STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8454

Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont	Hearings at Montpelier, Vermont August 18, 2015 and March 22, 2018

Order entered: 5/07/2020

ORDER ADOPTING PROPOSAL FOR DECISION ON REMAND AND DENYING PETITION

In this Order, the Vermont Public Utility Commission ("Commission")[1] adopts the following proposal for decision on remand and denies the petition of Apple Hill Solar LLC.

PROPOSAL FOR DECISION ON REMAND RECOMMENDING DENIAL OF THE PETITION

I. INTRODUCTION

This case involves a petition filed by Apple Hill Solar LLC ("Apple Hill" or "Petitioner") with the Commission requesting a certificate of public good ("CPG") under 30 V.S.A. § 248 for the proposed construction and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road, Bennington, Vermont (the proposed "Facility").

The Vermont Supreme Court remanded the case to the Commission to: (1) assess the impact of the Facility on the orderly development of the region in light of the 2010 Bennington Town Plan ("Town Plan") without consideration of the selectboard's purported position on the subject; and (2) determine whether the Facility violates clear, written community standards in the Town Plan in assessing whether the Facility's adverse effects are undue.[2]

In this proposal for decision on remand, I recommend that the Commission deny Apple Hill's petition and CPG. The Facility would not be in the public good because the Facility is inconsistent with the Town Plan and would unduly interfere with the orderly development of the

[1] Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

[2] *In re Petition of Apple Hill Solar LLC,* 2019 VT 64, at ¶ 31 and ¶ 36. The 2010 Bennington Town Plan was amended in 2018 after the Petition was filed in 2015. This proposal for decision examined the 2010 Town Plan.

region and have an undue adverse impact on aesthetics and the scenic or natural beauty of the area.

II. BACKGROUND

On March 15, 2015, the Petitioner filed a petition with supporting testimony and exhibits (the "Petition").

On August 18, 2015, I conducted an evidentiary hearing in the Commission's hearing room in Montpelier, Vermont. At the evidentiary hearing, all of the prefiled testimony and exhibits of the parties were admitted into the evidentiary record.

On April 4, 2016, Apple Hill filed a request to amend the Petition.

On May 24, 2017, I issued an order allowing for further discovery and a second evidentiary hearing to address Apple Hill's proposed amendment to the Petition.

On March 22, 2018, I held a second evidentiary hearing in this proceeding and admitted all of the additional prefiled testimony and exhibits of the parties.

On July 2, 2018, I issued a proposal for decision recommending that the Commission approve the Facility as amended and issue a CPG.

On September 26, 2018, the Commission issued a final order adopting the proposal for decision and issued a CPG to the Petitioner.[3]

On October 25, 2018, Libby Harris and the Apple Hill Homeowners Association ("AHHA") (together, the "Intervenors") jointly filed notice with the Vermont Supreme Court of their appeal of the Commission's September 26, 2018, decision.

On September 6, 2019, the Vermont Supreme Court issued a decision reversing the Commission's September 26, 2018, decision, and remanded the case to the Commission for further proceedings consistent with its opinion.[4] In its September 26, 2018, decision the Commission found that "the Town of Bennington Selectboard has determined that 'the Town will not oppose Apple Hill on the grounds that the [Facility] fails to comply with the Town Plan

[3] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 9/26/18.

[4] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

in effect when the application was filed.'"[5] The Vermont Supreme Court concluded that "the Selectboard's decision not to oppose the [Facility] as violating the Town Plan, on which the [Commission] heavily relied, does not necessarily mean anything."[6]

On September 24, 2019, the Petitioner filed a motion to reargue with the Vermont Supreme Court.

On October 2, 2019, the Vermont Supreme Court denied the Petitioner's motion to reargue.

On October 26, 2019, the Vermont Supreme Court issued a mandate returning the case to the Commission for action consistent with its remand.

On October 30, 2019, the Commission issued an order appointing me to serve as hearing officer to address the remand from the Vermont Supreme Court and directed the parties to file comments proposing recommendations for additional proceedings in response to the Court's remand.

On November 13, 2019, the Intervenors filed comments on the remand stating that:

> The Intervenors do not believe that any further pre-trial or trial process is necessary in this matter. The evidentiary record was deemed complete and in fact contains a great deal of documentary exhibits, prefiled testimony, rebuttal testimony, live testimony, and cross examination. The Supreme Court does not require further evidence to effectuate the directive of the Court. Therefore, there is no need for any further evidence to be submitted in this matter.
>
> There is nothing more to be done, other than for the Hearing Officer to reconsider the evidence without regard to those portions of the record that the Supreme Court deemed irrelevant.[7]

On November 14, 2019, the Petitioner filed comments. The Petitioner requested that the Commission open a new case in ePUC, the Commission's electronic filing and case management system, to handle the filings related to the remand. Having been filed in March of 2015, before ePUC became available, this case is designated a legacy case and will continue to be processed

[5] Docket 8454, Order of 9/26/18, findings 32 and 106.
[6] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 30.
[7] Intervenors' Comments on the Remand Process at 1.

in paper. The parties are encouraged to email copies of their paper filings to each other and the Commission, so that these filings may be available as electronic documents.

The Petitioner also recommended that I "issue a new proposal for decision that accounts for the Supreme Court's ruling regarding findings without further filings from the parties."[8]

No other comments on the remand process or the Petition were filed by the parties.

III. ADDITIONAL FINDINGS ON REMAND

Based upon the Petition and the accompanying record in this proceeding, I have determined that this matter is ready for decision. Based on the evidence of record, I report the following additional findings to the Commission in accordance with 30 V.S.A. § 8(c).

Description of the Facility

1. The Facility site abuts the site of the Willow Road Facility[9] on a 27-acre parcel located on Apple Hill between Willow Road and Apple Hill Road. The Facility topographically slopes from a high elevation of 778 feet at the northeast corner to a low point of 675 feet near the southwest corner. The overall grade is approximately 10% with a total vertical change of 103 feet over 1,028 feet. Mark Kane, Petitioner ("Kane") post-hearing affirmation 4/9/18 at ¶ 3; exhs. AHS-ECOS-3, AHS-MK-8, and AHS-ECOS-12.

2. Through a grid interconnection, the electricity generated by the Facility would be placed onto the distribution circuit of the local electric utility, Green Mountain Power Corporation ("GMP"). The grid interconnection would be accomplished over a distribution line extension to be constructed and owned by GMP but paid for by the Petitioner (the "GMP Line Extension"). The GMP Line Extension was developed to service two new 2.0 MW solar

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[8] Petitioner's Comments on the Remand Process at 1.

[9] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-NMP, Order of 6/12/19. The Commission denied the Willow Road petition because it concluded that the Willow Road Facility and the Apple Hill Facility were a single plant as defined in 30 V.S.A. § 8002. Chelsea Solar LLC has appealed the Commission's denial of the Willow Road petition to the Vermont Supreme Court. Earlier versions of the Willow Road Facility were called the Bennington Solar Facility and the Chelsea Solar Facility. Because the Willow Road Facility has been denied a CPG, the single-plant analysis need not be conducted here.

facilities on Apple Hill, the Apple Hill Solar Facility and the Willow Road Solar Facility. Exh. AHS-ECOS-5 at 5.

3. The racking system would be painted a matte-black color like the color of the nonreflective solar panels. Wilson pf. supp.1 at 2-3.

4. The Facility requires 9.67 acres of clear cutting. Brad Wilson, Petitioner ("Wilson") pf. 3; Wilson pf.supp.1 at 2; exh. AHS-ECOS-23.

Orderly Development of the Region
[30 V.S.A. § 248(b)(1)]

5. The Facility would unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.[10] This finding is supported by findings 6 through 26, below.

6. There are extensive public and conservation land holdings in the Town of Bennington, including portions of the Green Mountain National Forest, as well as significant areas of private conservation easements and recreation parks. Kane pf. at 5; exh. AHS-MK-3.

7. The Facility site is identified in the Town Plan as part of a Rural Conservation District. Rural Conservation Districts are located in valley areas outside the urban growth area and have been set aside to conserve their rural and open space character. Kane pf. at 5; exh. AHS-ECOS-13 at 16 and 25-26.

8. The purpose of the Rural Conservation Districts is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development in a manner that avoids the need for a public water supply and public sewer systems. Exh. AHS-ECOS-13 at 25-26, 29.

9. Approximately one-third of Bennington's land area has been designated as part of the Rural Conservation District in the Town Plan. Exh. AHS-ECOS-16 at 31.

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[10] This review of the impact of the Facility on the orderly development of the region considers the Bennington Town Plan without consideration of the Bennington Selectboard's position on the subject. *See In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 31. Also, because the Petition was filed in March of 2015, the 2018 change to Section 248(b)(1) requiring substantial deference to regional and municipal plans is not being applied.

10. The interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District. The area immediately to the west of Route 7 is in an Industrial Use District. The area immediately to the south of the interchange is a Mixed Residential District. The areas east of the Facility site are in Rural Residential, Rural Conservation, and Agricultural Districts, as identified by the Town Plan. The interchange highway complex thus serves as a boundary between minimally developed rural and agricultural areas in northeastern Bennington and developed urban and industrial areas in western, central, and southern Bennington. Exh. AHS-MK-3 at 31.

11. Commercial development has occurred within the Rural Conservation District, including the construction of two smaller, net-metered, 500-kW, commercial solar facilities approved by the Commission.[11] Kane pf. supp. 3 at 23; Wilson pf. reb. at 11.

12. The Town Plan addresses all the land area of the Town. It recognizes the need for continued growth and promotes further concentrated development that may occur in the urban growth area. The Town Plan also includes rural areas, including the Rural Conservation District, designated for less development. Specifically, the Town Plan states that although development will occur outside the urban growth area, it will be much less concentrated and shall not include new commercial uses unless such uses are compatible with the rural character of the area. Exh. AHS-ECOS-13 at 16.

13. The Town Plan articulates an energy policy with ten goals. Among others, these goals include: (1) ensuring a safe and reliable supply of energy to meet reasonable consumer demands; (2) decreasing reliance on non-local energy sources; (3) making energy choices that maintain or improve environmental quality; (4) encouraging the development of renewable energy resources; and (5) ensuring diversity in energy sources. AHS-MK-4 at 65.

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[11] *See Petition of Kobelia Bennington GLC Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, to install and operate a 500 kW group net-metered solar electric generation facility in Bennington, Vermont*, CPG #NMP-6523, 10/14/15 at 5 (finding that there are no land conservation measures contained in the applicable regional or town plans that would prohibit development in the area where the Facility is proposed); and *Application of ER Paper Mill Village Solar, LLC, for a certificate of public good for a 500 kW interconnected group net-metered photovoltaic electric power system in Bennington, Vermont,* CPG #16-0049-NMP, 11/17/16, at 5 (finding that the Facility was consistent with the Bennington Town Plan). These approvals are addressed in the discussion below.

14. The Town Plan includes a Parks and Open Space Plan (2007) that articulates Bennington's policy for use of its undeveloped open spaces – forests, fields, and parkland – now being used for recreational activity. The Facility site is not a candidate for open space protection. Kane pf. at 5; exh. AHS-MK-3 at 91.

15. The Facility would be visible during winter leaf-off conditions from the Vermont Welcome Center south of the base of Apple Hill. Exh. AHS-MK-7 at AHS-06.

16. The Facility would be visible from the west to vehicles heading north on Route 7 during winter leaf-off conditions. Exh. AHS-MK-7 at AHS-10.

17. The Facility would be visible from the closest residence to the Facility, approximately 400 feet to the north-northeast, during winter leaf-off conditions. Exh. AHS-MK-7 at AHS-22.

18. The Facility would be visible from the Mt. Anthony Country Club, approximately 6,200 feet southwest of the Facility. Joseph Schoenig, Intervenors ("Schoenig) pf. at 13-15; exh. AHHA-JS-2 at 22-24.

