STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington,Vermont.	

Order entered: 08/31/2021

ORDER DENYING MOTION TO REOPEN PROCEEDINGS

I. INTRODUCTION

On June 24, 2021, Chelsea Solar LLC ("Chelsea") filed a motion (the "Chelsea Motion") with the Vermont Public Utility Commission ("Commission") to reopen these proceedings because, according to Chelsea, "the sole basis on which the Commission denied the certificate of public good ("CPG") in its order dated June 12, 2019, no longer exists."[1]

On July 30, 2021, the Apple Hill Homeowners Association and the Mount Anthony Country Club ("Intervenors"), the Vermont Department of Public Service ("Department"), and the Vermont Agency of Natural Resources ("ANR"), each filed responses recommending that the Commission deny the Chelsea Motion (respectively, the "Intervenors' Response," the "Department's Response," and "ANR's Response").

In this Order, we deny the Chelsea Motion.

II. POSITIONS OF THE PARTIES

Intervenors' Response

The Intervenors assert that the Chelsea Motion should be denied because it is based on the flawed premise that the Apple Hill CPG[2] has been vacated:

[1] Chelsea Motion at 1 (citing Case No. 17-5024-PET, Order of 6/12/19 (denying the Willow Road facility a CPG because it would be part of a single plant with the Apple Hill facility and would exceed the size allowed by statute to receive the benefits of the standard-offer program)).

[2] *See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Vermont*, Docket 8454, Order of 5/7/20 (denying CPG petition), *appeal pending*.

> Therefore, until and unless the Petitioner withdraws its appeal before the Vermont Supreme Court, abandons its petition for a CPG for Apple Hill Solar, and withdraws its request for an extension of the commissioning deadline under Apple Hill's now-expired standard-offer contract, the "reason" that the Commission denied Chelsea Solar (Willow Road) (because it is a single plant with Apple Hill Solar LLC) does in fact, still exist. Consequently, the notion that the CPG has been "vacated" is inaccurate and misleading and the request itself is procedurally premature and inconsistent with the Commission's Final Order dated June 12, 2019.[3]

Department's Response

The Department asserts that the Chelsea Motion should be denied for three reasons. First, the Department argues that the Chelsea Motion is premature because the *Apple Hill* decision is before the Vermont Supreme Court and is not yet final. Second, the Department contends that Chelsea does not meet the standard under Vermont Rule of Civil Procedure 60(b)(5) for reopening the case because it has made no showing of either a "significant change in factual conditions or law."[4] And finally, the Department argues that "the proper recourse is not to reopen these proceedings, but instead to file an amended petition that either reflects the Apple Hill and Willow Road facilities as a single project [not supported by a standard-offer contract] or demonstrates that the Willow Road facility does not share equipment or infrastructure with the Apple Hill facility."[5]

ANR's Response

ANR similarly argues that the Chelsea Motion should be denied because the Apple Hill CPG has not been vacated and the Chelsea Motion is therefore "at best, premature."[6]

ANR contends that:

> [The] Petitioner's motion also ignores the fact that it is an affiliate of Allco Renewable Energy Limited and other associated entities, which are all under common ownership and control and which: 1) have petitioned the Commission for two standard-offer contracts and three CPGs at the 27-acre parcel where the

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[3] Intervenors' Response at 2.

[4] Department's Response at 2 (citing *Wild v. Brooks*, 2004 VT 74, 177 Vt. 17, 862 A.2d 225 (2004) (where the Court found that filing a V.R.C.P. 60(b) motion should not occur until the Act 250 process played out, stating "V.R.C.P. 60(b) does not operate to protect a party from freely made tactical decisions which in retrospect may seem ill-advised" (citing *Okemo Mountain Inc. v. Okemo Trailside Condos., Inc.*, 139 VT 433, 436, 431 A.2d 457, 459 (1981)).

[5] *Id.* at 2-3 (citing *J.L. v. Miller*, 158 Vt. 601, 604, 614 A.2d 808, 810-11 (1992)).

[6] ANR's Response at 1.

> Willow Road project is proposed; 2) have paid $850,000.00 for the distribution utility to construct a line extension to the 27-acre parcel for the purposes of serving the Willow Road and Apple Hill solar projects; and 3) intend to continue to pursue those solar projects at the 27-acre Apple Hill parcel.[7]

Finally, ANR further observes that Chelsea failed to mention the pathway for potential further review of a solar facility on Apple Hill provided by the Commission in the June 12, 2019, Order, where we stated the following:

> The Developer may seek to amend the Petition either (1) by formally merging the Apple Hill Facility and the Willow Road Facility as a single project and seeking authorization for a 4.0 MW plant unsupported by either standard-offer contract, or (2) demonstrating that the Willow Road Facility does not share equipment or infrastructure with the Apple Hill Facility.[8]

ANR argues that Chelsea "fails to meet its burden to justify its request for such an extraordinary remedy when a less disruptive pathway for further review of the Willow Road Project already exists."[9]

III. DISCUSSION AND CONCLUSION

The Chelsea Motion is premised on Chelsea's conclusion that the CPG in the Apple Hill Solar case "has since been vacated."[10] Apple Hill Solar LLC has appealed the Commission's order that denied the Apple Hill facility a CPG.[11] That denial (the "Remand Order") was issued by the Commission after the Vermont Supreme Court had reversed and remanded the Commission's issuance of a CPG for the facility.[12] Apple Hill Solar LLC's appeal of the Remand Order was then filed and is pending before the Vermont Supreme Court.[13]

The Remand Order denied and, in that sense, vacated the Apple Hill CPG. That denial is a final order that accurately states the current state of the case, until the Vermont Supreme Court

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[7] ANR Response at 2 (citations omitted).

