

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NO. 20-1611-INV

INVESTIGATION PURSUANT TO 30 V.S.A. SECTIONS
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.
SECTION 248(a) (2) --

August 31, 2020
3 p.m.

Via GoToMeeting

Status Conference held before the
Vermont Public Utility Commission, via GoToMeeting, on
August 31, 2020, beginning at 3 p.m.

P R E S E N T

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BY: L. BROOKE DINGLEDINE, ESQUIRE

1 MR. TOUSLEY: Good afternoon. This is
2 a status conference in Case No. 20-1611-INV which is
3 an investigation pursuant to 30 V.S.A. Sections 30
4 and 209 into whether the Petitioner initiated site
5 preparation at Apple Hill in Bennington, Vermont, for
6 electric generation in violation of 30 V.S.A. Section
7 248(a)(2).

8 The purpose of the status conference is
9 to address procedural concerns that might arise at
10 the hearing scheduled by the commission in this
11 proceeding at 1 p.m. on Tuesday, September 8, 2020.

12 My name is Mike Tousley. I'm a staff
13 attorney for the Vermont Public Utility Commission.
14 And with me is Kyle Landis-Marinello our General
15 Counsel.

16 In particular, the commission wants to
17 advise the parties that all the materials considered
18 in the TRO hearing have been entered into the record
19 and may be addressed in the September 8 hearing.

20 The purpose of that hearing is to
21 address, through oral argument and evidence, whether
22 to grant an injunction or dissolve the TRO that the
23 commission issued on June 26, 2020.

24 There have been additional filings in
25 this case, including the developer's motion to

1 dissolve this TRO with Mr. Melone's affirmation. The
2 parties have not requested that, and there have been
3 responses to that motion as well. The parties have
4 not requested additional discovery.

5 Mostly what we are together for is to
6 determine whether or not additional discovery is
7 required or if the parties are ready to go next
8 Tuesday, and whether they anticipate bringing in
9 witnesses, whether we will need the evidentiary
10 portion of the evidentiary hearing and oral argument.

11 The hearing today will begin -- the
12 hearing then will begin by the parties each making a
13 brief five-minute opening statement followed by the
14 presentation of evidence, including any affidavits,
15 live testimony or exhibits. And the question is
16 whether -- really whether or not the parties feel
17 content that there's sufficient material available
18 now to move forward with the evidentiary portion of
19 this, or if more discovery is required.

20 Should there be evidence presented,
21 this will be followed by cross examination of any
22 witnesses by the parties and the commission, redirect
23 examination, and closing arguments of no more than 10
24 minutes by each of the parties.

25 I'll start by taking appearances.

1 Starting with Mr. Melone.

2 MR. MELONE: Tom Melone for the
3 Petitioners.

4 MR. TOUSLEY: Let's say the developer.
5 How's that, sir?

6 MR. MELONE: Yeah. That's fine for
7 right now. Yup.

8 MR. TOUSLEY: Okay. Department?

9 MS. ACEVES: Good afternoon. Sarah
10 Aceves representing the Department of Public Service.

11 MR. TOUSLEY: The Vermont Agency of
12 Natural Resources?

13 MR. EINHORN: Don Einhorn for the
14 Agency.

15 MR. TOUSLEY: And the interveners?

16 MS. DINGLELINE: Brooke Dingleline for
17 Mt. Anthony Country Club, Apple Hill Homeowners
18 Association and Libby Harris.

19 MR. TOUSLEY: Thank you. Due to the
20 COVID-19 pandemic, the commission is limiting in-
21 person contact. As a result, the parties have agreed
22 to this remotely.

23 Let me just take a minute to confirm
24 that all the parties have consented to having a
25 remote hearing. If anyone no longer consents to

1 conducting this hearing remotely, they must speak up
2 now.

3 (No response).

4 MR. TOUSLEY: Okay. I want to ask that
5 each time you begin talking, please identify yourself
6 by name for the court reporter. If the Internet
7 connection cuts out, please try to rejoin the
8 GoToMeeting or call into the hearing using the
9 GoToMeeting telephone number that was provided in the
10 hearing notice.

11 If the audio or video from the hearing
12 has cut out, let me know when you are able to rejoin,
13 and I will summarize what happened, and we will
14 revisit any questions at which an objection may have
15 been allowed, including any admission of an exhibit.
16 I don't think we will get that far today.

17 If you are unable to call in to rejoin,
18 notify the platform manager, notify me, immediately
19 by email or the Clerk's office immediately by email
20 or phone, and we will pause the hearing until the
21 issue is resolved, the technical issue is resolved.