19. The Bennington Battle Monument is approximately 1.1 miles south of the Facility site. The Monument's observation level, 200 feet above the ground, has four narrow viewing windows at compass bearings of 340°, 070°, 160°, and 250°. The Facility would be located between two windows at a bearing of 020° and would be minimally visible from the Monument. Kane pf. at 4; exh. AHS-MK-2 at 9.

20. The roadways associated with the interchange at the junction of US Route 7 and VT Route 279 are heavily traveled. The VTrans route logs indicate that approximately 9,000 vehicles pass through the interchange each day. Kane pf. at 4-5; exh. AHS-MK-3 at 5.

21. The Bennington Regional Plan (2007) ("Regional Plan") was developed by the Bennington County Regional Commission, which was established to assist towns with their planning efforts and to promote coordination of planning efforts among towns in the region. The Regional Plan assimilates the planning efforts of the individual towns to produce a document that presents common goals and a basic development concept for the region. Exh. AHS-ECOS-15 at 1.

22. The land use plan in the Regional Plan provides municipalities with a framework within which to develop their own plans. Municipalities' adherence to the Regional Plan guidelines helps ensure that local planning occurs in a coordinated fashion and that the municipal plans are compatible with one another. Exh. AHS-ECOS-15 at 51.

23. The Regional Plan and the Bennington Regional Energy Plan articulate a number of goals supporting development of local renewable energy resources. Wilson pf. supp.1 at 16; exh. AHS-ECOS-15 Regional Plan at 6 and 65 and Regional Energy Plan at i, ii, 7, 32, and 36.

24. The Regional Plan considers the future land use of the region and advances regional goals. It states that "rural development must not be widely scattered throughout the countryside but should occur as relatively compact and cohesive units that serve to reinforce, rather than replace, the region's rural character." Kane pf. at 7; exh. AHS-MK-4 at 56.

25. The Regional Plan also states:

> Future development should be concentrated in and around growth centers; that is, the urban centers and villages in the region. These centers of development and activity should be surrounded by a rural landscape of farmlands, forests, and small rural residential communities. Moreover, the demarcation between growth centers and the rural environment should be quite distinct. Growth centers require careful delineation to accommodate future growth while protecting the values of the rural countryside. If development is allowed to sprawl outward from urban areas and villages the intervening open lands will eventually disappear, and the region will have lost much of its distinctive rural character and appeal. The land use plan, therefore, directs new growth to urban and village areas and allows the type of development in rural areas that will not prove costly to municipalities nor detract from the region's rural character.

Exh. AHS-ECOS-15 at 51.

26. With regard to more extensive commercial development, the Bennington Regional Plan recommends that the towns in the region limit the number and size of commercial establishments and advises towns to place special emphasis on coordinating development along roadways. Exh. AHS-ECOS-15 at 56.

Discussion

The first question in this remand review is whether the Facility would unduly interfere with the orderly development of the region in light of the Town Plan without consideration of the selectboard's purported position on the subject. My review focuses on the language of the Town Plan and the Regional Plan. I conclude that the Facility, because it is in the Rural Conservation District, would violate both plans and unduly interfere with the orderly development of the region.

The Petitioner argues that the Facility would not unduly interfere with orderly development because it is consistent with both the Town Plan and the Regional Plan. The Petitioner contends that, as amended, the Facility would not be visible and would not violate the Town Plan design standards.[12] The Petitioner also asserts that the Facility supports the goals of the Regional Plan.[13]

The Town Plan addresses all of the land area of the Town. It recognizes the need for continued growth and promotes further concentrated development in the urban growth area, not in the outlying rural areas. Specifically, the Town Plan states that "[a]lthough development will occur outside [the urban growth area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area."[14]

Bennington's Rural Conservation Districts are in valley areas outside the urban growth area and have retained their rural and open-space character. Considerable acreage of agricultural land exists in the Rural Conservation Districts, along with extensive woodlands and low-density residential development. The purpose of the Rural Conservation Districts is to preserve traditional rural and agricultural uses while accommodating low-density residential development. For example, the Town Plan states that "agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted."[15]

The highway interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District in which the Facility is proposed. The

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[12] Petitioner's Proposed Findings of Fact at 25-27.
[13] *Id.* at 21.
[14] Exh. AHS-ECOS-13 at 16.
[15] Exh. AHS-ECOS-13 at 26.

area immediately to the west of Route 7 is in an Industrial District. The area immediately to the south of the interchange is part of a Mixed Residential District. The areas east of the Facility site are in Rural Residential, Rural Conservation, and Agricultural Districts. The interchange highway complex thus serves as a boundary between developed urban and industrial areas in the western, central, and southern portions of Bennington, and minimally developed rural and agricultural areas in northeastern Bennington.[16]

The Town Plan makes the following design standards applicable to any new development in the Rural Conservation Districts:

> Specific design standards *shall* apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, *shall* require approval under those regulatory guidelines. Development in this area *cannot be sited in prominently visible locations* on hillsides or ridgelines, *shall* utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and *must* minimize clearing of natural vegetation.[17]

These design standards are specific land conservation measures, as contemplated by Section 248(b)(1).[18] These land conservation measures are specifically applicable to the Facility site.[19] While the Petitioner's amendment of the Facility reduces the visibility of the Facility on the hillside where it is proposed to be located, the Facility's clearing of 9.67 acres of existing vegetation in a prominently visible location on a hillside to build the Facility runs directly afoul of this provision in the Town Plan and orderly development of the region.

The Petitioner disagrees. It contends that:

(1) The localized impacts of the Facility do not rise to the level of interfering with the orderly development of the region;

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[16] Exh. AHS-ECOS-13 at 31.

[17] *Id.* at 26 (emphasis added).

[18] *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, Order of 2/16/16, at 54.

[19] Exh. AHS-ECOS-13 at 31.

(2) The Town Plan does not preclude commercial solar development within the Rural Conservation District;

(3) The Facility is not sited on a prominently visible location on a hillside;

(4) The Facility utilizes earth tones and non-reflective materials; and

(5) The Facility has minimized clearing.

I find these arguments unpersuasive.

Localized Impacts

The Facility would be visible at and near the Vermont Welcome Center for southwestern Vermont just above a major highway interchange. As the Intervenors assert, "the black box will stick out like a sore thumb" on the principally forested Apple Hill.[20] The Facility would be visible to local and regional visitors entering Vermont by vehicle from other parts of Vermont, New York, Massachusetts, and beyond. What those visitors would see would deviate from the Regional Plan, which supports the Town Plan's vision for that well-traveled part of Bennington. I am not persuaded that the Facility would have solely a localized impact.

Nor am I persuaded that the Facility supports the goals of the Regional Plan as the Petitioner asserts. While the Regional Plan restates energy goals, some of which would be supported by the Facility, the Regional Plan cautions against precisely the sort of development the Facility would create.

The Facility would break down the demarcation between the urban growth area and the Rural Conservation District. The Facility would be an example of the sprawling-out of an urban center with the result that the views towards the Facility would cause Apple Hill to lose some of its rural character and appeal. Despite the efforts of the Petitioner to make the Facility more compact, the Facility would nonetheless appear to be further growth along the highway, breaking down the distinction between urban and rural. These Facility impacts violate the Town Plan and the Regional Plan and would have a regional impact.

[20] Intervenors' Comments on Proposal for Decision, 7/23/18, at 11.

Commercial Solar Development

The Town Plan states: "Although development will occur outside the [urban growth area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area."[21] In its decision in Docket 8302, the Commission held that this language permitted only limited residential development, not commercial solar facilities, in the Rural Conservation District.[22] The Petitioner contends that this interpretation is incorrect and that this language allows for commercial solar facilities.

Although the design standards for the Rural Conservation District do not mention commercial solar facilities, they do specifically apply to *any* development in that district.[23] Any development in the Rural Conservation District shall observe the Town Plan's design standards in order to preserve the rural character of the district. The Petitioner is correct that the Town Plan does not state that it forbids commercial solar development.[24] That does not, however, mean that the Facility as a commercial solar development is necessarily permissible. Any development in the Rural Conservation District must meet the design standards to ensure that the development is compatible with the rural character of the area. Because the Facility would clear-cut 9.67 acres of existing forest in a prominently visible location on a hillside, as explained below, the Facility would violate the design standards and be impermissible under the Town Plan.

The Petitioner accurately observes that two smaller, net-metered, 500-kW commercial solar facilities, Kobelia Bennington and ER Paper Mill Village,[25] were approved for installation by the Commission in the Rural Conservation District and argues that therefore this Facility should also be approved.[26] This argument is unpersuasive for two reasons.

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[21] Exh. AHS-ECOS-13 at 16.

[22] Docket 8302, Order of 2/16/16, at 57 n. 42.

[23] Exh. AHS-ECOS-32 at 7. The Town Planner made this conclusion in his capacity as a representative of the Town under Vermont Rule of Civil Procedure 30(b)(6).

[24] Exh. AHS-ECOS-32 at 5-6. The Town Planner made this conclusion in his capacity as a representative of the Town under Vermont Rule of Civil Procedure 30(b)(6).

[25] *See* n.11, above

[26] *See In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 25 citing *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, at ¶ 25 ("We will . . . find error when a regulation is inconsistently applied [by an agency]. A fundamental norm of administrative procedure requires an agency to treat like cases alike.").

First, the locations, size, and character of these two much smaller plants are different from the Facility. Both approved projects are in open fields previously in regular agricultural use. They are both located in the Rural Conservation District, which includes about one-third of Bennington, but are distant from Apple Hill and the urban growth center. Kobelia Bennington is approximately 1.5 miles from Apple Hill and ER Paper Mill Village is approximately 3.8 miles from Apple Hill.[27] Neither project involved the prominently visible clear-cutting of trees on a hillside. Both projects are 500-kW net-metered facilities vice a 2.0 MW solar electric generation facility. Consequently, both projects take up less than half the acreage of the Apple Hill facility, 4.3 acres and 3.5 acres.[28] The Commission also found that:

> The visibility of [Kobelia Bennington] is expected to be minimal due to surrounding vegetation and topography. Most of the potential views of the Project will be from portions of roadways south of Route 9 and would be brief and filtered.[29]

And,

> [ER Paper Mill Village] will be minimally visible from the surrounding area, including Murphy Road. However, visibility from the road will be limited and proposed landscape screening will further mitigate any adverse effect on views from this area.[30]

Second, these cases were uncontested net-metering proceedings and their conformity with the Town Plan was not challenged by the parties or by the Commission. Each case was reviewed using the Town Plan under its own facts.

I am not persuaded by the Petitioner's argument that because commercial solar development was approved in those cases, the Facility must necessarily be approved. The Commission is not bound here by those case-specific facts but by the facts in this case. In this case, the facts indicate that the Facility would deviate from land conservation measures in both the Town Plan and the Regional Plan.

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[27] CPG #NMP-6523, Order of 10/14/15 at 4 and CPG #16-0049-NMP, Order of 11/17/16 at 4.
[28] *Id.*
[29] CPG #NMP-6523, Order of 10/14/15 at 5.
[30] CPG #16-0049-NMP, Order of 11/17/16 at 9.

Prominently Visible on a Hillside

The Petitioner challenges any reliance on the Town Plan's requirement that development in the Rural Conservation District cannot be sited in a prominently visible location on a hillside. According to the Petitioner, this requirement is vague and not clearly defined.[31] The Petitioner asserts that the Facility would not "alter the natural appearance of the topography as viewed from the highway" and would not "significantly impact the natural appeal of the hillside view."[32] The Petitioner does not agree that the Facility site on Apple Hill is necessarily on a hillside and further argues that "the [Facility] will not be visible and therefore, could not conceivably be sited in a prominently visible location."[33]

These arguments by the Petitioner are simply counterfactual. The Facility, including the access drive, would clear-cut nearly 10 acres of trees from the hillside of Apple Hill. That hillside topographically slopes with a 10% grade and a total vertical change of 103 feet over 1,028 feet. The Facility would be visible both from the neighboring highway and the Vermont Welcome Center as well as across the valley at the Mt. Anthony Country Club and the Bennington Battle Monument. While the Petitioner's amendment to the Facility would reduce its visibility, particularly from neighboring viewpoints, it would nonetheless remain a large black rectangle in the center of what was once a forested hillside at the southeastern corner of the Rural Conservation District. The Facility would be prominently visible on a hillside location.

