

**STATE OF VERMONT
SUPREME COURT**

In re: Investigation Pursuant to)	
30 V.S.A. §§ 30 & 209 into whether)	Docket No. 2020-242
the Petitioner Initiated Site)	
Preparation at Apple Hill in)	
Bennington, Vermont, for)	
Electric Generation in)	
Violation of 30 V.S.A. § 248(a)(2))	

**APPELLEE VERMONT AGENCY OF NATURAL RESOURCES’
RESPONSIVE MEMORANDUM IN SUPPORT OF DISMISSAL**

The Vermont Agency of Natural Resources files this response to Appellants’ October 27, 2020 Memorandum of Law in Support of the Appeal, which Appellants filed pursuant to this Court’s October 13, 2020 order to show cause why this appeal should not be dismissed for lack of a final judgment. In the appeal, Appellants seek to challenge the Public Utility Commission’s issuance of a temporary restraining order. However, there is no final judgment from which to appeal, Appellants have not obtained permission to take an interlocutory appeal, and an interlocutory appeal is not otherwise appropriate. The appeal should be dismissed.

BACKGROUND

In Vermont, electric generation facilities must obtain construction and siting approval from the Public Utility Commission (PUC). 30 V.S.A. § 248(a)(2) (with some exceptions not applicable here). This approval is known as a “certificate of public good” (CPG). *Id.* § 248. Before the PUC may issue a CPG, it must make findings under various statutory criteria supporting that the proposed project is in the public good—the “section 248” criteria. *See id.* § 248(b). In addition to the CPG

permitting process, the PUC oversees the standard-offer program. *See id.* § 8005a. Under this incentive program, renewable energy plants of 2.2 MW capacity or less may receive long-term contracts with stable pricing. *Id.* § 8005a(b), (e), (f)(4) (contract term of 10 to 25 years for solar plants).

Among other projects, Appellants propose to construct two neighboring solar facilities on a 27-acre parcel (the “Apple Hill Site”) in Bennington, Vermont—the “Apple Hill” facility and the “Willow Road” facility (formerly known as the Chelsea facility). *Investigation into Site Preparation at Apple Hill*, No. 20-1611-INV, Order Granting TRO & Notice of Prelim. Inj. Hr’g, at 3 (Vt. Pub. Util. Comm’n June 26, 2020) (“6.26.20 Order”) (Attachment 1); *Investigation into Site Preparation at Apple Hill*, No. 20-1611-INV, Order Den. Developer’s Mot. to Vacate Prelim. Inj. Hr’g & Notice of Rescheduled Prelim. Inj. Hr’g, at 2-4 (Vt. Pub. Util. Comm’n Aug. 26, 2020) (“8.26.20 Order”) (Attachment 2). Each facility has obtained a standard offer contract and petitioned for a CPG. 8.26.20 Order at 2-4. The petitions have gone through multiple proceedings over the past several years. *Id.* at 2-4. Currently, both are on appeal to this Court following CPG denials. *See In re Petition of Chelsea Solar LLC*, Docket No. 2019-226 (decision pending); *In re Petition of Apple Hill Solar LLC*, Docket No. 2020-232 (record complete Sept. 25, 2020).

On June 19, 2020, the PUC received public comments that tree clearing was occurring on the Apple Hill Site. 6.26.20 Order at 1. Additional parties filed comments and, on June 26, 2020, the PUC held an evidentiary hearing to determine whether it should issue a temporary restraining order (TRO) to “stop Allco from

conducting site preparation in violation of Section 248(a)(2) and to prevent Allco's ongoing site clearing from having an undue adverse effect on 'rare' and 'very rare' plants on the 27-acre Apple Hill site." *Id.* at 2-3. During the hearing, Allco said it was "clearing the site to allow for grazing sheep and growing hemp." *Id.* at 4. It had cleared 3 acres and planned to clear 23 more. *Id.* at 3. Allco also testified that it "still plans to build a combined 4.0 MW of solar electric generation at the Apple Hill site using two facilities, that it had engaged a forester to clear-cut trees at the Apple Hill site that is the subject of the two standard-offer contracts, and that the clear-cutting was occurring." 8.26.20 Order at 4. Allco further acknowledged that clear-cutting the trees on the Apple Hill Site "would be a necessary action to prepare the site for a solar facility." *Id.* at 11.