22 Similarly, if at any point you become
23 aware of another party, participant or member of the
24 public having trouble accessing the video or audio
25 feeds of this remote hearing, please let me know

1 immediately. We will pause this conference until the
2 issue is resolved. If it cannot be resolved, we will
3 reschedule the hearing.

4 Does anyone have any questions or
5 concerns about these procedures at this time?

6 (No response).

7 MR. MELONE: None here.

8 MR. TOUSLEY: Okay, none. Great. This
9 session shouldn't take long. This is an opportunity
10 for you to tell me if you mean to present evidence
11 that has not already been filed, and if so, what it
12 is, and if you may need additional time for discovery
13 into relevant facts.

14 And I'm just going to do a roll call to
15 see how you answer that question. Mr. Melone?

16 MR. MELONE: Thank you. We would
17 request additional discovery of the Agency. We would
18 like to serve written discovery as well as have a
19 deposition of their witness, or whatever witnesses
20 they intend to call, if there is more than one.

21 I also would like to get clarified for
22 the record exactly who the moving party is here. The
23 way this whole process started out it wasn't really
24 clear. It seemed as if the proceeding started as an
25 invitation by the commission.

1 So for the purpose of moving forward, I
2 would like to be clear for the record, and ask the
3 other parties exactly which parties are moving for an
4 injunction.

5 MR. TOUSLEY: Okay. We will start with
6 the Department.

7 MS. ACEVES: We are still assessing the
8 evidence right now. We don't think there is a need
9 for further discovery. But at this time, because we
10 are still reviewing the evidence, I'm not prepared at
11 this time to say one way or another what we are
12 recommending.

13 MR. TOUSLEY: Mr. Einhorn?

14 MR. EINHORN: The Agency's position is
15 essentially similar to the Department's in that
16 regard. We need to go back and review what's
17 transpired up to this point.

18 However, that said, I believe all the
19 evidence that's necessary is already in the record,
20 whether in this particular case or in the three
21 Section 248 proceedings that concerned this
22 particular site that's at issue.

23 So I don't see what additional
24 discovery at this point would accomplish. I think if
25 that's going to be entertained, the developer's going

1 to need to explain exactly why, what, and if any at
2 all. I think it would need to be very limited given
3 that we already have a substantial amount of evidence
4 in these cases.

5 As I said, the three Section 248
6 petitions as well as the present case, we have taken,
7 I think we had what? A five-hour hearing with live
8 testimony, testimony, affidavits filed before that in
9 June. So I really don't see the need for anything at
10 this point probably other than oral argument on the
11 8th.

12 MR. TOUSLEY: Okay. Thank you. Ms.
13 Dingleline?

14 MS. DINGLELINE: Thank you, Your Honor,
15 in terms of any further discovery, I don't perceive
16 any need for any other discovery so long as the
17 affidavits and exhibits that we have put in for the
18 temporary restraining order hearing are already being
19 put in the record for the injunction hearing. That's
20 fine.

21 I assume we will just pick up if there
22 are any further exhibits with the numbers in serial
23 fashion in addition to what's already been provided.
24 In terms of witnesses for the hearing, if Mr. Melone
25 is testifying, I would like to cross examine him, but

1 I would tend to agree with the notion that oral
2 argument is ripe at this point considering how much
3 testimony and opportunity for evidence to be
4 submitted has already occurred.

5 So we are prepared to move forward on
6 September 8th.

7 MR. TOUSLEY: Okay. Great. And Kyle,
8 correct me or jump in if you feel compelled to do so
9 here, but I think that from the commission's
10 perspective, this -- we are here because there was an
11 inquiry from the public that provided information to
12 which the Department and the Agency responded and
13 requested seeking some action to stop what was
14 perceived as site preparation by the developer.

15 So I suppose if we look at it in broad
16 terms, the movants in this case are the Agency and
17 the Department, at least initially. And then the
18 interveners, and so -- and then the developer is the
19 Respondent as opposed to the Petitioner, at least in
20 formal terms given -- in an investigatory setting.

21 With that, I think, Mr. Melone, who do
22 you want to discover? I don't think the Agency has
23 anything new.

24 MR. MELONE: Well when you say new,
25 there is really not much in the record. I mean the

1 initial TRO proceeding was done in a couple of days
2 as I recall. There is no opportunity for discovery
3 yet on any of the parties which is one reason why I'm
4 asking who is the movant.

5 The Rules of Procedure 65 clearly
6 require a movant, and what you just described did not
7 describe which party is moving for the injunction.