Earth-Tone Colors and Non-Reflective Materials

The Petitioner argues that the Facility meets this design standard and therefore should be approved. The Facility would feature black solar panels resting on a galvanized frame painted black to match the solar panels, and the Facility fence would be wrapped in a black or dark-green mesh fabric. Because the Facility would be a commercial development incompatible with the rural character of the area and be prominently visible on a hillside location, as discussed above, it would unduly interfere with the orderly development of the region. Therefore, there is no need to address this argument.

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[31] Petitioner's Proposed Findings of Fact at 26.
[32] Petitioner's Proposed Findings of Fact at 26.
[33] *Id.* at 27.

Clearing Minimized

The Town Plan design standards require that any development minimize clearing of natural vegetation. The Petitioner asserts that the Facility as amended meets this design standard because the cleared area of the Facility was reduced from 10.6 acres to 9.67 acres. Because the Facility would be a commercial development incompatible with the rural character of the area and be prominently visible on a hillside location, as discussed above, it would unduly interfere with the orderly development of the region. Therefore, there is no need to address this argument.

Having given the conservation measures contained in the Town Plan and the Regional Plan due consideration, I recommend that the Commission conclude that the Facility would unduly interfere with the orderly development of the region.

Aesthetics

[30 V.S.A. § 248(b)(5) and 10 V.S.A. § 6086(a)(8)]

25. The Facility, including the GMP Line Extension, would have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area. This finding is supported by findings 26 through 28, below, and findings 6 through 20, above.

26. The Facility site is almost entirely wooded with northern hardwood species. The site on Apple Hill slopes at a 10% grade from the northeast corner to the southwest corner, falling approximately 103 feet over this distance. The topography also exhibits some slight undulations along the slope. Kane pf. at 3-5; exh. AHS-MK-2; Kane post-hearing affirmation 4/9/18 at 2.

27. The Facility will be visible to the public on nearby heavily traveled highways. The unique form and visual qualities of the Facility relative to the existing conditions and topography would create visual incongruities. Wilson pf. supp.1 at 2; Kane pf. supp.3 at 19; exhs. AHS-MK-2 at 18-19, AHS-MK-7, AHS-MK-11, and AHS-MK-12.

28. The Town Plan defines the characteristics of the Rural Conservation District, where the Facility would be built, as a transitional land use area between more developed urban growth areas and forested lands. The primary purpose of the district is to "preserve the distinctive rural character" of the area. Kane pf. supp.3 at 22-23.

Discussion

The second question in this remand review is whether the Facility would violate a clear, written community standard under the Quechee test.[34] In order for a provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed facility would be located and must apply to specific resources in the proposed facility area.[35] A clear, written community standard must be more than simply "general in nature" and must do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."[36]

The Town Plan design standards for the Rural Conservation District create four specific requirements: (1) development shall not include new commercial uses unless such uses are compatible with the rural character of the area,[37] (2) no development may be sited in prominently visible locations on hillsides or ridgelines,[38] (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures,[39] and (4) any development must minimize the clearing of natural vegetation.[40]

The Petitioner argues that the design standards are not a clear, written community standard. The Petitioner asserts that the language of the design standards is vague and general, lacking any definition or guidance.[41]

The Petitioner sought further definition of the language of the Town Plan and looked to the related land use regulations. The Petitioner cites example 4B in the Town's land use regulations for the Rural Conservation District (Figure 1, below) as further defining what

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[34] *See In re Rutland Renewable Energy, LLC*, 2016 VT 50 at ¶ 13 (Observing that the Commission uses a modified Quechee test in exercising its regulatory power over facility siting. The test first asks whether the project will have an adverse effect on scenic and natural beauty in the area in which it is located. It then asks whether the adverse effect is undue. An adverse impact on scenic and natural beauty is not undue if three conditions are met: (1) the project must not violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; (2) the project must not offend the sensibilities of the average person; and (3) the petitioner must take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.).

[35] *In re Halnon*, NM-25, Order of 3/15/01 at 22.

[36] *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11 at 83.

[37] Exh. AHS-ECOS-13 at 16.

[38] *Id.* at 26.

[39] *Id.*

[40] *Id.*; *see also* Docket 8302, Order of 2/16/16, at 56.

[41] Petitioner's Proposed Findings of Fact at 66; Petitioner's Post-Technical Hearing Reply Brief at 6, 8.

"prominently visible on a hillside" means.[42] Example 4B is a photo of a prominently visible residence in the center of an opening of a forested hillside above a farmyard on the valley floor.

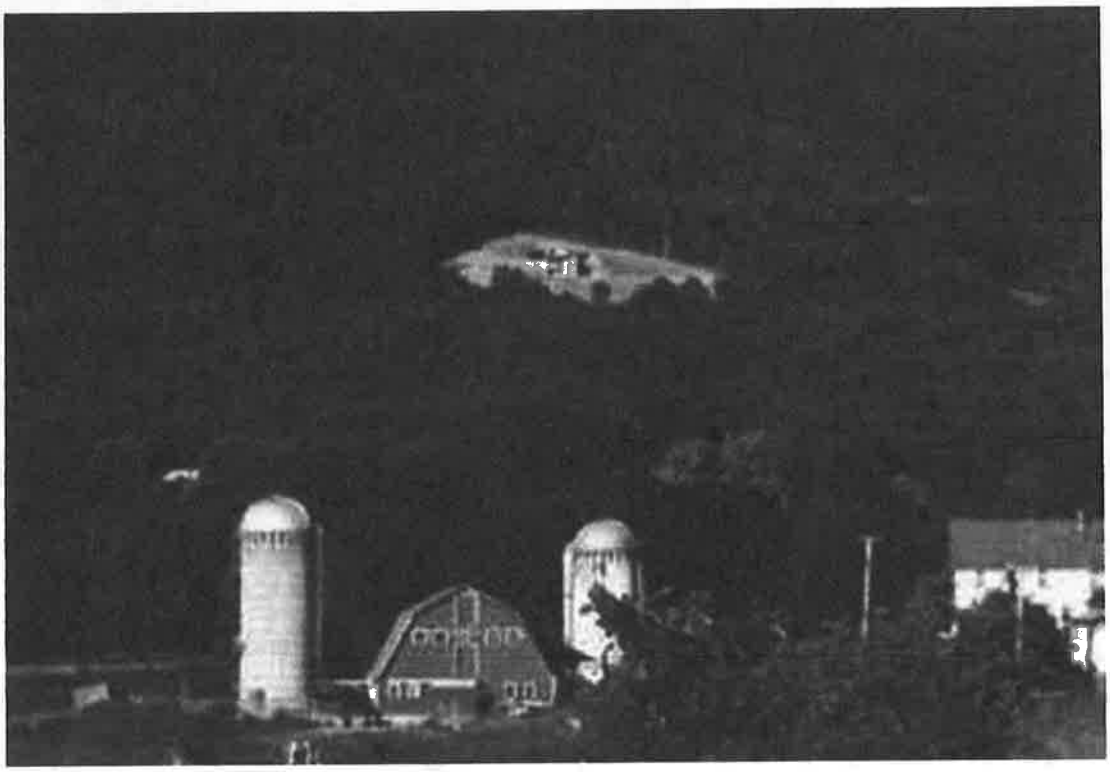

Figure 1. Bennington Land Use Regulations, Exh. AHS-ECOS-19
Example 4B. A large swath of trees was cut and the house was sited in the center of the opening significantly impacting the natural appeal of the hillside view.

Example 4B may be compared with the 3D overview simulation of the Facility on Apple Hill that the Petitioner prepared in exhibit AHS-MK-11 (Figure 2, below). While the slopes of the two hillsides and the perspectives are different, both the photo and the simulation appear to show facilities that "significantly impact the natural appeal of the hillside view."

[42] Exh. AHS-ECOS-19 at 4; Kane pf. supp. 3 at 26.

Figure 2. Exh. AHS-MK-11 3D Visual Simulation of Apple Hill Facility and the Willow Road Facility above the Vermont Welcome Center

Finally, in addressing the design standards, the Petitioner contends that "while the broader landscape is clearly scenic, the presence of the Facility does not undermine or degrade its visual quality."[43] In my opinion, the Facility would degrade the visual quality of Apple Hill. I am also not persuaded by the Petitioner's argument that the design standards are too vague and general to be applied as a clear, written community standard.

The Town Plan language is specific in nature, is specifically applicable to the Facility site, seeks to conserve scenic resources by identifying specific actionable requirements, and thus constitutes a clear, written community standard.[44] Consistent with my discussion of the Town Plan language as a land conservation measure under Section 248(b)(1), above, I also conclude here that the Facility violates this clear, written community standard.

The Facility violates two specific requirements in the Town Plan design standards for development in the Rural Conservation District. First, Apple Hill is not proposing a new

[43] Petitioner's Post-Hearing Brief in Support of its Section 248 Petition for a Certificate of Public Good at 21.

[44] Docket 8302, Order of 2/16/16, at 58 (citing *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11, at 83 ("It is appropriate for us to rely on the Town Plan as the primary source of clear, written community standards")).

commercial use that is compatible with the rural character of the area.[45] Rather, the Facility would be a further extension of the industrial growth of Bennington beyond the urban growth area and would appear as such. Second, while Apple Hill has developed an extensive visual screening plan, the Facility would nonetheless remain prominently visible on a hillside above the Vermont Welcome Center.

The Facility would have an adverse impact on aesthetics because the 9.67-acre of clear-cutting for the Facility would be visible from various public and private views, making it significantly out of context with the currently wooded view of Apple Hill and the less developed Rural Conservation District beyond it. Having concluded that the Facility would have an adverse aesthetic impact,[46] I now also recommend that the Commission conclude that the Facility would have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area. The Facility would violate a clear, written community standard because it would be incompatible with the rural character of the area and would be prominently visible on a hillside.

IV. CONCLUSION

Based upon the evidence in the record, I recommend that the Commission conclude that the Facility:

(a) would unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions and the land conservation measures contained in the plan of the affected municipality; and

(b) would have an undue adverse effect on aesthetics and on the scenic or natural beauty of the area.

I therefore recommend that the Commission deny Apple Hill's petition and request for a CPG. The Facility would not be in the public good because the Facility is inconsistent with the

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[45] Kane pf. supp. 3 at 23 ("[O]ther, non-residential uses, have been approved in the Rural Conservation District that ostensibly have not compromised the 'distinctive rural character'").

[46] Docket 8454, Order of 9/26/18 at 41 (concluding that the Facility would have an adverse impact).

Bennington Town Plan and would unduly interfere with the orderly development of the region and have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area.

To the extent the findings of fact and conclusions of law in this proposal for decision are inconsistent with any proposed findings of fact or conclusions of law submitted by any party, such proposed findings or conclusions of law, having been considered, are not adopted.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 6th day of January, 2020.

Michael E. Tousley, Esq.
Hearing Officer

V. COMMISSION DISCUSSION

The Petitioner has filed an 83-page brief, delivered oral argument, and raised 30 arguments why we should not adopt the hearing officer's 20-page proposal for decision on remand. We find the Petitioner's arguments unpersuasive. We adopt the hearing officer's recommendation that we deny the Petition on remand.

This is an order on remand from the Vermont Supreme Court.[47] The scope of our jurisdiction is limited by the Vermont Supreme Court's order. In our Final Order in this proceeding we adopted the hearing officer's first proposal for decision recommending the approval of the Petition. The Vermont Supreme Court reversed that Order and remanded the case to us for limited further review.

