



UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALLCO RENEWABLE ENERGY LIMITED)	
OTTER CREEK SOLAR LLC,)	Case No. 2:20-CV-44
THOMAS MELONE and)	
PLH VINEYARD SKY LLC)	
Plaintiffs,)	
v.)	
)	
JOSEPH KULKIN,)	
JANE DOES 1-3 and)	
JOHN DOES 1-3.)	
Defendants.)	

AMENDED
MOTION TO QUASH SUBPOENA,
MOTION FOR PROTECTIVE ORDER,
and
MOTION FOR SANCTIONS

NOW COME Vermonters for a Clean Environment, Inc. (“VCE”) and Annette Smith, Executive Director of VCE, by and through their attorneys, Valsangiacomo, Detora & McQuesten, P.C., and hereby respectfully request that this Honorable Court:

- 1) Quash the Subpoena Duces Tecum dated February 8, 2021, served upon *non-party* Annette Smith;
- 2) Issue a Protective Order to protect *non-parties* Annette Smith and VCE from Plaintiff’s abusive discovery; and,
- 3) Order Sanctions against Plaintiff Thomas Melone (who is also the sole owner of all other Plaintiffs, and is Plaintiffs’ counsel) to compensate Ms. Smith for her attorney’s fees, costs, expenses, lost time and inconvenience in responding to this abusive Subpoena and to punish Mr. Melone for his offensive fishing expedition designed to oppress Ms.

Smith and harm her financially to thwart her and her organization's environmental advocacy and educational mission. Such extraordinary relief is requested in good faith and fully supported by a substantial factual record, which demonstrates that the imposition of sanctions may be the only possible option to deter Plaintiff from continuing his bad-faith, scorched-earth litigation and discovery abuses.

TABLE OF CONTENTS

I.	SUBPOENA TO PRODUCE DOCUMENTS	3
II.	PLAINTIFF THOMAS MELONE and NON-PARTY ANNETTE SMITH	3
III.	STANDARD OFFER CONTRACTS and THE BENNINGTON SOLAR PROJECT	16
IV.	RUTLAND SOLAR PROJECTS OTTER CREEK SOLAR I, II, and III	21
V.	BAD MOTIVE	27
VI.	LEGAL ARGUMENT	29
A.	<u>Legal Standard For Quashing a Subpoena and Protection of Non-Parties</u>	29
B.	<u>Application of the Law to the Subject Subpoena</u>	33
	1. The Subpoena's First Request	33
	2. The Subpoena's Second Request	34
VII.	MOTION FOR SANCTIONS	36

I. SUBPOENA TO PRODUCE DOCUMENTS

1. Plaintiff Thomas Melone has caused a Subpoena Duces Tecum to be served upon a **non-party**, Annette Smith, which commands her to produce:

1. All Communications with Joey Kulkin.
2. All Communications related to the Rutland Projects.

"Communication" means any written or other transmission or exchange of words, thoughts or ideas to another person or entity, whether person-to-person, in a group, in a meeting, by telephone, by letter, by telex, facsimile, electronic mail, texting, or by any other process or medium, electronic or otherwise.

"Rutland Projects" means the Otter Creek Solar projects in Rutland, Vermont, which are the subject of Case No. 8797, Case No. 8798, Docket No. 19-1596, Docket No. 20-0253, Docket No. 19-3031 before the Vermont Public Utility Commission.

See Exhibit 1, Subpoena.

II. PLAINTIFF THOMAS MELONE and NON-PARTY ANNETTE SMITH

2. Annette Smith is the Executive Director of Vermonters for a Clean Environment Inc. (VCE),¹ a grassroots, environmental advocacy and educational organization that was formed in 1999 in response to a \$1 billion natural gas power plant and pipeline project supported by then-Governor Howard Dean, proposed for Rutland (1080 mW power plant) and Bennington (270 mW power plant) Counties in Vermont, with two 60-mile 24" high pressure pipelines proposed to fuel the power plants.² Prior to the formation of VCE, Annette Smith, a small farmer living off grid with solar in Vermont, wrote a

¹ <https://vce2.org/>

² <https://vce.org/energyindex.html>

letter to the editor about the project, which was published in the Rutland Herald on December 15, 1998, titled “Solar is Better than Gas Pipeline.” After VCE successfully defeated the huge fossil fuel project, the 501(c)3 non-profit assisted Vermonters in the defeat of out-of-scale quarries, large farms, and inappropriately sited landfills. VCE has assisted Vermont communities in addressing toxics issues, air pollution, groundwater contamination and protection, drinking water disinfection, and the preservation of important natural areas in Vermont.³ VCE has assisted Vermonters in addressing the environmental impacts of electric transmission lines, a second natural gas pipeline, wind, solar, and biomass energy proposals. **See Exhibit 3 – VCE 14 ys. Work w/ Vermonters.** VCE provides facts and information so people can make informed decisions. Whenever possible, VCE promotes collaboration over conflict. VCE also acts as a clearinghouse and assists individuals and municipalities to participate in regulatory proceedings, including Act 250 (Vermont’s land use law and process), Agricultural permitting for large farms, Agency of Natural Resources permits, and the Public Utility Commission. VCE serves in a watchdog role to hold corporations accountable for their actions in Vermont communities, and calls out the activities of bad actors who are operating outside of Vermont’s rules and law. Due to VCE’s vigilance and assistance to community members, a wind developer paid ten thousand dollars in fines to the state of Vermont,⁴ and a large solar developer (not

³ <https://vce.org/index-old.html>

⁴ PUC Case No. 17-2571-INV, Investigation pursuant to 30 V.S.A. Sections 30 and 209 into whether Georgia Mountain Community Wind, LLC, operated its wind electric generation facility in Georgia, Vermont, during icing conditions on January 3, 2017. *Order imposing civil penalty of \$10,000, February 1, 2018.*

Melone) paid \$57,500 for violations of its Certificate of Public Good (CPG).⁵ Thousands of CPGs have been issued by Vermont's PUC for solar projects, and an extremely tiny percentage of those have earned VCE's attention. VCE has been instrumental in reporting Thomas Melone to the PUC for violations of the law including violating injunctive orders⁶ and permit conditions.⁷ **See Exhibit 4** – VCE Complaint re Otter Creek.

3. Annette Smith was named "2016 Vermonter of the Year" by the Burlington Free Press on Jan. 2, 2017, stating:

For nearly two decades, Annette Smith has played a key part in making sure there is public debate over some of the most high-profile energy projects in Vermont.

As executive director of Vermonters for a Clean Environment, the Danby resident has organized communities, testified before government boards and advised residents who felt powerless in the face of state bureaucracies and big business...

... Smith recently has found herself making headlines facing off against major renewable energy projects, generally seen as helping to fight climate change by reducing reliance on fossil fuels. But Smith says she is no friend of oil and coal, or fossil fuels in general, living as she does off the grid on her solar-powered farm in Rutland County where she grows much of own food.

More than any particular issue in which she has been involved, or a specific position she has taken, Smith has distinguished herself by helping to raise awareness about the possible local impact of big projects and give voice to residents who find themselves up against much bigger forces....

... A common thread among those who have sought out Smith is that she helps better the odds against a wealthier, more knowledgeable and better funded

⁵ PUC Case No. 19-3671-INV, Investigation pursuant to 30 V.S.A. §§ 30 and 209 into potential violations of Coolidge Solar LLC's certificate of public good issued in Docket 8685. *PUC Order imposing civil penalty of \$57,500, July 24, 2020.*

⁶ PUC Case No. 20-1611-INV, Investigation whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation, case opened June 24, 2020. *Case pending.*

⁷ PUC Case No. 19-1596-INV, Otter Creek Solar/CPG Violation Investigation in Cases 8797 & 8798. Case opened May 28, 2019. *Case pending.*

adversary.

