

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-3587-NMP

Petition of Norwich Upper Loveland Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500 kW (AC) group net-metering solar electric generation system in Norwich, Vermont	
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Order entered: 06/02/2022

ORDER RE: HEARING REQUESTS

This case involves an application filed with the Vermont Public Utility Commission (“Commission”) by Norwich Upper Loveland Solar, LLC (“Applicant”) for a certificate of public good (“CPG”) to construct and operate a 500 kW solar electric generation project in Norwich, Vermont (the proposed “Project”). In this order, I address the issues for hearing identified in the filing by Stephen Gorman, John and Heather Benson, Dan and Jenn Goulet, and Joy Kenseth on April 18, 2022.

I. PROCEDURAL HISTORY

On January 10, 2022, I issued an order granting party status to adjoining landowners the Goulets, Samin Kim, and Jayoung Joo, who filed timely notices of intervention. I also requested responses to the remainder of the filings, which included: motions to intervene filed by nearby landowners Stephen Gorman, the Bensons, and Laurence and Shelley Ufford; hearing requests filed by Stephen Gorman, the Bensons, and the Goulets; a notice of intervention and hearing request from adjoining landowner Adam Lamperti filed after the January 3, 2022, deadline for filing; and a motion to intervene and hearing request filed after the January 3 deadline by John Lewis, managing member of host landowner 38 Acres LLC.

On February 1, 2022, the Applicant and the Vermont Department of Public Service (“Department”) filed responses to the notices and motions to intervene and the requests for a hearing.

On February 10, 2022, adjoining landowner Joy Kenseth filed a notice of intervention and a request for a hearing. Adjoining landowner Kenseth explained that the filings were late due to being ill with COVID-19.

On February 15, 2022, the Department filed a response to the notice of intervention and hearing request filed by adjoining landowner Kenseth.

On February 23, 2022, the Applicant filed a response to the notice of intervention and hearing request filed by Joy Kenseth. The Applicant also filed a supplemental response to the intervention and hearing requests filed by the landowners.

On February 25, 2022, the Applicant filed a notice that James and Kathleen McTaggart, also adjoining landowners, did not receive the 45-day advance notice of the Project or the notice of the complete petition that was provided to the other adjoining landowners in the case. The Applicant stated that the application materials were hand-delivered to the McTaggarts on February 24, 2022.

On March 17, 2022, I issued an order granting party status to: adjoining landowners Lamperti and Kenseth; nearby landowners Stephen Gorman, the Bensons, and the Uffords; and host landowner Lewis. I requested a clarification from Stephen Gorman, the Bensons, the Goulets, and Joy Kenseth of the issues for which they were requesting a hearing. I also reopened the comment period to allow the McTaggarts an opportunity to file comments, a notice of intervention, and a hearing request.

On April 18, 2022, Stephen Gorman filed a response to my order that provided additional details on the issues requested for hearing (“Hearing Clarification”), which was joined by the Bensons, the Goulets, and Joy Kenseth (the “Intervenor Landowners”). The Intervenor Landowners also raised concerns about the sufficiency of the conditions proposed by the Vermont Agency of Natural Resources (“ANR”) to protect the natural environment in the Project area.

Also on April 18, 2022, adjoining landowner James McTaggart filed a notice of intervention.

On April 20, 2022, the Applicant filed a response to the Hearing Clarification (“Applicant Response to Intervenor Landowners”), objecting to the issues identified in the Hearing Clarification as exceeding the scope of the Intervenor Landowners’ intervention.

On April 21, 2022, the Intervenor Landowners filed a reply to the Applicant's response ("Intervenor Landowner Reply").

On June 1, 2022, Attorney L. Brooke Dingedine filed a limited notice of appearance on behalf of intervenor parties the Goulets, Samin Kim, Jayoung Joo, Stephen Gorman, the Bensons, the Uffords, and Joy Kenseth, for the purpose of filing and arguing a concurrently filed motion seeking to dismiss the application and requesting sanctions. This motion is pending, the time for filing responses has not yet passed, and I have not addressed the substance of the motion in this order.

Although I stated in my March 17 order that I would set a date for a scheduling conference in this proceeding after receiving the additional requested materials, the remedies sought in the recently filed motion to dismiss are potentially dispositive if granted. In the interest of preserving the resources of the Commission and parties, I will not set a date for a scheduling conference until the June 1 motion has been resolved.

