

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Norwich Upper Loveland Solar LLC)
for a certificate of public good pursuant to 30)
V.S.A. §§ 248 and 8010, authorizing installation) Case No. 21-3587-NMP
and operation of a 500 kW (AC) photovoltaic)
group net-metering system in Norwich, Vermont)

**PETITIONER’S RESPONSE TO LANDOWNERS’
MOTION TO DISMISS & MOTION FOR SANCTIONS**

NOW COMES Norwich Upper Loveland Solar LLC (the “Petitioner”) and responds to the Motion to Dismiss Petition and Motion for Sanctions submitted on June 1 and 2, 2022¹ by Attorney L. Brooke Dingledine, Esq. on behalf of Dan & Jenn Goulet, Samin Kim & Jayoung Joo, Stephen Gorman, John & Heather Benson, Laurence & Shelley Ufford, and Joy Kenseth (collectively “Landowners”) on June 1, 2022 (the “Motion”), requesting the Vermont Public Utility Commission (“Commission” or “PUC”) to dismiss the Petitioner’s application for a 500 kW (AC) photovoltaic group net-metering system in Norwich, Vermont (the “Project”), and to issue sanctions on the Petitioner. The Motion avers that dismissal and sanctions are warranted purportedly because “the [P]roject’s Preferred Site Letter approvals were acquired through the use of false and/or material misleading information, resulting in the perpetration of a fraud upon this Tribunal.” Motion at 1.

The Motion is inaccurate, without merit, and should be rejected.

I. Background

As an initial matter, during the pre-CPG project development process, no information was knowingly withheld or mis-stated by Petitioner to mislead the Town of Norwich, the Two Rivers Ottaquechee Regional Planning Commission (“TRORC”), the Landowners, or the Commission. *See* accompanying Affidavit of Martha Staskus at 1. The course of project development and review at the local and regional level leading up to the Project petition filing on August 31, 2021, was entirely consistent with the iterative process for development and review

¹ The Motion was filed in ePUC on June 1, 2022. Ten supporting Exhibits were filed on June 2, 2022.

of solar projects. As compared to earlier conceptual designs shared with the Town and in the 45-day filing submitted on July 14, 2021, the Project array was shifted east by approximately 175 feet and reduced from the south by approximately 110 feet by the time the full Section 248 Application was completed and submitted to the Commission on August 31, 2021. On August 4, 2022, the Vermont Agency of Natural Resources (“ANR”) emailed me with comments on the 45-day filing, noting that it had identified via LIDAR what appeared to be a vernal pool as part of a wetland located at the southern end of the array. The Applicant’s environmental consultant reviewed the location and the vernal pool and associated 100 foot buffer were added to the Project mapping. Staskus Affidavit at 1. This movement of the array design was necessary to avoid the vernal pool complex and its associated 100-foot buffer south of the conceptual design. Staskus Affidavit at 1. *See* ex. DB-2 at 6-7 (August 27, 2021 Environmental Assessment prepared by Arrowwood Environmental).

The Project Application was deemed complete by the Commission on December 2, 2021, and a complete copy of all Application materials, including supporting testimonies, visual and environmental reports, and the final site plan and elevations, were sent to adjoining landowners, the Town of Norwich, and the TRORC on December 6, 2022.²

There is no mystery or anything inappropriate about this process or the realignment of a portion of the array to avoid natural resource impacts. The iterative process of siting the array on the landscape balances a range of considerations including natural resources, historic/cultural resources, existing infrastructure, setbacks, easements, topography, and other site specific attributes in designing as compatible a layout as practical. Information incorporated into an array design is not all always available from the beginning. It happens more often before CPG petitions are filed, but also may happen after CPG petitions are filed, and even after CPGs have been issued. While designers work to minimize the modifications, even the Commission understands this may occur and has Rules in place for such instances. *See* Rule 5.108 and Rule 5.109 for amendments.

² Though inadvertence, one landowner (the McTaggarts) was not included in the December 6, 2022 mailing. Once this was discovered, Petitioner corrected this by hand delivery to that landowner on February 24, 2022, whom the Hearing Officer granted an extension to submit any comments.

The Project Application materials submitted in this case on August 31, 2021, were and remain true and accurate to Petitioner's knowledge. Staskus Affidavit at 1. The array location is clearly depicted in the Site Plan, Exhibit NUL MS-2, and the elevations included in Exhibit NUL MS-3 are and remain true and accurate to Petitioner's knowledge and belief. Staskus Affidavit at 1.

