
IN THE SUPREME COURT OF THE STATE OF VERMONT

DOCKET NO. 2021-085

*In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether the
Petitioner Initiated Site Preparation at Apple Hill in Bennington, Vermont*

APPEAL FROM THE
VERMONT PUBLIC UTILITY COMMISSION
Case No. 20-1611-PET

Brief of Appellee Vermont Department of Public Service

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the appeal should be dismissed as premature because the Public Utility Commission's order was not a final judgment concluding the litigation nor was permission for an interlocutory appeal granted (Page 11).
2. Whether the site clearing activities comprised site preparation conducted without a Certificate of Public Good pursuant to 30 V.S.A. § 248(a)(2)(A) (Page 12).
3. Whether the Public Utility Commission correctly found Appellant subject to its regulatory authority (Page 13).
4. Whether the Public Utility Commission's order requiring a penalty phase was constitutional and not a violation of due process and the fair notice requirement (Page 18).
5. Whether the 30 V.S.A. § 248(a)(2)(A) prohibition on unlawful site clearing without a Certificate of Public Good is constitutional and not vague or standardless (Page 19).

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STATEMENT OF THE CASE

This appeal concerns an injunction issued by the Vermont Public Utility Commission (“Commission” or “PUC”) against Allco Renewable Energy Limited *et. al.* (“Appellant” or “Allco”) for beginning site preparation without a Certificate of Public Good (“CPG”) in violation of 30 V.S.A. § 248(a)(2)(A). The Commission’s conclusion is in accordance with its authority under state law, is consistent with the legislative intent of Section 248, and is supported by the record in this case. Appellee Vermont Department of Public Service (“Department”) seeks an order from this Court dismissing the appeal as premature, or alternatively affirming the Commission’s decision.¹

Procedural Background

On June 19, 2020, Vermonters for a Clean Environment (“VCE”) filed public comments in PUC Docket 8454 alleging that tree clearing was occurring on a site located in Bennington, Vermont. PC-6. The public comment also alleged that the tree clearing was disturbing areas of the site set aside for rare, threatened and endangered species. PC-6.

The site on which the clearing occurred is the same site Appellant has petitioned the Commission to install and operate a 2.0 MW solar electric generation facility (“Apple Hill”). PC-15.

Also on June 19, 2020, Appellant filed a response to VCE’s comments, alleging that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Agency of Natural Resources (“ANR”) Environmental Enforcement Officer Patrick Lowkes, who “confirmed that no [rare, threatened, or endangered species] area was being disturbed and that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion.” PC-6.

On June 23, 2020, ANR filed preliminary comments in response to VCE’s public comments. PC-6. ANR stated that it “has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed.” PC-6.

ANR also noted that the tree-clearing activity raised two concerns: (1) that Allco

¹ The Department formally joins the arguments filed by Appellee Vermont Agency of Natural Resources’ (“ANR”) Brief as they relate to ANR’s technical expertise in classifying rare plant species and rare plant species being adversely affected by Appellant’s clearing activities.

was conducting site preparation without a CPG; and (2) that the site clearing has not been reviewed to ensure that it did not have an undue adverse effect on the environment. PC-6. Specifically, ANR was concerned that the site clearing presented a substantial and immediate harm to “very rare” and “rare” plants at the site. PC-6. ANR requested a cease-and-desist order to prevent irreparable harm to the plants. PC-6.

On June 24, 2020, the Department filed comments stating that based on the initial findings of ANR’s Environmental Officer, cause appeared to exist meriting further investigation into whether Allco initiated site preparation in violation of 30 V.S.A. § 248(a)(2). PC-6-7.

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the “Intervenors”) filed comments in response to VCE’s public comments. PC-7. The Intervenors asserted that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission; and (2) the Appellant engaged in site preparation in violation of 30 V.S.A. § 248. PC-7. The Intervenors stated that the Commission should declare the petitions for those facilities withdrawn or abandoned. PC-7.

On June 24, 2020, the PUC initiated investigation into whether Allco conducted site clearing without a CPG in violation of Section 248(a)(2). PC-7.