The Vermont Supreme Court remand ordered us to do two things: (1) "assess the impact of the project on the orderly development of the region without consideration of [the] [S]electboard's purported position on the subject"[48] and (2) "apply the standard in the Town Plan in evaluating whether the project's adverse [aesthetic] effect[s] would be undue."[49]

The proposal for decision on remand follows the Vermont Supreme Court's remand order. The proposal for decision on remand also follows the applicable direction in our Final Order denying the neighboring *Chelsea Solar* petition.[50] We incorporate by reference those

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[47] *In re Apple Hill Solar LLC*, 2019 VT 64, 219 A.3d 1295.

[48] *Id.* at ¶ 31.

[49] *Id.* at ¶ 41.

[50] Docket 8302, Order of 2/16/16, at 54; *see also* Docket 8302, orders of 4/14/17 and 4/17/17 (denying reconsideration). The Commission's denial was based on its reading of the 2010 Bennington Town Plan, which was in effect at the time that both the *Chelsea Solar* and *Apple Hill* petitions were filed. Specifically, the Commission determined that the Chelsea Solar facility would unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the facility that would be violated if it were built. The Commission also determined that the Chelsea Solar facility would violate three clear, written community standards in the 2010 Town Plan that sought to conserve the Rural Conservation district where the Chelsea Solar facility was sited immediately adjacent to the Apple Hill facility. The Commission determined that the 2010 Town Plan prohibited the following activities in the Rural Conservation district: (1) nonresidential development; (2) development sited prominently on a hillside; and (3) development that did not minimize the clearing of natural vegetation. The proposed Chelsea Solar facility was not residential, was visible on a hillside above the Vermont Welcome Center, and required clear-cutting 15 acres of trees. In this case, we differ slightly from our opinion in *Chelsea Solar* inasmuch as we characterize the first violated standard as "commercial development incompatible with the rural character of the area" rather than "nonresidential development" and agree with the hearing officer that we need not determine whether the Project would violate the third standard of requiring minimized clearing of natural vegetation.

portions of our analysis in *Chelsea Solar* that are applicable here. As we did in *Chelsea Solar*, we conclude that the proposed Apple Hill Solar Facility (the "Facility") would unduly interfere with the orderly development of the region because it would violate specific land conservation measures in the Town Plan applicable to the Facility and would have an undue adverse impact on aesthetics and the scenic or natural beauty of the area because it would violate clear, written community standards in the Town Plan applicable to the Facility.

In this Order we also deny the Petitioner's motion to amend the Petition.

Additional Procedural History

On January 6, 2020, the hearing officer issued the proposal for decision on remand recommending denial of the Petition and setting a comment deadline of January 27, 2020.

On January 13, 2020, the Petitioner filed a motion for extension of the comment deadline by one month.

On January 14, 2020, the hearing officer granted the Petitioner's motion extending the comment deadline to February 27, 2020.

On January 21, 2020, the Petitioner filed a motion for an indefinite extension of the comment deadline.

On February 4, 2020, the hearing officer denied the Petitioner's motion for an indefinite extension to the comment deadline.

On February 28, 2020, the Petitioner filed comments on the proposal for decision on remand and a request for oral argument and a site visit (the "Petitioner's Comments").

On March 11, 2020, the Clerk of the Commission issued notice that the Commission would conduct oral argument on March 25, 2020, at 10:30 A.M.

On March 18, 2020, the Commission issued an order denying the Petitioner's request for a site visit, noting that the Commissioners and Commission Staff had already visited this site and surrounding areas five times.

On March 23, 2020, the Petitioner filed a motion to amend the Petition.

On March 25, 2020, the Commission conducted an oral argument by teleconference.

On April 7, 2020, the Vermont Agency of Natural Resources ("ANR") filed comments opposing the Petitioner's motion to amend the Petition ("ANR Comments").

No other comments on the proposal for decision on remand or motion to amend were filed.

Petitioner's Motion to Amend the Petition

On March 23, 2020, the Petitioner filed a motion to amend the Petition. We deny the Petitioner's motion for two reasons. First, the motion improperly seeks to expand the scope of our jurisdiction beyond the limited remand order of the Vermont Supreme Court. Second, it is untimely.[51] The Petitioner seeks to amend the Petition while the case is on review pursuant to a limited remand order from the Vermont Supreme Court. It is too late to amend the Petition now.

When this case was appealed to the Vermont Supreme Court, the Commission no longer had jurisdiction over it: "In this jurisdiction, it has long been the rule established by judicial decision that when a proper notice of appeal from a final judgment or order of the lower court is filed the cause is transferred to this Court, and the lower court is divested of jurisdiction as to all matters within the scope of the appeal."[52] Had the Vermont Supreme Court remanded the case to the Commission with no instructions whatsoever, then we would arguably have a broader scope of jurisdiction. That is not, however, what happened here.

The Vermont Supreme Court returned this case to the Commission for the limited purpose of reassessing the evidence, without considering the Town's position regarding the Facility, to determine whether the Facility would unduly interfere with orderly development and whether it violated a clear, written community standard. We issued a Final Order that the Vermont Supreme Court overruled and remanded. Our jurisdiction is limited by the scope of the

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[51] *See* Docket 8302, Order of 4/14/17, at 21-23 (motion to amend of petition is untimely because it was offered after the Final Order and the record was closed); *see also* Docket 8302, Order of 10/12/17 at 4 (motion for reconsideration and amendment of petition is denied because the case was already decided and was on appeal to the Vermont Supreme Court).

[52] *Kotz v. Kotz*, 134 Vt. 36, 38 (1975) (citing *Downer v. Battles*, 103 Vt. 201, 152 A. 805 (1930); *Alfred v. Alfred*, 87 Vt. 542, 90 A. 580 (1914); *see also, e.g.*, *Investigation into the Existing Rates of Shoreham Telephone Company, Inc.*, Docket 6914, Order of 12/14/06 (after Commission issued a final decision it had no jurisdiction to address proposed stipulation because the case had been appealed).

remand. We have no jurisdiction now to go back and reopen the original Petition and hear new evidence on that Petition because that would be outside the scope of that limited remand.[53]

Further, even if we had jurisdiction over this matter, the Petitioner's request to amend the Petition is untimely because the request came after the case had been appealed and remanded with a limited scope.[54] The Petitioner's motion to amend asks us to look at a different project with new exhibits that were not entered into evidence before our Final Order or the remand order.

The Petitioner's own filings in this case demonstrate that the Petitioner understood and accepted the limited scope of the remand ordered by the Vermont Supreme Court. In response to the Vermont Supreme Court's limited direction on remand, we assigned a hearing officer to do what the Court directed and make a recommendation in the form of a proposal for decision on remand. The hearing officer sought input as to the next procedural steps from the parties. The Petitioner proposed that the hearing officer respond to the Court's mandate and issue a proposal for decision on remand "without further filings" because "extensive evidence already exists in the record to support the issuance of a certificate of public good."[55] The hearing officer, relying on the evidence in the record, but without considering the Town's position (since that is what the Vermont Supreme Court directed), then issued a proposal for decision on remand recommending that we deny the Petition. The basis for the recommended denial was that the Facility would unduly interfere with orderly development of the region and would have an undue, adverse impact on aesthetics because it would violate a clear, written community standard.

Now the Petitioner wants to change the Petition significantly by amending it. While Commission Rule 2.204(G)(1) states that an amendment may be made at any time, there are jurisdictional and practical limits on when a petition may be amended. The Petitioner's

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[53] *See Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of the "Addison Natural Gas Project" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont*, Docket 7970, Orders of 9/4/14 and 1/16/15 (the Commission twice determined that it had no jurisdiction to assess the impact of separate increases in the project cost of an approved petition in the absence of specific limited remands because the case had been decided and was on appeal with the Vermont Supreme Court).

[54] *See* Docket 7970, Orders of 9/4/14 and 1/16/15.

[55] Proposed Recommendations of Apple Hill Solar LLC for Further Proceedings, filed 11/13/19, at 2.

interpretation of our amendment rule would lead to the absurd result of allowing amendments that would give a project proposal a potentially infinite lifespan. Instead, the Commission requires that new projects be filed as new projects.[56]

Having failed to receive our approval of the neighboring *Chelsea Solar* petition, the Petitioner twice sought unsuccessfully to amend it.[57] In those instances, like this one, the motions to amend were untimely because the record was closed, the Final Order had been issued, and the case as reflected in the Final Order was on appeal to the Vermont Supreme Court. This case is the same (in fact, it is further along, as we now have the case back on a limited remand) and cannot be amended.

We also observe that, as was the case with the Petitioner's first amendment of the Project, the Petitioner's motion to amend is also insufficient.[58] As noted in the ANR Comments, "the activities described in the Amendment present a threat of substantial harm to very rare and rare plants" that are not addressed in the amendment request.[59]

We therefore deny the Petitioner's motion to amend without prejudice to the Petitioner filing a new petition subject to the law at the time any new petition is filed.

Petitioner's Arguments Opposing the Proposal for Decision on Remand

In its brief on the proposal for decision on remand and in its oral argument, the Petitioner argues that:

1. The Vermont Supreme Court did not decide that the four clear, written community standards determined by the Commission in the *Chelsea Solar* Final Order are clear, written community standards in this case.
2. The proposal for decision on remand incorrectly concludes the four standards in Town Plan language that the Commission in *Chelsea Solar* determined were clear, written community standard are clear, written community standards.

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[56] *See* Docket 8302, Order of 10/12/17 (amendment request denied without prejudice to filing a new petition).

[57] See Docket 8302, Orders of 4/14/17 and 10/12/17.

[58] Docket 8454, Order of 5/24/17 at 3.

[59] ANR Comments as 1-2. ANR also argues that "the activities described in the Amendment are a pretext to constructing the Apple Hill solar project and constitute site preparation in violation of the prohibition, contained in 30 V.S.A. § 248(a)(2), on conducting site preparation or construction prior to issuance of a certificate of public good." ANR also requests that we issue a cease and desist order. This Order denies the Petition and moots ANR's request.

3. The proposal for decision on remand misapplies the "prominently visible on a hillside" standard.
4. The proposal for decision on remand misinterprets and expands the clear, written community standards determined in the *Chelsea Solar* Final Order.
5. The proposal for decision on remand's reliance on the term "forest" and the extent of clear-cutting of the site ignores the Town Plan and introduces a new Section 248 criterion.
6. The proposal for decision on remand misconstrues what regional impact is and ignores the evidence showing there is no regional impact.
7. The four clear, written community standards determined in the *Chelsea Solar* Final Order do not apply to the Apple Hill site.
8. The proposal for decision on remand inappropriately relies on evidence from the neighboring *Willow Road* case in this case.
9. The proposal for decision on remand erroneously relies on the zoning bylaws.
10. The proposal for decision on remand erroneously assesses visibility under the orderly development criterion in Section 248(b)(1).
11. The proposal for decision on remand incorrectly derives a clear, written community standard from Section 3.1 of the Bennington Town Plan.
12. Once a land use is permitted in a rural area, the size of a solar facility, the amount of clearing to develop the facility, and the amount of screening of the solar facility is immaterial.
13. The proposal for decision on remand erroneously concludes that the Facility's location outside the Urban Growth Area violates the Regional Plan.
14. The proposal for decision on remand fails to address greenhouse gas emissions.
15. The proposal for decision on remand erroneously concludes that the Town Plan language about the Rural Conservation District is a land conservation measure.
16. The proposal for decision on remand's application of aesthetics violates the Petitioner's due process and equal protection rights under the Vermont Constitution.
17. The proposal for decision on remand's application of aesthetics as applied to the Facility violates the Common Benefits Clause of the Vermont Constitution.
18. The proposal for decision on remand's application of undue adverse effect on aesthetics as applied to the Facility is an unconstitutional redelegation.
19. The proposal for decision on remand's application of the aesthetics criterion in this case is an unconstitutional redelegation.
20. The proposal for decision on remand's application of its modified Quechee test is unlawful and invalid as applied to the Facility because the modified Quechee test is a *de facto* rule that has not complied with the Vermont Administrative Procedure Act.

