APPLE HILL SOLARSTATE 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)	)))))	Case No. 20-1611-INV

VERMONT AGENCY OF NATURAL RESOURCES RESPONSE TO APPLE HILL SOLAR MOTION FOR ADMINISTRATIVE NOTICE

On January 26, 2021, Apple Hill Solar (the "Developer") filed a motion requesting that the Vermont Public Utility Commission ("Commission") take administrative notice of six separate documents filed with its motion.

The Vermont Agency of Natural Resources ("Agency") now provides this response, and requests that the Commission deny the Developer's request for the following reasons.

The documents fail to meet V.R.E. 201(b).

The Developer's motion fails to meet the requirements of V.R.E. 201(b). As an initial matter, none of the documents present "facts." To the extent they do offer facts, those which are offered are not "generally known" within the territorial jurisdiction of the Commission.[1] As such, they cannot be judicially noticed under V.R.E. 201(b)(1).

The documents also fail to meet the requirements of V.R.E. 201(b)(2), again, because they fail to offer facts. In addition, to the extent they may offer facts, any such facts are not "capable of accurate and ready determination by resort to sources whose

[1] *See,* V.R.E. 201(b)(1); *see also,* Reporter's Notes to V.R.E. 201(b)(1) (explaining that "matters will be noticed only if they are of sufficient notoriety to be deemed common knowledge within the jurisdiction").

accuracy cannot reasonably be questioned."[2] This is especially true with regard to the articles offered (Developer's Exhibits B and F). Developer's Exhibit's C, D, and E, while originating from a source referenced by the Agency's expert witness in this matter, are not sponsored by any fact witness with relevant expertise, and again, do not present facts but rather describe standards which are then interpreted and utilized by experts (who have specialized education, training and experience) in order to *establish* facts.[3] While Developer's Exhibit A might possibly be considered a government "report" and therefore, potentially viable under the Rule, there is no "fact" offered. Therefore, this too fails and must rejected.

To the extent any of the six documents satisfy either V.R.E. 201(b)(1) or V.R.E. 201(b)(2), they should then be rejected by the Commission for one, or both, of the following reasons.

The evidentiary record is closed and the motion is too late.

The Developer's motion for judicial notice was filed too late for the Commission to act on it and therefore must be rejected. The evidentiary record in this matter was closed by the Commission on December 4, 2020, at the conclusion of the evidentiary hearing and oral argument on that day.[4] The Developer had from June 24, 2020 (the date

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[2] See, V.R.E. 201(b)(2).
[3] The Developer's own motion, at pages 4-5, acknowledges this ("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").
[4] See, *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)*, Case No. 20-1611-INV, Tr. 12/4/20 at 221. At the conclusion of the hearing on that date, Chairman Roisman explained that the record, except for a few discovery items which remained to be completed at that time, was closed: "The record is not open for new witnesses, new exhibits, new testimony, other than whatever responses you get from these discovery exchanges." *Id.* The six documents which were included with the Developer's 1/26/2021 motion are not related to the outstanding discovery exchanges, rather, they are "new" exhibits and are therefore inadmissible.

the Commission opened this investigation) through December 4, 2020 (the date of the second and final evidentiary hearing), more than five months, to offer its six latest exhibits. It did not do so.[5] The record is closed. The motion is too late and must be rejected.

The materials are not relevant to this proceeding.

The six exhibits included with the Developer's motion are not relevant to the issues to be determined by the Commission. The Commission, having already determined that site clearing has occurred without a CPG and that the threat of irreparable harm exists, only needs to determine two things at this stage of the proceeding.[6] One, should the temporary injunction be continued or dissolved? Or, two, should the injunction be made permanent?

The Developer's new exhibits can at best only serve to support limited arguments, any of which are moot and irrelevant. For example, an argument that the asters are not rare. A moot point since that fact has already been established by the Agency and admitted by the Developer. Or, perhaps, an argument that there are only two separate populations (or occurrences), instead of three, of the very rare aster in Vermont. An argument which has no bearing on the established facts that illegal site clearing has already resulted in the destruction of a very rare species (and will result in more destruction of the same very rare species, and a rare species) if allowed to resume. These

[5] During that time, the Developer made multiple filings, offered testimony (and exhibits) from multiple witnesses, availed itself to cross-examination (utilizing cross-exhibits), and filed multiple additional exhibits without foundation from any sponsoring witness, all of which were stipulated to by the Agency, and admitted. The Developer has not offered any cause (good or otherwise) for its late action, and these additional exhibits, because there simply isn't any.

[6] *See,* Case No. 20-1611-INV, TRO order of 6/26/20.

too are facts with which the Developer concurs. The Motion should therefore be rejected as irrelevant and moot.

Conclusion

The Developer's motion should be denied for the above reasons.

Dated February 8, 2021, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources

By: __________________________

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