On June 26, 2020, the Commission held an evidentiary hearing, after which it issued a temporary restraining order (“TRO”) restraining Allco from further site-preparation activity on the Apple Hill site. PC-7.

On June 27, 2020, Allco conducted additional site-clearing work at the Apple Hill site. PC-7.

On July 1, 2020, Allco filed a motion to vacate the injunction hearing. PC-7.

On August 26, 2020, the Commission issued an order denying Allco’s July 1 motion. PC-7.

On September 1, 2020, Appellant filed a notice of appeal to the Vermont Supreme Court seeking relief from the Commission’s TRO and August 26, 2020 Order. PC-8.

On November 5, 2020, the Court dismissed Allco’s appeal without prejudice to refiling it if an injunction is granted. PC-8.

On November 13, 2020, the Commission provided the parties notice of an injunction hearing and advised the parties of the procedures that would be used in that evidentiary hearing scheduled for Friday, December 4, 2020. PC-8.

On December 4, 2020, the Commission conducted an evidentiary hearing to address whether the TRO should be lifted and whether Allco's tree-clearing activities were site-clearing operations in violation of 30 V.S.A. § 248(a)(2). PC-8.

On April 1, 2021, the Commission issued an Order Maintaining Injunction Prohibiting Further Site Preparation ("Order"). PC-1. The Commission concluded that Allco's clearing activity without a CPG at the Apple Hill site violated 30 V.S.A. § 248(a)(2)(A). PC-1. The Commission permanently enjoined Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities on Apple Hill. PC-24, 30.

The Order stated that the injunction is temporally limited and will remain in place only until either (1) Allco receives a CPG for constructing an electric generation facility on the site; or (2) final orders from the Vermont Supreme Court or the Commission deny both CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration expire, and both of Allco's standard-offer contracts expire or are voluntarily relinquished. PC-3, 21, 31. The Commission directed the parties to propose a schedule for the proceeding to address an appropriate civil penalty to be issued against Allco pursuant to 30 V.S.A. § 30. PC-31.

On April 2, 2021, Allco appealed the Commission's Order to the Vermont Supreme Court.

STANDARD OF REVIEW

The Court reviews PUC decisions with “great deference to the [PUC’s] expertise and judgement,” allowing for a “strong presumption of validity to the [PUC’s] orders.” *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2, 185 Vt. 296, 969 A.2d 144 (quotations omitted). Further, “[a]bsent a compelling indication of error, [this Court] will not disturb an agency’s interpretation of statutes within its particular area of expertise.” *In re Verizon New Eng., Inc.*, 173 Vt. 327, 334–35, 795 A.2d 1196, 1202 (2002). “It is well established that [this Court will] defer to an agency’s interpretation of a statute that the agency is tasked with interpreting, though [it will] not abdicate [its] responsibility to examine a disputed statute independently and ultimately determine its meaning.” *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, ¶ 20, 206 Vt. 430, 182 A.3d 53 (quoting *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 8, 202 VT 59, 147 A.3d 621) (internal quotation marks omitted). Finally, the Court will “defer to an agency’s interpretation of its own regulation, as long as that interpretation is consistent with the statute that authorized promulgation of the regulation in question.” *Id.* ¶ 20. (citations omitted).

LEGAL ARGUMENT

Appellant asserts several challenges to the PUC's decision in this case. At a basic level, Appellant claims the PUC was wrong to find any jurisdictional basis over it and its clearing activities and rejects the PUC's findings as lacking evidentiary and precedential basis. However, Appellant's arguments fail to disturb the Commission's sound reasoning in resolving the simple issue presented to it: whether site preparation for an electric generation facility was initiated without a Certificate of Public Good under Section 248(a)(2)(A). Appellant failed to obtain a CPG prior to conducting site clearing on the very parcel of land for which it has two standard offer contracts and has petitioned the PUC to install and operate a solar facility, both of which comprise actions subjecting Appellant to the Commission's jurisdictional and regulatory powers.

Because this appeal was made before the penalty phase of the proceeding began, it should be dismissed as premature. Or, should the Court find the appeal timely and decide the case on its merits, it should affirm the PUC's decision.