21. The proposal for decision on remand's test for undue aesthetics effect derived from 30 V.S.A. § 248(b)(5) as applied to the Facility violates 24 V.S.A. § 4413(b).
22. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) violates the Petitioner's due process and equal protection rights under the Vermont Constitution.
23. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) violates the Petitioner's rights under the Common Benefits Clause of the Vermont Constitution.
24. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) constitutes an unconstitutional redelegation.
25. The proposal for decision on remand's application to the Facility of the criterion to determine no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) is a *de facto* rule that is invalid because it has not been issued in compliance with the Vermont Administrative Procedures Act.
26. The proposal for decision on remand's application to the Facility of the criteria of no undue effect on aesthetics and no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b), violates the Common Benefits Clause and the Petitioner's rights to due process under the Vermont Constitution.
27. The proposal for decision on remand's application to the Facility of the aesthetics criterion in 30 V.S.A. § 248(b)(5) and the orderly development criteria in 30 V.S.A. § 248(b)(1) constitutes unlawful viewpoint discrimination violating the Petitioner's free speech, equal protection and due process rights.
28. The proposal for decision on remand's application to the Facility of the aesthetics and orderly development criteria violates Article 1 of the Vermont Constitution, the public trust doctrine and the Petitioner's due process rights.
29. The proposal for decision on remand's procedural background is incomplete.
30. The findings in the proposal for decision on remand do not mirror the language of the Petitioner's proposed findings.

Rulings on the Petitioner's Arguments

The Vermont Supreme Court remanded this case for our review so that we could make a public good determination based on additional findings under two criteria of Section 248: orderly development and aesthetics. The scope of our review is limited by the remand order.

We have organized our analysis of the Petitioner's various arguments into four categories: orderly development, aesthetics, public good, and constitutional challenges. First, we will address the Petitioner's orderly development arguments. Second, we will address the Petitioner's aesthetics arguments. Third, we will address the Petitioner's arguments that are not specifically related to either orderly development or aesthetics but arguably have some bearing on our public good determination. Fourth, we will address the Petitioner's constitutional challenges to the recommendations made in the proposal for decision on remand.

A. Orderly Development

1. Petitioner's Argument: The proposal for decision on remand misconstrues what regional impact is and ignores the evidence showing there is no regional impact.

The Petitioner bases this argument on language in the proposal for decision on remand that states:

> The Facility would be visible at and near the Vermont Welcome Center for southwestern Vermont just above a major highway interchange. As the Intervenors assert, "the black box will stick out like a sore thumb" on the principally forested Apple Hill.[60]

While metaphoric, the Intervenors' allusion to a "black box" is supported by the evidence. The findings in this case state that the solar panels will be black, the metal structure that the panels are attached to will be painted matte black, and that the fence will be visible and wrapped in black sheeting.[61]

The Petitioner acknowledges that "partially screened views of a fence might be possible" but then argues, without any supporting law, that "a fence is not part of the facility."[62] The Petitioner is correct that the fence would be visible. The Petitioner is incorrect in claiming that the fence is not part of the Facility. It is. The Facility refers to the entirety of the Project site. The visibility of the Facility is established in the evidence supporting findings 15 through 19,

[60] Proposal for Decision on Remand at 11 (citing Intervenors' Comments on the first Proposal for Decision, 7/23/18, at 11).

[61] *See* Findings 8 and 101 of the Final Order and Finding 3 of the Proposal for Decision on Remand.

[62] Petitioner's Comments at 37.

above. The fence would ensure safety and minimize impacts on wildlife, and it would be a required part of the Facility.[63] The Petitioner cannot claim the benefits of meeting certain required criteria by building a fence, while also claiming that the fence is not part of the Facility.

The proposal for decision is consistent with the evidence. The Facility would deviate from the Regional Plan because it would be development that would "sprawl outward" from the Urban Growth Area and "detract from the region's rural character."[64] The highway complex serves as a boundary between the Urban Growth Area and the Rural Conservation District. The Urban Growth Area on one side of the highway is heavily developed. But the Town and Regional plans both have determined that development in the Rural Conservation District—where the Facility would be located—shall remain rural in character. The proposal for decision on remand correctly finds that the Facility's "black box" appearance in a heavily forested area would not be consistent with the requirement to maintain the rural character of the area.

We conclude that the Petitioner's argument is both counterfactual and unpersuasive.

2. Petitioner's Argument: The proposal for decision on remand erroneously assesses visibility under the orderly development criterion in Section 248(b)(1).

The Petitioner asserts that "[v]isibility relates solely to aesthetics" and complains (without citation) that the proposal for decision attempts to install this aesthetics criterion into its review of orderly development.[65] The Petitioner then contends that under orderly development the Facility must only comply with "one specific criterion" stated at Section 248(b)(1)(B).[66] The

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[63] Final Order, Findings 14, 15, 20, 101, 104, and 129; the ANR MOU at 12 (acknowledging that a fence is a requirement of the National Electrical Code and National Electrical Safety Code); and condition 40 of the proposed certificate of public good ("the CPG Holder shall install and maintain fencing with a ground-level opening of six inches above the ground's surface").

[64] Finding 25 (citing the Regional Plan at 51).

[65] Petitioner's Comments at 40.

[66] Section 248 (b)(1)(B), which states:

> With respect to a ground-mounted solar electric generation facility, the facility shall comply with the screening requirements of a municipal bylaw adopted under 24 V.S.A. § 4414(15) or a municipal ordinance adopted under 24 V.S.A. § 2291(28), and the recommendation of a municipality applying such a bylaw or ordinance, unless the Commission finds that requiring such compliance would prohibit or have the effect of prohibiting the installation of such a facility or have the effect of interfering with the facility's intended functional use.

Petitioner then misapplies that inapplicable language to this case.[67] There was no municipal solar screening ordinance adopted pursuant to Section 248(b)(1)(B) by Bennington that was reviewed as part of this case. Instead, the Petitioner incorrectly uses this language to comment on the proposal for decision's review of the land conservation measures in the Town Plan, which were required to be reviewed by other, applicable language in Section 248(b)(1).[68]

It is unclear how the proposal for decision inserted a "back-door" application of (b)(5) visibility review into (b)(1) as the Petitioner argues.

We are not persuaded by this argument by the Petitioner. Section 248(b)(1)(B) does not apply to this case both because it was not in the statute when the Petition was filed and because there is no relevant municipal screening ordinance in this case.

3. Petitioner's Argument: The proposal for decision on remand erroneously concludes that the Facility's location outside the Urban Growth Area violates the Regional Plan.

The Petitioner asserts that the proposal for decision on remand fails to recognize language in the Regional Plan that "expressly supports development *in and around growth centers*."[69] According to the Petitioner, the "around" language allows for projects such as the Facility, because it is located near a growth center. However, the Petitioner fails to put that language into context as the proposal for decision on remand does at finding 25, which states:

> Future development should be concentrated *in and around growth* centers; that is, the urban centers and villages in the region. These centers of development and activity should be surrounded by a rural landscape of farmlands, forests, and small rural residential communities. Moreover, the demarcation between growth centers and the rural environment should be quite distinct. Growth centers require

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[67] Section 248 (b)(1)(B) became part of Title 30 with Act 56 in July 2015, after this Petition was filed in March 2015, and is therefore not applicable to this case and was not assessed as part of the review of this case. *See In re Rutland Renewable Energy, LLC*, 2016 VT 50 at ¶ 10 ("[This language does] not purport to be retroactive. Thus, we cannot consider the new requirements or the process that led to their enactment.").

[68] Section 248(b)(1) states:

> Before the Public Utility Commission issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment, or construction: (1) With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

[69] Petitioner's Comments at 46.

> careful delineation to accommodate future growth while protecting the values of the rural countryside. *If development is allowed to sprawl outward from urban areas and villages the intervening open lands will eventually disappear, and the region will have lost much of its distinctive rural character and appeal. The land use plan, therefore, directs new growth to urban and village areas and allows the type of development in rural areas that will not prove costly to municipalities nor detract from the region's rural character.* (Emphasis added.)

We are not persuaded by the Petitioner's argument. We agree with the proposal for decision on remand's conclusion that while the Regional Plan does encourage concentrated growth in and around the Urban Growth Area, it does so with the express direction that such growth will not "sprawl outward" and "detract from the region's rural character." The Facility, if built, would do precisely what the Regional Plan does not allow.

4. Petitioner's Argument: The proposal for decision on remand erroneously concludes that the Town Plan language about the Rural Conservation District is a land conservation measure.

The Petitioner argues that the Town Plan requirements about the Rural Conservation District are not land conservation measures "because they are ambiguous and are not enforceable."[70] In support of its argument, the Petitioner cites *In Re Chaves A250 Permit Reconsider*.[71] Among other things, *Chaves* stands for the proposition that under Act 250, town plan language that is "broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts" needs to list "specific requirements that are legally enforceable" to prohibit a project under Act 250.[72] The Vermont Supreme Court goes on to opine that in an Act 250 review the Environmental Court should look to zoning regulations to resolve any ambiguity in a town plan.[73]

While *Chaves* is instructive, the Commission's review of petitions under Section 248 is different from Act 250 review. The Vermont Supreme Court has long held that utility site-

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[70] Petitioner's Comments at 47.

[71] *In re Chaves Permit Reconsider*, 2014 VT 5, 195 Vt. 467.

[72] 2014 VT 5, at ¶ 41 (citing *In re JAM Golf, LLC*, 2008 VT 110, ¶¶ 13-14 (holding that ordinance which required design to "protect" natural resources was unconstitutionally vague because it created no real standard)).

[73] *Id.* at ¶ 41 (citing *In re Molgano*, 163 Vt. 25, 30, 653 A.2d 772, 775 (1994) ("Zoning bylaws are more than strong indications of legislative intent in determining the meaning of an ambiguous town plan; they are the specific implementation of the plan.")).

selection review under Section 248 differs from project environmental review under Act 250 because, for instance, in Act 250 review "state and local regulatory review coexist[s]."[74] The issue of whether there is a "clear, unambiguous community standard" in Act 250 cases differs from whether there is a "clear, written community standard" in Section 248 cases. Notably, the Petitioner's argument, which would require a review of zoning bylaws, contradicts its own argument that "zoning standards (or *de facto* zoning standards) … are pre-empted under section 248 review."[75] The Petitioner further contends that a "decision that relies on municipal zoning standards is manifestly erroneous."[76]

We agree with the Petitioner that relying on zoning bylaw standards in this case would be incorrect. Therefore, we are not persuaded by the Petitioner's argument that, under *Chaves*, the Town Plan is ambiguous and requires a further look at zoning standards.

Further, the Petitioner's reliance on *Chaves* disregards the requirement in Section 248 that the Commission affirmatively find that a project will promote the public good and that the project meets all of the required criteria. The Petitioner presumes that every development project is presumptively valid unless and until it is proven that the project violates a specific, legally enforceable zoning bylaw or municipal plan requirement. That is not the correct standard for Section 248 cases, and the Petitioner's arguments provide no explanation of how *Chaves* can be reconciled with the requirement in Section 248 that the Commission make affirmative public-good findings.

5. Petitioner's Argument: The proposal for decision on remand's application to the Facility of the criterion to determine no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) is a *de facto* rule that is invalid because it has not been issued in compliance with the Vermont Administrative Procedures Act.

The Petitioner contends that the proposal for decision on remand's application of the legislative direction in Section 248(b)(1) amounts to a *de facto* rule. Without any citation to case law, the Petitioner opines that:

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[74] *Rutland Renewable Energy, LLC*, 2016 VT 50, at ¶ 18.
[75] Petitioner's Comments at 39.
[76] Petitioner's Comments at 39-40.