Burlington Free Press, "Vermonters of the Year: Annette Smith," Jan. 2, 2017.⁸

4. No other environmental group in Vermont performs the functions that VCE does for Vermont's public, including assisting in access to regulatory processes, holding corporations accountable for their actions, and assuring that environmental impacts of renewable energy projects are mitigated, minimized or avoided.
5. Since July 2015 and as recently as December 2020, Thomas Melone has inappropriately and inaccurately referred to Annette Smith as an "anti-renewable energy activist"⁹ in legal filings in cases to which she is not a party at the PUC, the Vermont Supreme Court, and U.S. District Court.
6. In a filing to the PUC opposing the intervention by the Town of Bennington in a solar project, Melone inaccurately stated that Annette Smith is "one of the coal and gas industry's best friends in Vermont,"¹⁰ while his lawyer son, Michael Melone, Esq., who also works under the Allco umbrella, filed an opposition to the Town's intervention, stating, "The meeting clearly shows the result when the Annette Smith circus comes to Town and there is no one in attendance to correct false statements and

⁸ <https://www.burlingtonfreepress.com/story/opinion/2017/01/02/vermonter-year-annette-smith/95656130/>

⁹ PUC - 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 Prefiled Direct Testimony of Thomas Melone, Dec. 3, 2020, p. 5, "*On June 24, 2020, the PUC opened an investigation on its own motion in response to a complaint filed in Docket 8454 by anti-renewable energy activist Annette Smith, who has spearheaded the opposition to the two Bennington solar projects.*"

¹⁰ PUC - Supplemental Memo in opposition to intervention of Town of Bennington - 8.18.pdf, Aug. 18, 2015. "*Obviously, the Select Board was unwittingly drafted into supporting an effort against the project being spearheaded by anti-renewable energy advocate Annette Smith, one of the coal and gas industry's best friends in Vermont.*"

misrepresentations.”¹¹

7. In a filing to the U.S. District Court, Melone made the ludicrous allegation that Ms. Smith is the leader of a coordinated effort that included the former chair of the Vermont Legislature’s Committee on Natural Resources and Energy and the former chair of the Public Utility Commission to target Mr. Melone and his solar projects.¹²
8. In a document submitted to the PUC with a copy of the Complaint in this case, Mr. Melone erroneously alleged, without substantiation or reasonable belief, that the Defendant, Joseph Kulkin, is “part of the Vermonters for a Clean Environment’s opposition group.”¹³
9. In the instant case, Melone has advanced the erroneous allegation, without substantiation or reasonable belief,¹⁴ that Smith is an “all[y]” of defendant Kulkin.¹⁵
10. In other legal filings, Melone has alleged that Annette Smith has “sponsored” citizens

¹¹ PUC - Memo in opposition to intervention of Town of Bennington (FINAL with cert of service).pdf, Aug. 17, 2015. *“The meeting clearly shows the result when the Annette Smith circus comes to Town and there is no one in attendance to correct false statements and misrepresentations.”* p. 7

¹² U.S. District Court - Allco v. Volz, Vepp, PUC, Governor Scott, Complaint for Civil Rights Violations, Unlawful Taking, Declaratory and Injunctive Relief and Damages, March 9, 2020. *“In reality it was directed at the Plaintiffs’ Chelsea and Apple Hill solar projects, as part of a coordinated effort of Klein, other legislators, the neighborhood opposition group and their leader, Annette Smith. 21. How do we know that Klein’s warning to Volz and the PUC was targeted at Plaintiffs’ Chelsea and Apple Hill solar projects and was part of a coordinated effort of Klein, the neighborhood opposition group and their leader, Annette Smith?”* p. 6

¹³ PUC - March 20, 2020. Otter Creek Solar LLC’s Notice of Subsequent Event, *“As described in OCS’s brief on exceptions to the proposed decision, Joey Kulkin, part of the Vermonters for a Clean Environment’s opposition group to the Apple Hill and Chelsea solar projects...”*

¹⁴ U.S. District Court - Allco v. Kulkin, Complaint for Defamation, Injurious Falsehood and Tortious Interference with Prospective Contractual Relations, March 19, 2020. *“One of Kulkin’s allies in his efforts to stop Plaintiffs’ solar energy projects is Annette Smith of an organization that calls itself “Vermonters for a Clean Environment.””*

¹⁵ Opinion and Order, Allco v. Kulkin, Nov. 2, 2020, p. 5. *“Jumping back in time, on January 30, 2019, Annette Smith, an “all[y]” of Kulkin, filed a complaint with the PUC, alleging that Plaintiffs “were violating the CPGs [for the OC1 and OC2 Projects] by accessing the Solar Site from Cold River Road for site[-]clearing.””*

who participate in PUC regulatory proceedings,¹⁶ and makes vague, unsupported reference to her “cohorts”,¹⁷ alleging she has “spearheaded the opposition to the two Bennington solar projects.”¹⁸

11. During discovery in PUC and Vermont Superior Court cases, Melone routinely requests Intervenors’ correspondence with Annette Smith, and files public records requests with state agencies seeking their correspondence with Annette Smith.

12. On June 19, 2020, after Annette Smith reported site clearing for solar projects in Bennington for which Thomas Melone had not received a CPG, which potentially violated state statute,¹⁹ Melone sent an email to all parties to the case in which he

¹⁶ PUC - Petitioner's Reply Brief (FINAL with Cert of Service).pdf, Aug. 12, 2015. *“Harris and her sponsor, an organization that calls itself “Vermonters for a Clean Environment” (“VCE”), continue to advocate for the status quo... Harris and her sponsor would rather fiddle while Rome burns.”* p. 2 *“Ms. Harris is the lone wolf (with the support of her anti-renewable energy sponsor VCE) that continues to object...”* p. 8

¹⁷ PUC - Motion to strike pre-filed testimony of Richard Carroll (FINAL with cert....pdf, Aug. 4, 2015. *“Having failed in her bid to have the Board pay for real expert testimony to address Ms. Harris’ NIMBY concerns, she now attempts to drape an area resident and fellow cohort of Annette Smith in expert garb.”* p. 1

¹⁸ PUC - Supplemental Memo in opposition to intervention of Town of Bennington - 8.18.pdf, Aug. 18, 2015 *“Obviously, the Select Board was unwittingly drafted into supporting an effort against the project being spearheaded by anti-renewable energy advocate Annette Smith, one of the coal and gas industry’s best friends in Vermont.”*

¹⁹To the parties in PUC Case Nos. 8454 and 17-5024-PET:

Dear Parties - Below is a public comment the Public Utility Commission received today from Annette Smith of Vermonters for a Clean Environment. The Commissioners would appreciate any comments in response to VCE's comment as soon as possible.

Thank you.
Sincerely,
Judith C. Whitney
Clerk of the Commission
Vermont Public Utility Commission
112 State Street
Montpelier, VT 05620-2701
802-828-2358
puc.clerk@vermont.gov

accused Ms. Smith of “ignoring the disproportionate impact that people of color suffer from the burning of fossil fuels, and her and her cohorts activities exacerbating those conditions by trying to stop renewable energy projects.” Melone specifically referenced emissions from a coal power plant called Mystic Generating Station in Massachusetts, essentially accusing Ms. Smith of being responsible for poisoning people of color, stating “But whatever joy Annette Smith and her cohorts get from defeating renewable energy projects should be tempered with the knowledge that their actions support the continued death and destruction wrought by fossil fuels, and perpetuate generational health issues for families...”²⁰

From: Annette Smith <vce@vermontel.net>
Sent: Friday, June 19, 2020 1:08 PM
To: PUC - Clerk <PUC.Clerk@vermont.gov>
Subject: Apple Hill Solar forest clearing

Dear PUC Clerk,

Please let the Commission know that forest clearing for the Apple Hill Solar (and Chelsea Solar) sites has begun in the last week or so, apparently including driving through the area set aside for RTE species on the Apple Hill Solar site.

Annette Smith, VCE

²⁰ PUC - June 19, 2020

From: Thomas Melone <thomas.melone@gmail.com>
Subject: Re: PUC Case Nos. 8454 - Apple Hill Solar Project; and 17-5024-PET- Chelsea Solar Willow Road Project
Date: June 19, 2020 at 7:07:02 PM EDT
To: PUC - Clerk <PUC.Clerk@vermont.gov>
Cc: Michael Melone <mjmelone@allcous.com>, "Porter, James" <James.Porter@vermont.gov>, "Aceves, Sarah" <Sarah.Aceves@vermont.gov>, "Einhorn, Donald" <Donald.Einhorn@vermont.gov>, Brooke Dingleline <lbrooke@vdmllaw.com>, "Hayden, Kimberly, Esq." <khayden@pfcflaw.com>, Merrill Bent <Merrill@greenmtlaw.com>, Lora Block <lblock@sover.net>, "maru@mtanthonycc.com" <maru@mtanthonycc.com>, "Stone, Alison" <Alison.Stone@vermont.gov>, Rob Woolmington <rew@wittenetal.com>, Annette Smith <vce@vermontel.net>

Good evening Ms. Whitney,

I hope you are well on this warm summer evening of Juneteenth.