Following the hearing, the PUC issued a TRO against "tree-clearing on the Apple Hill site" and set an evidentiary hearing for July 9, 2020 on whether to issue a preliminary injunction (PI). 6.26.20 Order at 1, 7-8. The PI hearing would "address whether the restraining order should be lifted and whether Allco's tree-clearing activities were site-clearing operations without a certificate of public good in violation of 30 V.S.A. § 248(a)(2)." *Id.* at 7-8. On July 1, 2020, Appellants filed a motion to vacate the PI hearing. 8.26.20 Order at 4. The PUC then postponed the PI hearing pending resolution of the motion to vacate, to which Appellants did not object. *Id.* at 4-5. On August 26, 2020, the PUC denied the motion to vacate, explaining that Appellants "ha[ve] two standard-offer contracts and [are] in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities

on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts.” *Id.* at 8. Appellants had filed a motion to dissolve the TRO, and the PUC set the PI hearing for September 8 to address “whether to grant an injunction or dissolve the TRO.” *Id.* at 12.

At a status conference on August 31, 2020, Appellants requested discovery on ANR, including written discovery and depositions of any witnesses. Tr. (08-31-2020), at 7. The hearing officer explained that he would be “recommending to the commission that it cancel the hearing for next Tuesday at least until the Agency and the developer can develop a discovery schedule to get to -- to address the issues that the developer seeks discovery into.” Tr. (08-31-2020), at 19-20. Appellants then filed this appeal of the TRO and the PUC’s denial of Appellants’ motion to vacate the PI hearing.

ARGUMENT

The Court should dismiss this appeal because there is no final judgment on whether Appellants may conduct site-clearing activities on the Apple Hill Site, and none of the exceptions to the final judgment rule apply.

I. Temporary restraining orders and preliminary injunctions are not appealable as final judgments.

An aggrieved party may appeal a “final order, judgment, or decree” of the PUC to the Supreme Court. 30 V.S.A. § 12. Here, the relevant final order would be one that definitively determines whether Appellants may clear the Apple Hill Site (e.g., through the granting and terms of a CPG or some sort of permanent injunction). Instead, the PUC has issued a temporary restraining order and,

pursuant to Appellants' request for discovery, postponed a hearing on whether to dissolve the TRO or grant a preliminary injunction. By their terms ("temporary" and "preliminary"), neither of these is a final judgment.

As such, neither the TRO nor a preliminary injunction (if the PUC were to order one) are ordinarily appealable. *See Taylor v. Town of Cabot*, 2017 VT 92, ¶ 8, 205 Vt. 586, 178 A.3d 313 (hearing appeal of PI where "trial court granted interlocutory appeal of its ruling"); *Sunset Cliff Homeowner's Ass'n v. City of Burlington*, 2008 VT 56, ¶ 5, 184 Vt. 533, 955 A.2d 524 (noting "we granted developer permission to file this interlocutory appeal" of PI against cutting and clearing of project site); *Comm. to Save the Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc.*, 137 Vt. 142, 147, 400 A.2d 1015, 1018 (1979) (appeal of PI stopping demolition of building without Act 250 permit obtained through permission to file interlocutory appeal under V.R.A.P. 5).¹ Therefore, if Appellants wish to appeal a TRO or preliminary injunction, they must qualify for an exception to the final judgment rule.

II. None of the exceptions to the final judgment rule apply.

Appellants have not shown that any of the exceptions to the final judgment rule apply, and none do.