8 MR. TOUSLEY: It was moved by the
9 Department and the Agency.

10 MR. MELONE: I would like them to at
11 least confirm that right now for the record.

12 MR. TOUSLEY: Ms. Aceves?

13 MS. ACEVES: Yes. We agree that we are
14 co-movant for purposes of this proceeding.

15 MR. TOUSLEY: Mr. Einhorn?

16 MR. EINHORN: Yes. The Agency would be
17 -- based on that, I think that's the recollection at
18 the conclusion of the June 26 hearing, if I'm
19 remembering correctly, the Agency was in favor of an
20 injunction.

21 MR. TOUSLEY: Okay.

22 MR. MELONE: But with all due respect,
23 Don, being in favor of the junction and supporting
24 party is not the same thing as being a movant asking
25 for the injunction. That's what I'm just asking to

1 state for the record. Are you saying the Agency is
2 itself a movant for the injunction?

3 MR. EINHORN: If you're asking if we
4 filed a formal motion, we did not file a formal
5 motion. My recollection is the commission received
6 comments from members of the public if there were
7 activities going on that appeared to be for the
8 hearing.

9 The Agency got involved, filed
10 comments, expressing a concern if there was some
11 clearing that was a problem. That proceeded then, as
12 I understand it, to a hearing, and at the conclusion
13 of that hearing the Agency indicated affirmatively
14 that it supported an injunction. Did we file a
15 motion? No.

16 MR. MELONE: Well what I'm asking for
17 here since the burden of proof is on the movant, at
18 what's going to be coming up next week, who is the
19 movant that's going to move forward with the burden
20 of proof? The law really requires a movant.

21 MS. DINGLELINE: Mr. Tousley, this is
22 Brooke Dingleline, if I could just jump in for a sec,
23 please.

24 The interveners join in the request for
25 a preliminary and permanent injunction. We have not

1 filed the initial motion in that regard, but we would
2 join in that request. So we should be considered a
3 movant. And particularly because the particularized
4 interests of Libby Harris is implicated here as well
5 as the homeowners association with regard to Mr.
6 Melone's claim now that lot number 1, which contains
7 the apple orchard, which is erroneously being
8 referred to as quote, the orchard lot, that is the
9 portion of the project property where the orchard is
10 supposed to remain. And then 742 plantings of trees
11 and bushes are to be interspersed among that area in
12 order to create the screening that their experts have
13 opined will be sufficient to get them over the
14 mitigation prong of the Quechee analysis.

15 So it seems that the PUC has recognized
16 and is protecting that portion of the property as
17 well under that TRO to prevent any cutting of those
18 orchard trees. But Libby Harris, because it was
19 represented by the Petitioner as being specifically
20 built into or planted in terms of being able to
21 create the necessary screening from those northern
22 properties, it absolutely is part of the project
23 site. And because Libby Harris has that
24 particularized interest, as the homeowners
25 association does, we join in that request for a

1 preliminary injunction so long as there is a pending
2 application on these projects that is part of what is
3 proposed and cannot be eliminated. And if it
4 happens, then the petition should be canceled,
5 voided, whatever.

6 But it's very important that Ms. Harris
7 and the homeowners association be heard on that
8 issue, and they are movants on that motion.

9 MR. TOUSLEY: So I suggest, Mr. Melone,
10 that the movants in this case are the Agency, the
11 Department, and the interveners. Each of them during
12 the course of the injunction hearing came forward and
13 said they wanted an injunction and agreed to that
14 injunction orally, and they are the movants.

15 MR. MELONE: But again, but with all
16 due respect, the only person on this call that, you
17 know, I hear saying that they definitely are movant
18 for the injunction is Attorney Dingledine.

19 And of course, in Rule 65 to say you're
20 not a government Agency, we are entitled to request a
21 financial bond for the injunction, that they would
22 have to put that up. And that's what we do request
23 and will request, since they are a movant, that they
24 put up a financial bond.

25 But I did not hear Attorney Einhorn say

1 that the Agency is a movant, and as far as I can
2 tell, there is no actual motion required under Rule
3 65.

4 MR. TOUSLEY: I disagree. You can
5 treat the Department and the Agency as movants in
6 this proceeding. And I don't think we are going to
7 discuss this -- this issue any further.

8 My question to you, sir, is what is the
9 nature of the discovery you require?

10 MR. MELONE: The nature of our
11 discovery that we require on the Agency is related to
12 the status of the plants, how that was determined,
13 whether in fact -- whether there is any evidence of
14 any harm to either the plants or on the site, or
15 whether these are, in fact, some type of rare plants.

16 MR. TOUSLEY: As I recall, the Agency's
17 witness at the initial hearing was Mr. Popp to that
18 issue; is that correct, Mr. Einhorn?

