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**IN THE SUPREME COURT  
OF THE  
STATE OF VERMONT**

Docket No. 2021-085

**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)**

Appeal From:

Public Utility Commission  
Case No. 20-1611-INV

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**REPLY BRIEF OF APPELLANTS**

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Appellants submit this reply brief in support of reversal of the Public Utility Commission's ("PUC's") orders dated April 1, 2021, August 26, 2020, June 26, 2020 and June 24, 2020.

## ARGUMENT

### I. The Landowner's Site Work Does Not Violate 30 V.S.A. §248.

Appellants agree with the Department of Public Service's assertion that "[a]lthough § 248(a)(2)(A) does contain broad language, it is reasonable to conclude that 'site preparation' includes clear-cutting for the purpose of siting a solar facility." Dept Br. at 19 (emphasis added.)

The uncontradicted testimony shows that *the purpose of* the sitework was for the landowner to put its idle land to work by establishing the same farming business that it has in Connecticut, run through Vineyard Sky Farms Corp., *see* PC480-481, and additionally plant hemp because as compared to Connecticut, Vermont's rules are more permissive when it comes to hemp growing. There is nothing sinister going on as the PUC and the agencies imply as the basis for their positions.

The landowner has a significant investment in the land and never consented to what amounts to a regulatory taking giving up all rights to use the property while the PUC processes an application for a solar energy facility. Making matters worse, the PUC's holding here not only results in that regulatory taking but intends to impose a further financial penalty on the landowner for not recognizing that an application to the PUC means the landowner has forfeited its rights to use the property for unrelated and lawful purposes. Still worse, the PUC holding flies in the face of

1. contrary long-standing PUC precedent that "*a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board,*" PC184, *Georgia Mountain*, Docket No 7508, Order of January 5, 2012;
2. the contrary long-standing Attorney General's position requiring actual construction of a part of the electric facility before a violation of section 248(a)(2)(A) could occur, *see*, Appellants Opening Brief at 3-5, 10;
3. contrary PUC precedent stating that where an activity was a precursor to an electric generation facility, the PUC had jurisdiction when the activity had *no other purpose* except the construction of an electric generation facility. Thus, "temporary wind-measurement towers ... were precursors to, and essential for

the construction of, the wind generating facility, *and had no other purpose.*” *Id.* at 29, PC180-181 (emphasis added);

4. Contrary PUC precedent stating that even though the express purpose of an activity was the actual commencement of construction of an electric facility, petitioner could proceed with construction of a component of an electric facility—a digester—based on the applicant’s “representation that the digester had agricultural purposes apart from its use in the electric generation facility.” PC171.

The landowner’s site work does not constitute site preparation *for the construction of* an electric generation facility under 30 V.S.A. § 248(a)(2). It is *for an agricultural use*. As Appellants’ witness testified: “PLH’s clearing activities are site preparation for its farming activities.” PC485. Appellants’ uncontradicted testimony establishes that the landowner’s actions were specifically *not* part of a plan by anyone to sell renewable energy generated by the proposed facilities or for the construction of those facilities.

The PUC, the Department of Public Service (“Department”) and the Agency of Natural Resources (“ANR”) have all twisted the testimony beyond recognition from what was actually said to what they want it to say. By repeating the same baseless statements over and over again they hope that this Court will retreat to the default position of deferring to the PUC.

**A. ANR’s Question To Appellants’ Witness Involved The Pauli Exclusion Principle. Appellants Never “Explicitly Linked” The Clearing To Anything Other Than The Agricultural Use.**

All three agencies rely solely on a single thin reed of what they call evidence that the Appellants conceded that the clearing was “explicitly linked” to a plan to construct electric generation facilities. *See, e.g.*, Dept. Br. at 12, ANR Br. at 4, PC24. The purported “explicitly linked” evidence is based solely on Appellants’ witness’s answer on cross-examination to a physics question involving the Pauli Exclusion Principle posed by ANR’s Attorney Einhorn.