Vermont is certainly the envy of the Nation as it has fared so well during the current health crisis. My state of residence, on the other hand, the State of Florida, appears poised to be at the other end of the spectrum. The leadership that Governor Scott has shown by wearing a mask in public sets a standard that others should follow. It certainly speaks volumes that Annette Smith and sundry neighbors of our property express such concern on Juneteenth over a flower (the white arrow-leaf aster) that can be ordered from nurseries all over the United States,

13. Annette Smith lives off-grid in Danby, Vermont. Her electricity source is solar panels, batteries, and a back-up gasoline generator. She does not consume any electricity from the New England grid.

while ignoring the disproportionate impact that people of color suffer from the burning of fossil fuels, and her and her cohorts activities exacerbating those conditions by trying to stop renewable energy projects. The current pandemic has shined a spotlight on the ignored human health toll of the fossil fuel generation that Vermont chooses to consume from out-of-state generators, rather than building the necessary solar energy facilities within its borders. A recent study by the T.H. Chan School of Public Health at Harvard University concludes: "A small increase in long-term exposure to PM2.5 leads to a large increase in the COVID-19 death rate." <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2>. The energy from fossil fuels that Vermont chooses to consume rather than building the necessary solar energy facilities within its borders also causes a raft of other health issues that span generations, which disproportionately affect people of color. The fossil fueled Mystic Generating Station is one such power plant that supplies electricity to the ISO-New England region from which Vermont gets its electricity. This week's Boston Globe reported on the generational suffering that families like Sean Collie's have endured and still endure from Vermonters and New Englanders flipping on the light switch. See, <https://www.bostonglobe.com/2020/06/14/metro/effort-keep-states-largest-power-plant-open-fuels-concern-about-climate-public-health/> ("The towering smokestacks of the state's largest power plant have loomed for decades over the Boston area, spewing pollutants that produce smog, warm the planet, and exacerbate asthma and other respiratory illnesses, such as the coronavirus. ... Sean Collie, who has lived a few blocks from the Mystic plant for 23 years ... suffers from asthma, as does his 12-year-old daughter. Collie, whose wife gave birth last year to another daughter, worries for his growing family. The air in the neighborhood can be so difficult to breathe that they sometimes have to shut all their windows. The foul-smelling fumes often leave him wheezing, and prone to long spells of coughing.")

We may never know how many lives have been lost, and are yet to be lost, from the increases in the COVID-19 death rate from fossil fuel generation consumed by Vermont, including what would have been displaced if the Apple Hill solar project and other projects opposed by Annette Smith were timely approved when they should have been. But whatever joy Annette Smith and her cohorts get from defeating renewable energy projects should be tempered with the knowledge that their actions support the continued death and destruction wrought by fossil fuels, and perpetuate the generational health issues for families such as Sean Collie's. I am reminded of this quote: "*Out, damned spot! ... will these hands ne'er be clean*" ~William Shakespeare, *MacBeth*, Act 5, Sc. 1.

It is my understanding that at approximately 12:45p on June 16, 2020, the Apple Hill site was visited by VT Environmental Enforcement Officer Patrick Lowkes at the request of Don Einhorn. While ANR can certainly make its own comments, Officer Lowkes' inspection confirmed that NO RTE area was being disturbed and that the RTE area was cordoned off to prevent intrusion. I assume that if ANR believed there was any issue, it would have filed something already.

Please feel free to contact me with any further questions.

Respectfully,
Thomas Melone
Chief Executive Officer
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
(212) 681-1120
(801) 858-8818 (fax)

14. Thomas Melone owns a 6917 square foot residence in Edgartown on Martha's Vineyard in Massachusetts that Zillow estimates is worth \$12,223,779.²¹ Martha's Vineyard is served by the New England electricity grid, which is in part fueled by the Mystic coal power plant that is causing harm to the health of minority communities. Melone's residence consumes electricity generated by Mystic Generating Station.
15. Thomas Melone owns a 15,762 square foot residence in Bergen County, New Jersey valued for property tax purposes at \$5,483,000.²² The most recent data available from EIA shows New Jersey generates the majority of its electricity from fossil fuels, including coal.²³
16. In this instant case Melone states he is a resident of Florida and the sole owner of Allco Renewable Energy Limited and PLH.²⁴ Melone told the PUC in 2020 that during the pandemic he is living in Florida. Thomas Melone owns a 11,500 square foot home in Delray Beach, Florida, which Zillow estimates is worth \$16,431,178.²⁵ The most recent data available from EIA shows Florida generates the majority of its electricity from fossil fuels, including coal.²⁶
17. Thomas Melone unsuccessfully sued the Massachusetts Department of Public Utilities

²¹ https://www.zillow.com/homedetails/15-Gaines-Way-Edgartown-MA-02539/56027660_zpid/

²² <https://www.stateinfoservices.com/property/0228/403/21/#Assessment-Tax>

²³ <https://www.eia.gov/state/?sid=NJ>

²⁴ Complaint for defamation, injurious falsehood and tortious interference with prospective contractual relations, filed 3/19/20, United States District Court, District of Vermont, at 7. p. 3

²⁵ https://www.zillow.com/homedetails/601-S-Ocean-Blvd-Delray-Beach-FL-33483/46775583_zpid/

²⁶ <https://www.eia.gov/state/?sid=FL>

to stop the Cape Wind project proposed to be located offshore Martha's Vineyard on the basis that the renewable energy project would affect his viewscapes, diminish his property value, and oil and other contaminants could find their way to his property in Edgartown, Mass. on Martha's Vineyard.²⁷

18. Litigation appears to be Melone's primary occupation, not solar development. Using a virtual office²⁸ to claim residency for some of his businesses as Chittenden County, Vermont, Melone filed suit against the Town of Bennington in Vermont Superior Court, which the town moved to Federal Court where the case was withdrawn by Melone, and then was refiled by Melone in Vermont Superior Court's Environmental Division.²⁹ Named parties were the Town of Bennington Select Board and Planning Commission, the Bennington County Regional Planning Commission, some individual members of the Bennington Select Board, and some members of the Town of Bennington's ad hoc energy committee.³⁰ Melone's scorched-earth litigation strategy, designed to bully, bulldoze, or destroy anyone who stands in his way, is Thomas Melone's standard operating procedure. And, it works! It worked in bringing the Town

²⁷ <http://masscases.com/cases/sjc/462/462mass1007.html>

²⁸ <https://www.davincivirtual.com/loc/us/vermont/shelburne-virtual-offices/facility-1180>

²⁹ Vermont Superior Court Environmental Division, PLH, LLC v. Town of Bennington, et al. filed January 24, 2018 "Because the present matter is outside the scope of this Court's jurisdiction, we cannot provide declaratory relief requested by PLH LLC. See 12 V.S.A. § 4711 (providing for Superior Courts with the power to provide declaratory judgement "within their jurisdictions."). Nor is it within our authority to provide the preliminary injunction requested. Therefore, the Town's motion to dismiss is GRANTED. PLH LLC's complaint must therefore be DISMISSED for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(h)(3)."

³⁰ <https://vce.org/Complaint%20PLH%20et%20al%20v%20Bennington%20et%20al%20final.pdf>
"Plaintiff PLH is an Indiana limited liability company with its office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, VT 05482.

of Bennington to its knees after expending \$200,000 worth of litigation costs, attorneys' fees, and administrative expense, which ultimately caused the Town to enter a settlement - the only way to recover that crippling out-of-pocket amount (\$200k) - by withdrawing any opposition or promising not to oppose any of Melone's five proposed Bennington solar projects.³¹

19. Thomas Melone currently has separate litigation pending in Vermont Superior Court Chittenden Division against the Vermont Agency of Transportation,³² the Vermont Agency of Natural Resources,³³ and the Vermont Public Utility Commission.³⁴
20. Melone is litigating in Vermont Superior Court Chittenden Division against Bennington citizens who did not support two of his solar projects, including PUC intervenor Apple Hill Homeowners Association, PUC intervenor Libby Harris, the Estate of Earl Senecal who denied granting an easement to Melone, and the original 1960's developers of the Apple Hill residential development, Paul and Nancy Bohne.³⁵
21. In addition to this suit in U.S. District Court, Melone filed suit in U.S. District Court

³¹ https://www.benningtonbanner.com/archives/town-solar-developer-sign-off-on-settlement/article_8ef9d7ae-fec3-5653-807d-0a43c7b74a75.html

³² Vermont Superior Court, Chittenden Division, Otter Creek Solar LLC and PLH LLC v. State of Vermont and Vermont Agency of Transportation, *Filed April 9, 2018, Rulings on Motions for Summary Judgment, March 4, 2019. Granted and denied. Case Pending.*

³³ Vermont Superior Court Chittenden Unit, Otter Creek Solar LLC v. Vermont Agency of Natural Resources, filed February 20, 2020. *Case pending.*
Vermont Superior Court Chittenden Unit. Otter Creek Solar LLC v. Vermont Public Utility Commission, filed January 31, 2020. *Case pending.*

³⁴ Vermont Superior Court Chittenden Unit. Apple Hill Solar LLC et al v. Vermont Public Utility Commission, filed on January 21, 2020. *Claims against Governor, Access to Records, Case Disposed June 24, 2020*

³⁵ Vermont Superior Court. PLH LLC v. Libby Harris a/k/a Libby Garrison, the Apple Hill Homeowners Association Inc., Estate of Earl Senecal, Paul W. Bohne III and Nancy S. Bohne, April 10, 2019. *Case pending.*

against Governor Phil Scott, former Vermont PUC chair Jim Volz, each of the current three PUC Commissioners individually, the PUC, and VEPPI, the administrator of the state's Standard Offer program.³⁶ Melone filed yet another suit against the PUC that is also pending in U.S. District Court.³⁷

22. An internet search of Melone's business entities, Allco, PLH, etc. bring up numerous lawsuits filed in other states, including but not limited to Massachusetts,³⁸

