

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Solar LLC for a	)	
certificate of public good pursuant to 30 V.S.A.	)	
§§ 248 and 8010, authorizing installation and	)	Case No. 21-2939-NMP
operation of a 500 kW (AC) photovoltaic group	)	
net-metering system in Randolph, Vermont	)	

**PETITIONER’S RESPONSE RE PENDING LANDOWNERS’
1ST AND 2ND MOTIONS TO DISMISS/MOTIONS FOR STAY
AND
MOTION TO DELAY LANDOWNERS’ TESTIMONY**

NOW COMES Randolph Davis Solar LLC (the “Petitioner”) and responds to the Hearing Officer’s April 4, 2022 Procedural Orders re Joan Allen’s and Michael Binder’s (the “Landowners”) 1st Motion to Dismiss or Stay submitted March 1, 2022, as supplemented March 23, 2022, and Landowners’ 2nd Motion to Dismiss or Stay submitted March 29, 2022. Landowners’ pending motions ask the Hearing Officer to dismiss or, in the alternative, to stay the Vermont Public Utility Commission’s (“Commission” or “PUC”) review of the Petitioner’s application for a 500 kW (AC) photovoltaic group net-metering system in Randolph, Vermont (the “Project”). Petitioner also responds to Landowners’ April 6, 2022 Motion to Extend Schedule.

I. Relevant Procedural History

On August 11, 2021, the Petitioner filed a net metering application for the Project.

On August 18, 2021, the Commission deemed the application complete as of August 11, 2021, and stayed the proceeding pending Green Mountain Power Corporation’s (“GMP”) issuance of a Feasibility Study for the Project.

On September 22, 2021, the Applicant filed the GMP Feasibility Study as Exhibit RDS-MS-11.

On September 23, 2021, the Commission lifted the stay and commenced the thirty-day comment period under Rule 5.100.

On October 20, 2021, the Vermont Agency of Natural Resources (“ANR”) filed comments on the Project. ANR recommends that the Commission include a condition related to streams and supports the inclusion of the Petitioner’s proposed conditions 12 through 15 in any CPG that the Commission issued for the Project.

On October 21, 2021, the Vermont Division of Historic Preservation filed comments concluding that the Project will have no effect on any historic sites listed in or eligible for inclusion in the State Register of Historic Places.

On October 25, 2021, the Vermont Agency of Agriculture, Food, and Markets ("AAFM") filed a notice of intervention form and comments on the Project. AAFM requests that any CPG issued for the Project include conditions to mitigate potential impacts on primary agricultural soils.

Also on October 25, 2021, Landowners submitted comments and a motion to intervene in this proceeding. Landowners' motion to intervene raised concerns related to the Project's conformance with the Randolph Town Plan and natural resources.

The Vermont Department of Public Service ("Department") also filed comments on October 25, 2021. The Department supported the recommendations of ANR and AAFM and requested that the Commission include a CPG condition requiring the Petitioner to file the actual safety precautions used prior to commencing operations, and that Petitioner address Landowners' concerns related to the Randolph Town Plan.

On November 30, 2021, the Hearing Officer issued a procedural order instructing the Landowners to inform the Commission whether they were requesting a hearing in this case. The procedural order also directed the Petitioner to respond to all comments submitted to date by December 22, 2021.

Also on November 30, 2021, Petitioner filed a request with the Hearing Officer requesting that Petitioner not respond to Landowners until Landowners submit prefiled testimony.

On December 14, 2021, the Landowners filed a request for hearing, but failed to identify the hearing issues they were raising. Landowners' letter also requested the Hearing Officer stay the proceedings pending the Landowners request to the Town to rescind their Preferred Site letters.

On December 15, 2022, Petitioner responded to Landowners' Motion for Stay, providing the Randolph Planning Commission December 14, 2021 letter confirming that it had not revoked the Preferred Site Designation.

On December 16, 2021, the Hearing Officer issued a procedural order denying Landowners' motion for stay, ruling: "Because the status of the preferred designation letter has not changed, the Adjoining Landowners' motion to stay the proceeding is denied." The order also

informed the parties that the Hearing Officer would hold a scheduling conference to schedule prefiled testimony and a hearing, and expressly held that the Petitioner “may disregard the December 22 deadline [for the Petitioner to respond to all comments] set in my November 30 Order.”