I. Appellant's Appeal is Premature Because the Commission's Order was not a Final Judgment Concluding the Litigation nor was Permission for an Interlocutory Appeal Granted.

Through this appeal, Appellant seeks to challenge the PUC's issuance of a permanent injunction. However, the case below has yet to conclude and pass out of the Commission's jurisdiction and is therefore premature. *Appliance Acceptance Co. v. Raymond*, 121 Vt. 153, 155, 151 A.2d 316, 318 (1959) ("The judgment rendered must conclude the litigation in the court below to the extent that if no exceptions were taken, the controversy would end, and the case would pass out of court."). The PUC indicated in its April 1, 2021 Order that the judgment it made was not final because it was both temporal in nature and would enter a penalty phase to determine Appellant's financial liability. PC-3. This appeal should therefore be dismissed for not meeting the final judgement rule.

Appellant also does not have permission for interlocutory appeal. The PUC review statute provides that "the Commission, in its discretion before final judgment, may permit an appeal to be taken by any part to the Supreme Court for determination of questions of law in such manner as the Supreme Court may by rule provide for appeals before final judgment." 30 V.S.A. § 12. In turn, the Vermont Rules of Appellate Procedure provide that the superior court may "report the action" to this Court if "all the appearing parties

agree” and other requirements are met. Vt. R. App. P. 5(a)(1). A party may also move the superior court for permission to appeal from an interlocutory order. *Id.* 5(b)(1). Neither has occurred in this case, therefore prohibiting Appellant from appealing. *See Bloomberg v. Edlund Co., Inc.*, 151 Vt. 559, 560-61, 563 A.2d 995, 996 (1989) (holding that question of whether “interlocutory appeal could have been obtained under V.R.A.P. 5” was “academic, since no interlocutory appeal was sought”).

Should the Court consider this appeal, Appellant’s claims fail on the merits, as discussed herein.

II. The Commission Correctly Found that Appellant’s Clearing Activities Comprised Site Clearing without a CPG in Violation of Section 248(a)(2)(A).

Appellant makes several attempts to support the claim that it engaged in clearing activities intended for farming that lie outside the PUC’s authority. Appellant Brief at 5-7. However, the Commission’s conclusion that Appellant engaged in site clearing without a CPG is based on credible evidence, is consistent with Commission precedent and is therefore subject to the Commission’s Section 248 authority.

Appellant’s insistence that the record lacks evidence relating to the purpose of the site clearing is contradicted by the fact that the Commission’s findings rested on sound evidence as well as the Appellant’s own admissions in the record. These findings include:

1. Appellant’s admission that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility. PC-12, 20, 23.
2. Appellant’s admission that the location it is clearing is the site of a proposed solar facility. PC-23.
3. Appellant’s admission that the clearing activity is “explicitly linked” to its ultimate plan to construct electric generation facilities. PC-24.
4. Appellant’s March 23, 2020 motion to amend its petition in Docket 8454 to reflect the fact that the site would be cleared for agricultural use in order to prepare the site for a solar facility. PC-23, 25-26.

The 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. PC-24. This evidence irrefutably demonstrates that Appellant (1) engaged in site preparation intended for the installation and operation of a solar facility; and (2) did not first obtain a CPG for the site preparation. PC-2. Thus, the Commission’s conclusions in its April 1, 2021 Order were based on evidence demonstrating that Appellant’s clearing activities were a violation of

Section 248(a)(2)(A).