Attorney Einhorn’s question asked no more than whether Appellants’ witness agreed with the Pauli Exclusion Principle that no two objects can occupy the same space at the same time. Of course, the witness agreed that no two objects can occupy the same space at the same time. Thus, a solar module cannot be placed where a tree exists, nor could a house, a barn, a garage or crops. Nor could livestock graze on land occupied entirely by trees. But it is on that physics colloquy that the PUC’s orders and the agencies’ arguments entirely rest. The actual testimony is as follows, PC291:

Q. [Einhorn] And would you agree with me that, if the area wasn't cleared at all, you could not build the Apple Hill project, correct?

A. [Witness] If there were trees there, yeah, we couldn't, we obviously could not put solar modules where trees were.

Q. [Einhorn] Right. So the clearing is necessary to build the project?

A. [Witness] Well, a cleared area is necessary to build the project.

Q. [Einhorn] The Apple Hill project location that's proposed requires that trees be cleared before the Apple Hill solar facility can be constructed, correct?

A. [Witness] Not as we amended it, no.

Q. [Einhorn] *I'm not talking about when, how, why they're cleared.* I'm simply saying, You would agree with me that, before you can build a solar project where you want to build one for the Apple Hill facility, trees will need to be cleared?

A. [Witness] I would agree that, if trees were there, they would have to be cleared; that's right.

(emphasis added). Attorney Einhorn's statement that he does not care why the trees are being cleared reaffirms that all he was asking for related to the physics question of whether two objects can occupy the same space at the same time. But that does not answer the question of whether the sitework was *for the construction of* an electric generation facility as opposed to *for an agricultural use*. Attorney Einhorn conceded that he did not care that the clearing was being done for the purpose of an agricultural use.

**B. Clearing For The Proposed Agricultural Use Is Quantitatively And Qualitatively Different And Double The Cost Showing That The Clearing Is For An Agricultural Use And Not For The Construction Of An Electric Generation Facility.**

Then Attorney Einhorn asked about the difference in the type of clearing that needs to be done for an agricultural use versus a solar use, PC292:

Q. [Einhorn] ... the activities that are being conducted right now seems to involve removing stumps as well.

A. [Witness] That's correct, yeah, and that's one difference between clearing for agricultural use and clearing for the solar use.

Q. [Einhorn] Okay. So the removal of stumps was not contemplated for the solar use?

A. [Witness] I think, in general, only if they were in the way of the posts.

Q. [Einhorn] Yeah, that was, that was my recollection as well.

Notably, Attorney Einhorn's last question was actually a statement agreeing that clearing for an agricultural use is in fact much different than clearing for a solar use. And

the testimony is clear that the clearing was planned is for an agricultural use. *See also*, e.g., PC485-6 where the Appellants' witness explains that "the site preparation for the farming use is more expensive and more involved than clearing and site preparation for a solar project. For example, in the case of a solar project, tree stumps do not need to be removed unless they end up being in the way of a post for the support racking of the modules. Clearing for PLH's farming use, however, requires that all the stumps be removed, which can more than double the cost of clearing."

Thus, the only linkage here is that the sitework is linked to the planned agricultural uses, and the PUC's conclusion to the contrary has no evidentiary basis. The PUC's conclusion is based upon speculation, which is what tends to happen when a single body acts as prosecutor, judge, and jury.

**C. The PUC's Conclusion Regarding The Primary Purpose Of The Agricultural Uses Is Clearly Erroneous And Without Any Supporting Record Evidence.**

The Department claims that "[t]he record is replete with evidence of Appellant's purpose in clearing the Apple Hill site, including Appellant's own admissions during live testimony that although sheep may end up being used for farming purposes, the sheep would be placed in the Apple Hill location primarily to serve the proposed solar projects. PC24." Dept. Br. at 12. That assertion is from the PUC's clearly erroneous factual conclusion on PC 24 that the sheep would be placed at the Bennington site primarily to serve the non-existent, contingent solar projects.

