STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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)	**)** **)** **)** **)**	**Case No. 20-1611-INV**

MOTION TO STAY PROCEEDINGS

Apple Hill Solar LLC ("Apple Hill Solar") hereby moves the Public Utility Commission (the "Commission") to stay the above-captioned proceedings until a pending appeal at the Vermont Supreme Court (Case No. 169-2-20 Cncv, the "Supreme Court Case") concerning whether or not the Vermont Agency of Natural Resources ("ANR") has the authority to regulate plants outside of the parameters of the delegation of power set forth in 10 V.S.A. § 5402(a) (the "Vermont Endangered Species Law" or "ESL") is resolved.

I. BACKGROUND

On June 24, 2020, the Commission opened an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors (collectively, "Allco") were conducting site clearing on Apple Hill in Bennington, Vermont, in violation of Section 248(a)(2) of Title 30. On April 1, 2021, the Commission issued an order in this proceeding finding that Allco Renewable Energy Limited and its affiliates (collectively, "Allco") had begun site preparation without a certificate of public good ("CPG"), and enjoined Allco from any further site preparation without a CPG (the "Injunction Order"). The Commission also directed the parties to confer and file a proposed schedule for the penalty phase of this proceeding by no later than the close of

business on April 16, 2021. On April 2, 2021, Allco filed notice that it was appealing the Injunction Order to the Vermont Supreme Court.[1] On April 16, 2021, Allco filed a motion (the "Allco Motion") requesting that the Commission stay the penalty phase of these proceedings because, according to Allco, the "Commission has been divested on all matters relating to the scope of the Appeal."[2] On December 3, 2021, the Vermont Supreme Court dismissed Allco's appeal because there was not yet a final appealable order from the Commission in this case.[3]

On October 3, 2022, the Hearing Officer in these proceedings filed a Procedural Order requesting that Allco confer with the other parties and file a proposed schedule for the penalty phase of this proceeding by no later than Friday, October 21, 2022. On October 13, 2022, the Vermont Agency of Agriculture Food and Markets as well as the Town of Bennington confirmed that they will not be participating in the penalty phase of the proceedings. On October 17, 2022, Allco discussed the schedule with the Vermont Department of Public Service ("DPS").

On October 18, 2022, Allco discussed the schedule with the Vermont Agency of Natural Resources ("ANR"). During that discussion ANR confirmed that any penalty in these proceedings would necessarily include a component related to Allco's purported impact on the (i) *Symphyotrichum urophyllum* (the "Aster") and (ii) nimblewill muhly (*Muhlenbergia schreberii*) (the "Nimblewill") (together, the "Plants"). ANR's *ultra vires* regulation of the Plants are directly at issue in the Supreme Court Case. To the extent Allco

[1] Allco had previously appealed the Commission's issuance of a temporary restraining order in this case. On November 5, 2020, the Vermont Supreme Court dismissed that appeal "without prejudice to refiling it if a preliminary injunction is granted." *In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al.)*, Supreme Court Docket No. 2020-242, November Term, Entry Order of 11/5/20 at 2.
[2] Allco Motion at 2.
[3] *See In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al.),* 2021 VT 92, at ¶ 1.

is successful in the Supreme Court Case, Allco would be irreparably injured if it were to be penalized in these proceedings based on any purported impact to the Plants. Allco would have to spend the time and money defending against a purported impact of the Plants that ANR has no authority to regulate. As such, Allco requested that ANR agree to stay these proceedings until a decision is reached in the Supreme Court Case.

On October 20, 2022, ANR's counsel stated that he would be unable to confirm ANR's position on a possible stay until sometime the following week. That same day, October 20, 2022, Allco filed a motion requesting an extension of the filing deadline for the schedule in these proceedings on the grounds that Allco, DPS and ANR need some additional time to agree on the appropriate path forward with respect to the penalty phase of these proceedings. The motion was granted by the Commission on October 21, 2022, with the direction that Allco file a proposed schedule for the penalty phase of this proceeding by no later than the close of business on Friday, November 4, 2022.

On November 1, 2022, ANR's counsel informed Allco that they would not agree to a stay.

II. STANDARD FOR A MOTION TO STAY

"To prevail on a motion for stay, the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995). "The first two factors … are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). A party faces irreparable harm where, "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 2001);

see also Nken, 556 U.S. at 421 ("if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review"). Allco is likely to prevail in its appeal, and because it will suffer irreparable injury if it is required to proceed to a penalty phase and assessed a penalty based on the purported impact of the Plants, the PUC should stay these proceedings until the Supreme Court issues its decision in the Supreme Court Case.