These findings are also consistent with Commission precedent. Despite Appellant's assertions to the contrary, the clearing activity is in fact reasonably related to the proposed electric generation facility. Appellant Brief at 10, 13-14, 17. The Commission made clear in its April 1, 2021 Order that Appellant's site clearing activity is factually and procedurally distinguishable from the Commission's findings in *Georgia Mountain*, *Beaver Wood* and *Monument Farms*. PC-23-24. And while the Commission has not expressly outlined a consistent method for determining when site clearing activity is reasonably related to an electric generation facility, this Court has applied a totality-of-the-circumstances test in fact-intensive cases like this where it is difficult to apply a single formula in reaching relevant public policy issues. See *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 26, 210 Vt. 27, 210 A.3d 1230 (where the Court applied an objective view of the circumstances to demonstrate that a temporary meteorological tower is reasonably related to a grid-connected wind generation facility). See also *Thompson v. Hi Tech Motor Sports, Inc.*, 2008 VT 15, ¶ 6, 183 Vt. 218, 945 A.2d 368 (applying totality-of-circumstances test to determine whether waiver of liability was void because in fact-intensive cases it is difficult to apply "formulaic approach"—"no single formula will reach the relevant public policy issues in every factual context") (quotation omitted).

In this case, an objective review of the circumstances surrounding the site clearing demonstrates that it was conducted with the intention to prepare the site for a solar facility and therefore, the clearing activity is reasonably related to the establishment of an electric generation facility. The PUC considered Appellant's actions prior to when the clearing activity took place when it filed its March 23, 2020 motion as well as statements made during the investigation with Appellant's own admissions that the clearing took place on the same site as the proposed solar facility, that the clearing is linked to its ultimate plan to construct electric generation facilities and that sheep would be placed in the Apple Hill location primarily to serve the proposed solar projects, all of which demonstrate the relationship of the clearing activity to a potential solar facility. Therefore, the clearing activity falls within the PUC's jurisdiction under Section 248 and required a CPG.

III. The Commission Correctly Determined that Appellant is Subject to its Supervision

Appellant attempts to challenge the Commission's supervisory role in several

ways, including (1) its Section 209 authority to open the investigation and restrain companies for violations of law; (2) its Section 248 authority to prevent companies and persons from beginning site preparation for an electric generation facility before issuance of a CPG; and (3) its Section 30 authority to impose civil penalties. Appellant Brief at 9-11. Each claim rests upon an untenable reading of the statutory sections and is unsupported by law. Further, Appellant offers no compelling arguments as to why the Commission’s conclusions do not support exercise of its supervisory authority under these sections. Because Appellant has two active standard-offer contracts with the State and has filed a petition for a CPG to install and operate a solar facility at the Apple Hill site, Appellant has availed itself to the supervision of the Commission and is therefore subject to the dictates of each statute, including the imposition of a penalty under Section 30.

a. The Commission’s Powers

This Court has recognized that “[t]he Legislature has invested the Commission with “the powers of a court of record.”” *In re SolarCity Corp.*, 2019 VT 23, ¶ 13, 210 Vt. 51, 210 A.3d 1255 (citing 30 V.S.A. § 9). This Court has also recognized that the Commission “is not a court in the strict sense,” but rather “an administrative agency that possesses quasi-judicial powers.” *Id.* (quotations omitted). *See also Tybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7-8, 20 A.2d 117, 120 (1941) (describing the Commission as “an administrative body, clothed in some respects with quasi-judicial functions” and holding that Commission’s jurisdiction is of a “supervisory nature, to be exercised in the interest and for the welfare of the general public.”)

It is in this quasi-judicial role that the Commission oversees petitions for CPGs. *See, e.g. In re Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. s 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, No. 8454, 2018 WL 4696953 (Vt. Pub. Util. Comm. Sept. 26, 2018). When a petition for a CPG comes before the Commission, it comprises a proceeding that involves the interests of the public where “the Commission may be responsible for independently evaluating what disposition of the matter is in the public interest.” *In re SolarCity Corp.*, 2019 VT 23 ¶ 14. This includes petitions for a CPG filed under 30 V.S.A. § 248, which specifically prohibits site preparation without a CPG. *See* 30 V.S.A. §§ 248(a)(2)(A) and (B):

N]o company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an

electric generation facility...unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.

With respect to granting injunctive relief, several authorities support that the PUC has such authority over matters within its jurisdiction. *See* 30 V.S.A. § 209(a)(6) (PUC may “restrain any company subject to supervision under this chapter from violations of law”); *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996) (noting that PUC “has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction”); 18-1-1 Vt. Code R. § 2.406 (PUC provisions for temporary restraining orders, preliminary injunctions and permanent injunctions).