As explained in Appellants' uncontradicted testimony, the PUC's and agencies' assertion is clearly erroneous and wholly without any evidentiary support. Appellants' uncontradicted testimony at the December 2020 hearing proves that the PUC's conclusion is clearly erroneous. *See* the testimony at PC481:

ROISMAN: It sounds like the sheep that you're proposing here is primarily sheep to be used to graze at solar projects and that it, maybe you want to use this area as a, as a way station for sheep that you would be transporting around to sites that have solar projects already built and that need sheep to graze there. Is that a fair characterization?

[emphasis added]

[Witness]: ... that's the primary aspect. ... the plan that the sheep farmer has given to us, I think, does contemplate also the wool being sold as a commodity, and some of the, and I guess some of the sheep as well would be sold. I guess, to the extent that there are

new sheep that are born and that are more than we need, then she has that in the business plan, too, as far as a revenue stream. So, I mean, so it really would be while we're getting into the business because of all the solar farms that we operate in the northeast. The business plan does also contemplate the normal sheep operations and income of selling the wool and selling some of, of the sheep, you know, if it's more than we need in terms of sheep there.

The PUC Chair's question refers to "solar projects" not the proposed Chelsea and Apple Hill solar projects. That is the crucial difference. The Appellants' witness's testimony at PC482 re-emphasized that point:

while the impetus for getting into the farming business was to maintain solar projects owned by Allco and third parties, the farming business will also engage in and realize revenue from the more typical livestock farm revenue streams. The potential use of the sheep to graze at the site in Bennington is an incidental benefit of the overall sheep business, it by no means is the "primary" purpose as concluded by the PUC.

The PUC's contrary conclusion is based upon surmise and speculation. No testimony backs up or provides support for the PUC's conclusion. The only thing the record is "replete with" is that the sitework is for agricultural uses, like the one Vineyard Sky Farms already engages in in Connecticut, and not for site preparation for the construction of a solar facility. The Appellants' testimony at PC483-4 further elaborated on that fact:

the primary aspect of PLH *getting into the business of sheep farming* was "to graze at solar projects" throughout the Northeast. At no time did I state (as Finding #5 claims) that "[t]he sheep grazing is being done 'primarily' to control vegetative growth at the petitioner's planned solar projects at the site." But even if the sheep grazing was being done primarily to control vegetative growth of what is now a non-existent solar array, the activities on the Parcels still include the raising, feeding, and management of sheep which is still farming.

...the grazing at the Bennington site is not dependent at all on a solar facility being on the site one day. The raising, feeding, and management of the sheep is a completely separate business and farming activity, and would commence prior to any solar project being on the site and would continue whether or not a solar project is ever built. PLH would be operating a farming business that would not depend at all, much less primarily on the prospect of a solar facility on the Bennington site. It would make no

business sense to commence a farming business that was dependent upon the existence of two solar projects that the PUC has denied CPGs for.

PLH would be engaging in farming and the property would be considered a farm both before and after any solar facility that might be placed in service. The hoped-for solar projects at the site (which the Commission has denied CPGs for both) would be a small portion of the solar projects that would be serviced by the sheep, which would include both Allco-related projects and third-party projects (in New York, Vermont, Massachusetts and Connecticut).

As explained above, the claimed “admissions” are non-existent. The PUC’s and agencies’ foundational conclusion that creating an agricultural use for the management and raising of sheep *now* and planting hemp and building hemp storage buildings *now* was merely a ruse so the sheep could primarily serve *non-existent* solar projects, is without evidentiary foundation. Moreover, even if the PUC’s conclusion were correct, the sitework is still for the agricultural use and the sheep and hemp business would still constitute farming.