On February 16, 2022, Petitioner filed supplemental testimony and an amended Project Site Plan, Exh. RDS MS-2 (rev 2-9-22) as earlier shared with the Town of Randolph Selectboard, shifting the solar array within the limit of disturbance (“LOD”).

On February 16, 2022, the Hearing Officer held a scheduling conference, and on February 25, 2022, issued a scheduling order. The order specified that: “If motions for summary judgment or motions for dismissal are filed in this case, then, consistent with Vermont Rule of Civil Procedure 7(b)(4) and unless different deadlines are established by the Commission, (1) responses shall be due 30 days after the motion is filed; and (2) replies to any responses shall be due 14 days after the responses are filed.”

On March 1, 2022, the Landowners filed a 1st Motion to Dismiss, and in the alternative, Motion for Stay. The 1st Motion to Dismiss asserted that the case should be dismissed purportedly because the Project must be “in conformance” with the Randolph Town Plan language. 1st Motion to Dismiss at 1-2.

On March 10, 2022, the Hearing Officer issued a procedural order instructing the Petitioner to respond to the 1st Motion to Dismiss by March 16, 2022, sixteen days after the motion was filed, rather than the specified thirty-day response period for motions to dismiss as in the Hearing Officer's February 16, 2022 order. The order also instructed Petitioner to file by March 18, 2022, an explanation as to whether the array shift was a minor or major amendment.

On March 16, 2022, Petitioner responded to the 1st Motion to Dismiss as well as to the Hearing Officer request regarding the amendment. The response included detailed procedural and substantive legal reasons why the motion should be denied. The response included the Randolph Selectboard March 3, 2022 Meeting Minutes further confirming its support of their earlier Preferred Site letter.

On March 23, 2022, the Landowners responded to Petitioner's March 16, 2022 filing alleging that Petitioner was concealing information and supplemented their claims made in the 1st Motion to Dismiss alleging that Petitioner failed to file its net metering application within 180 days of filing its 45 day advance notice.

On March 24, 2022, Petitioner responded to Landowner's supplemented 1st Motion to Dismiss and pointed out (1) that the net metering application was deemed complete 51 days after the 45 day advance notice was delivered, and (2) emphasizing the revised map was provided addressing a Town's request, and that slope detail is nowhere mentioned in Commission Rule 5.107.

On March 25, 2022, the Hearing Officer conducted a site visit as set by the Hearing Officer's February 25, 2022 Procedural Order.

On March 25, 2022, the Department filed its support of the minor amendment filing.

Also on March 25, 2022, Landowners filed objection to Petitioner's reasoning for the minor amendment.

On March 29, 2022, Landowners filed their 2nd Motion to Dismiss, this time alleging natural resource delineations were purportedly not included in the Project Site Plan, and again asserting that a further survey of slopes is required.

On March 30, 2022, Landowners filed an objection to the notice of minor amendment.

On April 4, 2022, the Hearing Officer issued two procedural orders: (1) requiring Petitioner to respond to the Landowners 2nd Motion to Dismiss by March 12, 2022 (also within less than 30 days as previously ordered per V.R.C.P. 7(b)(4)), and (2) requesting additional information requiring further onsite survey and clarification of proposed clearing.

On April 5, 2022, the Hearing Officer issued an order confirming the minor amendment.

On April 6, 2022, the Landowners filed a motion to delay their filing of testimony, notwithstanding their earlier agreement to the existing case schedule setting a deadline of April 22, 2022 for Landowners' prefiled testimony.

As of this Response, the Hearing Officer has not ruled on the Landowners' 1st Motion to Dismiss.

II. Petitioner's Responses

A. V.R.C.P. 15 Precludes Parties From Submitting Serial Amendments and Supplements to a Pending Motion to Dismiss to Which Petitioner Has Already Responded, Without Leave of the Tribunal or Consent of Petitioner

Commission Rule 2.105 provides that procedures not otherwise governed by the Commission's Rules of Procedure are governed by the Vermont Rules of Civil Procedure ("V.R.C.P."). The Commission rules do not address procedures for motions to dismiss. As such, motions to dismiss are governed by the V.R.C.P.

