STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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)	

Order entered: 05/30/2023

NOTICE OF LIMITED HEARING AND ORDER ON THE DEVELOPER'S MOTION FOR A HEARING

I. INTRODUCTION

On March 16, 2023, Allco Renewable Energy Limited and its affiliates (collectively, the "Developer") filed a motion with the Vermont Public Utility Commission ("Commission") to reopen the record for new evidence in a third evidentiary hearing ("Developer's Motion"). In this order, we deny in part the Developer's Motion. We nonetheless provide notice to the parties of a limited evidentiary hearing to provide the Developer with the opportunity to seek to admit into evidence, with live testimony, the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. The Commission also provides notice to the parties of their opportunity to present oral argument after the limited evidentiary hearing. Oral argument will be limited to addressing the appropriate amount of a civil penalty, including addressing the penalty amounts proposed by the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service ("Department"). This limited hearing will be conducted by video teleconference on Thursday, June 29, 2023, at 9:30 A.M. Further guidance on the procedure to be observed at this limited hearing is provided below.

II. BACKGROUND

On June 24, 2020, the Commission opened this investigation, pursuant to 30 V.S.A. §§ 30 and 209, into whether the Developer was conducting site clearing on Apple Hill without a certificate of public good ("CPG") in violation of Section 248(a)(2) of Title 30 of the Vermont Statutes Annotated.

On June 26, 2020, the Commission held an evidentiary hearing and issued an order temporarily restraining the Developer from any further tree clearing on any of the property identified in applications for two solar projects in the Apple Hill area in Bennington, Vermont.[1]

On September 8, 2020, the Developer appealed the Commission's temporary restraining order to the Vermont Supreme Court.

On November 5, 2020, the Vermont Supreme Court dismissed the Developer's appeal "without prejudice to refiling if a preliminary injunction is granted."[2]

December 4, 2020, the Commission held a second evidentiary hearing.

On April 1, 2021, the Commission issued an order in this proceeding finding that the Developer had begun site preparation without a CPG, and we enjoined the Developer from any further site preparation without a CPG (the "Injunction Order"). We also directed the parties to confer and file a proposed schedule for the penalty phase of this proceeding by no later than April 16, 2021.

On April 2, 2021, the Developer filed notice that it was appealing the Injunction Order to the Vermont Supreme Court.

On December 3, 2021, the Vermont Supreme Court dismissed the Developer's appeal because the Injunction Order was not yet a final appealable order from the Commission.[3]

On October 3, 2022, the Commission directed the Developer to file a proposed schedule for the penalty phase of this proceeding by October 21, 2022.

On October 20, 2022, the Developer requested an extension to that deadline. On October 21, 2022, the Commission extended the deadline for the Developer to file a proposed schedule for the penalty phase of this proceeding to November 4, 2022.

On December 14, 2022, the Commission requested that ANR confer with the other parties and file a proposed schedule for the penalty phase of this proceeding by January 13, 2023.

On January 13, 2023, ANR filed a proposed month-long schedule for the penalty phase of this proceeding. The Developer responded with a year-long schedule proposal.

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[1] Those applications are in Docket 8454 and Case No. 17-5024-PET.

[2] *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.

[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, ¶ 1.

On January 30, 2023, the Commission requested that the parties file briefs with penalty recommendations by March 2, 2023.

On March 2, 2023, ANR and the Department each filed briefs with penalty recommendations.

On March 16, 2023, the Developer replied to the two agency briefs and filed the Developer's Motion for a third evidentiary hearing. The Developer also filed the affirmations of Steve Broyer, the Developer's project manager, and Jim McClammer, its natural resources consultant.

On March 30, 2023, ANR and the Department filed responses to the Developer's reply brief and to the Developer's Motion.

III. POSITIONS OF THE PARTIES

A. The Developer

The Developer denies that it began site preparation without a CPG, and the Developer requests another evidentiary hearing. The Developer asserts that there is no evidence to support the agencies' penalty recommendations.[4] The Developer requests the opportunity to provide the Commission with a rare plant inventory to demonstrate that no actual harm was done.[5] The Developer seeks to supplement the evidentiary record with new testimony on environmental harm:

> [The Developer] propose[s] to introduce evidence that shows (i) there has been no actual environmental harm, (ii) there has been no harm to the regulatory process and (iii) there has [not] been nor could there have been any economic benefit from the clearing.[6]

> If the [Commission] is inclined to issue a penalty based in whole or in part on purported impacts to the Aster population, it would be arbitrary and capricious and an abuse of discretion to do so based on the incorrect standard of measuring such population.[7]

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[4] Developer's Motion at 1 ("Neither [the Department] nor ANR have presented any evidence of actual environmental harm or harm to the regulatory process.").