II. DISCUSSION

A. McTaggart Notice of Intervention

Commission Rule 5.117 addresses party status in net-metering proceedings. Commission Rule 5.117(B)(3) grants party status to, among others, adjoining landowners, provided that they file a notice of intervention. James McTaggart filed a timely notice of intervention and is granted party status.

B. Positions of the Parties

The Intervenor Landowners request a hearing on the following issues: orderly development; aesthetics; streams, headwaters, wetlands, and soil erosion; necessary wildlife habitat and rare, threatened, and endangered species; and public health and safety. The Hearing Clarification primarily addresses issues related to air and water purity, natural resources, and the natural environment, but states that these issues are in addition to the orderly development, aesthetics, and public health and safety issues raised in their initial intervention filings.

The Applicant objects to the Hearing Clarification. The Applicant argues that the Hearing Clarification exceeds the scope of the Intervenor Landowners' intervention as set out in

my March 17 order. The Applicant also argues that the Intervenor Landowners waived the right to a hearing on issues related to orderly development, aesthetics, and public health and safety by not addressing those issues in the Hearing Clarification. The Applicant acknowledges that my March 17 order did not limit the scope of intervention for Intervenor Landowners Goulet and Kenseth, who are adjoining landowners.¹

The Intervenor Landowners filed a response to the Applicant's objection providing additional detail on their request for a hearing on orderly development, aesthetics, and public health and safety issues.

C. The Applicant's Objections

A hearing request by a party will be granted if the request raises:

- (1) one or more substantive issues under the applicable Section 248 criteria; or
- (2) a substantive issue that is within the Commission's jurisdiction to resolve.²

In my March 17 order, I deferred resolution of the Intervenor Landowners' hearing requests because the requests lacked the specificity required by Rule 5.119. In the interest of encouraging citizen participation in the proceeding, I asked the Intervenor Landowners to clarify the subjects for which they were seeking a hearing.

The Scope of Intervenor Participation

My March 17 order granted permissive intervention to Stephen Gorman and the Bensons under Commission Rule 2.209 on the issues of orderly development, aesthetics, and public health and safety, but denied intervention on issues related to natural resources and the natural environment because the filings did not demonstrate a particularized interest or an interest that would not be adequately protected by other parties. While I limited the scope of permissive intervention for Stephen Gorman and the Bensons under Commission Rule 2.209, the Goulets and Joy Kenseth are adjoining landowners and their intervention was not similarly limited. The Commission has explained that adjoining landowners "by definition have a substantial interest in net-metering cases," and adjoining landowners have been permitted to address any issue for

¹ Applicant Response to Intervenor Landowners at 2-3.

² Commission Rule 5.119.

which an evidentiary hearing is granted in a net-metering case.³ Consistent with this precedent, the Goulets and Joy Kenseth were free to raise any of the issues identified in the Hearing Clarification.

Commission Rule 2.209(C) states that “the Commission *may* restrict” the participation of a party granted intervention “to only those issues in which the party has demonstrated an interest.”⁴ Restriction is permissive, not required. In the Hearing Clarification, the Intervenor Landowners provided specific explanations of the issues for which they are requesting a hearing, including representations that the existing evidentiary record is incomplete on many of the issues for which Stephen Gorman and the Bensons asked to intervene. The Intervenor Landowners state that they will provide additional evidence that has not been presented by other parties or considered by the other state parties to the proceeding.

Allowing nearby landowners Gorman and the Bensons to join with the Goulets and Joy Kenseth to present evidence on issues for which a hearing will be held anyway will not unduly delay the proceeding or prejudice the interests of any existing parties or the public, and will allow for a more complete development of the evidentiary record. To ensure the full development of the evidentiary record for the Commission’s consideration, any party will be permitted to participate in any issue for which a hearing is granted in this proceeding. Intervening parties remain subject to the restriction that parties with similar interests join together when presenting evidence, submitting briefing, and cross-examining witnesses as stated in my March 17 order.

Procedural Objections

The Applicant also raises several procedural arguments based on the Vermont Rules of Civil Procedure (“VRCP”) regarding the amendment of pleadings and requests for reconsideration.

³ See *Petition of Acorn Energy Solar 2, LLC for a certificate of public good*, Case No. 17-4049-NMP, Order of 3/14/18 at 5 (citing *In re: Revised net-metering program pursuant to Act 99 of 2014*, 2016 WL 4582561, Order of 08/29/16, at 25, 26-27); *Petition of St J Old Center Solar LLC for a certificate of public good*, Case No. 20-2481-NMP, Order of 1/20/21 at 4-5.

⁴ Commission Rule 2.209(C) (emphasis added).