³⁶ United States District Court of Vermont. Allco Renewable Energy Limited, Otter Creek Solar LLC, Chelsea Solar LLC, Apple Hill Solar LLC and PLH LLC v. James Volz, VEPP Inc., Anthony Roisman, Sarah Hofmann, Margaret Cheney, Vermont Public Utility Commission, Phil Scott in his official capacity of governor of the State of Vermont, and the State of Vermont, March 9, 2020. Demand: \$75,000,000.00. *Case pending.*

³⁷ United States District Court for the District of Vermont. Allco Finance Limited, Otter Creek Solar, LLC, and PHL Vineyard Sky, LLC v. Anthony Roisman, Sarah Hofmann and Margaret Cheney in their official capacities as commissioners of the Vermont Public Utility Commission, July 21, 2020. *Case pending*

³⁸ United States Court of Appeals, First Circuit. Allco Renewable Energy Limited v. Massachusetts Electric Company, agent of National Grid; Angela M. O'Connor, individually and in her official capacity as Chairperson of the DPU; Jolette A. Westbrook, individually and in her official capacity as Commissioner of the DPU; Robert Hayden, individually and in his official capacity as Commissioner of the DpU; Judith Judson, individually and in her official capacity as Commissioner of the MDER, decision November 13, 2017. *Allco fails to show that the district court erred in dismissing its claims against National Grid, because it lacks a private right against National Grid. So too does Allco fail to show that the district court abused its discretion in limiting the relief it granted against the state defendants. Accordingly, we affirm.*

United States District Court of Massachusetts. PLH LLC v. Town of Ware, January 23, 2019. *Resolved*

Connecticut,³⁹ and, New York,⁴⁰ California⁴¹ where Melone intervened in the PG&E bankruptcy case claiming he is entitled to more than \$600 million for un-built solar projects for which he alleges PG&E should have contracted.

23. Thomas Melone has appealed Green Mountain Power's projects to the Vermont Supreme Court, which dismissed his challenges, preventing him from turning a limited permitting proceeding before the PUC into a broad challenge to the methods of PURPA compliance in Vermont, and affirming his lack of standing in another case.⁴²

³⁹ United States Court of Appeals for the Second Circuit. *Allco Finance Limited v. Robert J. Klee* in his official capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection, Office of Consumer Council, Fusion Solar LLC, Number Nine Wind Farm LLC, Greenskies Reneable Energy, LLC., November 6, 2015. *Disposition: Appeal from a district court judgment* (Arterton, J.), which dismissed the plaintiff's complaint. *We hold that: (1) the plaintiff cannot bring claims under and 1988 to vindicate any rights conferred by the Public Utility Regulatory Policies Act ("PURPA") because PURPA's private right of action forecloses such a remedy; (2) the plaintiff failed to exhaust administrative remedies, a prerequisite to bringing an equitable action seeking to vindicate any rights conferred by PURPA; and (3) the plaintiff lacks standing to bring a preemption action seeking solely to void the contracts awarded to the intervenors. Accordingly, we AFFIRM the district court's judgment on alternative grounds.*

United States District Court for the District of Connecticut. *Allco Fin. Ltd. V. Etsy*, July 2, 2014. *Greenskies's motion for permissive intervention is granted for the limited purpose of objecting to Allco's discovery request and seeking to obtain a modification of the operative protective order.*

⁴⁰ United States District Court Southern District of New York. *Allco American Capital Limited, LLC vs. Thomas M. Rainwater*, November 2009. Filed by Thomas M. Melone, CEO and President AllcoUS against CEO of Sun Edison LLC. *"This action involves claims by the plaintiff, a limited liability company whose sole member is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of New York (as alleged in its State Court complaint), against the defendant, a resident and citizen of the State of Maryland, seeking damages under theories of "tortious interference with plaintiff's rights" and "breach of fiduciary duty to plaintiff." Outcome unknown.*

⁴¹ United States District Court Northern District of California San Francisco Division. *Winding Creek Solar LLC, Foothill Solar LLC, Hollister Solar LLC, Vintner Solar LLC, Bear Creek Solar LLV, and Allco Renewable Energy Limited v. Pacific Gas & Electric Company*. November 20, 2019. *"Plaintiffs sought damages in excess of \$600 million, as well as injunctive relief in the form of court-ordered contracts with the Utility....The Adversary Proceeding is dismissed without leave to amend on the basis that Plaintiffs have, by commencing the Adversary Proceeding, employed an improper procedure (specifically, an adversary proceeding under Part VII of the Bankruptcy Rules) for asserting their prepetition claims against the Utility." Dismissed.*

⁴² Vermont Supreme Court. *GMPSolar-Richmond, LLC v. Allco Renewable Energy Limited*, Nov. 22, 2017 *"Allco sought to make the limited CPG proceeding a platform for a broad challenge to the methods of PURPA compliance in Vermont. We conclude that it was within the Board's discretion to require that such a challenge be made in a proceeding suited to resolve the specific issues raised and in which all affected parties could fully*

III. STANDARD OFFER CONTRACTS and THE BENNINGTON SOLAR PROJECTS

24. Melone currently has at least four appeals pending before the Vermont Supreme Court.

Two cases are appeals of two of his Bennington Solar projects. Two cases are appeals of the PUC's Standard Offer program.⁴³

25. Standard Offer contracts are Melone's vehicle of choice for developing solar projects in Vermont. Vermont's Standard Offer program was established "to encourage the development of renewable energy resources in Vermont as well as the purchase of renewable power by the state's electric distribution utilities."⁴⁴ The process is administered by VEPP, Inc.,⁴⁵ which annually issues a Request for Proposals ("RFP") on which developers bid. Projects are capped at 2.2 mW. Contracts are awarded to the lowest qualified bidders. Applicants who bid for contracts are expected to have site control such that they "have a realistic chance of being commissioned,"⁴⁶ if a contract

participate. We find no abuse of discretion."

Vermont Supreme Court. *Allco Renewable Energy Limited v. Green Mountain Power Corp. Approval to Invest in Hydroelectric Generation Facilities Located Outside Vermont*, May 2018. "*Because Allco was properly denied party status, it cannot appeal the grant of the CPG. We affirm the denial of Allco's petition to intervene. We dismiss Allco's appeal of the grant of the certificate of public good.*"

⁴³ *Allco Renewable Energy Limited and PLH LLC v. Public Service Board*, August 25, 2017. In re Programmatic Changes to Standard-Offer Program & Investigation into Establishment of Standard-Offer Prices <https://www.vermontjudiciary.org/sites/default/files/documents/op16-399.pdf> "*In this case, not only did Allco not raise the issue at the proper time, but also Allco failed to provide an adequate factual basis for the Board to determine that the solar projects qualified under the "sufficient benefits" test.*"

Allco Renewable Energy Limited & PLH LLC v. Public Utility Commission, May 2020. In re Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019 <https://www.vermontjudiciary.org/sites/default/files/documents/op19-393.pdf>

⁴⁴ <https://vermontstandardoffer.com/standard-offer/>

⁴⁵ <http://vermontstandardoffer.com/>

is awarded and the PUC subsequently issues a CPG. Contracts contain a site-control requirement, but, unlike the RFP, the contract defines “site control” as “proof of dominion over real property to the extent necessary to construct the project.”⁴⁷

26. In April 2013, Melone d/b/a Ecos Energy LLC submitted two bids in response to VEPP, Inc.’s RFP issued in the Standard Offer program for Bennington Solar LLC, and for Apple Hill Solar LLC, both projects to be located on the same 27 acre parcel in Bennington, Vermont. Both projects promised to be in commercial operation by May 31, 2015.

27. The PUC approved a contract for Bennington Solar, LLC (which was renamed Chelsea Solar, LLC) to be located on Apple Hill in Bennington, but denied the contiguous Apple Hill Solar LLC on the same parcel of land, finding that the two projects together were really a single plant: one 4.0 mW project that exceeded the 2.2 mW cap of the Standard Offer program.

28. In the Spring of 2013, neighbors who live at the end of the cul-de-sac of the road known as Russet Drive which is located in the Apple Hill Residential Subdivision called the Apple Hill Homeowners Association’s President, Bill Knight, to report that heavy earth-moving equipment and trucks were at the end of their street. Mr. Knight went to the scene, identified himself, and asked the operator of the big earth mover what he was doing. He said he was going to make a road through the end of Russet Drive to a solar

⁴⁶ <https://www.vermontjudiciary.org/sites/default/files/documents/op19-393.pdf>. “explaining that site control requirement was adopted “to reduce speculative bidding and ensure that projects have a realistic chance of being commissioned”, p. 11

⁴⁷ Id. p. 14.

project. Mr. Knight told him he was in the wrong place. The operator made a phone call and then left. **See Exhibit 6**, Affidavit of Bill Knight. This is the quintessential example of Mr. Melone's modus operandi: to bulldoze - literally in this instance - anyone who gets in his way of whatever he wants.