**D. The Proposed March 2020 Amendment For The Proposed Apple Hill And Chelsea Projects Confirms That The Sitework Is Completely Divorced From Those Proposed Projects.**

The PUC and the agencies point to the March 2020 proposed amendment of the CPG applications for the proposed (and denied) Chelsea and Apple Hill solar projects as some type of “evidence” that sitework for the agricultural uses is in reality site preparation for the construction of an electric generation facility. That proposed amendment says the exact opposite. It simply explained what the landowner’s unrelated agricultural activities would mean for the site. Not only would sheep reside, be managed and raised there, but there would be agricultural structures for the sheep as well as for the storage of crops. Those farming uses are what the amendment shows the sitework and construction of buildings is for.

Moreover, the land that was cleared is shown on PC768. That land was not the proposed location of solar modules. That area is the site of a proposed agricultural building. *See*, Exhibit AHS-IJ-2.

**E. This Court’s Approach Is *Mollica* And The PUC’s Approach in *Monument Farms* and *Georgia Mountain* Is Dispositive That No Violation Of Section 248 Occurred.**

The PUC’s *Monument Farms* and *Georgia Mountain* approach is the well-settled approach firmly supported the Attorney General’s 1971 opinion as well as by cases such

as *Mollica v. Div. of Prop. Valuation & Review*, 2008 VT 60 (2008) (“*Mollica*”). In *Mollica*, a mobile home was used for only six weeks each year as part of a short season for Christmas tree sales. During the off-season, which was roughly 88% of the time, the mobile home was used for non-farm purposes such as occupancy rentals. Thus, even though the predominant use of the mobile home, referred to as a “cottage”, was non-farm, this Court held that the use was for farm purposes. *Id.* at P17 (“The cottage is not a ‘development,’ ... because it is used exclusively for farming uses during the entire, albeit short, selling season. Nor can the occasional off-season use of the cottage as a rental property be considered the ‘subsequent commencement’ of a nonfarming use so as to bring the property within the definition of ‘development.’”)

This equally applies here. PLH would be harvesting timber and preparing the land for agricultural uses, not engaging in site preparation for the construction of an electric generation facility. The costs PLH incurs will be treated for federal and state tax and accounting purposes as related to farming, not related to an electric generating facility. This Court’s decision in *Mollica* firmly supports the PUC’s prior consistent approach to the issue taken in *Monument Farms* and *Georgia Mountain* and by the Attorney General—a use that has a separate function apart from the electric facility is not site preparation for an electric generation facility. The actual overlapping use of the cottage in *Mollica* as a farm and non-farm did not transform the cottage into a development. The mere potential of a future overlapping use of the land here does not change a farming activity to site preparation for an electric generation facility.

## **II. The Prohibition On Site Preparation Is Unconstitutionally Vague and Standardless On Its Face And As-Applied.**

The Department essentially concedes the issue when it states that no one knows what the rules of the road are. *See*, Dept. Br. at p. 13:

*the Commission has not expressly outlined a consistent method for determining when site clearing is reasonably related to an electric generation facility.*

In order to remedy that lack of a standard or guidance the Department asks this Court to create a new test that the Legislature chose not to. This test would be that one looks to whether the activity is “reasonably related” to an electric generation facility, rather than being for the construction of an electric generation facility.

The “reasonably related” approach as now promoted by the Department has been rejected since the 1971 Attorney General opinion. *See*, Appellants Opening Brief at 3-5, 10. *Petition of Beaver Wood Energy*, 2011 Vt. PUC LEXIS 169 (April 1, 2011) (“*Beaver Wood IP*”) at \*17-18, PC178. As the PUC stated, because “the ‘reasonably related to’ language is sufficiently vague ... the standard does not simply ask whether the site

improvement in question is reasonably related to the generation facility. It also requires, in the words of the Attorney General, that the improvement ‘can be considered to be part of an electric generation or transmission facility.’” PC178.