First, the Applicant argues that the Intervenor Landowners are precluded from expanding the scope of their intervention by VRCP 15. The Applicant asserts that VRCP 15 only permits the amendment of pleadings after a responsive pleading is filed if the party receives leave of court or the written consent of the adverse party, neither of which was obtained here.

For VRCP 15 to apply here, the Intervenor Landowners' hearing request must be a "pleading"—an issue that does not appear to have been resolved by the Commission. However, the Commission has observed that "[p]roceedings before the Commission do not follow the exact framework of matters in civil court" and that the guidance provided by the rules of civil procedure "must often be by analogy rather than by direct reference."⁵ The Commission has also explained that "parties do not generally file an 'answer' in Commission proceedings," and that a responsive pleading in Commission cases may include any responsive filing to a petition or application.⁶ The Hearing Clarification, which is responsive to the CPG application and identifies substantive issues for a hearing, falls within Commission's description of a responsive pleading. For the purpose of addressing the Applicant's argument, I will assume that VRCP 15 applies to the Intervenor Landowners' hearing request.

As the Applicant acknowledges, VRCP 15 allows a party to amend its pleading with leave of court and also states that "leave shall be freely given when justice so requires." The Intervenor Landowners' Hearing Clarification was submitted at my request. As discussed below, the Hearing Request raises substantive issues regarding multiple Section 248 criteria that are relevant to the Commission's required findings and of interest to the other state parties. To develop a full evidentiary record in this proceeding, I grant the Intervenor Landowners leave to amend the scope of their hearing request to the extent that leave is required by VRCP 15.

The Applicant also argues that VRCP 59(e) required the Intervenor Landowners to file a motion to amend my intervention order within 28 days. VRCP 54 defines a "judgment" as "a decree and any order from which an appeal lies." VRCP 59(e) applies to appealable judgments, not hearing officer orders addressing procedural issues.⁷ Any appeal of my order would be to

⁵ *In re Vermont Yankee Nuclear Power Corp.*, Docket No. 6300, Order of 2/14/01 at 8-9.

⁶ *Id.* Commission Rule 2.103 also explains that, for the purpose of applying the Vermont Rules of Civil Procedure, "references to complaints shall be deemed to be references to petitions, applications, or complaints."

⁷ See *Petition of Next Generation Solar Farm, LLC, for a certificate of public good*, Docket 8523, Order of 8/13/15 at 5.

the Commission pursuant to Commission Rule 2.215(C), and would occur after I have issued and served a proposal for decision.⁸ The timing of Commission Rule 2.215(C) applies here, not the 28-day deadline of VRCP 59(e).

D. Issues for Hearing

The Intervenor Landowners ask to present evidence in the form of photographs, maps, GPS data, and expert witness testimony on the following issues:

Orderly Development (30 V.S.A. § 248(b)(1))

The Intervenor Landowners argue that the Project violates the policies of the Norwich Town Plan that address development on steep slopes at the Project site and on protected ridgelines. The Intervening Landowners also argue that the Town's review of the Project was flawed.⁹

The Intervenor Landowners have raised a specific substantive issue regarding orderly development and I grant their request for a hearing on this criterion. However, no representative from the Town of Norwich is currently a party to this proceeding. To facilitate the full development of the issues involving the town plan, I encourage the parties to request Town participation in the proceeding.

Aesthetics (30 V.S.A. § 248(b)(5))

The Intervenor Landowners argue that the Applicant has not evaluated the aesthetic impact of the Project on views from the Norwich Town Forest, during leaf-off conditions, or from vantage points east of the Project location, including Interstate 91.¹⁰ The Applicant's aesthetic analysis includes views from northern and southern vantage points, along with a view from the east of the Project from a location across Interstate 91, and states that "[v]iews along Upper Loveland Road will be limited, if any." The aesthetic analysis, however, does not

⁸ See also *Application of Green Mountain Power Corporation for a certificate of public good*, CPG NM-1646, Order of 2/20/14.

⁹ Intervenor Landowner Reply at 2, 3.

¹⁰ Intervenor Landowner Reply at 3.

specifically address views from the residences along Upper Loveland Road and Interstate 91 during leaf-off conditions, or views from the Norwich Town Forest.¹¹

The Intervenor Landowners have raised a specific substantive issue regarding aesthetics and I grant their request for a hearing on this criterion.