¹ Federal law provides for automatic interlocutory appeal of injunctions, *see* 28 U.S.C. § 1292(a)(1), but Vermont has not adopted a similar provision, *Bloomberg v. Edlund Co., Inc.*, 151 Vt. 559, 560 n.*, 563 A.2d 995, 996 n.* (1989) ("Although we have broad authorization to adopt rules allowing interlocutory appeals, 12 V.S.A. § 2386(a), we have not adopted the federal provision on interlocutory orders involving injunctions.").

A. Appellants do not have permission for interlocutory appeal under the Vermont Rules of Appellate Procedure.

The PUC review statute provides that “the Commission, in its discretion and before final judgment, may permit an appeal to be taken by any party to the Supreme Court for determination of questions of law in such manner as the Supreme Court may by rule provide for appeals before final judgment.” 30 V.S.A. § 12. In turn, the Vermont Rules of Appellate Procedure provide that the superior court may “report the action” to this Court if “all the appearing parties agree” and other requirements are met. Vt. R. App. P. 5(a)(1). Alternatively, a party may move the superior court for permission to appeal from an interlocutory order. *Id.* 5(b)(1). Neither has occurred here, so Appellants may not appeal under Rule 5. *See Bloomberg v. Edlund Co., Inc.*, 151 Vt. 559, 560-61, 563 A.2d 995, 996 (1989) (holding that question of whether “interlocutory appeal could have been obtained under V.R.A.P. 5” was “academic, since no interlocutory appeal was sought”).

Similarly, though Appellants assert the PUC’s orders are appealable under the “collateral order doctrine,” Appellants’ Mem. at 22-25, they have not obtained permission or otherwise followed the required procedures for interlocutory appeal of collateral orders. *See* Vt. R. App. P. 5.1 (providing that party must move Superior Court for permission for interlocutory appeal of final collateral orders).

B. There is no other basis for interlocutory appeal.

The circumstances allowing for interlocutory review outside the Rules of Appellate Procedure also are not present. Neither the TRO nor a preliminary injunction would call for “the immediate transfer of real or otherwise unique

property.” *See Hospitality Inns v. S. Burlington R.I.*, 149 Vt. 653, 656, 547 A.2d 1355, 1357 (1988) (describing exception to finality requirement).

Appellants also cannot avoid the final judgment rule through reliance on 30 V.S.A. § 15. *See* Appellants’ Mem. at 20-22. That provision allows a party or the PUC to “complain to the Supreme Court” for relief *against* noncompliance with a PUC order. 30 V.S.A. § 15. For instance, if a party to the current proceeding were to ask the Court to enforce the TRO against Appellants should they continue site-clearing activities. *See In re Investigation into General Order No. 45*, 2013 VT 24, ¶¶ 1, 6, 8-9, 193 Vt. 676, 67 A.3d 285 (dismissing complaint seeking enforcement of order against Vermont Yankee where party had not exhausted administrative remedies); *McFeeters v. Parker*, 113 Vt. 139, 147, 30 A.2d 300, 305 (1943) (issuing writ of mandamus for enforcement of Commission order). A writ of prohibition only would seem to arise where, after receiving a complaint for enforcement, the Court determined the PUC did not have jurisdiction to issue the order in the first instance. *See id.* at 145, 146, 30 A.2d at 304, 305 (reasoning that Commission had *power* to issue order in question but that Court could not rule on *reasonableness* of order because “[m]atters so within [the Commission’s] jurisdiction cannot be reviewed in this proceeding”).