Appellants do not dispute the Department’s assertion that “it is reasonable to conclude that ‘site preparation’ includes clear-cutting *for the purpose of* siting a solar facility.” Dept. Br. at 19 (emphasis added.)

The uncontradicted testimony shows that *the purpose of* the sitework was for the landowner to put its idle land to work by establishing the same farming business that it has in Connecticut, run through Vineyard Sky Farms Corp., *see* PC480-481, and additionally plant hemp because as compared to Connecticut, Vermont’s rules are more permissive when it comes to hemp growing.

Here, the statute on its face and as applied by the PUC “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Here, there is no “ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly.” *In re Handy*, 171 Vt. 336, 349 (2000). That is particularly so here because the long-standing PUC and other precedent is exactly opposite to what the PUC has held here.

### **III. The PUC’s Ordering A Penalty Phase Is Fundamentally Unfair And Violates Due Process And The Fair Notice Requirement.**

Even if this Court were to uphold the PUC’s substantive holding regarding site preparation, it should vacate the penalty phase. As argued above and in Appellants’ opening brief, it would be fundamentally unfair to impose a penalty on Appellants when they were relying on long-standing precedent of the PUC and the Attorney General that “a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board,” PC184, and that actual construction of a part of the electric facility must have occurred for a violation of section 248(a)(2)(A).

Even where an activity was a precursor to an electric generation facility, which Appellants’ sitework is not, the PUC explained that it had jurisdiction only when the activity had *no other purpose* except the construction of an electric generation facility. Thus, “temporary wind-measurement towers ... were precursors to, and essential for the construction of, the wind generating facility, *and had no other purpose.*” *Id.* at 29, PC-180-181 (emphasis added). Similarly, in *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010), the PUC stated that the petitioner could proceed with construction of a component of an electric facility—a digester—based on the applicant’s “representation that the digester had agricultural

purposes apart from its use in the electric generation facility,” even though the express purpose was to commence construction of the electric facility. *See, Petition of Beaver Wood Energy*, 2010 Vt. PUC LEXIS 565, \*14 (December 9, 2010) (“*Beaver Wood I*”) (PC167).

Under such circumstances Appellants did not have fair notice that simply clearing the site for agricultural uses would possibly constitute a violation of section 248(a)(2)(A).

#### **IV. The Other Arguments Presented By ANR And The Department Have Been Shown To Be Wrong In Appellants’ Opening Brief.**

ANR’s and the Department’s arguments in their briefs do not alter the fact that:

1. The landowner’s site work does not violate 30 V.S.A. §248. See above and Appellants’ Op. Br. at 5-7.
2. VS Farms would be engaging in farming and the property would be considered a farm both before and after any solar facility that might be placed in service on the land. Appellants’ Op. Br. at 6.
3. Alleged violations of section 248(a)(2)(A)’s site preparation prohibition must proceed under 30 V.S.A. §30(h). Appellants’ Op. Br. at 7-9.
4. The PUC lacked authority to open this investigation and it lacks authority to maintain it. Appellants’ Op. Br. at 9.
5. The PUC has no jurisdiction to issue the injunction. Appellants’ Op. Br. at 9-10.
6. Because trees removed are not part of an electric generation facility, no offense could be committed. Appellants’ Op. Br. at 10.
7. Neither the filing of a section 248 application nor entering into a power sale contract creates PUC jurisdiction over farming-related activities on a site. Appellants’ Op. Br. at 11-13.
8. The PUC’s order is arbitrary and capricious. Appellants’ Op. Br. at 13.
9. There is no irreparable injury justifying an injunction the tree clearing does not constitute irreparable harm. Appellants’ Op. Br. at 14-15.
10. There is no irreparable injury to the white-arrow leaved aster. Appellants’ Op. Br. at 16.
11. There is no irreparable harm to the nimblewill noxious weed. Appellants’ Op. Br. at 16.
12. ANR has no authority to classify plants outside of the ESL. Appellants’ Op. Br. at 18. ANR’s claim that ANR’s classification system for plants is simply a “policy” under the Vermont Administrative Procedure Act is wrong. ANR’s policy is a “rule” because it is a “statement of general applicability that implements, interprets, or prescribes law or policy.” A rule “affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively

