

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209)	Case No. 20-1611-INV
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))	

**VERMONT AGENCY OF NATURAL RESOURCES REPLY TO ALLCO'S
BRIEF AND MOTION FOR HEARING**

The Vermont Agency of Natural Resources (“Agency”) now submits the following reply in response to Allco Renewable Energy Limited’s (“Allco”) March 16, 2023, brief and motion. Essentially, Allco now seeks to relitigate issues that it has already litigated, and which the Public Utility Commission (“Commission”) has already resolved, in this proceeding. Allco’s request should be denied for the following reasons.

BACKGROUND

The parties in this proceeding have engaged in a nine-month litigation process before the Commission, from June 2020 through February 2021. This process included the submission and admission of testimony and numerous exhibits sponsored by multiple witnesses, two separate evidentiary hearings where Allco cross-examined witnesses, discovery, briefing, and findings by the Commission – and culminated in issuance of an order by the Commission in April 2021, enjoining Allco from continuing its site preparation activities which violated 30 V.S.A. § 248. Despite all this, Allco suggests that genuine issues of material fact remain concerning the 30 V.S.A. § 30 factors related to: (i) environmental harm; (ii) harm to the regulatory process; and (iii) economic benefit.

Allco claims that further testimony, discovery and a third evidentiary hearing are now needed.¹

DISCUSSION

- i. *Allco's request for testimony, discovery, and an evidentiary hearing on environmental harm should be denied because those processes have already taken place.*

The basis for Allco's offering additional testimony and its request for another hearing on environmental harm is that it is entitled to challenge the Agency's evidence on actual and potential impacts to rare plants as well as the Agency's policies concerning rare plants. Allco relies on the Vermont Supreme Court decision in *Otter Creek Solar LLC & PLH LLC*, 2022 VT 60, to support its requests.

In affirming the dismissal, we take no position on the merits of plaintiffs' claim that ANR lacks the power to regulate plant species other than threatened or endangered species. Our decision in this case also does not leave plaintiffs without a remedy. They can challenge the admissibility and weight of the ANR policies during the CPG process, and they can appeal to this Court if they are unsatisfied with the PUC's rulings.²

The Agency agrees that an applicant for a certificate of public good "can challenge the admissibility and weight of the ANR policies during the CPG process."³ The fundamental flaw with Allco's reliance on this principle is that Allco has already challenged the Agency's policies regarding rare plants, as well as impacts to rare plants and harm to the environment in this proceeding.⁴ The Commission has already found

¹ As indicated in its initial brief, the Agency is relying on the extensive record which has been established in this proceeding and the Commission's prior findings and orders. It is the Agency's position that there is adequate evidence in the record in this matter for the Commission to evaluate the factors under 30 V.S.A. § 30(c) and impose a penalty under 30 V.S.A. § 30(a)(1).

² *Otter Creek Solar LLC & PLH LLC*, 2022 VT 60, ¶ 17.

³ *Id.*

⁴ In fact, Allco has already admitted that the plants at the Apple Hill site are rare and very rare. *See* Allco's testimony and reports filed in the underlying CPG proceedings related to the Apple Hill site in Dockets

that the plants are rare and very rare.⁵ The Commission has already determined that Allco's site clearing activities destroyed rare and very rare plants.⁶ The Commission, after hearing testimony from both Allco's and the Agency's witnesses on rare plants, determined that the Agency's plant classification system is rational and entitled to deference.⁷ Finally, the Commission concluded "that Allco's activities have caused—and would continue to cause—*substantial and immediate irreparable harm to rare and very rare species.*"⁸ (emphasis added)

Allco is not entitled to an evidentiary hearing on the issue of environmental harm because that hearing has already occurred.⁹ The Commission has decided the issue and the evidentiary record establishing harm to the environment is closed.¹⁰

8302 and 8454, and Case No. 17-5024; *see also* Case No. 20-1611, Order of 4/1/21, finding 3, and exhs. ANR-11; ANR-12; ANR-13; ANR-14; ANR-15.

⁵ Case No. 20-1611, Order of 4/1/21, finding 3.