Finally, 30 V.S.A. § 30(a)(1) authorizes the Commission to impose civil penalties for violations of laws subject to its authority, including Section 248: “A person, company or corporation subject to the supervision of the Commission...who violates...a provision of Section 231 or 248 of this title...shall be required to pay a civil penalty...after notice and opportunity for hearing.” 30 V.S.A. § 30(a)(1). This Court has recognized the explicit grant of authority under Section 30(a)(1) to impose penalties for violations of Section 248:

Subsection (a)(1) [of Section 30] applies when a person, company, or corporation subject to the supervision of the PUC...who fails within a reasonable time to obey a final order or decree of the PUC, or who violates a provision of [S]ection 248...shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing. Subsection (b) provides for a civil penalty of not more than \$ 40,000, or, in the case of a continuing violation, not in excess of \$ 100,000 or one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company or corporation in the preceding year...Thus, if a person or company is within the jurisdiction of the PUC and violates § 248, then that person or company is subject to penalty under subsection (b)...

In re Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 39 (citations and quotations omitted).

b. Appellant’s Jurisdictional Claims

Appellant incorrectly claims that the Commission does not have Section 209 authority to restrain it because Appellant is neither a company nor are its activities

subject to Commission jurisdiction. Appellant Brief at 9-11. In making such assertions, Appellant fails to consider the fact that it continues to seek and obtain a CPG to install and operate electric generation facilities on Apple Hill, which, upon Appellant's signing of two standard-offer contracts, subjected it to the Commission's jurisdiction. PC-18.

Appellant's claim that somehow the Commission's jurisdiction does not attach until after a CPG is issued in an inapposite read of the statute completely unsupported by law. Appellant Brief at 10. The Commission rightly explained that Appellant's arguments to this effect are flawed because "[t]he general jurisdiction conferred under Section 209 over "property subject to supervision under this chapter" further enhances the Commission's particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, including the site preparation proposed for solar facilities here." PC-19. By placing itself under the Commission's supervision by executing standard-offer contracts and filing CPG petitions to develop facilities pursuant to said contracts, Appellant became subject to the dictates of the statute.

Appellant's claim that it is not subject to the Commission's authority until it obtains a CPG also negates the entire purpose of Section 248(a)(2)(A) to ensure against site preparation without a CPG. The Commission appropriately highlighted the fact that

If 30 V.S.A. § 248(a)(2)(A)'s prohibition of site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission's jurisdiction over a "proposed site" attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a "proposed site" remains within the Commission's jurisdiction until there is a "ceasing and abandoning" of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review.

PC-19.

The Commission's correctly found that so long as Appellant's "actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, Allco is subject to the Commission's jurisdiction" PC-18. Therefore, acts conducted in preparation of the site for electric generation – including the clear cutting activities at issue here – fall under the Commission's Section 248 authority.

Appellant's assertion that penalties must be assessed under 30 V.S.A. § 30(h) is completely misguided and should be flatly rejected. Section 30(h) provides that "the Department may issue an administrative citation to a person the Department believes

after investigation violated section 246, 248, 248a or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections.” 30 V.S.A § 30(h). As the Commission has previously found:

[S]ubsection 30(h) does not override the provisions of subsections (a) and (b). It simply provides an alternative mechanism for enforcement by empowering the Department to issue draft administrative citations of up to \$5,000 without first going through a penalty hearing. The subsection sets out a process that that the Department must follow if it opts to exercise its administrative citation authority...