III. ARGUMENT

A. Allco Has A Strong Likelihood Of Success On The Merits.

ANR has been authorized by the Legislature to make classifications of endangered and threatened species under the Vermont Endangered Species Law. The ESL sets forth the requirements for classifications, such as the use of the best scientific evidence and other practical restrictions including ones related to habitat and economics. ANR has sought to enlarge its authority beyond threatened and endangered species by making classifications of what ANR considers "rare" plant species that are in no danger of becoming threatened or endangered.

As an administrative body, ANR "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." *Perry v. Med. Practice Bd.*, 169 Vt. 399, 403, 737 A.2d 900, 903 (1999) (quotations omitted).

The Vermont Endangered Species Law reflects the give and take of the political process. A result of that process was that ANR was not given any authority to classify species that were neither threatened nor endangered. Despite that lack of legislative authorization, ANR has created a plant classification system classifies plants as "very rare," and "rare."

At the trial court, the Judge agreed with Allco that "the exact statutory source for [ANR's] authority remains unclear,"[4] and (2) "the State does not directly contest the merits of the assertion that ANR lacks statutory authority to regulate rare or very rare plant species."[5]. Those conclusions should have resulted in the trial court denying the State's motion to dismiss. Instead, the trial court created a new test of agency power that if left in place would result in unchecked expansion of agency power outside of the political process. Instead of looking at whether the Legislature granted an agency certain power, under the trial court's erroneous approach, the question would be did the Legislature expressly prohibit an agency from doing what it is doing.

Thus, while it is true that "the Endangered Species Law requires ANR to make lists for endangered and threatened species, [and] does not preclude the Agency from doing the same for "rare" or "very rare" species,"[6] the logical conclusion of such reasoning is that ANR has unlimited authority to do whatever it wishes, except to the extent a statute expressly prohibits it from doing something. That approach turns on its head the fundamental administrative law principle that an agency's "powers include only those expressly granted by the Legislature and such incidental powers as are necessarily implied to carry out its express grant." *In re Petition of Swanton Wind LLC*, 2018 VT 141, P9, 204 A.3d 635 (internal quotations and citations omitted.). As such, Allco firmly believes that it has a strong likelihood of success on the merits at the Vermont Supreme Court.

B. Allco Will Suffer Irreparable Injury If The Stay Is Not Granted.

If Allco is successful at the Vermont Supreme Court and these proceedings result in

[4] *Otter Creek Solar LLC et. al. v. Agency of Natural Resources et. al.*, Superior Court Chittenden, Case No. 169-2-20 Cncv, Decision on Motion to Dismiss, November 16, 2022, at 27.
[5] *Id*.
[6] *Id.*

a penalty, a component of which includes a penalty for the purported impact to the Plants, Allco will clearly suffer an irreparable injury. Allco would have to spend the time and money defending against the purported impact of plants that ANR has no authority to regulate. This case is a textbook example of the need for an injunction to preserve the Supreme Court's ability to render a meaningful decision on the merits by avoiding irreparable harm in the interim.

C. The Stay Will Not Substantially Harm Other Parties And Will Serve The Best Interests Of The Public.

Neither DPS nor ANR will be harmed if the stay is granted because the penalty phase can continue once a final decision is rendered by the Vermont Supreme Court. Neither party is harmed by a delay in these proceedings and any delay would be minimal given that the Supreme Court case was fully briefed as of July 29, 2022. Further, as a matter of law, ANR cannot show any harm by being required to follow the path set by the Vermont Legislature concerning the ESL and being prevented from pursuing an *ultra vires* classification system and agenda that conflicts with what the Vermont Legislature prescribed. The public interest, like the other injunctive factors, strongly favors the granting of injunctive relief.

D. CONCLUSION

Given that the penalty phase of these proceedings will necessarily involve a component related to the purported impact of the Plants and ANR's *ultra vires* regulation of such Plants is directly at issue in the Supreme Court Case, Allco respectfully moves the Commission to stay the penalty phase of these proceedings pending resolution of the Supreme Court Case.

Respectfully submitted on November 4, 2022,

APPLE HILL SOLAR LLC

By: 

Michael Melone, Esq.
Allco Renewable Energy Limited
157 Church Street, 19th Floor
New Have, CT 06510
mjmelone@allcous.com