Air and Water Purity (30 V.S.A. § 248(b)(5))

Streams, Headwaters, Wetlands, and Soil Erosion

The Intervenor Landowners state that the site plan for the Project identifies only a single stream in the Project area. According to the Intervenor Landowners, a field investigation by a qualified expert found that there are two unmarked stream channels that intersect the Project area and that the staging area, construction road, and solar arrays will be built on the unmarked streams. The Intervenor Landowners also allege that the Project staging area will impede water flows in the stream resulting in potential runoff, erosion, and flooding that could affect the water quality at a nearby wetland, two nearby ponds, and the Connecticut River. The Intervenor Landowners also state that the tree cutting required for the Project could also increase water flows at downstream residences.¹²

The Intervenor Landowners also argue that clearcutting the Project area will result in the potential spread of invasive shrubs from the adjacent powerline, adversely affecting the nearby wetland and vernal pool.¹³ No other party has addressed the potential for the spread of invasive plants into the wetland areas near the Project site.

The Intervenor Landowners have raised specific substantive issues regarding the presence of unmapped streams in the Project area and the potential for Project impacts on those unmapped streams, as well as on headwaters, wetlands, soil erosion, and the spread of invasive species. I grant the Intervenor Landowners' request for a hearing on these criteria.

Greenhouse Gas Impacts (30 V.S.A. § 248(b)(5))

The Intervenor Landowners state that they will present expert testimony that the proposed clearcutting for the Project will have an undue adverse impact on the natural environment by

¹¹ Exhibit NUL MS-6 at 3-6.

¹² Hearing Clarification at 2,4; Intervenor Landowner Objections to ANR Conditions at 1.

¹³ Hearing Clarification at 4.

removing trees that would otherwise sequester carbon dioxide and the emission of carbon dioxide during the logging operations.¹⁴

The Intervenor Landowners have raised a specific substantive issue regarding the greenhouse gas impacts associated with the clearing of trees proposed for the Project that has not been addressed in the application materials. I grant the Intervenor Landowners' request for a hearing on this criterion.

The Natural Environment (30 V.S.A. § 248(b)(5))

Necessary Wildlife Habitat and Rare Threatened and Endangered Species

The Intervenor Landowners state that the Project area hosts an unmapped deer wintering area, an unmapped black bear habitat evidenced by bear scarring and red oak and beech stands, and is adjacent to a vernal pool that is a habitat for the rare Jefferson salamander. The Intervenor Landowners argue that the proposed forest clearing will have an adverse effect on the deer and bear habitats, and the natural environment generally due to the fragmenting of the largest forest block in Norwich.¹⁵ The Intervenor Landowners state that they will present evidence of the unmapped wildlife habitat and that ANR's proposed 100-foot buffer is insufficient to protect the amphibian habitat from the effects of clearcutting. The Intervenor Landowners also note that bats are regularly observed in the Project area and have not been identified in the application materials.¹⁶

The potential presence of an unmapped deer wintering area or black bear habitat is relevant to the Commission's findings under Section 248 and to the conditions proposed by ANR. Although ANR has proposed conditions to protect amphibian habitats associated with the nearby vernal pool, ANR's comments note that the timing of the natural resource assessment prevented an identification of the type of species present. The Intervenor Landowners state that the vernal pool is a habitat for Jefferson salamanders, which could have an impact on the condition language proposed by ANR.

The Intervenor Landowners have raised specific substantive issues regarding the potential presence of unmapped deer and bear habitat and the presence of a rare amphibian species in the

¹⁴ Hearing Clarification at 3; Intervenor Landowner Objections to ANR Conditions at 2.

¹⁵ Hearing Clarification at 2-4; Intervenor Landowner Objections to ANR Conditions at 2.

¹⁶ Hearing Clarification at 3; Intervenor Landowner Objections to ANR Conditions at 3.

nearby vernal pool. I grant the Intervenor Landowners' request for a hearing on these issues. The Intervenor Landowners may also address the effect of forest fragmentation in connection with this criterion.

Although the Intervenor Landowners states that bats have been observed in the area, the Applicant has explained that: (1) the proposed tree clearing is below the threshold for requiring additional conservation measures to protect the northern long-eared bat according to guidance documents issued by the Vermont Fish and Wildlife Department; (2) is not in an area of potential summer roosting of the Indiana bat; and (3) does not involve the demolition of any potential little brown bat roosting habitat. I conclude that the Intervenor Landowners have not raised a substantive issue regarding bat habitat, and I deny the Intervenor Landowners' request for a hearing on this issue.

