

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209	)	Case No. 20-1611-INV
into whether the petitioner initiated site	)	
preparation at Apple Hill in Bennington, Vermont,	)	
for electric generation in violation of 30 V.S.A. §	)	
248(a)(2)	)	

**STATEMENT OF THE VERMONT AGENCY OF NATURAL RESOURCES IN
RESPONSE TO HEARING NOTICE DATED NOVEMBER 13, 2020**

On November 13, 2020, the Vermont Public Utility Commission (“Commission”) issued a notice concerning the rescheduling of a preliminary injunction hearing in this case to December 4, 2020. In its notice, the Commission directed the parties to address the following, through filings, by 4:30 P.M. on November 25, 2020:

1. A statement identifying witnesses to be called at the hearing, the time expected for direct examination, and a brief description of the nature of the witness’s testimony;
2. Identification of all exhibits to be introduced at the hearing or used in cross-examination; and
3. Any objections to the admission of all materials filed to date, as well as all transcripts, in this case.

The Commission also indicated that the parties should notify the Commission whether they are requesting, or opposing, an injunction and whether an injunction is necessary to avoid irreparable harm.

The Vermont Agency of Natural Resources (“Agency”) responds to the Commission’s notice as follows.

Witness Testimony. The Agency intends to call Robert Popp, Agency botanist, as a witness at the December 4, 2020 evidentiary hearing. Mr. Popp’s supplemental direct testimony, in the form of an affidavit (along with exhibits), is being filed concurrent with this statement. Therefore, the time needed for direct examination at the hearing will be limited to introducing the witness and his exhibits. Mr. Popp testified at the June 26 hearing. The nature of Mr. Popp’s supplemental direct testimony is to provide additional clarity concerning the existence of rare plants at the Apple Hill site, how the locations of those plants relate to the Developer’s proposed site clearing activities, and to convey the Agency’s position with regard to irreparable harm.

Exhibits. Exhibits to be introduced at the hearing are Mr. Popp’s supplemental direct testimony of today’s date and the five exhibits which accompany it. The Agency notes that it previously provided direct testimony (in the form of two affidavits from two separate witnesses) and accompanying exhibits in advance of the June 26 hearing and that these were admitted into the evidentiary record (as ANR Exhibits 1 through 9) at that hearing. The Agency requests, and expects, that all its previous filings (testimony and exhibits) will remain, and be considered, a part of the record in this matter. The cross-examination exhibits which the Agency anticipates using at the December 4 hearing will be those in the record in this matter and include testimony and exhibits admitted at the June 26 hearing, the transcript of the June 26 hearing, and the supplemental testimony

and exhibits which are now being filed by the Agency in advance of the December 4 hearing.¹

Objections. The Agency does not object to the admission into evidence in this proceeding all the materials filed to date by the parties, as well as all transcripts of Commission hearings and status conferences. The Agency respectfully requests that these be admitted as proposed by the Commission, including the site map referenced in footnote 1.

Injunction. The Agency's position is that an injunction is necessary to avoid irreparable harm to rare plants at the 27-acre Apple Hill site. In its notice, the Commission sought a response as to whether a preliminary or permanent injunction, under Commission Rule 2.406, is being sought. The Agency believes that the designation of one type or the other in this instance is immaterial despite the Rule's provision which appears to limit only the duration of the preliminary form, as opposed to a permanent form, to one which "cannot remain in effect beyond the conclusion of the proceeding in which it is issued."²

This is because any injunction issued in this proceeding (an investigation into whether the Developer has engaged in site clearing in violation of Section 248's prohibition on such activities without issuance of a certificate of public good) – whether deemed preliminary or permanent – would be of limited duration. An injunction issued here is rooted in the proceedings which established the Commission's jurisdiction over

¹ The Agency also notes that, subsequent to the June 26 hearing, the Developer was to file in this case a copy of the site map that Mr. Kobelia testified he was using to inform his site clearing activities, and which purportedly identified the RTE plant areas that he was to avoid. *See*, June 26, 2020 hearing transcript, at pages 106-107. This was never done to the Agency's knowledge. Therefore, the Agency requests that the Commission direct the Developer to file this document no later than three days before the December 4 hearing so that it may be used at the hearing.

² PUC Rule 2.406(A)(2).

site clearing in the first instance – namely the Apple Hill Solar and Willow Road (formerly Chelsea) Solar Section 248 petitions for certificates of public good, as well as the standard offer contracts which were awarded for those projects. In other words, even if a permanent injunction were issued in this proceeding it would not remain in effect beyond the resolution (inclusive of all appeals) of the status of the underlying Section 248 petitions and standard offer contracts. The Commission’s jurisdiction here, by necessity, is tied to those matters. Once those matters resolve, the injunction resolves.

For this reason, the Agency’s position is that either designation would have the same effect. Regardless of what type of injunction the Commission issues the Agency believes its duration would run parallel with, and be limited by, the duration of the underlying proceedings.³

³ For example, if the Commission’s denials of the Section 248 petitions are ultimately upheld and all appeals are exhausted (and the standard offer contracts terminated), then the Commission no longer has jurisdiction over the Apple Hill site and the injunction is dissolved. Conversely, if the Developer is ultimately successful and obtains the CPGs which it has affirmatively stated it continues to seek then the site clearing would not be violative of the prohibition of its commencement without a CPG. In this instance, the injunction would also dissolve. (Of course, there would still remain the requirement that the Developer conduct its site clearing activities in accordance with all CPG conditions.)

Dated November 25, 2020, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



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