[5] *Id*. at 2-3 ("Although it was clear from these proceedings to date that some of these plants *may* have been impacted by the clearing (see Exhibit PLH-TMM-2), there is nothing in the record to demonstrate that the plants were actually destroyed or negatively impacted by the clearing.").

[6] *Id.* at 3-4.

[7] Developer's Motion at 10.

B. ANR

It is ANR's position that no further evidence is needed and that this matter should proceed to oral argument:

> [The Developer] now seeks to relitigate issues [i.e. harm to the environment] that it has already litigated, and which the [Commission] has already resolved, in this proceeding. [The Developer's] request should be denied.[8]

> The Agency does not oppose [the Developer] 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 [the Developer's] activities and their effect on the regulatory process.[9]

> The Agency does not oppose [the Developer] 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 [the Developer's] actions.[10]

C. The Department

It is the Department's position that "the existing record provides an adequate basis to impose a penalty and ample information for the Commission to use in evaluating the factors under 30 V.S.A. § 30." The Department further notes the following:

> [The Developer] appears to suggest that additional evidence is needed regarding (1) harm to the regulatory process and (2) the economic benefit that could have been anticipated from a knowing or intentional violation. It's true that economic benefit, if any, has not been established – yet this factor was not an integral part of the Department's recommendation. Nor is it a key consideration for the Commission in this case, where the evaluation of other factors yields far more insight [into] the nature and severity of the violation. As to regulatory harm: the Commission has concluded after two evidentiary hearings that [the Developer] commenced site preparations without a Certificate of Public Good in violation of 30 V.S.A. § 248(a)(2)(A). This conclusion, along with its evidentiary underpinnings, provides the basis for finding harm to the integrity of the

[8] ANR's Reply Brief at 1.
[9] *Id.* at 5.
[10] *Id.*

> regulatory process. Therefore, the Commission is not obligated to reopen the record.[11]
>
> If [the Developer] wishes to be heard prior to the imposition of a penalty, the Department does not object to an appropriately limited hearing on the existing record.[12]

As to the record, the Department argues that no further evidence is needed for the Commission to issue a ruling assessing a civil penalty in this matter:

> 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 [the Developer] commenced site preparations at Apple Hill in Bennington, Vermont, without a CPG in violation of 30 V.S.A. § 248(a)(2)(A). As the Commission noted, the findings underpinning the decision "establish a factual basis for issuing a civil penalty" for the violation.[13]
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> 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." That principle applies with equal force here.[14]

IV. DISCUSSION

The Developer's Motion is granted insofar as the Developer may have a limited evidentiary hearing at which it may seek the admission into evidence of the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. Mr. Broyer's additional testimony could be useful because it may provide evidence related to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer's ability to pay a civil penalty. Unlike the other evidence the Developer seeks to admit (discussed below), the matters raised by Mr. Broyer's affirmation have not yet been litigated in these proceedings. Thus, a limited evidentiary hearing on these matters is appropriate.

That said, we are not going to admit Mr. Broyer's affirmation at this time because we have questions about the credibility and reliability of Mr. Broyer's testimony in its present form. In particular, Mr. Broyer claims that, due to our injunction, the Developer has not had "the

[11] Department's Response to the Developer's Motion at 1-2.
[12] *Id.* at 2.
[13] *Id.* (citing Case No. 20-1611-INV, Order of 4/1/21 at 30).
[14] *Id.* (citing *In re SolarCity Corp*., 2019 VT 23, at ¶ 33).

ability to use its land for any purpose."[15] This broad statement cannot be squared with the limited nature of the injunction that we granted, which only prohibited site-preparation activities, not the use of the land for any other purposes. Mr. Broyer is reminded that testimony filed with the Commission must be truthful and not misleading. In advance of the upcoming evidentiary hearing, we encourage Mr. Broyer to review his testimony and consider whether it must be revised so as to be truthful. We will take up the admission of Mr. Broyer's testimony at the time of the evidentiary hearing.

