

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

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Case No. 20-1611-INV

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)	
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**VERMONT DEPARTMENT OF PUBLIC SERVICE’S REPLY BRIEF
ON PENALTY RECOMMENDATION**

On March 2, 2023, the Vermont Department of Public Service (“Department”) filed its penalty recommendation in this proceeding. Focusing on harm to the integrity of the regulatory process,¹ the Department’s assessment of factors under 30 V.S.A. § 30(c) was informed by: the record, the procedural history, and the findings and conclusions of the Commission, all of which have been established in connection with two evidentiary hearings and associated Orders in this investigation. The Department’s recommendation was also informed by Commission precedent. While the Department has put forward its evaluation of the relevant facts and circumstances, the penalty assessment under § 30 is ultimately a matter entrusted to the judgment and sole discretion of the Commission.²

The Respondent, Allco Renewable Energy Limited (“Allco”),³ filed a brief on March 16, 2023, raising several issues – some of which have already been resolved by the Commission. The Department submits this reply brief to address three limited issues, as relevant to its penalty recommendation: (1) the Commission’s authority to impose a penalty for Allco’s violation, (2) the state of the record, and (3) the Department’s analysis of certain § 30(c) factors.

¹ The Department defers to the Vermont Agency of Natural Resources (“ANR”) as to harms and potential harms under the natural resources and environmental criteria of 30 V.S.A. § 248a(b)(5).

² See *In re SolarCity Corp.*, 2019 VT 23, ¶ 19, 210 Vt. 51 (2019) (stating, in the context of an investigation under § 30: “The Legislature has . . . explicitly entrusted the Commission, and only the Commission, with the authority to determine whether an electricity system will promote the public good. Thus, the Commission had a responsibility to independently evaluate the parties’ proposal, and it had authority to decide differently than the parties recommended in their stipulation.”) (citation omitted).

³ For purposes of this proceeding, “Allco” includes Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC.

I. The Commission's Authority to Impose a Penalty

Allco argues that the Commission does not have authority to impose a penalty because neither Allco nor its affiliated entities are “a person, company, or corporation subject to the supervision of the Commission.”⁴ This issue was addressed in the Commission's Order of August 26, 2020,⁵ and fully resolved in the Order of April 1, 2021 (“April 1 Order”).⁶ After extensive briefing by the parties, the Commission found that it had jurisdiction “to [o]versee, [e]njoin, and [p]enalize Allco.”⁷ The Department concurs, and incorporates the arguments put forward in earlier briefing.⁸

II. The State of The Record

Allco asserts that “there is no evidentiary basis on which to support a penalty,” and that the Department's penalty recommendation is “based upon advocate speculation, not evidence.”⁹ The Department disagrees. The materials in the record and the findings and conclusions of the Commission in its earlier orders provide ample support for the imposition of a civil penalty. In the April 1 Order, issued after the second evidentiary hearing in this investigation, the Commission concluded that Allco commenced site preparations at Apple Hill in Bennington, Vermont (“the site”), without a Certificate of Public Good (“CPG”) in violation of 30 V.S.A. § 248(a)(2)(A).¹⁰ As the Commission noted, the findings underpinning the decision “establish a factual basis for issuing a civil penalty” for the violation.¹¹

The Vermont Supreme Court has endorsed the principle that “evidence supporting the Commission's finding that petitioner committed a violation also provides an evidentiary basis to find liability and to support the imposition of a penalty.”¹² That principle applies with equal force here. As the Court indicated, § 30 states that a respondent who violates § 248 “shall be required

⁴ Respondent's Brief Re: Penalty Recommendations at 4, Case No. 20-1611-INV, filed March 16, 2023.

⁵ See *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, Order of 8/26/20 at 8–12 and n.30 (concluding that the Commission has jurisdiction over “the Developer and its associated entities”).

⁶ See *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, Order of 4/1/21 at 16–22.

⁷ See *id.* at 16, 30.

⁸ See Department of Public Service Reply Brief at 2–6, Case No. 20-1611-INV, filed February 12, 2021.

⁹ Respondent's Brief Re: Penalty Recommendations at 1, Case No. 20-1611-INV.

¹⁰ Case No. 20-1611-INV, Order of 4/1/21 at 30

¹¹ See *id.*

¹² *In re SolarCity Corp.*, 2019 VT 23, ¶ 33 (citing 30 V.S.A. § 30(a)).

to pay a civil penalty.”¹³ The remaining question, then, is how the facts and circumstances should inform the Commission’s judgment as to the penalty amount.

In reaching a final penalty determination, the Commission may consider any of the 8 factors under § 30(c).¹⁴ The Department’s recommendation illustrates that there is ample information in the record for the Commission to use in evaluating the relevant factors. While Allco suggests that § 30(c) does not provide fair notice of a penalty amount,¹⁵ notice is not the purpose of that subsection. The potential liability for a violation is spelled out in black and white under § 30(b): a penalty of up to \$85,000 may be imposed, with an additional fine of up to \$42,500 per day for continuing violations.¹⁶

With the maximum penalty expressly provided, the purpose of § 30(c) is to lay out what factors may be considered in determining the precise amount. It is important to stress the permissive language of the statute here, as it reinforces the discretion granted to the Commission in this context. It is certainly true that there must be an evidentiary basis for the penalty, but as with civil penalties in other contexts and jurisdictions, the exact penalty amount is a remedy committed to the sound discretion of the adjudicator. As the Vermont Supreme Court has stated:

“The evidence must establish the grounds for such a penalty, but ultimately the amount must be based on the seriousness and nature of the grounds, and what action is necessary to prevent reoccurrence. As long as the [Commission]’s decision shows a thorough and fair evaluation of the various relevant factors . . . it will be upheld. The [Commission’s] discretion is not limited to selecting from recommendations made or supported by the parties.”¹⁷

The Department maintains that the current record supports the imposition of a penalty and provides sufficient information to evaluate the relevant factors.