19 MR. EINHORN: That is correct. And
20 it's also a fact that Mr. Melone has already
21 conducted the discovery that he wants to conduct.
22 Now if you look at 19-0516, we had two rounds of
23 discovery from the developer in that case on this
24 very same issue. And we have also put in -- we have
25 prefiled testimony in that case on the issue of the

1 plants. So we have already gone through that.

2 I'm happy to move that testimony from
3 the Warner Solar Project into the record. I'm happy
4 to move our discovery responses into the record in
5 this case. If that makes -- I mean then we don't
6 have to spend time rehashing the issue.

7 The developer has already engaged in
8 discovery on this issue.

9 MR. TOUSLEY: Okay. Refresh my
10 recollection here, Mr. Einhorn. The Warner project
11 addressed plants on Apple Hill?

12 MR. EINHORN: No. The Warner project
13 is also in Bennington. It is probably, off the top
14 of my head, at least a mile or so west of the Apple
15 Hill site. It's on the other side -- it's west of
16 Super 7 or Route 7.

17 And in the developer's assessment of
18 that site, which was required as part of the 248
19 application, they discovered also that the White
20 Arrowleaf Aster was growing on that site as well.
21 And we attempted to resolve that issue in smaller
22 ways; the issue was resolved in Apple Hill and
23 Chelsea. But that -- those efforts failed. And
24 therefore, we put in testimony explaining why these
25 plants are rare, how they would be impacted. And

1 then the developer proceeded to serve us with two
2 rounds of discovery which we responded to.

3 So this issue has already been dealt
4 with.

5 MR. MELONE: I say I disagree. There
6 is discovery, some, on the White Aster in that
7 docket, and zero discovery on the Nimblewill. There
8 is zero discovery on the trees that are allegedly an
9 issue as well. And we were never given any
10 opportunity for discovery in this docket on the
11 trees, the Asters or the Nimblewill.

12 MR. EINHORN: The Agency isn't raising
13 any concern about the trees other than that obviously
14 cutting trees in advance of a Certificate of Public
15 Good would be site preparation, and cutting mature
16 trees is probably difficult to then reverse what's
17 happened.

18 The reason why we didn't have discovery
19 in this case on the two rare plants is because we
20 reached MOUs with the developer, and in fact, the
21 developer in more than six years of testimony and
22 studies and reports at the Apple Hill site agrees
23 that these are rare plants. So I don't know what the
24 issue is.

25 MR. MELONE: Yeah. No. We don't agree

1 that they are rare plants. The only thing we agree
2 to is that ANR classifies them as rare plants. That
3 doesn't mean that they are rare plants.

4 MR. TOUSLEY: Okay. Well it sounds
5 like we have an issue that requires further action
6 and discovery, at least inasmuch as it is addressed
7 to the Apple Hill site.

8 I would suggest, Mr. Melone, the reason
9 we are kind of on a little fast track here is the
10 commission's desire to be responsive to your motion
11 to dissolve the TRO. Discovery will delay that
12 process.

13 I would ask -- given that fact, which
14 would mean we wouldn't have a hearing next Tuesday on
15 this issue, it would happen sometime in the future
16 after the Department or after the Agency and the
17 developer were able to conclude what the developer
18 believes is essential discovery. And that may mean
19 that part of that hearing, when it should occur after
20 discovery happens, would be litigating the issue
21 whether or not the plants are rare plants or not.

22 MR. MELONE: That's right.

23 MR. TOUSLEY: So I think that may take
24 some time, and that would require that the
25 restraining order stay in place until that discovery

1 can occur and the parties be prepared to address and
2 litigate the issue of whether or not the plants are
3 rare, whether or not they are there, what appropriate
4 steps are the next steps, if any.

5 How do you respond to that, Mr.
6 Einhorn?

7 MR. EINHORN: That's fine with me. And
8 since this mainly seems to concern the developer and
9 the Agency, I'm happy to work with the developer on
10 hashing out some sort of a discovery schedule we can
11 then file.

12 MR. TOUSLEY: Okay. Great. Great.
13 Ms. Aceves, do you have any comments?

14 MS. ACEVES: Just if the Agency wants
15 the Department to be part of those conversations, I'm
16 happy to do that.

17 MR. TOUSLEY: Ms. Dingleline?

18 MS. DINGLELINE: We don't have any
19 objection to discovery.

20 There is one other issue that I do want
21 to raise. I don't want to interrupt this
22 conversation for it though.

23 MR. TOUSLEY: Okay. Well I think we
24 may be at the end of the discovery issue inasmuch as
25 it appears that the commission will -- I will be

1 recommending to the commission that it cancel the
2 hearing for next Tuesday at least until the Agency
3 and the developer can develop a discovery schedule to
4 get to -- to address the issues that the developer
5 seeks discovery into.