Importantly, the Petitioner sought a Preferred Site Letter from the Town, notwithstanding that the Town Energy Plan provision for preferred siting expressly states that the entire Town is presumed to be a preferred site, regardless of whether it is in a Ridgeline Protection Overlay:

For solar generation projects sized from 15kW to 500kW the presumption is that all of Norwich meets the Public Utility Commission definition of 'preferred site', notwithstanding the existing areas of local concern including the Ridgeline Protection Overlay Area and the historic village district as identified in the Norwich Land Use Regulations.

Exhibit NUL MS-6, App. A, Section 3.2.h (emphasis added). The ordinary meaning of "notwithstanding" is "in spite of" or "despite." Black's Law Dictionary 1230 (10th ed. 2014). By that ordinary meaning, the second clause of Section 3.2.h of the Town Plan provides that the presumption of preferred sites designation should apply here, despite the fact the Project is located in a Ridgeline Overlay District. Attorney Dingleline's Motion omits to mention this important fact. The Renewable Energy Project Siting Standards quoted by Attorney Dingleline from Section 3.8 of the Town Plan (pages 10-12 of the Motion) is worded differently (using the word "except" rather than "notwithstanding"), and therefore creates a potential ambiguity. Still, both the Town Planning Commission and Selectboard conducted their process for preferred siting designation and the Applicant fully complied with Town requests. *See* Exhibits NN-4 and NN-6.

Attorney Dingleline also omits to mention in her Motion that well after the Town of Norwich was sent a copy of the full PUC Application on materials on December 6, 2022, the Town of Norwich was requested to re-visit and rescind the Preferred Site Letter for this Project and conducted a lengthy hearing on the subject on February 23, 2022. The Selectboard voted to not revisit the Preferred Site Letter. Exhibit NUL MS-13 (Town of Norwich Selectboard 2/23/22 Draft Minutes). Attorney Dingleline spoke at length at this meeting, shared a screen with the

visual simulation she included at page 28 of her Motion, and notwithstanding her vigorous protests, the Selectboard chose not to pursue the matter further. *See* <https://youtu.be/pwUYvnoJFSc?t=7073>.

Based upon this record, Attorney Dingledine's inaccurate and incomplete version of the Town's process and decision should be rejected.

II. Legal Memorandum

A. Municipalities and Regional Planning Commissions Designate "Preferred Sites," Not the Commission

The Project has been designated a preferred site through a joint letter of support from the Town of Norwich and the TRORC, being the duly authorized municipal legislative body and the municipal and regional planning commissions empowered to designate preferred siting status under Commission Rule 5.103. Rule 5.103 defines "Preferred Site" in relevant part as follows:

(7) A specific location designated in a duly adopted municipal plan under 24 V.S.A. chapter 117 for the siting of a renewable energy plant or specific type or size of renewable energy plant, provided that the plant meets the siting criteria recommended in the plan for the location; or a specific location that is identified in a joint letter of support from the municipal legislative body and municipal and regional planning commissions in the community where the net-metering system will be located.

Rule 5.103.

As discussed above, while Section 3.2.h of the Town Plan expressly designates the entire Town of Norwich as presumptively preferred, the process the Town followed in this case was to review the Project and issue a Preferred Site Letter, per its authority under the second clause of part (7). Exh. NUL MS-5. Importantly, had the Petitioner chosen to rely upon the Town Plan language of Section 3.2.h, rather than obtaining a preferred Site Letter, the Commission would have jurisdiction under the first clause of part (7) to review whether "the plant meets the siting criteria recommended in the plan." That review provision is excluded from the second clause of part (7) when a municipality issues a Preferred Site Letter, as was the case here.

Notwithstanding this important distinction, a significant proportion of the Motion is devoted to review of the siting criteria referenced under Section 3.8 of the Town Plan, and to challenging the Town and Regional Commission decisions and processes for their Preferred Site

determination. Town planning commissions and selectboards are governed by Title 24 of the Vermont Statutes Annotated. Except in the situation where an applicant relies on language in a town plan to confer preferred site status, which is not the case here, the municipality retains sole jurisdiction over that determination. And then, the Commission's Section 248 process is to determine whether the Project satisfies the 30 V.S.A. § 248 review criteria. Attorney Dingleline's arguments about the Town level processes are irrelevant to the Commission's review of 248 review criteria. Claims regarding those separate processes are therefore inadmissible under 30 V.S.A. § 810 and V.R.E. 402.

Regardless, the record clearly shows the municipal bodies supported the preferred site designation of the Project and followed their processes.

B. Landowners' Motion Fails to Satisfy V.R.C.P. 12(b)(6)

The Motion states that the Commission should ignore the Preferred Site letter and instead "deem the Application incomplete and Applicant's Petition should be Dismissed and/or treated as Withdrawn pursuant to PUC Rule 5.107(B)(4)." Motion at 29, 37. Presumably, the Motion alleges that the Commission should treat the Preferred Site Letter as if it did not exist, was not part of the Application, thus causing the Application to be incomplete and therefore subject to dismissal under V.R.C.P. 12(b)(6).