> The [Commission] has not followed the require[d] process for adopting its *de facto* rule providing for various criteria for general application related to application of criterion to determine no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1). The [Commission] cannot simply promulgate and implement *de facto* rules without following the requirements for adoption of rules under the [Vermont Administrative Procedures Act]. Its application in the [proposal for decision on remand] to [the Petitioner] is therefore unlawful.[77]

We disagree. Section 9 of Title 30 provides the Commission with "the powers of a court of record." The Vermont Supreme Court has long held that the Legislature has authorized the Commission to serve as a quasi-judicial body:

> The Public [Utility] Commission is an administrative body, clothed in some respects with quasi-judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly.[78]

As an administrative agency acting in a quasi-judicial capacity, the Commission is bound to follow the substantive standards and procedural requirements set forth in applicable statutes and procedural rules. As a quasi-judicial body, the Commission may also rely upon its own precedent in interpreting the direction of the Legislature provided in Section 248 of Title 30.[79]

The Vermont Supreme Court has recognized that the Commission's quasi-judicial powers include interpreting statutes.[80] There is no statutory requirement for the Commission to go

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[77] Petitioner's Comments at 52-53

[78] *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 20 A.2d 117 (1941) (citing *Sabre v. Rutland R. R. Co.*, 86 Vt. 347, 361, 362, 85 A. 693 (1913) and *Bessette v. Goddard*, 87 Vt. 77, 81, 88 A. 1 (1913)); *see also George v, Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635, 637 (1914) ("If an impartial tribunal is provided for the determination of the questions of necessity and compensation, and the provisions with respect to notice and hearing and decision upon evidence and the judicial determination of questions of law are all provided for, the Constitution is satisfied, and due process of law is accorded, although the determination of facts is left to a body not strictly a court but to an administrative body exercising quasi-judicial functions. Such a body is our Public [Utility] Commission.").

[79] *Application of Twenty-Four Elec. Utilities*, Docket 5330-C, Order of 6/4/92, at n.2 ("[This] principle applies to references to formal decisions of this quasi-judicial Commission, arising from contested cases in which the Commission has acted in its judicial role. Such references are essential in explaining the policy reasons for, and precedential value of, prior Commission decisions.").

[80] *In re SolarCity Corporation*, 2019 VT 23, ¶ 9, 210 A.3d 1255; *see also In re Derby GLC Solar, LLC*, 2019 VT 77, ¶ 18, 221 A.3d 777.

through Vermont Administrative Procedures Act rulemaking procedures before issuing decisions on CPGs.[81] When an administrative agency performs rulemaking, it must follow the requisite requirements for rulemaking. Rulemaking involves the promulgation of policies and guidelines of general applicability.[82] But when an administrative agency sits in its quasi-judicial capacity, it renders decisions as a court would with an accompanying legal analysis.[83] That is different from rulemaking.

The hearing officer's review of the orderly development criterion of Section 248 conforms to relevant statutes and the Commission's precedent. It is not a *de facto* rule that required rulemaking before being applied. We are not persuaded by this unsupported argument.

B. Aesthetics

1. Petitioner's Argument: The Vermont Supreme Court did not decide that the four clear, written community standards determined by the Commission in the *Chelsea Solar* Final Order are clear, written community standards in this case.

The Petitioner contends that the proposal for decision on remand erroneously concludes that the Vermont Supreme Court determined that the four site standards in the Bennington Town Plan for the Rural Conservation District are clear, written community standards. The Petitioner misconstrues the hearing officer's proposal for decision on remand.

The Petitioner is correct that the Vermont Supreme Court did not conclusively state that the four standards are clear, written community standards. Instead, the Court rejected our previous conclusion that the four standards are *not* a clear, written community standard. The Vermont Supreme Court stated as follows:

> [We] conclude that the record does not support the finding that the Town applied the standards in its Town Plan concerning the Rural Conservation District inconsistently or selectively such that the standards do not constitute clear, written

[81] *See, e.g.*, 30 V.S.A. §§ 9 (authorizing the Commission to render judgments and orders), 11(c) (authorizing the Commission to make findings and state rules of law generally), 248 (authorizing the Commission to issue CPGs).

[82] *See Re Mountain Cable Company dba Adelphia Communications Corporation Additional party: Better TV of Bennington*, Docket 5545, Order of March 10, 1992 (citing *Appeal of Stratton*, 157 Vt. 436 (1991)); *see also In re Diel*, 158 Vt. 549 (1992) (A "rule" is an "agency statement of general applicability which implements, interprets, or prescribes law or policy.").

[83] *Id.*

> standards. We accordingly direct the [Commission] to determine whether the project violates those standards in assessing whether the project's adverse effects are undue.[84]

The Court rejected our conclusion that the Town Plan did not include clear, written community standards because none of the evidence we relied on in making that conclusion "demonstrate[d] that the Town inconsistently or selectively applied the Town Plan." Because of our previous conclusion, we did not make our required Quechee-test findings about whether the Facility would violate a clear, written community standard. The Court therefore directed us to make such findings "to determine whether the project violates those standards."

The Court's directive implies that the four standards are in fact clear, written community standards. After all, there would be no need "to determine whether the project violates those standards" if the standards are not enforceable because they do not qualify as clear, written community standards. However, we need not resolve whether the Court's implication is binding here because the proposal for decision on remand explains that the four standards are clear, written community standards. We agree with the hearing officer's analysis.

The Petitioner next argues that the Vermont Supreme Court directed the Commission to find new evidence in order to determine a second time that the four standards in the Town Plan are not clear, written community standards. We disagree. To begin, even if this were what the Court asked us to do, the Petitioner has failed to provide any new evidence to support its argument that the Town Plan language does not include clear, written community standards. The Petitioner instead reiterates arguments based on disqualified evidence addressing the Town's position on the Petition and on inapplicable Act 250 and zoning bylaws—arguments that we rejected in our *Chelsea Solar* decision.[85] The Petitioner presses these claims without referencing or attempting to distinguish our previous rejection of these same arguments in *Chelsea Solar*.

The Petitioner's argument is outside the scope of our limited remand. Even if it were within the scope, we would remain unpersuaded by the Petitioner's argument.

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[84] 2019 VT 64, at ¶ 36.
[85] Docket 8302, Order of 4/14/17 at 20.

2. Petitioner's Argument: The proposal for decision on remand incorrectly concludes the four standards in Town Plan language that the Commission in *Chelsea Solar* determined were clear, written community standard are clear, written community standards.

The Petitioner argues that the proposal for decision on remand erroneously concludes that the Town Plan articulates four clear, written community standards.[86] The Petitioner relies on zoning bylaws and inapplicable land development law that the Commission rejected in *Chelsea Solar* (and above), to reiterate an argument that the language of the Town Plan is too ambiguous to serve as a clear, written community standard.[87]

Again, the Petitioner argues against itself by relying on zoning bylaw precedent that the Petitioner also contradictorily argues is "pre-empted" from consideration by *Rutland Renewable Energy, LLC*.[88] The Petitioner does not address its own contradiction or the Commission's determination in *Chelsea Solar,* and we are not persuaded by this argument.

3. Petitioner's Argument: The proposal for decision on remand misapplies the "prominently visible on a hillside" standard.

The Petitioner makes several assertions under this argument, none of which are persuasive.

First, the Petitioner argues that the Facility would not violate the standard set in the Town Plan because while the Facility's fence would be minimally visible, the Facility itself would remain invisible behind the fence.[89] As noted earlier, we disagree because the fence is a necessary part of the Facility. The Petitioner cites no precedent that supports the argument that the fence is not part of the Facility, and we are not persuaded.

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[86] Petitioner's Comments at 14.

[87] Petitioner's Comments at 14-15 (citing *In re Handy*, 171 Vt. 336, 349 (2000) ("A restriction on development is valid 'only if it is accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses.'")); *see Chelsea Solar*, Docket 8302, Order or 4/14/17 at 20 (rejecting these arguments). As noted earlier, we incorporate by reference those portions of our analysis in *Chelsea Solar* that are applicable here.

[88] *Id.* at 11 (citing 2016 VT 50 at ¶¶ 35-36 ("[T]he permitting process pursuant to § 248 preempts municipal zoning requirements altogether.").

[89] *Id.* at 17-18.

The Petitioner also reiterates the argument that the Facility on Apple Hill would not be on a hillside.[90] The Petitioner persists in this argument despite that fact that its own aesthetics consultant acknowledged that there is a moderate slope of approximately 9 to 15% at the site, which was reiterated in a post-trial filing and is a finding in the proposal for decision on remand.[91]

The Petitioner further argues that the finding that the Facility would be visible from the golf course at the Mt. Anthony Country Club is irrelevant because it is a mile away and a private facility.[92] These features do not change the fact that the whole 10-acre Facility on the currently forested Apple Hill, including both the fence and the solar panels, would be prominently visible above the Bennington Welcome Center. A portion of the Facility would be visible from the Bennington Battle Monument and the whole facility would be prominently visible from the golf course.[93]

We are also unpersuaded by the Petitioner's citations to zoning bylaws and inapplicable land use planning law to assert that the Town Plan and municipal bylaws require that a clear standard and definition of a hillside be stated.[94] This argument includes the Petitioner's conclusion that a "drone's view" of the Facility is not the test used by the Town of Bennington.[95]

With regard to the "drone's view," we observe that both Figure 1 and Figure 2 in the proposal for decision on remand are exhibits created and introduced by the Petitioner. The hearing officer correctly noted that the Petitioner's own exhibits rebut the Petitioner's claim that "while the broader landscape is clearly scenic, the presence of the Facility does not undermine or degrade its visual quality."[96] The hearing officer used a "drone's view" in Figure 2 as one of

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[90] *Id.* at 20.

[91] Tr. 3/22/18 at 39 (Kane); Proposal for Decision on Remand Finding 1.

[92] Petitioner's Comments at 83.

[93] *See* Findings 18 and 19, above.

[94] Petitioner's Comments at 20-21 (citing *In re Kisiel*, 172 Vt. 124 (2000) (reversing the Environmental Board's Act 250 review and denial of proposed subdivision because the development project was not incompatible with the town plan); *In Re Green Peak Estates*, 154 Vt. 363, 368 (1990) (affirming Environmental Board Act 250 review and decision that subdivision development was not in conformance with either the town or regional plan); and *In re Handy*, 171 Vt. 336, 349 (2000) (holding that selectboard's denials of consent to proceed using authority of town statute zoning bylaws that were being amended unconstitutionally gave town selectboard unbridled discretion to decide whether to review applications under the old or new zoning bylaws)).

[95] Petitioner's Comments at 17.

[96] Petitioner's Post-Hearing Brief in Support of its Section 248 Petition for a Certificate of Public Good at 21.

many evidentiary bases for Finding 27 that reiterates the Petitioner's aesthetics consultant's conclusion that "the unique form and visual qualities of the Facility relative to the existing conditions and topography would create visual incongruities."[97]

Recognizing that Figure 2 is a demonstrative aid used to respond to an argument about visual incongruity, this "drone's view" of the Facility created by the Petitioner's consultant does not form the basis of our conclusion that the Facility would violate the second of the four standards in the Town Plan because it would be prominently visible on a hillside. That conclusion is based on the other findings made in the proposal for decision on remand.[98]

4. Petitioner's Argument: The proposal for decision on remand misinterprets and expands the clear, written community standards determined in the *Chelsea Solar* Final Order.