*Petition of Otter Creek Solar LLC Requesting Non-Substantial Change Determinations or in the Alternative Amends. to the Certificates of Pub. Good Issued to the Otter Creek 1 & Otter Creek 2 Solar Projects in Rutland, Vermont in Case Nos. 8797 & 8798. Investigation Pursuant to 30 V.S.A. §§ 30 & 209 into Alleged Violation of Otter Creek Solar, LLC’s Certificates of Pub. Good Issued in Cases 8797 & 8798,, No. 19-1596-INV, 2021 WL 1270242, at *3 (Apr. 1, 2021).*

As the plain language of the rule and the Commission’s decisions both make clear, the Department’s § 30(h) authority is discretionary in nature. The Department *may* issue an administrative citation for violations of Sections 246, 248, 248a or 8010, and this has historically been the Department’s customary practice. *See, e.g. Investigation Pursuant to 30 V.S.A § 30 and 209 into Alleged Violation of GSPP Gilman, LLC’s Certificate of Pub. Good Issued in Docket 8725, No. 18-0332-INV, 2018 WL 3854963 (Vt. Pub. Util. Comm. Aug. 1, 2018)* (where the Department used its § 30(h) discretion to impose an administrative citation upon solar developer and Commission declined to open a separate investigation into the matter under § 30(h)(2)(D)). Moreover, it is to the best of the Department’s knowledge that where the Commission initiates its own investigation, as it did in the present case, the Department has never sought to exercise its administrative authority under § 30(h). Therefore, Appellant’s assertions that the penalty phase *must* proceed under 30(h) is without merit. For the aforementioned reasons explaining the Commission’s Section 248 jurisdiction over Appellant, assessing a penalty under Section 30(a)(1) is appropriate and ordering a penalty phase is well within the Commission’s authority consistent with previous practice. *See, e.g. Investigation into Compliance of Town of Stowe Elec. Dep’t, with Requirements for the Use of Gen. Obligation Bond Proceeds, No. 7579, 2012 WL 252290, at *1 (Vt. Pub. Util. Comm. Jan. 13, 2012)* (where the Commission initiated a second phase of the proceeding to determine the amount of penalties to be assessed against utility); *Investigation Pursuant to 30 V.S.A. §§*

30 & 209 Regarding the Alleged Failure of Vermont Gas Sys., Inc. to Comply with the Certificate of Pub. Good in Docket 7970 by Burying the Pipeline at Less Than Required Depth in New Haven, Vermont. Notice of Probable Violations of Vermont Gas Sys., Inc. for Certain Aspects of the Constr. of the Addison Nat. Gas Pipeline., No. 17-3550-INV, 2021 WL 1771953 (Apr. 30, 2021) (directing the hearing officer to review evidence and penalty criteria as part of a penalty phase to determine utility’s financial liability for CPG violations).

Finally, Appellant is wrong in claiming that these proceedings should be initiated by the Department in Superior Court under 30 V.S.A. § 32. It is true that the Department “may commence an action or proceeding in the Superior Court” in order to seek injunctive relief where companies subject to its supervision are violating the law or any order of the Commission. 30 V.S.A. § 32. However, because the Commission has the powers of a court of equity, it can grant injunctive relief directly where matters within its jurisdiction are involved. Such is the case here where the investigation into Appellant’s Section 248 violations was initiated by the Commission pursuant to 30 V.S.A. § 209. PC-7. *See Petition of Vicon Recovery Sys., Inc.*, No. 4813-A, 1987 WL 417216 (Vt. Pub. Util. Comm. Nov. 3, 1987) (explaining that Section 32 authorizes the Department to seek injunctive relief in Superior Court if it believes a utility is about to violate the law or order of the Commission and recognizing that while the Commission cannot bring an action under Section 32, as a court of equity under 30 V.S.A § 9, it can “grant injunctive relief where matters within its jurisdiction are involved.”). Therefore, Appellant’s Section 32 claim must be rejected.

IV. The Commission Followed Due Process and the Fair Notice Requirement in Ordering a Penalty Phase

Despite Appellant’s claims to the contrary, the Commission satisfied due process and the fair notice requirement in ordering a penalty phase. Section 30(a)(1) states: “A person, company or corporation subject to the supervision of the Commission...who violates...a provision of Section 231 or 248 of this title...shall be required to pay a civil penalty...after notice and opportunity for hearing.” 30 V.S.A. § 30(a)(1).

This language satisfies due process because the statutory language provides notice to companies and persons alike that where they fail to comply with the law, they will be required to pay a civil penalty after notice and opportunity for hearing. “Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices will satisfy due process.” *In re Palmer*, 171 Vt.