29. On May 21, 2013, Melone moved the PUC to reconsider its decision to deny the Apple Hill Solar standard offer contract. Attached to its Motion for Reconsideration were two diagrams of the proposed projects showing that each project would be served by a separate access road and a separate point of interconnection. The Apple Hill Solar, LLC project was depicted as being accessed via Willow Road from the south. However, the Bennington/Chelsea Solar LLC project was depicted as being accessed via a road from the north that does not exist. Melone or his agent, had altered the aerial photo and drew in a make-believe extension to Russett Drive's cul-de-sac over the lands of Earl Senecal, a resident of the Apple Hill Residential Subdivision. The road depicted does not exist and is the same road that Melone's contractor tried to bulldoze earlier that Spring without permission or any rights of any kind.
30. On June 20, 2013, Bennington Solar LLC executed a Standard Offer contract for a 2.0 mW solar facility to be located in Bennington.
31. In July 2013, Melone or his agents approached Apple Hill resident Earl Senecal of Russet Drive seeking an easement through his property to access the Bennington Solar site from the north. Senecal declined to enter into an easement with the solar developer. **See Exhibit 7**, Affidavit of Steven Senecal.
32. On October 18, 2013, Melone, appearing as Ecos Energy LLC, appealed the PUC's

denial of Apple Hill Solar, LLC's standard offer contract to the Vermont Supreme Court. Included in Ecos's Printed Case were the same two diagrams presented to the PUC in the Motion for Reconsideration, showing two separate points of interconnection and two separate access roads, one from the north ("Russet Dr.") leading to Bennington Solar and one from the south ("Willow Road") leading to Apple Hill Solar. Melone's diagram still showed the make-believe extension of Russet Drive through Earl Senecal's property, which Senecal had declined to grant an easement for, just three months prior. **See Exhibit 5**, PUC Order re Russett Drive & Single Plant issue. The Ecos Exhibits, which depict Russett Drive (fake road from the north) and Willow Road (from the south) are attached to the PUC Order at pages 7 and 8.

33. Based on the false representations by Melone that the two projects would be served by separate roads with separate points of interconnection, on March 28, 2014 the Vermont Supreme Court reversed the PUC.⁴⁸
34. On May 12, 2014, Apple Hill Solar LLC executed a Standard Offer contract for a 2.0 mW solar facility to be located in Bennington, Vermont.
35. On June 19, 2014, Melone d/b/a Ecos Energy LLC filed a petition for "Chelsea Solar LLC".⁴⁹
36. Site plans for Chelsea Solar LLC showed the solar site would be accessed by a road different from the diagram presented to the PUC and the Vermont Supreme Court in

⁴⁸ Allco Renewable Energy Limited and Ecos Energy LLC v. Public Service Board, March 28, 2014 <https://www.vermontjudiciary.org/sites/default/files/documents/In%20re%20Programmatic%20Changes.pdf>

⁴⁹ Melone renamed Bennington Solar LLC and called it Chelsea Solar LLC in the petition filed with the PUC.

2013. Instead of using Russet Drive as depicted in the diagram provided to the Vermont Supreme Court, Melone proposed using a private right-of-way that is an extension of Apple Hill Road, through the Apple Hill residential development, all of whose properties contain deed restrictions and covenants prohibiting commercial use of Apple Hill properties. Chelsea Solar LLC now proposed to interconnect to the grid via the same one-mile power line extension that Apple Hill Solar LLC presented to the PUC and Vermont Supreme Court, and not the point of interconnection near Russet Drive that was part of the basis for the Vermont Supreme Court's reversal of the PUC's denial of Apple Hill Solar LLC.

37. In June 2017, Melone, through his representative Brad Wilson, submitted revised plans for the Chelsea Solar LLC and Apple Hill Solar LLC projects.⁵⁰

38. On Feb. 14, 2019, the PUC asked parties to the Chelsea Solar LLC case to comment on the diagrams from the 2013 Vermont Supreme Court Printed Case showing the use of Russet Drive and the separate points of interconnection. Parties to the PUC case had never seen the 2013 plan to use a non-existing extension of Russet Drive to access one of the solar project sites and interconnect to the grid in the residential area of Apple Hill until the PUC brought it into the Chelsea Solar permitting case in 2019, asking parties to comment on whether the two projects together constituted a single plant. See **Exhibit 5**, PUC Order re Russett Drive and Single Plant.

39. Melone's failure to obtain legal rights to access one of the Bennington solar projects

⁵⁰ https://www.benningtonbanner.com/archives/new-solar-plan-200k-settlement-reviewed/article_c823af21-5286-553d-919d-843dc20ccea.html

has resulted in years of litigation. Each of the two cases that began in 2013 are now before the Vermont Supreme Court for the third time, with oral argument scheduled for March 17, 2021 in Apple Hill Solar LLC while the Court's decision in Chelsea Solar LLC is still pending.⁵¹

**IV. RUTLAND SOLAR PROJECTS
OTTER CREEK SOLAR I, II, and III**

40. On April 29, 2016, Melone d/b/a PLH LLC submitted a bid for a 2.2 mW Rutland Town project in response to the 2016 Standard Offer RFP, and was awarded a contract signed by Otter Creek Solar LLC on February 3, 2018.
41. On August 23, 2016, Melone d/b/a Otter Creek Solar LLC applied to the PUC to develop two contiguous solar projects, 2.2 mW and 4.9 mW, on the same 55.9 acre forested parcel in Rutland Town, Vermont. Both projects went through an unusual combined process at the PUC with different, consecutive case numbers, 8797 and 8798. A joint public hearing was held, a joint site visit was held, and a joint evidentiary hearing was held. Both projects were approved by the PUC and received CPGs on Feb. 27, 2018.
42. On May 23, 2017, Melone d/b/a Otter Creek Solar LLC submitted a bid for 2.2 mW of the 4.9 mW Rutland Town project in response to the 2017 Standard Offer RFP, and Otter Creek Solar LLC was awarded a contract that was revised March 22, 2018.
43. On Jan. 30, 2019, Melone obtained a third Standard Offer contract for the other portion

⁵¹ 2014 Reversal in both cases, Chelsea Solar Denial 2016, Chelsea Solar Denial 2019, Apple Hill Solar remand 2018, Apple Hill Solar Denial, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-358_1.pdf

of the 4.9 mW project.

44. No other solar developer participating in the Vermont Standard Offer program has proposed siting more than one 2.2 mW solar project on the same parcel. The Rutland Town projects are Melone's third such attempt to game Vermont's program – the others, Chelsea Solar and Apple Hill Solar, and Battle Creek Solar,⁵² Warner Solar and Stark Solar⁵³ are in Bennington.
45. Melone's cases at the PUC become overly complicated to the point of being convoluted due to his practice of getting more than one Standard Offer contract for contiguous projects to be located on one parcel.
46. The Rutland Town projects at issue in this proceeding were proposed to be located on a 55.9 acre forested parcel bordered by the Cold River Road to the east and Windcrest Road to the west. Cold River Road is used as a bypass by many drivers to avoid the traffic lights on Route 7 to the west, and therefore has a high volume of traffic. It is hilly with challenging lines of sight for property owners attempting to enter the road. Windcrest Road is a relatively short dead end road directly off Route 7 with no traffic safety issues.
47. All testimony submitted by Melone to the PUC for the Rutland Town projects stated that both projects would be cleared and constructed via Windcrest Road. Testimony by Melone's representative, Brad Wilson, specifically stated that neither project would be cleared or constructed via Cold River Road.

⁵² Battle Creek Solar is constructed and in operation.

⁵³ Warner Solar and Stark Solar are currently litigating the single plant issue.

48. Annette Smith and VCE staff attended the PUC's site visit, where Brad Wilson stood on Windcrest Road and provided details of the project to town officials, neighbors, the PUC Commissioners and other interested parties.
49. At no time, either in testimony filed with the PUC or as represented by Brad Wilson at the site visit, did Melone or his agents disclose that an easement from the adjoining property owner on Windcrest Road was necessary to access the sites to clear and construct the projects.
50. At no time, either in testimony filed with the PUC or as represented by Brad Wilson at the site visit, did Melone or his agents disclose that the necessary easement had not been secured. At the time Melone submitted bids for the projects in response to the RFPs, Melone did not have site control to clear and construct the projects as represented to the PUC in testimony.
51. Standard offer contracts and CPGs for the Rutland Town projects were obtained in 2018. At the time that Melone signed the Standard Offer contracts and at the time CPGs were issued, he did not have site control due to the failure to obtain the undisclosed and necessary easement.
52. On January 30, 2019, VCE filed a complaint with the PUC notifying them that the Rutland Town projects were being cleared using Cold River Road, not Windcrest Road, potentially in violation of the CPGs. VCE's complaint included information with maps showing the need for the easement, which had not been disclosed to the PUC prior to the complaint filed by VCE. As stated in the complaint, VCE became aware of the issue during discussions with Rutland Town officials. VCE's complaint included some

other issues where the project was being developed differently than presented in testimony to the PUC, such as burning and selling the wood rather than chipping it on site to use for erosion control as represented by Brad Wilson in testimony to the PUC.