We denied the *Chelsea Solar* petition because we concluded that the proposed Chelsea Solar facility violated the Town Plan, which designated the Rural Conservation District as an area conserved for less development:

> Specifically, the Town Plan states that "[a]lthough development will occur outside [the Urban Growth Area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area."[99]

We interpreted this language to permit only limited residential development in the Rural Conservation District. We further concluded that "[w]hile limited residential development is permitted, commercial development is prohibited with certain rural exceptions."[100]

In our review of aesthetics, we determined that this language was the first of four clear, written community standards applicable to the Chelsea Solar facility:

> The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted, (2) no development may be sited in prominently visible locations on hillsides or ridgelines, (3) any development must utilize earth-tone colors and non-reflective

[97] *See also* Kane pf. supp.3 at 19; exhs. AHS-MK-2 at 18-19, AHS-MK-7, AHS-MK-11, and AHS-MK-12.
[98] *See, e.g.*, Findings 1, 26.
[99] Docket 8302, Order of 2/16/16 at 51 (citing the 2010 Bennington Town Plan, exh. AHS-ECOS-13 at 16).
[100] *Id.* at 52 (citing the Town Plan at 16 and 26).

materials on exterior surfaces of all structures, and (4) any development must minimize the clearing of natural vegetation.[101]

In the proposal for decision on remand, the hearing officer recast the language of the first standard. Rather than restate the *Chelsea Solar* standard that "only limited residential development is permitted," the hearing officer determined that this first requirement was better stated as "development shall not include new commercial uses unless such uses are compatible with the rural character of the area."[102] This change reflects testimony from the Petitioner's aesthetics consultant, not available in *Chelsea Solar*, that "other, non-residential uses, have been approved in the Rural Conservation District that ostensibly have not compromised the 'distinctive rural character.'"[103] The proposal for decision on remand then recommends that we find that the Facility would have an undue adverse impact on aesthetics because "Apple Hill is not proposing a new commercial use that is compatible with the rural character of the area."[104]

The Petitioner asserts that the hearing officer's change to the first clear, written community standard we articulated in *Chelsea Solar* "misinterprets and impermissibly expands" that first clear, written community standard.[105] The Petitioner contends that this new language creates a new "vague standard-less notion."[106] The Petitioner cites to other solar and electrical projects approved by the Commission in the Rural Conservation District, even though the hearing officer has distinguished those projects in the proposal for decision on remand.[107] The

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[101] *Id.* at 52 (citations omitted).
[102] Proposal for Decision on Remand at 16.
[103] Kane pf. supp. 3 at 23.
[104] Proposal for Decision on Remand at 18-19.
[105] Petitioner's Comments at 21.
[106] *Id.* at 23.
[107] Proposal for Decision on Remand at 12-13. The proposal for decision on remand does not address our 2012 approval of the replacement of existing electrical infrastructure in the Rural Conservation District. The Facility at issue here is distinguishable from that case because that case did not seek to build a multi-acre commercial solar development but rather was a reliability improvement project with transmission and distribution upgrades by public utilities that was supported by the Town and resolved in a memorandum of understanding between the parties that included rural conservation offsets. *See Joint Petition of Vermont Electric Power Company, Inc. and Vermont Transco LLC (collectively, "VELCO") and Central Vermont Public Service Corporation ("CVPS") for a certificate of public good pursuant to 30 V.S.A. § 248 authorizing the construction of the Bennington Substation Project, including: (1) the construction of a new VELCO Bennington substation and a new CVPS substation at a new location; (2) the removal of VELCO's existing Bennington substation; (3) the modification of the existing CVPS Woodford Road substation; (4) the installation of a temporary CVPS switch; and (5) the construction of associated transmission plant, all in the Town of Bennington, Vermont*, Docket 7763, Order of 8/17/12.

Petitioner then asserts that "this an incorrect and highly selective reading of the applicable Regional Plan provisions."[108] The Petitioner then jumps to language in the Regional Plan that seeks to limit urban sprawl by maintaining the "demarcation between growth centers and the rural environment," and concludes that "[s]uch reasoning is completely vacuous, lacking in substantial evidence, and arbitrary and capricious."[109]

We are not persuaded. The hearing officer's recasting of the first Town Plan standard reflects a more precise reading of the Town Plan as informed by the Petitioner's aesthetics consultant and a review of the other cases approved by the Commission in the Rural Conservation District. We adopt the proposal for decision on remand's recommendation that the Facility would violate this first clear, written community standard in the Town Plan and make the Facility's adverse aesthetics impact undue under the Quechee test.

5. Petitioner's Argument: The four clear, written community standards determined in the *Chelsea Solar* Final Order do not apply to the Apple Hill site.

The Petitioner argues that the design standards in the Town Plan cannot be clear, written community standards because they apply throughout the Rural Conservation District, which encompasses "over 13,600 other acres in Bennington."[110] Because the standards apply to so large an area, the Petitioner contends that "the project site is not part of any area of special importance."[111] In support of this argument, the Petitioner cites to the Commission's denial of a request for reconsideration in *In re Petition of Rutland Renewable Energy, LLC*.[112]

The Facility is in the Rural Conservation District. As the Vermont Supreme Court observed in its remand decision:

> The project site is in the southwest corner of a Rural Conservation District as defined in the Bennington Town Plan. According to the Town Plan, Rural

[108] Petitioner's Comments at 30.
[109] *Id.* at 31
[110] Petitioner's Comments at 39.
[111] *Id.* at 39.
[112] *In re Petition of Rutland Renewable Energy, LLC*, Docket 8188, Order of 5/6/15 at 7 (citing *In re Halnon*, NM-25, Order of 3/15/01, at 23-24 ("[T]he provisions in the town plan and zoning ordinances cannot be considered clear, written community standards under the 'Quechee analysis,' because they do not designate specific scenic resources in the proposed project area or provide specific guidance in project design.")).

> Conservation Districts are characterized by considerable agricultural acreage, along with extensive woodlands and low-density residential development. The purpose of Rural Conservation Districts is to preserve the open space and distinctive rural character of the area while accommodating low-density residential development in a way that avoids the need for public water-supply and sewer systems. The Town Plan includes specific design standards for the Rural Conservation Districts, stating, "Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation."[113]

The fact that the area of the Rural Conservation District encompasses thousands of acres does not diminish its importance in the Town Plan as a designated scenic resource with specific guidance in project design, as required by *Halnon*.

The Petitioner ignores crucial parts of our decision to deny reconsideration in *In re Petition of Rutland Renewable Energy, LLC*.[114] In that case, the project site was located in an area that the Town of Rutland had set aside and designated for Industrial/Commercial use in the Town's Future Land Use Map.[115] The standard historically applied by the Commission recognizes the areas covered by land use maps and allows for large areas to be so designated by towns for conservation purposes because it "does not create a significant new burden on towns, given that town plans are required to have a land use map set forth 'present and prospective land uses, indicating those areas proposed for forests, recreation, agriculture . . . , residence, commerce, industry, public, and semi-public uses and open spaces reserved for flood plain, wetland protection, or other conservation purposes.'"[116]

Like the Neighbors in *In re Petition of Rutland Renewable Energy, LLC*, the language the Petitioner has cited "in fact undermines their position."[117] The Facility at issue in this case highlights the fact that the whole Rural Conservation District was set aside for conservation by the Town. Just as we were not persuaded by the Neighbors in the case cited by the Petitioner, we are not persuaded by the Petitioner's argument here.

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[113] 2019 VT 64, at ¶ 3.
[114] Docket 8188, Order of 5/6/15.
[115] *Id.* at 6.
[116] *Id.* at 7 (quoting 24 V.S.A. § 4382(a)(2)(A)).
[117] *Id.*

6. Petitioner's Argument: The proposal for decision on remand incorrectly derives a clear, written community standard from Section 3.1 of the Bennington Town Plan.

In this argument, the Petitioner contends that we should disregard the following language in the Bennington Town Plan:

> Although development will occur outside of this area, it will be much less concentrated and *shall not* include new commercial uses because such uses are *incompatible* with the rural character of the area. These outlying rural areas also contribute important historic and scenic qualities to the town, and new development in these areas must be carefully planned to protect those resources.[118]

We will not disregard this language. Section 248(b)(5) and the Quechee test direct us to examine the Town Plan to determine whether the Facility violates a clear, written community standard. We conclude that the language above does create such a standard and is violated here.

We therefore disagree with the Petitioner's argument that the language is vague and should not be considered. Rather, we agree with the hearing officer's recommendation that we conclude that the Facility would violate that clear, written community standard because "the Facility would be a further extension of the industrial growth of Bennington beyond the urban growth area and would appear as such."[119]

7. Petitioner's Argument: The proposal for decision on remand's application of its modified Quechee test is unlawful and invalid as applied to the Facility because the modified Quechee test is a *de facto* rule that has not complied with the Vermont Administrative Procedure Act.

In this argument, the Petitioner contradicts itself by challenging the Vermont Supreme Court's determination that a "modified" Quechee test is applicable in Section 248 cases. The Petitioner does not rely on its own accurate summary that a modified Quechee test applies in a Section 248 review. In this argument, the Petitioner contends contradictorily that, even though the "modified" Quechee test is used in the proposal for decision on remand as directed by the

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[118] Exh. AHS-13 at 16) (emphasis added); *see* Petitioner's Comments at 22 (arguing that this language should be disregarded).

[119] Proposal for Decision on Remand at 18-19.

Vermont Supreme Court in its remand decision, the Quechee test is a *de facto* rule that does not comply with the Vermont Administrative Procedures Act.

The Petitioner's novel argument is not only self-contradictory and inconsistent with the direction of the Vermont Supreme Court, it is also unsupported by any relevant case law. And we are unpersuaded by it.

8. Petitioner's Argument: The proposal for decision on remand's test for undue aesthetics effect derived from 30 V.S.A. § 248(b)(5) as applied to the Facility violates 24 V.S.A. § 4413(b).

Section 4413(b) of Title 24 provides that zoning bylaws "shall not regulate power generating plants and transmission facilities regulated under 30 V.S.A. § 248." In Section 248 review, "municipalities have a different role."[120] The Commission must give "due consideration" or "substantial deference" to municipal recommendations, but "the [Commission] has the final policy decision."[121] Commission review under Section 248 is consistent with 24 V.S.A. § 4413(b). We are not persuaded by the Petitioner's argument.

C. Public Good

1. Petitioner's Argument: The proposal for decision on remand's reliance on the term "forest" and the extent of clear-cutting of the site ignores the Town Plan and introduces a new Section 248 criterion.

The Petitioner argues, without citation to authority, that the use of the word "forest" in the proposal for decision on remand is "arbitrary and capricious" because "[t]he PUC cannot introduce a new regulation or criterion based upon a vague and undefined notion of what is or is not a 'forest.'"[122] The Petitioner further asserts that "[i]n fact, the land to be cleared is not a forest."[123] This argument by the Petitioner is unsupported by any citation except for the

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[120] *See City of South Burlington*, 133 Vt. 438, 447-448; *see also Application of Green Mountain Power Corporation for a Certificate of Public Good for an Interconnected Group Net-Metered Wind Turbine*, CPG #NM-1646, Order of 3/27/15 at 5 (the Commission did not take judicial notice of municipal planning and development bylaws because those bylaws do not regulate public utility power generating plants.)

[121] *Rutland Renewable Energy*, 2016 VT 50, at ¶¶ 18, 31-37.

[122] Petitioner's Comments at 31-31.

[123] *Id.*

inapplicable definition of a "municipal forest."[124] A "forest" is "a dense growth of trees and underbrush covering a large tract."[125] The 10 acres on Apple Hill that the Petitioner is seeking our permission to clear-cut in order to install the Facility is indeed a forest.

The Petitioner also asserts that its clear-cutting of 10 acres is not an appropriate fact for the Commission to consider because that missing 10 acres of trees would not be visible. The Commission has long considered the effect of clear-cutting under Section 248(b)(5), both for its potential aesthetic impact and for its effect on natural resources.[126]

> In any case, the Petitioner's argument is irrelevant. Regarding the Town Plan standard of whether the proposed Facility minimizes clearing of natural vegetation, the hearing officer recommends that our decision need not address whether the Petitioner's proposal to clear fewer acres than originally proposed – 9.67 acres instead of 10.6 acres – met this Town Plan standard. We agree with that recommendation. Thus, we need not determine whether the Facility minimized forest clearing.

2. Petitioner's Argument: The proposal for decision on remand inappropriately relies on evidence in the *Willow Road*[127] case in this case.