464, 472, 769 A.2d 623, 628 (2000). *See also Brody v. Barasch*, 155 Vt. 103, 110, 582 A.2d 132, 137 (1990) (A statute must be sufficiently clear to give a person of “ordinary intelligence a reasonable opportunity” to know what is proscribed). Here, the statute clearly conveys a warning to persons, companies and corporations that they will be required to pay a civil penalty should the Commission find them liable after notice and hearing. Accordingly, because the Commission gave notice in its April 1, 2021 Order that there would be a penalty phase of the proceeding pursuant to Section 30, Appellant was provided with proper due process and notice.

V. The 30 V.S.A. § 248(a)(2)(A) Prohibition on Unlawful Site Clearing Without a Certificate of Public Good is Constitutional and Not Vague or Standardless.

Appellant asserts that § 248(a)(2)(A) is unconstitutionally vague as it applies to site preparation. Appellant Brief at 16-18. Generally, courts presume statutes to be constitutional, and “the proponent of a constitutional challenge has a very weighty burden to overcome.” *In re LaBerge NOV*, 2016 VT 99 ¶ 18. Void-for-vagueness challenges are generally grounded in the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend XIV, § 1. *See also In re LaBerge NOV*, 2016 VT 99 ¶ 17. Statutes will be considered unconstitutionally vague and violate the Due Process Clause when they either: “(1) fail to provide sufficient notice of what conduct is prohibited, or (2) authorize or encourage arbitrary and discriminatory enforcement by failing to provide explicit standards.” *State v. Green Mountain Future*, 2013 VT 87, ¶ 45, 194 Vt. 625, 86 A.3d 981. Courts aim “to decide cases on nonconstitutional grounds if possible, and to adopt a construction of the statute that avoids constitutional deficiencies.” *State v. Schenk*, 2018 VT 45, ¶ 10, 207 Vt. 423, 190 A.3d 820. *See also State v. Green Mountain Future*, 2013 VT 87 ¶ 48 (“State courts have wide latitude for assigning narrowing constructions to potentially unconstitutional statutes,” and “may give [a statute] a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent.” (quotation omitted)).

Appellant’s arguments concerning the constitutionality of “site preparation” fail on their merits. The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for adjudication. U.S. Const. amend. XIV, § 1. *See also State v. Green Mountain Future*, 2013 VT 87, ¶ 18. Although § 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. To decipher any ambiguity, the traditional tools of

statutory construction must be examined to discern the intent of the Legislature. *Tarrant v. Dep't of Taxes*, 169 Vt. 189, 197, 733 A.2d 733, 739 (1999). Section 248 was enacted to address the environmental, economic and social impacts associated with a particular project. Here, it is logical to conclude that the Legislature intended for § 248(a)(2)(A) to include activities like clear-cutting trees – which have a direct impact on Vermont's environment – as site preparation.

Appellant's reliance on *Snyder*, which addressed the question of whether a zoning ordinance properly complied with and effectuated a statute, is misplaced. There is no question that the Commission, as an expert tribunal, has properly carried out its duty to interpret and enforce Section 248(A)(2). The fact remains that the Commission, in meeting its statutory mandate to ascertain whether a proposed solar facility will promote the general good of the state, will frequently address such proposals on a case-by-case basis. *See, e.g., In Re: Review of the Standard-Offer Program*, No. 17-5257-INV, 2019 WL 314275, at *3 (Vt. Pub. Util. Comm. Jan. 15, 2017) ("The Commission can ensure...that such projects meet any other applicable statutory criteria, on a case-by-case basis as part of the Commission's review under 30 V.S.A. § 248.") To do as the Appellant suggests and apply an overly rigid 1:1 standard to what are almost always proposals with complicated, varying intricacies would ensure that those proposals are not properly vetted based on their specific traits, which would effectively go against the public interest.

VI. CONCLUSION

For the reasons stated above, Appellee Vermont Department of Public Service requests that this Court DISMISS, or in the alternative, AFFIRM the decision below.

Dated in Montpelier, Vermont, this 17th day of September, 2021.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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