[8] Case No. 17-5024-PET, Order of 6/12/19 at 56 n.71.

[9] ANR Response at 2-3.

[10] Chelsea Motion at 1.

[11] *See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Notice of Appeal to the Vermont Supreme Court, filed 8/27/20.

[12] Docket 8454, Order and CPG of 9/26/18.

[13] *Id.*; *see also Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 21-1485-PET, petition filed 4/20/21, at 3 ("The Remand Appeal has been argued and is currently pending an opinion of the Vermont Supreme Court.").

rules on the pending appeal. However, Apple Hill Solar LLC appealed that order and is arguing that the Vermont Supreme Court should reverse the Remand Order and require the reinstatement of a CPG for the Apple Hill facility. Chelsea's request to reopen this case is premised on the vacating of the Apple Hill CPG. While we agree that we "vacated" the CPG, that decision is currently under appeal. Therefore, the Chelsea Motion fails to provide a valid basis for reopening a final order.

The Chelsea Motion does not meet the standard in Rule 60(b) for reopening a final order. The Vermont Supreme Court has set a high bar for reopening final orders:

> Rule 60(b)(5) permits the court to relieve a party from a final judgment when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." In 1932, the United States Supreme Court held that a court should modify a consent decree only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions." The "grievous wrong" standard, however, no longer applies to motions to modify consent decrees related to institutional reform. A party seeking modification under Rule 60(b)(5) now has the burden of showing either a "significant change in factual conditions or in law."[14]

As the parties observe, Chelsea has made no showing that there has been either a "significant change in factual conditions or law."[15] In particular, there have been no significant factual changes to the plans of Chelsea and its affiliates to develop two solar projects on the same 27-acre Apple Hill parcel consistent with their 2013 and 2014 standard-offer contracts. In fact, in June 2020, Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors (collectively, the "Developer") were conducting site clearing affecting both facility sites on Apple Hill in Bennington, Vermont, despite the fact that the Developer did not have a CPG to do so, in violation of Section 248(a)(2) of Title 30.[16] The Chelsea Motion is therefore denied because there has been no showing of a significant change in facts or the law.

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[14] *J.L. v. Miller*, 158 Vt. 601, 603-4 (citing V.R.C.P. 60(b)(5); *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932); and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 764–65, 116 L.Ed.2d 867 (1992)).

[15] Department's Response at 2 (citing *J.L. v. Miller*, 158 Vt. 601, 604, 614 A.2d 808, 810-11 (1992)).

[16] *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, Order of 4/1/21, at 2, *appeal pending*.

Finally, we also deny the Chelsea Motion because it deviates from the pathway the Commission offered in the Final Order of June 12, 2019:

> The Developer may seek to amend the Petition either (1) by formally merging the Apple Hill Facility and the Willow Road Facility as a single project and seeking authorization for a 4.0 MW plant unsupported by either standard-offer contract, or (2) demonstrating that the Willow Road Facility does not share equipment or infrastructure with the Apple Hill Facility.[17]

The Chelsea Motion does not address this guidance, which would require filing a new petition rather than reopening this case.

The Commission respects the finality of judgments and has consistently observed the requirements of V.R.C.P. 60(b). As a result, the Commission does not allow continual re-amendment of a denied project in the same case, after a final order has been issued. In fact, this case is the product of an amendment made by Chelsea to the predecessor *Chelsea Solar* case where we stated:

> The Petitioner's interpretation of our amendment rule would lead to the absurd result of allowing amendments that would give a project proposal a potentially infinite lifespan. Instead, the Commission requires that new projects be filed as new petitions.[18]

In the current motion, Chelsea seeks to reopen and amend the existing petition by demonstrating that the successor to the Willow Road facility does not share common equipment or infrastructure with the Apple Hill facility since we have denied a CPG to the Apple Hill facility. This would require a new, amended petition that may also reflect any additional changes to the petition, including the reconfiguration of the 27-acre site to allow for the introduction of sheep as part of the project as the Developer has proposed.[19] Because any such amendment would amount to a new project, that amendment could only occur as a new petition in a new case, not a reopened Willow Road facility petition. Therefore, we also deny the Chelsea Motion because it fails to observe what we previously ordered.

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[17] Case No. 17-5024-PET, Order of 6/12/19 at 56 n.71.

[18] Docket 8454, Order of 5/7/20, at 24-25 (citing *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, Order of 10/12/17 (amendment request denied without prejudice to filing a new petition)).

[19] *See* Case No. 20-1611-INV, Order of 4/1/21 at 6 (citing Docket 8454, Order of 5/7/20 (denying motion to amend the petition to reflect grazing sheep at the project site)).

For these reasons, the Chelsea Motion is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 31st day of August, 2021.

Anthony Z. Roisman	)	PUBLIC UTILITY
	)	COMMISSION
	)	OF VERMONT
Margaret Cheney	)	

OFFICE OF THE CLERK

Filed: August 31, 2021

Attest: ______________________
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 17-5024-PET - SERVICE LIST

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