Finally, Appellants may not appeal under 3 V.S.A. § 815(a). The right to review of a “preliminary, procedural, or intermediate action” under the Administrative Procedure Act’s (APA’s) contested case provisions is limited to those situations where “the final decision would not provide an adequate remedy.” *See* 3

V.S.A. § 815(a); *Petition of Cent. Vt. Pub. Serv. Corp.*, 142 Vt. 138, 140, 453 A.2d 1108, 1109 (1982) (dismissing appeal of Public Service Board order granting temporary rate increase). The burden is on the appellant to show that a final order would not grant an adequate remedy. *Cent. Vt. Pub. Serv.*, 142 Vt. at 139, 453 A.2d at 1109. Relevant factors are whether the lower tribunal “clearly exceeded the scope of its authority” and whether “the claimed defect in the order is such that the harm is greatly aggravated by delay.” *See In re Taft Corners Assocs., Inc.*, 160 Vt. 583, 589, 632 A.2d 649, 652 (1993) (citation omitted); *see also id.* (“We conclude that, where a decision clearly exceeds the jurisdiction of the Board and requires the applicant virtually to commence the application process again, the delay and expense involved justify our consideration of the interlocutory decision.”).

Appellants have not met their burden and neither factor is present here.²

² Even if interlocutory review were appropriate, it would be limited to “those issues concerning the scope of the [PUC’s] authority.” *Taft Corners*, 160 Vt. at 589, 632 A.2d at 652. Thus, if the Court does not dismiss the entire appeal, it should dismiss Appellants’ appeal issues 4, 6, 7, and 8 because those issues do not concern the PUC’s underlying authority to enjoin site-preparation activities. *See Appellants’ Docketing Statement* at 3 (Sept. 1, 2020). *See also infra* at 12 (discussing difference between authority to take action and whether action properly was taken). Similarly, Appellants’ briefing on these admittedly “merits” issues is not properly before the Court. *See Appellants’ Mem.* at 25-33. To the extent issue 8 does address the PUC’s authority by mentioning the word “jurisdiction,” it should be dismissed for the reasons explained in this Response. Issue 5 should be dismissed because, among other things, Appellants have not appealed an order opening an investigation. Additionally, if the Court does not dismiss the entire appeal, issue 3 should be dismissed because it asks the Court to render an advisory opinion without a case or controversy. *See Cupola Golf Course, Inc. v. Dooley*, 2006 VT 25, ¶ 14, 179 Vt. 427, 898 A.2d 134. The PUC has not enjoined farming “on land that is not a proposed site for an electric generation facility seeking a certificate of public good” so there is no reason to decide this issue. *See Appellants’ Docketing Statement* at 3; *infra* at 10-11.

1. The PUC has not clearly exceeded the scope of its authority.

First, the PUC has not clearly exceeded the scope of its authority in issuing a TRO, nor would it if it issued a preliminary injunction. Appellants focus on 30 V.S.A. § 209(a)(8) and claim it does not allow the PUC to enjoin site clearing, Appellants' Mem. at 8-11, but regardless of whether that argument has any merit, § 209(a)(8) was not the only authority the PUC relied upon. See 8.26.20 Order at 10-11. Many authorities support that the PUC has authority to grant injunctive relief over matters within its jurisdiction. See 30 V.S.A. § 9 (“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.”); *id.* § 209(a)(6) (PUC may “restrain any company subject to supervision under this chapter from violations of law”); *id.* § 10(e) (“the Commission or a single member may grant temporary restraining orders”); *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996) (noting that PUC “has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction”); 18-1-1 Vt. Code R. § 2.406 (PUC provisions for temporary restraining orders, preliminary injunctions, and permanent injunctions).

Further, Appellants are incorrect that 30 V.S.A. § 30(h) is the exclusive means to remedy a violation of § 248. See Appellants' Mem. at 17-18. This provision is a grant of authority to the Department of Public Service, and nothing in it places limitations on the PUC's own authority to address violations of § 248. See

30 V.S.A. § 30(h); *see also In re SolarCity Corp.*, 2019 VT 23, ¶¶ 10, 33, 210 Vt. 51, 210 A.3d 1255 (affirming PUC’s imposition of penalty and stating “Petitioner’s argument essentially asserts that the Commission is *only* an adjudicative body and that it has no power independently to evaluate the matters within its jurisdiction. This is incorrect.”).