- touched by it,” Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, sec.6.1 at 228 (3d. ed. 1994). Under that formulation, ANR’s classification system used in this injunction proceeding is clearly a rule. ANR issued the classification rule and those rules would be applied in a future proceeding involving the agency and the legal position of anyone, such as the Appellants, would be affected.
13. ANR has no authority to seek an injunction and has no injury. Appellants’ Op. Br. at 18-19.
  14. The Orders’ coverage of the horticultural use lot and the areas where the rare species have been transplanted is overbroad. Appellants’ Op. Br. at 19.
  15. The PUC could not constitutionally be given the power to stop the landowner’s activities. Appellants’ Op. Br. at 19-20.

## **V. This Appeal Is Not Premature.**

In its order of November 5, 2020, in docket 2020-242, this Court dismissed the appeal stating: “We are [] not persuaded that adequate review is unavailable on appeal from a preliminary injunction, if one is granted.” A final injunction has now been issued. Therefore, in accordance with that order, this appeal is ripe.

In addition, this appeal is from orders of the PUC that are treated as final under 3 V.S.A. § 815(a). “[B]y virtue of 3 V.S.A. § 815(a), appeals of interlocutory rulings of administrative agencies should be treated as appeals from final decisions.” *In re Taft Corners Assocs.*, 160 Vt. 583, 589 (1993) quoting the Reporter’s Notes to V.R.A.P. 13. Here, “appeal of the ultimate order will not provide an adequate remedy [and] the nature of the claimed defect in the order is such that the harm is greatly aggravated by delay,” *Taft Corners*, 160 Vt. at 589, because every day the landowner suffers irreparable harm by not being able to put its idle land to productive use. Moreover, like the interlocutory order at issue in *In re Appeal of Palmer Trust*, 2018 VT 134, P32, the PUC orders “conclusively determined the discrete issue”: whether the PUC has jurisdiction and whether the Appellants violated section 248.

This appeal is also proper under the related collateral order doctrine. *This Court has held that V.R.A.P. 5 (relating to the collateral order doctrine) does not apply to administrative appeals.* See, *In re Taft Corners Assocs.*, 160 Vt. 583, 589 (1993). In *State v. Lafayette*, 148 Vt. 288 (1987), this Court adopted the collateral order exception to the finality rule announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). “As stated by Judge Posner in *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 742 F.2d 369 (7th Cir. 1984): ‘[The *Cohen*] doctrine allows the immediate appeal of some orders which, while not injunctions and so not appealable under 28 U.S.C. § 1292(a)(1), have the same effect as injunctions: they inflict irreparable harm.’” *M.A. Mortenson Co. v. United States*, 877 F.2d 50, 51 (Fed. Cir. 1989). Vermont does not have a statute similar to the federal statute authorizing as-of-right

interlocutory review by appellate courts of grants of injunctions. But as implicitly recognized by Judge Posner, in the absence of such a statute, the *Cohen* rule would allow immediate appeal of orders that are injunctions or are the functional equivalent of injunctions. The PUC's orders clearly fall within that category because PLH is suffering irreparable harm from the PUC's orders and suffering an uncompensated taking. Finally, this appeal is proper under 30 V.S.A. §15 because Appellants seek "relief against any disobedience of or noncompliance with" the PUC's Injunction.

## **VI. Conclusion**

For the reasons stated above and in Appellants' opening brief, the PUC's Orders should be reversed.

Dated: October 22, 2021

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Certificate of compliance with V.R.A.P. 32(a)(4)(D)

I hereby certify that this brief complies with the word-count limit of V.R.A.P. 32(a)(4). According to the word count of the Microsoft Word processing software the brief is 4,477 words.

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