

**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)	)	

**VERMONT AGENCY OF NATURAL RESOURCES OBJECTION TO
SUPPLEMENTAL TESTIMONY**

On February 16, 2021, Apple Hill Solar (the “Developer”) filed nine pages of supplemental testimony along with an additional 420 pages of documents (which the Developer calls “exhibits”) in this matter. The six “exhibits” appear to be the exact same documents which the Developer previously filed with its January 26, 2021 motion for “administrative notice.”¹

The Vermont Agency of Natural Resources (“Agency”) now objects to this most recent attempt to further supplement the record in this matter, and requests that the Vermont Public Utility Commission (“Commission”) reject the Developer’s filing and remind the Developer of the need to abide by Commission orders in this proceeding.

The evidentiary record is closed; the filing is too late.

The Developer’s filing is too late. The Commission closed the evidentiary record in this matter on December 4, 2020, at the conclusion of the evidentiary hearing on that day.² The Developer’s filing disregards the Commission’s clear directive in that it offers

¹ The Agency filed a response to the Developer’s motion on February 8, 2021 and the Developer filed a reply to the Agency’s response on February 16, 2021. The Commission has not yet ruled on that motion.

² 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,

both “new testimony” and “new exhibits.”³ The Developer had from June 24, 2020 (the date 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 latest testimony and exhibits. It did not do so.⁴ The record is closed. The testimony and “exhibits” filed on February 16 are too late and must be rejected.

The Developer’s repeated inappropriate and late filings are detrimental to the orderly process of this investigation, abusive to the parties participating in this investigation, and warrant admonishment by the Commission.

As the Commission has recently noted, “attorneys have a duty to expedite the litigation process. Actions that result in delay must also serve a substantial interest other than to simply delay a proceeding.”⁵ The Developer’s actions throughout this proceeding have ran counter to the Commission’s attempts to “expedite the litigation process.” The Developer has failed to comply with at least three separate orders issued by the

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.* (emphasis added)

³ *Id.*

⁴ 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.

⁵ *See, Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont*, Case No. 8585, Order of 2/17/21 at 3 (referencing Vermont Rule of Professional Conduct 3.2 (“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”); and Vermont Rule of Professional Conduct 3.2 at Comment 1 (“The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.”)) Here, the Developer’s attempt to supplement the record is also perplexing in that briefing in this matter has concluded. In this regard, the filing has no “substantial purpose.” It just creates additional work for the Agency and the Commission, at the risk of further delay in resolution of this matter as those entities are now forced to address the Developer’s most recent filing.

Commission. It has also caused hearings to be cancelled,⁶ and has imposed unnecessary and burdensome work on the other parties and their counsel, in particular the Agency.

First, the Developer failed to abide by the TRO issued by the Commission June 26, 2020 when site preparation activities continued the very next day. Second, the Developer ignored the November 25, 2020 filing deadline established by the Commission's November 13, 2020 procedural order when it made multiple filings the night before and morning of the December 4 hearing. Those filings imposed unreasonable burdens on the other parties and their counsel as they prepared for the hearing. The Commission noted that the Developer's approach was less than appropriate.⁷ Third, the Developer, with its January 26, 2021 motion for "administrative notice," then attempted to introduce additional evidence after the evidentiary record was closed – a fact reinforced in the Commission's post-hearing order of December 8, 2020 which identified the only four remaining evidentiary items to be completed.

Finally, the Developer now attempts to file new testimony and 420 pages of exhibits, astonishingly, more than two months after the record was closed and briefing by all parties has been concluded. The Developer's actions throughout this proceeding, which have been detrimental to an orderly process (and burdensome in the Agency), are not limited to the four occurrences detailed above where Commission orders or directives were clearly ignored.⁸

⁶ Evidentiary hearings which the Commission had scheduled for July 9, 2020 and September 8, 2020 were both cancelled due to the Developer's acts and requests.

⁷ See, Tr. 12/4/20 at 19-20.

⁸ For example, the Developer, during the August 31, 2020 status conference held in advance of the hearing scheduled for September 8, 2020, requested an opportunity to conduct discovery. The request was granted, necessitating cancellation of the hearing. The Developer did not follow through with its discovery request. Then, after the hearing was rescheduled for December 4, 2020, the Developer attempted to serve discovery requests on the Agency after hours on Thanksgiving Eve, demanding responses in three days, and only two days prior to the scheduled hearing. The Developer then took a similar, unjustified, approach after the

The Agency believes that the Developer's actions justify admonishment by the Commission in the hope that will discourage further abuse by the Developer and signal to others that similar conduct will not be condoned. The Agency also recommends that the Commission appropriately consider the Developer's repeated conduct during the penalty phase of this proceeding.

Conclusion

The Developer's February 16, 2021 filing should be rejected in its entirety by the Commission for the above reasons.

Dated February 23, 2021, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



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December 4 hearing, serving discovery requests on the Agency on December 7 and requesting responses by December 14, without any legal basis, non-compliant with the Vermont Rules of Civil Procedure, and further jeopardizing the schedule agreed to by the parties and established by the Commission. *See*, Order of 12/8/2020 at 2.