Second, site-preparation activities for electric generation facilities are within the PUC’s jurisdiction. Title 30 provides that “no company . . . and no person . . . may begin site preparation for or construction of an electric generation facility . . . 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.” 30 V.S.A. § 248(a)(2) (emphases added). It also provides that the PUC has jurisdiction over companies or persons that manufacture electricity for the public “so far as may be necessary to enable [it] to perform the duties and exercise the powers conferred upon [it] by law.” *Id.* § 203(1)-(2). Thus, the PUC does not “clearly exceed its jurisdiction” when it issues an order addressing site preparation activities.

Appellants claim they have a “Solar” parcel and a “Horticultural Use” parcel, and that the Horticultural Use parcel in particular is not subject to PUC jurisdiction. *See, e.g.*, Appellants’ Mem. at 3. Whatever terms Appellants may give these parcels, the fact is that the TRO only applies to property identified as being part of Appellants’ solar project in the CPG applications and any approved amendments to those applications. 6.26.20 Order at 1. If this property includes the

Horticultural Use parcel, then the TRO should apply to the Horticultural Use parcel.³

Appellants’ also are incorrect that they are not subject to the PUC’s jurisdiction because none of the Appellants are “companies” and PLH is not a “person.” *See* Appellants’ Mem. at 8, 14-15. Appellants clearly are “companies” or “persons” or both—otherwise there would be no reason for them to obtain a CPG in the first instance. *See id.* § 248(a)(2) (“no company . . . and no person . . . may begin site preparation” without a CPG). Both terms (company and person) are broadly defined and, while ANR disagrees that Appellants are not “companies,” other than PLH, Appellants do not appear to dispute that they are “persons.” *See* 10 V.S.A. § 6001(14) (defining “person”); 30 V.S.A. § 201(1) (defining “company”). As such, the PUC may prohibit them from conducting site-clearing activities without a CPG under multiple sources of authority. *See supra* at 9.

As for PLH LLC, Appellants’ argument that it is not a “collective person” under *In re Mountain Top Inn & Resort* is not relevant. *See* Appellants’ Mem. at 7-8. PLH plainly is a “person” in its own right. *See* 10 V.S.A. § 6001(14) (defining “person” to include, among other things, any “legal or commercial entity”). Thus, if PLH conducts site-clearing activities for electric generation at the Apple Hill Site without a CPG, it violates § 248 and the PUC may enjoin the site-clearing. If PLH does not conduct site-clearing at the Apple Hill Site, then it should be easy for PLH

³ The PUC denied Appellants’ March 2020 attempt to amend their CPG petition because it went beyond the scope of remand and asked the PUC to “look at a different project” with significant changes. *See Petition of Apple Hill Solar LLC*, No. 8454, at 23-25 (Vt. Pub. Util. Comm’n May 7, 2020) (Attachment 3).

to comply with the TRO, but this does not relieve the other Appellants from complying with the TRO. Put simply, none of the Appellants may conduct site-clearing without a CPG.

The subsequent question—whether a TRO or preliminary injunction is appropriate—is an issue of *discretion*, not *authority* in the first instance. *See Town of Cabot*, 2017 VT 92, ¶ 20 (“While this Court has not explicitly adopted any standard of review for preliminary injunctions, federal courts review the award of injunctive relief for abuse of discretion.”); *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 58 (2d Cir. 2020) (“We review a district court’s decision to grant a preliminary injunction for abuse of discretion, examining the legal conclusions underpinning the decision de novo and the factual conclusions for clear error.”). *Contrast with Petition of Green Mountain Power Corp.*, 133 Vt. 107, 109, 329 A.2d 372, 373 (1974) (intermediate appeal appropriate where issue is “whether or not the Board is *authorized* to grant more than one temporary rate increase during the pendency of a petition for permanent rate changes”) (emphasis added). To appeal on the basis of whether a PI or TRO is properly issued—versus whether the PUC has authority to issue one—Appellants would need permission, and they do not have it. *See supra* at 6; Vt. R. App. P. 5(a)-(b).