53. In addition to the original two Rutland Town cases, 8797 and 8978, the PUC has opened investigations and Melone has petitioned the PUC in the Rutland Town projects resulting in numerous cases⁵⁴ necessary to address the alleged violations and over-

⁵⁴ **8797** -- Petition of Otter Creek Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of a 4.99 MW solar electric generation facility located on Windcrest Road in Rutland, Vermont. Filed August 23, 2016. PUC CPG issued February 27, 2018

8798 -- Petition of Otter Creek Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of a 2.2 MW solar electric generation facility located on Cold River Road in Rutland, Vermont. Filed August 23, 2016. PUC CPG issued February 27, 2018.

19-1596-INV – Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Otter Creek Solar, LLC's certificates of public good issued in Cases 8797 and 8798. Case opened May 28, 2019.

"We agree with the hearing officer that this result is compelled by the CPGs' separate identification of "site preparation" and "construction" in several conditions throughout the CPGs and the lack of the words "site preparation" in Condition I. We also agree that OCS was the unintended beneficiary of a drafting oversight — an oversight that will be corrected going forward when the Commission issues CPGs under Section 248. We also agree with the concerns expressed by the hearing officer over OCS's failure to correct the sworn testimony in the record of Cases 8797 and 8798 regarding the access point to be used for site clearing." PUC Final Order December 4, 2019. Appealed, jointly with 19-3031-PET, by Melone to Vermont Supreme Court, April 14, 2020. Remanded September 1, 2020.

19-3031-PET -- Petition of Otter Creek Solar LLC requesting non-substantial change determinations or in the alternative amendments to the certificates of public good issued to the Otter Creek 1 and Otter Creek 2 Solar Projects in Rutland, Vermont in Case Nos. 8797 and 8798. Filed July 17, 2019.

"The Vermont Public Utility Commission partially adopts the proposal for decision, denies a motion to dismiss filed by Otter Creek Solar LLC, and opens an investigation to determine the appropriate amount of a civil penalty to impose on Otter Creek Solar for its violation of Commission Rule 5.408." "The change of access point from Windcrest Road to Cold River Road for performing site clearing was a change in the "approved proposal" that had the potential for significant impact under Section 248 and was therefore subject to the requirements of Rule 5.408." "OCS's selective enforcement argument also fails." "OCS continues to mischaracterize the Commission's precedent on the difference between the concepts of material deviation, found in the CPGs, and substantial change, found in Rule 5.408." "OCS also mischaracterizes the reasoning in the proposal for decision when it criticizes the description of Rule 5.408 as requiring a forward-looking analysis." "OCS's argument is simply not accurate." "We agree with the hearing officer that changing the point of access for site clearing from a dead-end road that serves a limited number of properties to a Class 2 town highway had the potential for such impacts and that OCS's failure to obtain authorization for the change violated Rule 5.408." "OCS misstates the facts in making this argument." "We also reject OCS's argument that Rule 5.408 is a procedural rule, the violation of which is not subject to the penalty provisions of 30 V.S.A. § 30." "OCS's argument is without merit." "OCS's final argument fares no better." "For the reasons discussed above, we find that OCS violated Commission Rule 5.408 when it used the temporary access drive off Cold River Road for site clearing without first obtaining authorization from the

Commission.” PUC Order March 19, 2020.

Appealed jointly with 12-1596-INV by Melone to Vermont Supreme Court, April 14, 2020. Remanded September 1, 2020.

20-0233-PET. Petition of Otter Creek Solar LLC for relief from standard-offer contract commissioning milestone for the Otter Creek 2 project. Filed January 29, 2020.

“As explained in the Commission’s order of April 16, 2020, OCS failed to meet the statutory requirements that are a prerequisite to the Commission exercising its discretion to extend the commissioning deadline. As a result, the Commission was required to deny the petition, thereby subjecting the contract to the statutory termination mechanism.” “For the reasons discussed above and in the Commission’s April 16, 2020, Order, OCS’s motion to reconsider is denied.” PUC Order re Motion to Reconsider. Dec. 18, 2020

20-0253-PET. Petition of Otter Creek Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248(j), authorizing the installation and operation of the “Otter Creek 3 Solar Project,” a 2.2 MW solar electric generation facility to be located in Rutland, Vermont. Filed January 30, 2020.

“In today’s order, the Vermont Public Utility Commission (“Commission”) denies a second motion filed by Otter Creek Solar LLC (“OCS”) to vacate or reconsider the Commission’s order dated February 20, 2020, dismissing the petition filed by OCS in this case.” “For the reasons discussed above and in the Commission’s February 20, 2020, and May 6, 2020, Orders, OCS’s second motion to reconsider is denied.” PUC Order December 18, 2020.

20-0266-PET. Petition of Otter Creek Solar LLC requesting a non-substantial change determination in connection with the reduction in size of the Otter Creek 1 solar project in Rutland, Vermont. Filed January 30, 2020.

“In today’s order, the Vermont Public Utility Commission (“Commission”) denies as moot a second motion filed by Otter Creek Solar LLC (“OCS”) to vacate or reconsider the Commission’s order dated February 19, 2020, dismissing the petition filed by OCS in this case.” “The Commission’s December 3, 2020, approval of OCS’s petition in Case No. 20-3025- PET effectively renders moot OCS’s pending motion in this case. The motion is therefore denied. Additionally, because the Commission dismissed the petition filed in this case in an order issued on February 19, 2020, and denied OCS’s first motion for reconsideration by order dated May 6, 2020, there is nothing further to be done in this case. Case No. 20-0266-PET is therefore closed.” PUC Order December 3, 2020.

20-0440-PET. Petition of Otter Creek Solar LLC for relief from standard-offer contract certificate of public good filing milestone for the Otter Creek 3 project. Filed February 18, 2020.

“In its June 11 motion, OCS proposes that the standard-offer contract that applies to the OC-3 facility be transferred to its previously approved 2.2 MW Otter Creek 2 facility (“OC-2”) and that the commissioning deadline in that contract also be extended. 3 During the August 21 status conference, OCS represented that it no longer intends to pursue the approval and construction of the OC-3 facility.” PUC Order August 24, 2020.

20-0625-PET. Petition of Otter Creek Solar LLC for relief from both the standard-offer contract commissioning milestone, and waiver of the certificate of public good milestone for the Otter Creek 1 project. Filed March 9, 2020.

“In granting this relief we stress that our decision is an exercise of Commission discretion and is solely based on the unique circumstances of this case as well as events that occurred after the hearing officer issued the proposal for decision. Even though we are granting relief from the petition-filing milestone deadline in the contract, we agree with the hearing officer’s enumerated proposed findings and legal reasoning that support the recommended denial of the petition. As a result, this Commission decision should not be read as precedent for other projects seeking extensions of standard-offer deadlines should similar circumstances arise in the future.” PUC Order December 3, 2020.

20-2572-PET. Petition of Otter Creek Solar LLC for the amendment of Attachment A and the extension of the commissioning deadline of the January 30, 2019, standard-offer contract applicable to the Otter Creek 3 solar electric generation facility in Rutland, Vermont. Filed September 9, 2020.

“In today’s order, the Vermont Public Utility Commission (“Commission”) grants in part the petition filed by Otter Creek Solar LLC (“OCS”) seeking: (1) an amendment to Attachment A to the January 30, 2019, standard-offer

complexity resulting from the failure to clear the project according to testimony and plans, and so many Standard Offer contracts on the same parcel. The investigation resulting from the site clearing off Cold River Road instead of Windcrest Road is now in the penalty determination phase.

54. Melone challenged the PUC's award of Standard Offer contracts in 2019 and 2020 with appeals to the Vermont Supreme Court. **In one case, a primary issue he litigated was the alleged lack of site control by the winner of the bidding process, NextEra, Melone's primary competitor.** In oral argument before the Vermont Supreme Court in 2020, he told the Vermont Supreme Court Justices:

10:05: Thomas Melone: But they [NextEra] didn't have the easement at the time of the bid and that's really the test, whether they had the land rights at the time of the bid.

12:40: Thomas Melone: The easiest thing is what we do, is it's clear that we have site control.⁵⁵

contract that applied to OCS's proposed Otter Creek 3 ("OC-3") solar facility (the "Contract") so that the Contract applies to OCS's already approved Otter Creek 2 ("OC-2") solar facility; and (2) an extension of the commissioning milestone deadline in the Contract until August 26, 2021." PUC Order December 18, 2020.

20-3025-PET – Amended CPG issued 12/03/20 -- Petition of Otter Creek Solar LLC for an amendment to the certificate of public good issued in Case No. 8797 authorizing the installation and operation of the "Otter Creek 1 Solar Project" in Rutland, Vermont. Filed October 9, 2020.

