[5]

There is no exception for sheep that may also be grazing on a site that maintains a solar facility. Indeed, such a concept would be antithetical to the concept of farming. Mr. Melone testified that the primary aspect of PLH *getting into the business of sheep farming* was "to graze at solar projects" throughout the Northeast. At no time did Mr. Melone state (as Finding #5 claims)

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[5] https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations

that "[t]he sheep grazing is being done 'primarily' to control vegetative growth at the petitioner's planned solar projects at the site." The landscaping benefit to the Apple Hill solar site is incidental compared to the overall sheep business.

Prior to the existence of any solar facility that may be approved for and placed on part of the site, the sheep would primarily be grazing—but only while they were on the site and not at some other site. After any solar facility might be placed on part of the site, the sheep would *primarily be doing the same thing on a daily basis*—grazing—but only while they were on the site and not at some other site. Contrary to the TRO's inaccurate factual finding, the grazing at the Bennington site is not dependent at all on a solar facility being on the site one day. The raising, feeding, and management of the sheep is a completely separate business and farming activity. The landowner and owner of the sheep, PLH, would be operating a farming business that would not depend at all, much less primarily on the prospect of a solar facility on the Bennington site.

It is undisputed that PLH would be engaging in farming and the property would be considered a farm both before and after any solar facility that might be placed in service. Notwithstanding that fact, under the TRO's reasoning, a farm is not farm, and farming is not farming if at some point in the future there might be a solar facility on the site, regardless of who might own the solar facility. There is no legal basis for such a conclusion and the TRO cites to none.

The TRO's also makes no defense of how the Orchard parcel gets wrapped up in the TRO other than the Commission taking on the role of a court of equity. In that connection, the Commission's order of July 1, 2020, *Procedural order re: guidance for injunction hearing*, stated at footnote 4:

> While the Developer has moved for clarification on whether the TRO extends to the "Apple Orchard Lot," no clarification is necessary because the Apple Orchard Lot was identified as the site of "mitigation planting" in the revised site plan for the Apple Hill facility, filed by the Developer in Docket 8454 as exhibit AHS-MK-12. The Developer also agreed that this property was protected from any development in the Developer's Settlement Agreement with the Town of Bennington dated September 14, 2018, filed by the Developer in Case No. 17-5024-PET. Thus, while the Developer is free to argue for a different outcome in the upcoming preliminary injunction hearing, the current status is that the TRO by its clear terms extends to the Apple Orchard Lot.

The Commission's reference to the settlement agreement not only misstates what the agreement provides, but shows that the Commission believes it has the powers of a court of equity to enforce its interpretation of an entirely unrelated agreement. What the settlement agreement may or may not provide is wholly outside the scope of the Commission's jurisdiction. Moreover, the mitigation plantings that were previously proposed for the very north end of the Orchard Lot, have no relevance to the purported irreparable injury, and are in a location that is already cleared and has been so prior to PLH purchasing the property. There is simply no justification for expanding the scope of the TRO the sole effect of which is to cause irreparable injury to the landowner by preventing the preparation of the land for planting, and the planting, of hemp.

The hoped-for solar projects at the site (which the Commission has denied CPGs for both) would be a small portion of the solar projects that would be serviced by the sheep, both Allco-related projects and third-party projects (in New York, Vermont, Massachusetts and Connecticut).

PLH's proposed activities of raising, feeding and management of sheep fit squarely with clause (b) above. PLH's proposed activities of selling lambs and wool fit squarely with clause (e) above. PLH's proposed activities of growing, storing and processing hemp fit squarely with clauses (a) and (e) above. Moreover, the Commission has no jurisdiction to say what constitutes a farm or farming.

The Commission has recognized that section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011). The Commission has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not solely related to the electric generating facility, even when those were expressly incurred for federal and state tax purposes as part of construction of the electric generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) at 6 ("the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.") *See also, Georgia Mountain*, Docket No 7508, Order of 1/5/2012 ("*a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land*, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.") It is also indisputable that site preparation related to agricultural use "constitute[s] 'farming'." *Re: Scott Farm, Inc.* 2003 VT ENV LEXIS 6 (2003).

As is plainly shown by the transcript, the TRO is based upon a factual finding (#5) that is unsupported. But from the unsupported factual finding the TRO then adjudicates what constitutes "farming" and a "farm" under Vermont law. *See*, TRO at 4 ("The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is 'devoted primarily to farming.' The petitioner testified in this proceeding that, although the sheep may end up being used for some farming

purposes, he was putting the sheep in this location 'primarily' to serve the proposed solar projects. This does not qualify as farming.")

The Commission has no jurisdiction to decide what constitutes "farming" or a "farm" under Vermont law. That jurisdiction is for the judiciary.

F. Conclusion

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, and to waive it right to sovereign immunity. 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, and neither AHS nor any other person named in the TRO is 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). *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, P19. In any case, 30 V.S.A. §30(h) does not authorize the Department or the Commission to issue injunctive relief. 30 V.S.A. §30(h) does authorize the Department to seek remedial retrospective relief, but not injunctive relief.

Even in the case of a company subject to the jurisdiction of the Commission or the Department that is alleged to have violated section 248, the law commits to the Department under 30 V.S.A. §32 the authority to initiate injunction proceedings *in Superior Court* if there is an alleged violation. Only the Superior Court is vested with the jurisdiction to issue injunctive relief in those circumstances.

For the foregoing reasons, AHS asks the Commission to grant the motion to permanently vacate the preliminary injunction hearing.

Dated: July 16, 2020

Respectfully submitted,

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