III. The Department’s Analysis of § 30(c) Factors

Though Allco’s discussion of the factors under 30 V.S.A. § 30(c) appears largely directed at ANR’s penalty recommendation, the Department takes this opportunity to clarify its analysis as to three of the factors.

¹³ See 30 V.S.A. § 30(a)(1).

¹⁴ See 30 V.S.A. § 30(c) (listing 8 factors with the last being “any other aggravating or mitigating circumstance”).

¹⁵ See Respondent’s Brief Re: Penalty Recommendations at 5, Case No. 20-1611-INV.

¹⁶ 30 V.S.A. § 30(b).

¹⁷ See *In re Citizens Utilities Co.*, 171 Vt. 447, 457 (2000); see also *Town of Pawlet v. Banyai*, 2022 VT 4, ¶ 29–31, 38, 274 A.3d 23 (2022) (reviewing fines imposed by the Environmental Division after considering similar factors).

- a. Factor 1: The extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers.

Because Allco appears to take issue with the analysis of harm to the regulatory process,¹⁸ the Department seeks to clarify the basis for finding regulatory harm and describe how this harm has been incorporated into Factor 1. As explained in the Department’s penalty recommendation, the Commission has held that failure to comply with regulatory obligations “harms the integrity and credibility of the regulatory process.”¹⁹ Though Allco may argue otherwise, the finding of a violation itself provides the basis for the harm. This notion is well-established and follows from the principle that the process “cannot function when regulated entities ignore their obligations.”²⁰

As for how damage to the process fits within Factor 1, it is an extension of the harm and potential harm to (1) public safety and welfare, (2) the environment, and (3) utility customers. The § 248 process aims to protect these interests by preventing undue adverse impacts. “When an entity acts within the Commission’s jurisdiction but without the Commission’s approval, such conduct undermines the integrity of the regulatory review process, which exists to protect the public from harm.”²¹

- b. Factor 3: The economic benefit, if any, that could have been anticipated from an intentional or knowing violation.

To the extent Allco suggests that this factor was integral to the penalty recommendation, the Department now clarifies: the potential economic benefit to Allco was not considered a significant factor, because the Department was not able to quantify that benefit.²²

¹⁸ See Respondent’s Brief Re: Penalty Recommendations at 6, Case No. 20-1611-INV.

¹⁹ See, e.g., *Investigation into potential violations of the Public Utility Commission’s March 23, 2021, Order in Case No. 20-2570-PET*, Case No. 21-2501-INV, Order of 10/07/21 at 5.

²⁰ See *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Otter Creek Solar, LLC’s certificates of public good issued in Cases 8797 and 8798*, Case No. 19-1596-INV, Order of 4/1/21 at 4–5; see also, e.g., *Investigation pursuant to 30 V.S.A. §§ 30, 209, and 248 regarding the 2.2 MW solar plant owned by Charlotte Solar, LLC in Charlotte, Vermont*, Case No. 8636, order of 10/23/17; *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into potential violations of Coolidge Solar I, LLC’s certificate of public good issued in Docket 8685*, Case No. 19-3671-INV, order of 7/24/20.

²¹ See Case No. 19-3671-INV, order of 7/24/20 at 8 (quotation omitted); see also *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Newbury GLC Solar, LLC’s certificate of public good issues in Case #17-4721-NMP*, Case No. 19-0734-INV, Order of 8/1/19 at 7–8.

²² See Department’s Recommendation of Penalty Assessment at 3–4, Case No. 20-1611-INV, filed March 2, 2023 (noting that “this factor is assigned a neutral weight”).

c. Factor 8: Any other aggravating or mitigating circumstance.

The Department maintains that Allco's continued site-clearing activity on June 27, 2020, represents a significant aggravating circumstance. The activity began after the Commission issued a Temporary Restraining Order ("TRO") from the bench on the afternoon of June 26, and after the TRO was memorialized in an Order issued that same evening. Allco suggests that the activity was somehow *de minimis* because its forester was "simply removing brush from an already cleared area."²³

The characterization offered in Allco's brief does not reduce the significance of its failure to ensure that activity at the site ceased in accordance with the TRO. First, the record does not support Allco's characterization, nor do the findings of the Commission.²⁴ Furthermore, the Department does not see how the area was "already cleared" if brush was still being removed. Regardless of how the activity is characterized, it is evident that Allco continued site-clearing or site preparation after the TRO was issued, in the midst of an investigation into whether that same conduct violated § 248. This is a significant aggravating circumstance.

Dated in Montpelier, Vermont on this 30th day of March 2023.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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²³ See Respondent's Brief Re: Penalty Recommendations at 23, 24, Case No. 20-1611-INV.

²⁴ See Tr. 06/26/20 at 63, 65-66 (Kobelia) (indicating that small ash trees were bulldozed and noting that "my purpose was to clear the site"); Case No. 20-1611-INV, Order of 4/1/21 at Finding 16 ("Between 7 A.M. and 1 P.M. on June 27, 2020, the forester used a bulldozer to continue clearing a 100-foot-by-250-foot area of the Apple Hill site of vegetation. . . .").