⁶ *Id.* finding 18.

⁷ *Id.* finding 21.

⁸ *Id.* at 28.

⁹ Allco asks to re-open the hearing, claiming that the Agency incorrectly applied a distance measurement contained in the methodology the Agency uses to determine whether there are one or two very rare plant populations in the vicinity of the Apple Hill site (*see* Allco brief at 15-17) and now seeks to provide additional testimony concerning distance measurements in that methodology (*see* Allco motion at 2). The problem with Allco's position, aside from the fact that this topic, and the methodology, were already addressed at length during the December 4, 2020, evidentiary hearing (*see* Case No. 20-1611, tr. 12/4/20 at 163-165 and 179-181), is that Allco's proposed "new" evidence is dated May 2020. *See* Allco motion at 8. If Allco believes that a distance reference in a methodology dated May 2020 was not correctly applied by the Agency, it had from June 2020 thru December 2020 to address it, including during Allco's cross-examination of the Agency's expert witness on this very topic during the December 4, 2020, hearing. Allco did not then, and cannot now, more than two years later. In any event, Allco's purported purpose, to demonstrate there is a single population, not two separate populations, of a very rare plant does not change the fact that the plant is still classified as very rare under either scenario. Thus, even if Allco was correct (which it isn't) the Commission's finding that very rare plants were destroyed by Allco's unauthorized site clearing activities at Apple Hill would still apply.

¹⁰ Case No. 20-1611, Order of 4/1/21 at 9-10; *see also* tr. 12/4/20 at 221 (Roisman). The record in this proceeding was closed at the end of the second evidentiary hearing on December 4, 2020, except for a limited scope of evidence that was allowed to be submitted after the hearing. That process was completed on January 25, 2021, when Allco filed supplemental testimony and three related exhibits.

Allco's request for discovery fails too. Allco has already engaged in discovery on the Agency concerning rare plants and harm.¹¹

Allco served the Agency with twenty-five separate post-hearing discovery requests dated December 12, 2020. On January 8, 2021, the Agency provided its responses to those requests, along with twenty-three additional documents which were responsive to those requests, all of which the Agency filed in *ePUC* in this case that same day. However, despite receiving the Agency's discovery responses, Allco never asked that they be include in the evidentiary record. Allco did file post-hearing motions in an attempt to get other documents in the record, but Allco's requests were denied by the Commission because those documents were beyond the scope of what was allowed at the conclusion of the December 4 hearing.¹²

Discovery has concluded. Allco cannot now ask for discovery on the very same issues that it conducted discovery on more than two years ago especially where, as here, the issues have been fully litigated over the course of nine months and decided. Allco's request for a discovery do-over after extensive litigation, closure of the evidentiary record, and findings by the Commission on all issues relevant to environmental harm, is unduly burdensome, duplicative, and disproportional to the needs of this case.¹³ It should be denied.

¹¹ At the conclusion of the December 4, 2020, evidentiary hearing, the parties were provided with an opportunity to engage in discovery and to then introduce any relevant discovery responses they received into the record. *Id.* Tr. 12/4/20 at 221 (Roisman).

¹² See Order of 4/1/21 at 9-11 (discussing what was entered into the record after the December 4, 2020, evidentiary hearing, as well as what was attempted but was denied).

¹³ See PUC Rule 2.230(A)(1); *see also* PUC Rule 2.230(A)(2)(b) (limiting discovery which is unreasonably cumulative or duplicative, or where the party seeking discovery has had ample opportunity to obtain the information by discovery in the action). Allco's request is duplicative in that the Agency has already responded to Allco's discovery requests. Allco was also provided with ample opportunity to seek discovery during development of the record in this case. At the close of the evidentiary hearing on

- ii. *The Agency does not oppose Allco being heard by the Commission on the issue of harm to the regulatory process.*

The Agency does not oppose Allco being heard on the issue of harm to the regulatory process. Oral argument before the Commission should sufficiently address this factor as there already is an extensive evidentiary record and Commission findings concerning Allco's activities and their effect on the regulatory process.