6 Once that schedule is complete, we
7 should propose a date for a hearing as well as the
8 discovery schedule. Then we will have that hearing.

9 Ms. Dingledine?

10 MS. DINGLELINE: Thank you. I'm
11 following this up with a written filing to --
12 hopefully this afternoon, but we are requesting an
13 order from the Public Utility Commission that the
14 terminology that is being used by Mr. Melone, the
15 orchard lot, to describe the property north of the
16 Van Nostrand land, the lot that they own in the Apple
17 Hill residential subdivision, which has an apple
18 orchard on it. The problem with Mr. Melone's calling
19 that lot the orchard lot is that there is a lot
20 called the orchard lot in the Apple Hill residential
21 subdivision. And the orchard lot happens to be Libby
22 Harris's lot which is a lot that overlooks the
23 orchard, hence the name.

24 When Mr. Melone's lot number 1 was
25 created, it was called lot number 1. So on that lot

1 number 1 is part of the project tract and parcels
2 that are proposed for the solar array project.
3 Continuing to refer to lot number 1 as the orchard
4 lot is not only problematic here for confusion as to
5 what property is actually encompassed in the project
6 tract, but also because it's actually going to create
7 a cloud on title to Ms. Harris's property by having
8 Public Utility Commission orders, et cetera,
9 referring to a name that actually in deeds, surveys
10 of records, and all permitting on the subdivision,
11 that is the name of her lot, whereas all the other
12 lots are known by an actual number.

13 So we would ask for an order from the
14 PUC that while there is an apple orchard on lot
15 number 1 it be referred to only by the terminology
16 lot number 1, and that is what is part of the 27
17 acres of the actual project. So that we can make
18 sure this doesn't have ramifications later either in
19 the Chittenden case, that's happening right now, that
20 Mr. Melone brought for declaratory rulings for in the
21 future in terms of any title problems that were
22 created by the confusion that should not be
23 happening.

24 MR. TOUSLEY: Mr. Melone, do we need an
25 order here, or can you simply agree to referring to

1 the lot as lot number 1?

2 MR. MELONE: I think what we just heard
3 was pretty absurd, to be honest. And if we call it
4 the orchard lot or the apple orchard lot, you know, I
5 don't see why that is a problem.

6 MR. TOUSLEY: Well then it shouldn't be
7 a problem to call it lot number 1.

8 MR. MELONE: I don't think we should be
9 required to call it something that another party
10 wants --

11 MR. TOUSLEY: Although it's called --

12 MR. MELONE: -- because they want it.

13 MR. TOUSLEY: Okay, okay. I'm not
14 going to rule on this. I just was hoping that this
15 could be simply resolved.

16 Ms. Dingledine, the commission will
17 await your motion.

18 Are there other issues that we need to
19 address in this status conference today? Now that we
20 have determined we are not having a hearing on
21 Tuesday.

22 MR. MELONE: Yes. There is. The issue
23 under Rule 65(c) since Attorney Dingledine confirmed
24 that they are a movant under 65(c), there needs to be
25 a determination of the amount of security that they

1 have to post for this injunctive relief -- for the
2 existing injunctive relief.

3 MR. TOUSLEY: I don't think that's
4 necessary. Ms. Dingleline is drafting a motion to
5 address her issue. Then you draft a motion to
6 address your issue.

7 MR. MELONE: Okay.

8 MR. TOUSLEY: It will not be ruled upon
9 today.

10 MR. MELONE: Okay. That's fine.

11 MR. TOUSLEY: Do we have other issues
12 to address?

13 (No response).

14 MR. TOUSLEY: Okay. Well thank you all
15 for your time. This staff -- status conference is
16 adjourned.

17 (Whereupon, the proceeding was
18 adjourned at 3:32 p.m.)
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C E R T I F I C A T E

I, Kim U. Sears, do hereby certify that I recorded by stenographic means the Status Conference re: Case No. 20-1611-INV, via GoToMeeting, on August 31, 2020, beginning at 3 p.m.

I further certify that the foregoing testimony was taken by me stenographically and thereafter reduced to typewriting and the foregoing 23 pages are a transcript of the stenograph notes taken by me of the evidence and the proceedings to the best of my ability.

I further certify that I am not related to any of the parties thereto or their counsel, and I am in no way interested in the outcome of said cause.

Dated at Williston, Vermont, this 3rd day of September, 2020.

A rectangular box containing a handwritten signature in cursive script that reads "Kim U. Sears". The signature is written in dark ink on a light-colored background.