Public Health and Safety (30 V.S.A. § 248(b)(5))

The Intervenor Landowners argue that the proposed tree clearing will have an adverse effect on the trees surrounding the cleared area because of the proposed location of the Project on a ridgeline. The Intervenor Landowners state that the trees that will remain are on steep slopes with shallow root systems, and are susceptible to falling due to the increased exposure to the elements that will result from clearing the ridgeline. The Intervenor Landowners explain that the potential for falling trees is a safety risk for the people and homes downslope from the Project.

Although this issue has significant overlap with the aesthetics and forest fragmentation issues discussed above, the Intervenor Landowners have also raised a specific substantive issue regarding the safety of the residences located downslope from the Project. I grant the Intervenor Landowners request for a hearing to address any safety risks that may result to these residences from the Project.

III. SUMMARY

Pursuant to 30 V.S.A. § 8010 and Commission Rule 5.100, I determine that substantive issues have been raised with respect to:

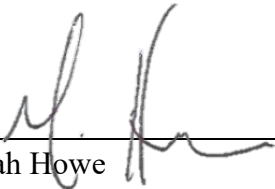
Issues under 30 V.S.A § 248(b)(1) (orderly development)

Issues under 30 V.S.A § 248(b)(5) (aesthetics; streams; headwaters; wetlands; soil erosion; necessary wildlife habitat; rare, threatened, and endangered species; natural environment; and public health and safety).

An evidentiary hearing will be held on the issues listed above and in accordance with the description contained in the preceding discussion.

SO ORDERED.


Dated at Montpelier, Vermont, this 2nd day of June, 2022.



Micah Howe
Hearing Officer

OFFICE OF THE CLERK

Filed: June 2, 2022

Attest: 
Deputy 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. 21-3587-NMP - SERVICE LIST

Parties:

John and Heather Benson, *pro se*
8 Spur LN
Norwich, VT 05055
jkbenson3@gmail.com

(for L. Brooke Dingleline, Esq.)

Benjamin Civiletti
Department of Public Service
112 State Street
Montpelier, VT 05620
benjamin.civiletti@vermont.gov

(for Vermont Department of Public Service)

*Alison Stone, General Counsel
Vermont Natural Resources Board
nrb.comments@vermont.gov

(for Vermont Natural Resources Board)

L. Brooke Dingleline, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
P.O. Box 625
Barre, VT 05641
lbrooke@vdmlaw.com

(for Dan & Jenn Goulet) (for Laurence and Shelley Ufford) (for Jayoung Joo) (for Stephen CN Gorman) (for John and Heather Benson) (for Samin Kim) (for Joy Kenseth)

Donald J. Einhorn, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
donald.einhorn@vermont.gov

(for Vermont Agency of Natural Resources)

Stephen CN Gorman, *pro se*
504 Hawk Pine Road
Norwich, VT 05055
steve@stephengorman.com

(for L. Brooke Dingleline, Esq.)

Dan & Jenn Goulet, *pro se*
185 Upper Loveland Road
Norwich, VT 05055
jggoulet08@gmail.com

(for L. Brooke Dingleline, Esq.)

Kimberly K. Hayden, Esq.
Paul Frank + Collins PC
One Church Street 05402
P.O. Box 1307
Burlington, VT 05401
khayden@pfclaw.com

(for Norwich Upper Loveland Solar LLC)

Jayoung Joo, *pro se*
147 Upper Loveland Road
Norwich, VT 05055
jayoung.joo@gmail.com

(for L. Brooke Dingleline, Esq.)

Joy Kenseth, *pro se*
133 Upper Loveland Road
Norwich, VT 05055
joy.kenseth@dartmouth.edu

(for L. Brooke Dingleline, Esq.)

Samin Kim, *pro se*
147 Upper Loveland Road
Norwich, VT 05055
skim2308@gmail.com

(for L. Brooke Dingleline, Esq.)

Aaron Lamperti, *pro se*
557 New Boston Rd
Norwich, VT 05055
aaron.lamperti@gmail.com

John C. Lewis, *pro se*
346 Palm Street
Hollywood, FL 33019
jlewis6577@aol.com

Karin McNeill
Vermont Agency of Natural Resources
1 National Life Drive
Davis 2
Montpelier, VT 05620-3901
Karin.McNeill@vermont.gov

(for Vermont Agency of Natural Resources)

James McTaggart, *pro se*
71 Upper Loveland Road
Norwich, VT 05055-9417
mctagjjim@aol.com

Laurence and Shelley Ufford, *pro se*
64 Loveland Road
Norwich, VT 05055
ljufford@t-n.com

(for L. Brooke Dingleline, Esq.)