- iii. *The Agency does not oppose Allco being heard by the Commission on the issue of economic benefit.*

The Agency does not oppose Allco being heard on the issue of economic benefit. Oral argument before the Commission should sufficiently address this factor as there already is an extensive evidentiary record and Commission findings. As stated in the Agency's initial brief, the Agency is unaware of any economic benefit that resulted from Allco's actions.

- iv. *Allco's generalized arguments lack merit and should be rejected.*

Allco fundamentally misconstrues the construct of this proceeding, the related Section 248 proceedings, and the Agency's roles before the Commission in them.

Allco alleges it has been "ambushed,"¹⁴ that it has not been provided with "advance notice and an opportunity to present evidence,"¹⁵ and that there was lack of "fair notice" that a penalty would be imposed.¹⁶ However, the caption of this investigative proceeding, which was opened by the Commission's order dated June 24,

December 4, 2020, Chair Roisman stated: "[O]ur order at the time we granted the TRO last summer, urged the parties to do their discovery back then. ... Everybody has put in a discovery request well after what we thought would be the, the discovery request time." See Tr. 12/4/20 at 220-221 (Roisman). The Agency has not sought discovery in this case.

¹⁴ Allco motion at 2.

¹⁵ *Id.*

¹⁶ Allco brief at 4.

2020, begins: “Investigation pursuant to 30 V.S.A. §§ 30 and 209...” Section 30 of Title 30 is entitled “Penalties; affidavit of compliance.”¹⁷ Allco has been on notice for thirty-three months that this is a penalty proceeding. To now suggest it was not provided with notice belies reality.

Allco’s arguments that imposition of a penalty now would violate its rights to due process, that Section 30 does not provide “fair notice of a penalty amount,”¹⁸ and that penalty amounts need to be attributed to specific penalty factors,¹⁹ similarly lack merit. As stated in Section 30(b), “[t]he Commission may impose a civil penalty under subsection (a) of this section of not more than \$85,000.00.”²⁰ There is no basis, statutory or otherwise, for Allco’s assertion that discrete penalty amounts be assigned to each factor. “A civil penalty” means just that, a penalty. Had the legislature intended for separate penalties to be imposed under each factor it would have said so. It didn’t.

Allco’s claim that the Agency “has no authority to regulate ‘rare’ or ‘very rare’ plants,”²¹ while only partially true, is not relevant to this proceeding.²² It is the Commission, not the Agency, which regulates Allco’s activities under both Section 248 and Section 30. With respect to Section 248, the Agency’s statutory role is to provide the Commission with evidence and to make recommendations concerning impacts on the

¹⁷ 30 V.S.A. § 30.

¹⁸ Allco brief at 5.

¹⁹ *Id.*

²⁰ 30 V.S.A. § 30(b).

²¹ Allco brief at 8.

²² The Agency notes that it does have independent regulatory authority concerning rare and very rare plant species, and other fish and wildlife species, when the Agency determines a particular species is threatened or endangered in Vermont. *See* 10 V.S.A. § 5402. The Agency also has the authority to adopt policy and guidance documents, and to utilize those documents in proceedings before the Commission as it has done in numerous Section 248 proceedings. *See* 3 V.S.A. § 835.

natural environment.²³ While Section 30 contains no such requirement, the Agency believes it is valuable to make penalty recommendations when there is actual or potential harm to the environment as here. The recommended penalty here reflects the totality of Allco's actions examined through the Section 30 factors. However, this simply remains a recommendation. It is neither legally binding on Allco nor the Commission. The Agency is not "regulating" Allco in this instance. Section 30 assigns to the Commission, not the Agency, the authority to determine the amount of, and impose, a penalty in this proceeding.

CONCLUSION

For the reasons discussed above, the Agency respectfully asks that the Commission deny Allco's requests to conduct discovery, offer more evidence and have a third evidentiary hearing on the issue of harm to the environment.

Dated March 30, 2023, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



By:

Donald J. Einhorn, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
Phone: (802) 249-1720
Email: donald.einhorn@vermont.gov

²³ 30 V.S.A. § 248(a)(4)(E).