The Petitioner states that it was "manifestly erroneous" for the proposal for decision on remand to use exhibit AHS-MK-11 in its discussion.[128] This exhibit shows both the Apple Hill

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[124] *Id.* (citing 10 V.S.A. § 2651). Section 2651 of Title 10 defines a "municipal forest" as follows:

> As used in this subchapter, "municipal forest" means a tract of land primarily devoted to producing wood products, maintaining wildlife habitat, protecting water supplies, providing forest recreation and conservation education. A municipal forest shall not be construed to include landscaped grounds and plantings around residential, industrial, institutional, municipal buildings or municipal areas devoted to off-street recreation.

[125] Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/forest. Last updated 3/26/20.

[126] *See, e.g., Petition of Renewable Generation, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, to install and operate a 500 kW group net-metered solar electric generation facility in Dover, Vermont*, CPG #NMP-5921, Order of 6/8/15 (Applicant shall not clear-cut within 0.25 miles of a of a known, occupied northern long-eared bat maternity roost tree during the pup season from June 1 to July 31), *Joint Petition of Vermont Electric Power Company, Inc., Green Mountain Power Corporation and the Town of Stowe Electric Department for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the so-called Lamoille County 115 kV Project, consisting of the construction of a transmission line from Stowe to Duxbury, Vermont, and accompanying facilities*, Docket 7301, Order of 3/16/06 (no compelling rationale was given as to why the public good would require the creation of a 100-foot wide clear-cut through state forest); and *Amended Petition of UPC Vermont Wind, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of a 40 MW wind electric generation facility, consisting of 16 wind turbines, and associated transmission and interconnection facilities, in Sheffield, Vermont, to be known as the "Sheffield Wind Project,"* Docket 7156, Order of 8/8/07 (aesthetics finding that impact of past logging activities is visible but the clearings do not appear as large clearcuts and the area has a high degree of intactness).

[127] Case No. 17-5024-NMP, Order of 6/12/19.

facility and the neighboring Willow Road facility projected onto Apple Hill. The Petitioner asserts without any legal support that because the petition for the Willow Road case was denied by the Commission, using that exhibit was "clear error."[129] The Petitioner submitted exhibit AHS-MK-11 and it was admitted into evidence by the Petitioner for use by the Commission in its determination in this case. The Petitioner's argument that we should not look at the Petitioner's own exhibit is unpersuasive.

3. Petitioner's Argument: The proposal for decision on remand erroneously relies on the zoning bylaws.

The Petitioner makes the factual assertion that the PFD fails to account for the fact that the RCON District is in fact a zoning district, that the RCON "standards" in the 2010 Town Plan are taken from the RCON zoning by-laws, and are therefore zoning standards" and "preempted under Section 248 review."[130] While we agree that it would be inappropriate for the Commission to rely on zoning standards in its Section 248 review, we disagree that the language of the 2010 Bennington Town Plan addressing the Rural Conservation District is "preempted." The review of Town Plan language, like the description of the Rural Conservation District and the standards it contains, is required by both Section 248(b)(1)[131] and (b)(5).[132]

We observe that while the Petitioner correctly asserts that the Commission may not rely on zoning bylaws in conducting its orderly development and aesthetics reviews, the Petitioner nonetheless filed zoning bylaws in the form of the Bennington Land Use Regulations, exh. AHS-ECOS-19, in order to support its arguments that the Facility did not unduly interfere with orderly development and did not violate clear, written community standards.[133]

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[128] Petitioner's Comments at 39.

[129] *Id.*

[130] *Id.* at 39-40 (citing the concurring opinion in *Rutland Renewable Energy, LLC*, at ¶ 36).

[131] Section 248(b)(1) states:

> With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and **the land conservation measures contained in the plan of any affected municipality**. (Emphasis added.)

[132] *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10, at 53.

[133] *See, e.g.,* Petitioner's Proposed Findings of Fact at 28 and 52, and Petitioner's Comments at 75-77.

The fact that the Rural Conservation District is addressed in both the Town Plan and the zoning bylaws does not "preempt" the Town Plan language addressing the Rural Conservation District. The Commission does not rely on zoning bylaws in making its conclusions under Section 248. We are, however, required to assess the language of the Town Plan under both Sections 248(b)(1) and (b)(5). In this case that language addresses the Rural Conservation District. We are not persuaded that because the Petitioner strayed into an assessment of zoning bylaws that we erred by looking at the Town Plan.

4. Petitioner's Argument: Once a land use is deemed permitted in a rural area, the size of a solar facility or the amount of clearing involved to develop a facility and the amount of screening is immaterial.

The Petitioner argues that because the Town "permitted" commercial-scale ground-mounted solar facilities in the Rural Conservation District, this necessarily means that any size solar project, including the Facility, is "permitted."[134]

We disagree with this argument for two reasons.

First, the Town does not "permit" solar facilities. The Commission is responsible for authorizing requests to construct and operate solar facilities. The Commission reviews any land conservation measures in the Town Plan and gives those measures and any recommendations of municipal legislative bodies due consideration under orderly development. [135] The Quechee test applies to aesthetics review, and if the Facility has an adverse effect, as this one does, we look to the Town Plan to determine if there is a clear, written community standard and if the Facility would have an undue adverse effect under that standard, as it does here.[136]

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[134] Petitioner's Comments at 43-44.

[135] A town plan may also be given substantial deference if it is duly adopted pursuant to Section 248(b)(1)(C) and 24 V.S.A. § 4352. The 2010 Bennington Town Plan predates the statutory language regarding substantial deference; therefore the Commission must only give it due consideration.

[136] As the Petitioner in its capacity as Chelsea Solar LLC acknowledged, "it is well settled in Vermont that zoning regulations are not the most appropriate source for a clear, written community standard under the Quechee test and projects under Section 248 are exempt from zoning bylaws." Docket 8302, Order of 4/14/17, at 20 (quoting the Chelsea PFD Response at 6 (citing *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/1/10 at 52 (quoting *City of South Burlington v. Electric Power Company, Inc.*, 133 VT 438, 447 (1975) (holding municipal zoning regulation of transmission line preempted by state regulatory authority))).

Second, the Town's interpretation of its own Town Plan is not dispositive. As the Vermont Supreme Court noted in its order remanding this case, it remains unsettled as to "whether and how a town selectboard's interpretation of its own town plan should inform a determination of a project's compliance with clear, written community standards."[137]

We are not persuaded by the Petitioner's argument that because the Town did not oppose two 500 kW net-metered solar projects in the Rural Conservation District, the Town Plan necessarily allows for the development of any and all solar projects in that same district, regardless of the project's size or the amount of clearing involved.

5. Petitioner's Argument: The proposal for decision on remand does not address greenhouse gas impacts.

The issue of greenhouse gas impacts was not remanded to the Commission for further review. It is outside the scope of this Order. It is also immaterial because an analysis of greenhouse gas impacts would not affect the criteria that the Facility fails to meet here.

6. Petitioner's Argument: The proposal for decision on remand's procedural background is incomplete.

The proposal for decision on remand includes those procedural events that are relevant to the limited review conducted on remand. The longer procedural background stated in the hearing officer's initial proposal for decision that we adopted in our Order of September 26, 2018, was not restated in his proposal for decision on remand and need not have been.

To begin, the Petitioner has failed to identify any legal requirement that a proposed decision include any procedural background at all. Further, the Petitioner's Comments present an extended procedural history to broadly argue against the proposal for decision on remand's recommendation. The Petitioner's arguments fail to address the limited scope of the Vermont Supreme Court's remand. The limited procedural background in the proposal for decision on remand accurately and adequately states those events that are relevant to our decision on remand.

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[137] 2019 VT 64, at ¶ 38 n.11.

7. Petitioner's Argument: The findings in the proposal for decision on remand do not mirror the language of Petitioner's proposed findings.

In its "list of exceptions and specifications of error," the Petitioner makes various requests that the Commission alter the proposal for decision on remand's factual findings. To the extent the findings of fact and conclusions of law in the proposal for decision on remand are inconsistent with any proposed findings of fact or conclusions of law submitted by the Petitioner, such proposed findings or conclusions of law, were considered and are not adopted.

D. Constitutional Violations

Finally, the Petitioner makes the following objections to the proposal for decision on remand based on constitutional grounds:

1. The proposal for decision on remand's application of aesthetics violates the Petitioner's due process and equal protection rights under the Vermont Constitution.
2. The proposal for decision on remand's application of aesthetics as applied to the Facility violates the Common Benefits Clause of the Vermont Constitution.
3. The proposal for decision on remand's application of undue adverse effect on aesthetics as applied to the Facility is an unconstitutional redelegation.
4. The proposal for decision on remand's application of the aesthetics criterion in this case is an unconstitutional redelegation.
7. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) violates the Petitioner's due process and equal protection rights under the Vermont Constitution.
8. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) violates the Petitioner's rights under the Common Benefits Clause of the Vermont Constitution.
9. The proposal for decision on remand's application to the Facility of the criterion of no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b)(1) constitutes an unconstitutional redelegation.
10. The proposal for decision on remand's application to the Facility of the criteria of no undue effect on aesthetics and no unduly adverse effect on orderly development of the region in 30 V.S.A. § 248(b), violates the Common Benefits Clause and the Petitioner's rights to due process under the Vermont Constitution.

11. The proposal for decision on remand's application to the Facility of the aesthetics criterion in 30 V.S.A. § 248(b)(5) and the orderly development criteria in 30 V.S.A. § 248(b)(1) constitutes unlawful viewpoint discrimination violating the Petitioner's free speech, equal protection and due process rights.
12. The proposal for decision on remand's application to the Facility of the aesthetics and orderly development criteria violates Article 1 of the Vermont Constitution, the public trust doctrine and the Petitioner's due process rights.

The Petitioner attempts to paint all of these arguments as "as-applied" challenges. However, the Petitioner has failed to identify any specific way in which the practice reflected in the proposal for decision on remand deviates from the guidance provided by the Legislature in Title 30, as shaped by longstanding Commission and Vermont Supreme Court precedent. The Petitioner has therefore failed to adequately brief an as-applied challenge.

Rather, the Petitioner simply does not like what state law requires and therefore challenges its constitutionality. The Petitioner's various constitutional arguments are a type of facial challenge to the constitutionality of Title 30 that the Commission is unable to adjudicate.[138] The Commission cannot render judgment on the facial constitutionality of legislation.[139] Therefore, because the Petitioner is raising facial challenges to the constitutionality of Title 30, it must do so in another forum and not before the Commission.[140]

Conclusions

Having considered the Vermont Supreme Court's limited direction on remand, the parties' comments on the proposal for decision on remand, the Petitioner's many arguments in opposition to the proposal for decision on remand, and the parties' oral arguments, we adopt the

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[138] *See, e.g., Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019*, Case No. 18-2820-INV, Order of 8/9/19, at 6 (citing *Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357-59 (1988)).

[139] *Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357-59 (1988) ("Here, we find no grant of power in the statutory scheme, either express or implied, to determine the constitutional validity of statutes. Moreover, because administrative agencies are created to carry out statutory purposes, the legislature could not have intended that the [Commission] would be able to question the very validity of its enactments.").

[140] We observe that the Petitioner also recognizes that these arguments are facial challenges and is making them in a separate action in federal district court. *See Allco Renewable Energy Limited et al. v. James Volz, VEPP Inc., Anthony Roisman et al*, Civil Action No. 5:20-cv-00034-gwc, filed 3/19/20 in the United States District Court for the District of Vermont.

hearing officer's findings and recommendation on remand that we deny the Petition for the Apple Hill Facility.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted. All other findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.

2. The Petition of Apple Hill Solar LLC for a certificate of public good pursuant to 30 V.S.A. § 248 is denied.

3. This case is closed.

Dated at Montpelier, Vermont, this 7th day of May, 2020.

Anthony Z. Roisman) PUBLIC UTILITY
)
)
Margaret Cheney) COMMISSION
)
) OF VERMONT
Sarah Hofmann)

OFFICE OF THE CLERK

Filed: May 7, 2020

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.