

**STATE OF VERMONT  
PUBLIC UTILITY COMMISSION**

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

**REQUEST OF APPLE HILL SOLAR LLC FOR ADMINISTRATIVE NOTICE**

Pursuant to Commission Rule 2.216, 3 V.S.A. § 810(1), 3 V.S.A. § 810(4) and V.R.E. 201<sup>1</sup>, Apple Hill Solar LLC (“AHS”) submits this request for administrative notice of the following documents:

1. United States Department of Agriculture, Natural Resources Conservation Service *Symphyotrichum urophyllum* Plant Profile and related Data Source, a true and correct copy of which is attached hereto as **Exhibit A**, and which is publicly available at: <https://plants.usda.gov/core/profile?symbol=SYUR>
  
2. Jonathan A. Myers, Mark Vellend, Sana Gardescu, P. L. Marks, *Seed dispersal by white-tailed deer: implications for long-distance dispersal, invasion, and migration of plants in eastern North America*, *Oecologia*, 139: 35–44 (2004), a true and correct copy of which is attached hereto as **Exhibit B**, and which is publicly available at: <https://pubmed.ncbi.nlm.nih.gov/14740288/>

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<sup>1</sup> Or, in the alternative, V.R.E. 801(d)(2)(A), 801(d)(2)(B), 803(6) and 803(8).

3. NatureServe, *Element Occurrence Data Standard*, February 6, 2002, a true and correct copy of which is attached hereto as **Exhibit C**, and which is publicly available at:  
  
[http://downloads.natureserve.org/conservation\\_tools/element\\_occurrence\\_data\\_standard.pdf](http://downloads.natureserve.org/conservation_tools/element_occurrence_data_standard.pdf)
4. NatureServe, *Habitat-based Plant Element Occurrence Delimitation Guidance*, May 2020, a true and correct copy of which is attached hereto as **Exhibit D**, and which is publicly available at:  
  
[https://www.natureserve.org/sites/default/files/eo\\_specs-habitat-based\\_plant\\_delimitation\\_guidance\\_may2020.pdf](https://www.natureserve.org/sites/default/files/eo_specs-habitat-based_plant_delimitation_guidance_may2020.pdf)
5. NatureServe, *Ranking Species Occurrences: Generic Guidelines and Decision Key*, May 2020, a true and correct copy of which is attached hereto as **Exhibit E**, and which is publicly available at:  
  
[https://www.natureserve.org/sites/default/files/eo\\_rank\\_specifications-generic\\_guidelines\\_and\\_decision\\_key\\_may2020.pdf](https://www.natureserve.org/sites/default/files/eo_rank_specifications-generic_guidelines_and_decision_key_may2020.pdf)
6. Nesom, G.L., *Review of the taxonomy of Aster sensu lato (Asteraceae: Astereae), emphasizing the New World species; Hybridization in the tribe Astereae; Phytologia Memoirs available*, *Phytologia*, Vol. 77, No. 3, 141-308 (September 1994), a true and correct copy of which is attached hereto as **Exhibit F**, and which is publicly available at: <https://www.biodiversitylibrary.org/item/46740#page/1/mode/1up>

### **Legal Standard**

Commission Rule 2.216 adopts 3 V.S.A. § 810. Pursuant to 3 V.S.A. § 810(4), the State of Vermont Public Utility Commission (the “Commission”) may take notice of judicially

cognizable facts.<sup>2</sup> In applying Section 810(4), the Vermont Supreme Court has interpreted the phrase “judicially cognizable” by referring to V.R.E. 201(b), which states that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>3</sup> In addition, pursuant to 3 V.S.A. § 810(1), the Commission has the authority to admit evidence if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs regardless whether it is otherwise admissible.<sup>4</sup> Furthermore, VRE 201(d) requires the Commission to take administrative notice if requested by a party and it has been supplied with the necessary information.

There can be no question that the documents that AHS seeks to introduce into evidence in this Docket pertaining to the *Symphotrichum urophyllum* (the “Aster”) are highly material given that the purported impact on the Aster is one of the material issues in these proceedings.

**Exhibit A – The United States Department of Agriculture, Natural Resources Conservation Service *Symphotrichum urophyllum* Plant Profile and Data Source**

Administrative notice of Exhibit A is appropriate under Section 810(4) and VRE 201(b) because the contents of the Plant Profile are not in dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit A is available to the public through the official website of the United States Department of Agriculture and the accuracy of such source cannot be reasonably questioned.

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<sup>2</sup> See, *Petition of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power (GMP), Docket 6860, Order of 8/9/2004 at 5.*

<sup>3</sup> *In re Handy*, 144 Vt. 610, 612 (1984).

<sup>4</sup> 3 V.S.A. § 810(1)

Administrative notice of Exhibit A is also appropriate under Section 810(1) because a reasonably prudent person would take into account the plant profile of the Aster when considering a project's purported impact on the Aster.