"OCS's petition amends the CPG authorizing a reduction in the alternating current ("AC") capacity of the previously approved OC-1 project from 4.9 MW to 2.2 MW and states that the reduced-capacity project will be known as the "MacKinnon" project." PUC Order December 3, 2020.

⁵⁵ *In re Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019 (Allco Renewable Energy Limited & PLH LLC, Appellants)*, 2020 VT 103 No. 2019-393.

See Video of Oral Argument at: <https://youtu.be/FiT7KV58bqs>.

V. BAD MOTIVE

55. Thomas Melone's attempt to involve Annette Smith in the case at bar is totally improper, but appears to have been his end game all along. Melone has been obsessed with Smith for years, gunning for her because she runs a watchdog group that keeps track of bad actors and has shone a light on his misrepresentations and violations. Melone now seeks to turn his scorched earth tactics to abuse and ultimately silence Ms. Smith and VCE, because she stands in his way.
56. Melone has sued Mr. Kulkin for an absurd amount of money, and is now attempting to involve Smith in a case where he, alone, is responsible for his own delays – years and years of delays due to his obsessive litigiousness. Even the PUC has identified Melone's culpability, but rather than take responsibility, Melone blames others and weaponizes the litigation process to get what he wants. **See Exhibit 8**, PUC Order re Melone's Delays of Otter Creek.
57. In Melone's fantasy world, Smith is the leader of a conspiracy in concert with the former chair of the PUC and former chair of the Vermont House Committee on Natural Resources and Energy, a scenario so implausible as to be laughable.
58. In Melone's real world, in two of his Bennington solar cases, he presented false and misleading information to the Vermont Supreme Court to achieve a reversal of the PUC's denial of one of his projects where he did not have site control to construct a project according to the contract.
59. In the Rutland Town cases at issue in the instant suit, Melone obtained Standard Offer Contracts and CPGs for the Otter Creek projects for which he, himself, did not have

site control. Melone should never have bid into the RFP or received the contracts or the CPGs. And then, incredibly, Melone held up another company - NextEra's - receipt of a Standard Offer Contract by appealing its award of the Contract to the Vermont Supreme Court, arguing that NextEra was not entitled to a Standard Offer Contract because it did not have proper site control, and falsely claiming that Melone acquires site control at the time of the bid saying, it is "what we do." The instant case itself proves Melone's statement to the Supreme Court is false. Obviously, securing site control before he bid on the Standard Offer contract for Otter Creek Solar, was required according to his own arguments against NextEra before the Supreme Court. Yet in the instant case, Melone is suing Mr. Kulkin for 25 million dollars for doing something that he claims delayed Melone getting an easement that he should have obtained years before. Melone was never entitled to a contract for the project site because he did not have site control and procured the bid through fraudulent representations.

60. The PUC's Decision attached as **Exhibit 8**, comprehensively deals with all of the same arguments that Mr. Melone is making in the case at bar. The PUC has carefully analyzed every argument Melone advances to to blame others for his own dilatory conduct that created issues, but that were still within Melone's control.

61. The PUC sums up the Otter Creek Solar delays as Melone's responsibility as follows:

In this case, OCS could have avoided any delays caused by its difficulties in obtaining access from Windcrest Road by timely seeking Commission approval to use Cold River Road for construction access. The alleged financing difficulties that OCS claims to have experienced were the product of its own actions—actions taken at least in part without regard to the Commission's regulatory oversight responsibilities. Furthermore, the Commission's investigations into the unauthorized use of Cold River Road to access the project site for clearing purposes were the direct result of

OCS's own actions and could have been avoided by developing the project according to the previously approved plans."

Exhibit 8 at 29. See also **Exhibit 9** for a non-highlighted version of Exhibit 8.

61. For the Court's further information, attached is a copy of a recent filing by the Vermont Agency of Natural Resources in a Melone case at the PUC that further demonstrates the Plaintiff's ongoing litigation abuses:

"The Developer has persistently and willfully refused to abide by the Commission's requirements in these proceedings. The Developer has abused the process and demonstrated disregard for other parties' rights to an orderly proceeding. The Developer's actions have imposed unnecessary and inappropriate burdens on the parties and their counsel in dealing with and responding to the Developer's unauthorized, unacceptable, and persistent conduct."

Exhibit 10 at 12.

VI. LEGAL ARGUMENT

A. Legal Standard for Quashing a Subpoena and Protection of Non-Parties

"Rule 45 of the Federal Rules of Civil Procedure governs the issuance, service, and enforcement of subpoenas, and the procedures for objecting to them. The Rule provides a level of protection for persons subject to subpoena, allowing such persons to object on particular grounds, including 'undue burden or expense.'" *Standard Fire Ins. Co. v. Donnelly*, No. 5:08-CV-258, 2010 WL 11610603, at *2-5 (D. Vt. Apr. 2, 2010) (citing FED. R. CIV. P. 45(c)(1), (c)(2)(B)).

Rule 45(c), entitled "Protecting a Person Subject to a Subpoena," states, in relevant part:

A person commanded to produce documents or tangible things ... may serve on the party or attorney designated in the subpoena a written objection The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served."

FED. R. CIV. P. 45(c)(2)(B). “Generally, unless an ‘adequate excuse’ is provided, a person served with a valid subpoena must obey it, or be held in contempt. FED. R. CIV. P. 45(e)). However, any order compelling a **non-party** to comply with a subpoena ‘must protect’ that non-party ‘from significant expense resulting from compliance.’” *Standard Fire Ins. Co.* at *2-5 (citing FED. R. CIV. P. 45(c)(2)(B)(ii); *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996))(emphasis supplied). Moreover, “the court must not enforce a subpoena that ‘requires disclosure of privileged or otherwise protected matter’ or presents an ‘undue burden.’” *Id.* (citing *Orbit One Communications v. Numerex*, 255 F.R.D. 98, 105 (S.D.N.Y. 2008) (quoting FED. R. CIV. P. 45(c)(3))).

“The burden of persuasion on a motion to quash a subpoena is borne by the movant.” *Id.* (citing *Jones v. Hirschfeld*, 219 F.R.D. 71, 74–75 (S.D.N.Y. 2003); *Concord Boat Corp.*, 169 F.R.D. at 48)). “Determinations of issues of ‘undue burden’ are committed to the discretion of the trial court.” *Id.* (citing *Hirschfeld*, 219 F.R.D. at 74.) As this Honorable Court explained in *Standard Fire Ins. Co. v. Donnelly*, in making such determinations, a court must limit a party’s discovery if it determines that:

“(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”

Id. (quoting FED. R. CIV. P. 26(b)(2)). This Court further articulated the factors that the court is required to weigh in determining the issues of burden and reasonableness:

“An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party. *Whether a subpoena imposes an “undue burden” depends upon such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed. However, courts also give special weight to the burden on non-parties of producing documents to parties involved in litigation.* The determination of issues of burden and reasonableness is committed to the sound discretion of the trial court.” *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 288 F.R.D. 111, 113 (D. Conn. 2005).

Id. (bold emphasis supplied).

Moreover, a critical holding in the *Standard Fire Ins. Co. v. Donnelly* decision, provides the following:

Clearly, implicit in Rule 45 is a requirement that the subpoena must seek relevant information, meaning information that is reasonably calculated to lead to the discovery of admissible evidence. *See Stock v. Integrated Health Polan, Inc.*, 241 F.R.D. 618, 621 (S.D. Ill. 2007) (“A subpoena will survive a motion to quash when it designates topics that are reasonably calculated to lead to admissible evidence.”); *Syposs v. United States*, 181 F.R.D. 224, 226 (W.D.N.Y. 1998) (“**The reach of a subpoena issued pursuant to [Rule] 45 is subject to the general relevancy standard applicable to discovery under [Rule] 26(b)(1).**”).

Id. (emphasis supplied). The relevancy requirement was further discussed a few years later in *Clift v. City of Burlington, Vermont*, in which the Court stated:

Rule 45 requires the Court to modify or quash a subpoena in several circumstances, including whenever the subpoena subjects the moving party to an “undue burden.” Fed. R. Civ. P. 45(c)(3)(A). Although Rule 45 does not explicitly refer to the relevancy requirements for discovery, many courts have quashed subpoenas that are not “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1); *see, e.g., Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 927 (8th Cir. 1999) (upholding the quashing of a subpoena because it sought irrelevant

material); *Warnke v. CVS Corp.*, 265 F.R.D. 64, 66 (E.D.N.Y. 2010) (“A subpoena issued to a non-party pursuant to Rule 45 is subject to Rule 26(b)(1)’s overriding relevance requirement.”) (internal quotation omitted). **Of course, a subpoena may be unduly burdensome even when the information or documents are relevant; in such cases, the question is whether the “burden of compliance with [the subpoena] would exceed the benefit of production of the material sought by it.”** *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 927 (7th Cir. 2004) (quashing a subpoena for the medical records of patients who received late term abortion procedures because although the material might have been relevant, it was of little probative value.).