The Motion ignores the fact that the Town and TRORC have sole discretion to and did issue the Preferred Site Letter, and it is part of the evidence making the Application complete. In fact, the Town re-visited and expressly voted not to rescind the Preferred Site Letter at the Selectboard's February 23, 2022 meeting. There is no credible evidence or argument to support treating the Preferred Site Letter as if it did not exist.

The Motion does not meet the applicable dismissal standards under V.R.C.P.(b)(6) and therefore should be rejected.

C. The Photographs and Maps Inserted into Attorney Dingleline's Motion Are Inadmissible to Support the Motion

Attorney Dingleline herself introduces photographs into the Motion at pages 26 and 27, and a simulation on page 28, as a witness, though without stating any qualifications as an expert or under oath, nor would it be proper for her to act as both witness and legal counsel for any

party. There is no foundation for the images, there is no meta data, no information on focal length or the accuracy of the images, and the images are not offered through a qualified expert under oath. The simulation appears as exaggerated features with warped array rows, rather than parallel, as if viewed through a round lens, and it appears as though the remaining trees have been removed. This information cannot be relied upon to support the Motion.

Under V.R.E. 702, only “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise” V.R.E. 702. The foundation for expert testimony must establish the following: “First, ‘the testimony is based upon sufficient facts or data,’ second, it is ‘the product of reliable principles and methods,’ and third, ‘the witness has applied the principles and methods reliably to the facts of the case.’” *State v. Kolts*, 2018 VT 131, ¶¶ 32, 34, 205 A.3d 504 (quoting V.R.E. 702). “[A]n expert's opinion may not be based on mere speculation.” *Turgeon v. Sneider*, 150 Ct. 268, 274-45, 553 A.2d 548 (Vt. 1987). “Opinion based on speculation is irrelevant, and is not admissible.” *Id.* at 275 (quoting V.R.E. 401, 402). “Evidence which is not relevant is not admissible.” V.R.E. 402.

The images inserted in Attorney Dingledine's Motion are inadmissible under V.R.E. 402, 403, and 702 and cannot be relied upon for the Motion.

D. The Motion is Not Accompanied by a Memorandum of Law as Required by Commission Procedural Rule 2.206

Commission Rule 2.206 provides in relevant part: “*Motions not made during the hearing shall be in writing and, if they raise a substantial issue of law, shall be accompanied by a brief or memorandum of law.*” (emphasis added). The Motion seeks to dismiss this entire proceeding, and so by its very nature, raises a substantive issue of law. Contrary to Rule 2.206, however, while the Motion states it includes memorandum of law, in fact it is devoid of any law to support the asserted fraud claim, and therefore should be rejected. *See id.*; *Dubie v. Cass-Warner Corp.*, 125 Vt. 476, 480, 218 A.2d 694 (Vt. 1966) (motion to dismiss not briefed waived the issue raised).

The Motion includes legal briefing only with respect to Vermont's penalty statute, 30 V.S.A. § 30. *See* Motion at 33-35. However, the Motion fails to identify any aspect of the Section 248 materials that are incorrect or how Section 30 would apply to require imposition of a penalty. As already demonstrated, the Motion fails in supporting a claim that information before

the Town and TRORC was inaccurate, ignores that the Town and TRORC processes for approving a Preferred Site Letter were followed, that the decision was re-visited in February, 2022 and the Town chose not to rescind the letter.

The Motion is deficient under Rule 2.206 and should be dismissed.

E. The Motion is an Improper Pleading Under V.R.C.P. 9(b) and Should be Rejected

V.R.C.P. 9(b) requires that with respect to any pleadings that allege fraud, “the circumstances constituting fraud or mistake shall be stated with particularity.” V.R.C.P. 9(b). The “particularity” required by rule 9(b) means “that all of the elements be specifically pled.” *Cheever v. Albro*, 138 Vt. 566, 570, 421 A.2d 1287 (1980). “To maintain a cause of action for fraud, plaintiff must demonstrate five elements: ‘(1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party’s knowledge; (4) that the defrauded party act[ed] in reliance on that fact; and (5) that thereby harmed.’” *Felis v. Downs Rachlin Martin, PLLC et al.*, 2015 VT 129, ¶ 13 “Failure to prove any one of the five elements defeats the fraud claim.” *Id.*

Here, Attorney Dingledine’s Motion avers fraud, but fails to plead any of the requisite elements of fraud, let alone prove them. The Motion should be dismissed.

Dated at Burlington, Vermont, this 3rd day of June, 2022.

Respectfully submitted,

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