Nor should they have received permission if they had sought it. Numerous factors support the PUC’s conclusion that Appellants performed site-preparation activities for solar generation, any one of which should be sufficient to support the finding of unlawful site preparation: Appellants are pursuing CPGs for solar

generation on the parcel, they have standard offer contracts for solar generation on the parcel, and they acknowledge that they intend to pursue solar generation on the parcel and that the site clearing would be a necessary prerequisite. 8.26.20 Order at 8, 11.

To the extent this can be characterized as a question of law, there cannot legitimately be “substantial ground for difference of opinion” that these facts support the PUC’s conclusion that Appellants performed site preparation for solar generation. *See* Vt. R. App. 5(b)(1)(A) (“controlling question of law about which there exists substantial ground for difference of opinion” one of two required grounds for interlocutory appeal permission). As the PUC explained, otherwise, “developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval.” 8.26.20 Order at 10. Contrary to Appellants’ assertions, this is not an instance of “otherwise lawful activities” that “do not conflict with any requirements contained in a CPG.” Appellants’ Mem. at 3 (citing *Georgia Mountain*). In *Georgia Mountain*, the evidence did not show that blasting and access road use on portions of a 1,000-acre site that also supported timber harvesting and maple sugaring were construction for the wind facility. *See* Memorandum from Susan M. Hudson to Parties, No. 7508, at 3-4 (Vt. Pub. Serv. Bd. Jan. 5, 2012) (Attachment 4). Here, the factors noted above show otherwise.

Nor would this appeal qualify for interlocutory review as a collateral order, if such review were sought. At a minimum, both the TRO and the underlying CPG

proceedings involve the issue of whether Appellants may conduct site-clearing activities for electric generation at the Apple Hill Site. *See* Vt. R. App. 5.1 (requirements for interlocutory review of collateral order include that issue is “completely separate from the merits of the action”).

2. Appellants do not suffer harm greatly aggravated by delay.

Next, the “nature of the claimed defect in the [PUC’s] order” is *not* such that “the harm is greatly aggravated by delay.” *See Taft Corners*, 160 Vt. at 589, 632 A.2d at 652 (articulating factor) (citation omitted). Appellants’ claimed defect is that the PUC may not enjoin site-clearing activities on the Apple Hill Site. Their purported harm flowing from that defect is that they cannot commence site clearing for agricultural activities. But Appellants have admitted they are “unlikely to do any sheep farming or hemp growing in 2020.” 6.26.20 Order at 5; *see also* Tr. (06-26-2020), at 71-73 (Mr. Melone {Appellants} testifying that, if no TRO were issued, hemp growing would likely start in 2021 growing season; and that it would likely be 2021 for implementation of sheep grazing).

Further, unlike *Taft Corners*, where the applicant would have had to virtually “commence the application process again” and bear the associated expense because of a decision remanding an Act 250 application, any “delay” in resolving whether the PUC may enjoin site-clearing activities on the Apple Hill Site will not “greatly aggravate” Appellants’ purported, largely unquantified harm. *See Taft Corners*, 160 Vt. at 589, 632 A.2d at 652. Additionally, Appellants did not object to the PUC’s postponement of the PI hearing to address a motion that Appellants

themselves filed, and they then asked for discovery, further delaying the PI hearing. Appellants simply must wait until they have permission, or learn that no permission is needed, to clear the Apple Hill Site.

CONCLUSION

The Court should dismiss this appeal because the PUC's TRO (or PI if issued) is not a final judgment, and no exception to the final judgment rule applies.

Dated: October 29, 2020

Respectfully submitted,

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES

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