**Exhibit B – Seed dispersal by white-tailed deer: implications for long-distance dispersal, invasion, and migration of plants in eastern North America**

Administrative notice of Exhibit B is appropriate under Section 810(4) and VRE 201(b) because the contents of the article on seed dispersal methods are not in dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit B is available to the public through numerous reputable sources, including PubMed.gov.

Administrative notice of Exhibit B is also appropriate under Section 810(1) because a reasonably prudent person would take into account the dispersal mechanisms of the Aster when considering the size and scope of the local Aster population.

**Exhibit C – NatureServe's Element Occurrence Data Standard**

Administrative notice of Exhibit C is appropriate under Section 810(4) and VRE 201(b) because the contents of this study on where species and communities exist on the ground the viability of their populations or stands are not in dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit C is available to the public through numerous reputable sources, including naturereserve.org.

Administrative notice of Exhibit C is also appropriate under Section 810(1) because a reasonably prudent person would take into this data when considering the size and scope of the local Aster population at issue in these proceedings. Knowledge of where species and communities exist on the ground and the viability of their populations or stands is essential for

assessing risk of extirpation or extinction and for planning conservation actions. The EO data standard provides a common foundation on which zoologists, botanists, and ecologists can build discipline-specific guidance for surveying, assessing, and mapping locations of high-priority “elements of biodiversity.” The element occurrence (EO) concept is the linchpin of the work of the NatureServe network. EOs typically represent populations and ecosystems that, if conserved, can contribute to the survival or persistence of the element. EO methodology provides a consistent approach to data management, including defining, delineating, ranking, and mapping EOs. The EO Data Standard was developed to encourage a comprehensive and uniform approach to EO data management, helping ensure consistency and comparability of data among programs.

It is also worth noting that the Vermont Fish and Wildlife Department (the “Department”) ranking methodology is coordinated by NatureServe (See Direct Testimony of Bob Popp, January 30, 2020, page 12).

**Exhibit D – NatureServe’s *Habitat-based Plant Element Occurrence Delimitation***

**Guidance**

Administrative notice of Exhibit D is appropriate under Section 810(4) and VRE 201(b) because the contents of this methodology for delineating element occurrences is not in dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit D is available to the public through numerous reputable sources, including [natureserve.org](http://natureserve.org).

Administrative notice of Exhibit D is also appropriate under Section 810(1) because a reasonably prudent person would take into account this methodology for determine whether two (or more) observations if different but nearby places should be considered different Eos, or

combined into a single EO considering that the size and scope of the local Aster population is one of the primary issues in these proceedings.

It is also worth noting that the Department's own ranking methodology is coordinated by NatureServe (See Direct Testimony of Bob Popp, January 30, 2020, page 12).

**Exhibit E – NatureServe's *Ranking Species Occurrences: Generic Guidelines and Decision Key***

Administrative notice of Exhibit E is appropriate under Section 810(4) and VRE 201(b) because the contents of this guidance which provides a succinct assessment of the estimated viability (probability of persistence) of occurrences of a given species is not in dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit E is available to the public through numerous reputable sources, including [natureserve.org](http://natureserve.org).

Administrative notice of Exhibit E is also appropriate under Section 810(1) because a reasonably prudent person would take into account this information concerning the estimated viability of occurrences of a given species considering that the viability of the local Aster population is one of the primary issues in these proceedings.

It is also worth noting that the Department's own ranking methodology is coordinated by NatureServe (See Direct Testimony of Bob Popp, January 30, 2020, page 12).

**Exhibit F – *Review of the taxonomy of Aster sensu lato (Asteraceae: Astereae), emphasizing the New World species; Hybridization in the tribe Asterae; Phytologia Memoirs available***

Administrative notice of Exhibit F is appropriate under Section 810(4) and VRE 201(b) because the contents of this article concerning the delineation of the Asters in New England is not in dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exhibit F is available to the public through numerous reputable sources, including the Biodiversity Heritage Library, the world's largest open access digital library for biodiversity literature and archives.

Administrative notice of Exhibit F is also appropriate under Section 810(1) because a reasonably prudent person would take into account this information concerning the delineation of the Aster in New England considering that the viability of the local Aster population is one of the primary issues in these proceedings.

### **Conclusion**

The practice of taking administrative notice is founded on the assumption that certain matters are not controversial and therefore need not be established for legal purposes by presenting contested evidence to a trier of fact.<sup>5</sup> The purpose of administrative notice is "to save the time and trouble that it would take to present evidence of matters, the truth of which no one can legitimately challenge."<sup>6</sup> Neither the substance nor the source of these documents is controversial.

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<sup>5</sup> *Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., Docket 7862, Order of 3/29/13 at 5.*

<sup>6</sup> Jack H. Friedenthal, Mary Kay Kane, Arthur R. Miller, *Civil Procedure* § 5.22 (2<sup>nd</sup> ed. 1993).

Respectfully submitted,

**APPLE HILL SOLAR LLC**

By:

A handwritten signature in black ink, appearing to read 'M Melone', is enclosed in a thin black rectangular box.

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Dated: January 25, 2021