V.R.C.P 15, titled "Amended and Supplemented Pleadings" provides in relevant part:

"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when Justice so requires."

V.R.C.P. 15(a)(emphasis added).

Petitioner responded to Landowners' 1st Motion to Dismiss on March 16, 2022. The Hearing Officer has not ruled on that motion. As such, any further amendments or supplements to the 1st Motion to Dismiss require Commission leave. Notwithstanding, Landowners supplemented the 1st Motion to Dismiss on March 23rd, and again in their 2nd Motion to Dismiss on March 29, 2022, both without leave from the Commission. These unilateral, serial amendments to Landowners' 1st Motion to Dismiss are improper and should be rejected as they contravene V.R.C.P. 15(a). Petitioner does not consent in writing to such amendments, as the Motions to Dismiss are also improper for all of the reasons stated in Petitioner's March 16, 2022 response.

In addition, Petitioners respectfully request that the Hearing Officer remind Landowners that Commission Rule 2.201(B) provides that pro se parties that they shall be under the same obligations as an attorney admitted to practice in this state.

Further, as the Hearing Officer ordered on December 16, 2021, Petitioner need not respond to Landowners' ad hoc filings because this is a contested case, proceeding under the Administrative Procedures Act and the V.R.C.P and applicable rules of evidence. Landowners' numerous serial motions and filings to date go to the merits of the case and should be presented in

the form of testimony under oath that conforms with the case schedule, the V.R.C.P. and applicable rules of evidence.

B. Conformance With the 30-Day Response Period for Motions To Dismiss Required by V.R.C.P. 7

As with V.R.C.P. 15, this case should be governed by the timelines for motions to dismiss set forth in V.R.C.P. 7. In contrast to the Hearing Officer's December 16, 2021 Order reaffirming this, the recent procedural orders issued in the absence of proper Landowner pleadings, require Petitioner at additional time and expense to conduct additional survey work, delineations and mapping, on expedited schedules and solely because the Landowners demand so.

In the case of the survey and slope detail, previously provided additional detail was prepared and provided to the Town. Such information is not required by Commission Rule 5.107 or Section 248(b) and was provided to the Case to document responses to the Town planning and legislative bodies. Petitioner has previously briefed this in detail and such work would cost significant additional time and expense.

Similarly, the additional wetlands mapping demanded by Landowners is based solely upon the admittedly non-expert opinion of Mr. Binder where unbeknownst to Petitioner, he entered upon the host parcel (not his land) and posted his own flagging, creating much confusion at the site visit.

C. The Landowners' Motions to Dismiss are Not Supported and Should be Rejected

Petitioner respectfully submits that the claims advanced by the Landowners go to the merits of the case. As already briefed in Petitioner's March 16, 2022 response, when considering a motion to dismiss, the Commission "accepts all factual allegations pleaded in the [petition] as true and all reasonable inferences from those facts." *Ass'n of Haystack Prop. Owners*, 145 Vt. at 444, 494 A.2d at 123 (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48-49, 726 A.2d 81, 85 (1999)). The Commission should not dismiss a cause of action "unless it appears beyond doubt that there exist no circumstances or facts which the [Petitioner] could prove about the claim made in [its petition] which would entitle [Petitioner] to relief." *Id.* The Landowners' motions do not meet the applicable dismissal standards and should be rejected.

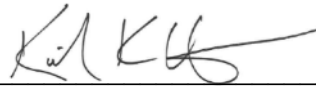
D. The Commission Should Not Further Extend and Delay the Schedule

For the reasons set forth herein and in Petitioners' prior responses to the numerous Landowner motions in this case, the Commission should deny Landowners' request to delay their testimony. Landowners' issues go to the merits of the case, and they should present their evidence before Petitioner is forced to respond any further to claims that have no evidentiary basis and fail to conform with the V.R.C.P.

Dated at Burlington, Vermont, this 7th day of April, 2022.

Respectfully submitted,

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