Clift v. City of Burlington, Vermont, No. 2:12-CV-214, 2013 WL 12347197, at *1–2 (D. Vt. Aug. 26, 2013)(emphasis supplied). The *Standard Fire Ins. Co. v. Donnelly* and *Clift v. City of Burlington* cases were decided in 2010 and 2013 respectively. The 2015 Amendments to the Federal Rules of Civil Procedure revised Rule 26(b)(1) by eliminating the “reasonably calculated” language and redefining the scope of discovery as limited by relevance and proportionality:

any nonprivileged matter that is relevant to any party’s claim or defense and proportionate to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

F.R.C.P. Rule 26(b)(1). While the wording of the scope of discovery has been amended to a stricter relevance and proportionality standard, the reasoning of the Court’s 2010 *Standard Fire Ins. Co. v. Donnelly* decision and the 2013 *Clift v. City of Burlington* case remain equally applicable. In fact, the Court has since confirmed that the amended “Rule 26(c)(1) authorizes the Court to modify or quash a subpoena ‘to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’” *Ernst v. Kauffman*, No. 5:14-CV-59, 2016 WL 11261290, at *3 (D.

Vt. June 23, 2016).⁵⁶ Therefore, as a threshold matter, the materials requested via the subject subpoena must be relevant as defined by Rule 26(b)(1). It is only after the requesting party clears the relevance threshold that the Court is obligated to engage in weighing of factors to determine whether there is an undue burden.

B. Application of the Law to the Subject Subpoena

The Subpoena that is the subject of this Motion to Quash which was served on non-party Annette Smith commands production of:

1. All Communications with Joey Kulkin.
2. All Communications related to the Rutland Projects.

"Communication" means any written or other transmission or exchange of words, thoughts or ideas to another person or entity, whether person-to-person, in a group, in a meeting, by telephone, by letter, by telex, facsimile, electronic mail, texting, or by any other process or medium, electronic or otherwise.

"Rutland Projects" means the Otter Creek Solar projects in Rutland, Vermont, which are the subject of Case No. 8797, Case No. 8798, Docket No. 19-1596, Docket No. 20-0253, Docket No. 19-3031 before the Vermont Public Utility Commission.

See Exhibit 1.

1. The Subpoena's first request: "All Communications with Joey Kulkin," contains no time limit or topic and is, on its face, vague, overbroad, burdensome and violative of Ms. Smith's reasonable expectation of privacy and VCE's statutory rights under the Vermont Trade

⁵⁶ "Under Federal Rule of Civil Procedure 45, a court may quash a deposition subpoena if the testimony it seeks is irrelevant. *See, e.g., Clift v. City of Burlington*, No. 12-CV-214, 2013 WL 12347197, at *1 (D. Vt. Aug. 26, 2013) ("**Although Rule 45 does not explicitly refer to the relevancy requirements for discovery, many courts have quashed subpoenas that are not reasonably calculated to lead to the discovery of admissible evidence.**") (internal quotation marks omitted)); *GMA Accessories, Inc. v. Electric Wonderland, Inc.*, No. 07 Civ. 3219, 2012 WL 1933558, at *5 (S.D.N.Y. May 22, 2012) (same)."

Denniston v. Abiomed, Inc., No. 19-MC-6010-FPG, 2019 WL 6827487, at *1 (W.D.N.Y. Dec. 13, 2019).

Secret's Act, and imposes an undue burden and expense on Ms. Smith and her organization. Such discovery has not been shown to seek documents that are remotely relevant to the claims or defenses in this case, and the documents are certainly available from the Defendant, another source that is more convenient, less burdensome, and less expensive than imposing an undue burden on a non-party to this action. Since the communications requested belong to the Defendant himself, it is beyond credulity that Attorney Melone, a very experienced litigator, has not requested document production from Mr. Kulkin. Nor has Mr. Melone made a showing that the requested documents were not available from Mr. Kulkin. And, given the expected discovery process that has no doubt taken place, the subpoena is objectionable as unreasonably cumulative or duplicative. Lastly, the burden and expense of Mr. Melone's fishing expedition on a non-party with no showing of need or relevance, does not even require a weighing of burden versus benefit. This is a frivolous weaponized case brought for an absurd amount of money, which claim is wholly unsupported by any factual basis whatsoever since Melone has currently received his CPGs and Standard Offer Contracts for the Otter Creek projects that are at the heart of his alleged claim against Mr. Kulkin. Thus, the amount in controversy is a fraud. Melone will make his \$25 million on the Otter Creek projects at issue in this case, and the discovery proposed to be subpoenaed from Ms. Smith, has no role in resolving any of the issues in the litigation nor is it relevant in any event.

2. The Subpoena's second request: "All Communications related to the Rutland Projects" takes Melone's abuse to a new level, presumably requiring the production of any email or other correspondence, at any time, to or from anyone in the entire universe pertaining to the "Rutland Projects" which is defined as 5 different Dockets at the PUC. The request is nothing short of the text book example of a "fishing expedition." But, it actually represents much more

than that. As detailed in the factual history supra, Mr. Melone has demonstrated a pattern of ill will towards Ms. Smith, engaging in false narratives and disparaging *ad hominin* attacks, all because she has uncovered his repeated flagrant and belligerent disregard of the law, which have caused him delay, expense and potential fines imposed by the PUC for his violations. Ms. Smith has blown the whistle on Melone several times now, so he seeks to destroy her and her organization through his abusive litigation tactics and malicious discovery abuses, designed solely to destroy and silence any opposition to his unlawful and abusive business practices. Ms. Smith implores this Honorable Court to Quash the Subpoena served upon her and issue a Protective Order preventing Mr. Melone from harassing, abusing and oppressing her with service of further Subpoenas.

In summary, the Court should Quash the Subpoena served upon Ms. Smith for the following reasons:

- Melone has failed to demonstrate that his discovery of all communications between Ms. Smith and Mr. Kulkin are relevant to the claims or defenses in this case.
- Melone has failed to demonstrate that his discovery of all of Ms Smith's emails regarding the "Rutland Projects" are relevant to the claims or defenses in the case.
- Melone has failed to demonstrate that the Kulkin emails were not able to be obtained through the normal discovery process from the Defendant.
- The requests are vague, overbroad, burdensome, oppressive and violate Ms. Smith's rights to privacy and her organization's protections under statutory and common law.
- The requests are for an improper purpose and made in bad faith designed solely to destroy and silence any opposition.

VII. MOTION FOR SANCTIONS

Under Rule 45 a court must impose a sanction where a subpoena imposes undue burden or expense. Fed.R.Civ.P. 45(d)(1). “The rule leaves district courts discretion regarding the form of such sanctions.” *Simuro v. Shedd*, No. 2:13-CV-30, 2014 WL 5776149, at *5 (D. Vt. Nov. 6, 2014)(citing *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir.2013)). “Nevertheless, the Second Circuit has reversed sanctions for attorney's fees or lost earnings absent a clear factual showing of bad faith and “clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes” *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir.1982) (internal quotation marks and citation omitted).

The case at bar provides clear evidence that Melone’s serving of the Subpoena on Ms. Smith is entirely without color and propounded for the purpose of annoyance, oppression, and to silence any opposition to his solar energy projects. Such actions demonstrate Mr. Melone’s bad faith intent to destroy Annette Smith and Vermonter’s for a Clean Environment, so no one will be left to report Melone’s violations of law.

Ms. Smith’s request for the extraordinary relief of sanctions is requested in good faith and fully supported by a substantial factual record, which demonstrates that the imposition of sanctions may be the only possible option to deter Plaintiff from continuing his bad-faith, scorched-earth litigation and discovery abuses.

Annette Smith has no role in Mr. Melone’s conspiracy fantasy and he should not be permitted to abuse strangers to this litigation.

WHEREFORE, Annette Smith and VCE respectfully request that the Court:

- 1) Quash the Subpoena Duces Tecum served upon *non-party* Annette Smith;
- 2) Issue a Protective Order to protect *non-parties* Annette Smith and VCE from Plaintiff's abusive discovery; and,
- 3) Order Sanctions against Plaintiff Thomas Melone (who is also the sole owner of all other Plaintiffs, and is Plaintiffs' counsel) to compensate Ms. Smith for her attorney's fees, costs, expenses, lost time and inconvenience in responding to this abusive Subpoena and to punish Mr. Melone for his offensive fishing expedition designed to oppress Ms. Smith and harm her financially in order to thwart her and her organization's environmental advocacy and educational mission.

DATED at Town of Randolph, County of Orange, State of Vermont this 15th day of March, 2021.

**Vermonters for a Clean Environment &
Annette Smith**

/s/ *L. Brooke Dingle*

By: L. Brooke Dingle, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
Attorneys for Annette Smith
172 N. Main Street
P.O. Box 625
Barre, Vermont 05641
Tel: (802) 476-4181, ext. 311
Lbrooke@vdmlaw.com

cc: Thomas Melone, Esq.
Joseph Kulkin