The Commission denies the rest of the Developer's Motion, including the proffered supplemental affirmation of Mr. McClammer and the request for a third evidentiary hearing on the matters Mr. McClammer addresses, for three reasons.

First, the specific evidence that the Developer proffers regarding the actual harm created by its unauthorized site preparation is untimely and unnecessary.[16] The Developer seeks to establish that no actual environmental harm occurred as the result of its actions, but there is no requirement for the Commission to determine that there was actual harm to the environment. Rather, in determining the amount of a fine pursuant to 30 V.S.A. § 30(c)(1), the Commission "*may* consider 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."[17] The Developer's proffer of evidence of actual harm is not a genuine issue of material fact requiring a third evidentiary hearing. The applicable penalty factor provides the Commission with discretion to take into account whether the Developer's actions "might have harmed . . . the environment" regardless of whether there was any actual harm.[18]

Further, the Developer is untimely in its request that we reopen the record to allow for the admission of new evidence that will challenge the penalty recommendations of ANR and the Department. The injunction proceeding looked specifically at whether the Developer's actions harmed or potentially harmed the environment. The proffer of evidence of a rare plant survey is untimely and should have been provided, if at all, by the Developer by conducting a survey in

[15] Broyer Affirmation at ¶ 5.
[16] *See, e.g.*, Vt. Rules Evid. 403 (allowing for the exclusion of evidence that is of limited relevance, cumulative, or leads to undue delay).
[17] 30 V.S.A. § 30(c)(1) (emphasis added).
[18] *Id.*

the summer of 2020 when the event occurred, or at the latest at the time of the evidentiary hearing on whether to grant an injunction. Such a rare plant survey is of questionable relevance at this point in the proceedings.

The Developer acknowledges that "it was clear from these proceedings to date that some of these plants *may* have been impacted by the clearing."[19] The evidence upon which this statement is based is sufficient to address the "harm" criterion of 30 V.S.A. § 30(c)(1). Now the Developer argues that evidence of actual harm is required to issue a civil penalty. We disagree.

The Commission's conclusion that the Developer violated 30 V.S.A. § 248(a)(2)(A) was based on the results of two previous evidentiary hearings in which the Developer was a central and active participant. Evidence has been admitted sufficient both to support the injunction of the Developer's unauthorized site preparation and to consider the weight and admissibility of evidence that might support a civil penalty. The Developer had two opportunities to be heard and now seeks a third. After we decided that the Developer had violated 30 V.S.A. § 248(a)(2)(A), the Developer requested that the Commission reopen the record so that it might relitigate the entire incident. We see no reason to do so.

Second, the Developer effectively wants us to reconsider our previous conclusion that the Developer has violated 30 V.S.A. § 248(a)(2)(A) and issue an order saying that ANR's guidance on rare, threatened, and endangered species was misapplied and is unauthorized. We decline to do so because the Developer has not met the high standard for reconsideration.[20] It may have been a tactical error by the Developer not to do more to shape the findings at the first two evidentiary hearings. But the Commission has not erred. There is no need to develop additional evidence to challenge the agencies' penalty recommendations or to weigh the existing evidence and consider an appropriate civil penalty.

Third, further delay in concluding this investigation is not in the public interest. Consistent with its request for additional discovery and a third evidentiary hearing, the

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[19] Developer's Motion at 2-3.

[20] *See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 7/31/20 at 2 ("Reconsideration . . . is appropriate only to avoid an unjust result 'due to mistake or inadvertence of the Commission, as opposed to that of a party.' The disposition of a reconsideration motion rests with the discretion of the Commission. . . . [Reconsideration] does not permit parties to relitigate issues or correct previous tactical decisions." (citations omitted)).

Developer proposed a schedule that would further delay this proceeding by another year. The penalty phase of this proceeding has already been substantially delayed. We have not yet issued a final order addressing the appropriate civil penalty to be issued against the Developer for its unpermitted site-preparation activity on Apple Hill in the summer of 2020. Any further delay in doing so would delay the ultimate resolution of this matter.

Continued delay in this proceeding harms the parties because the delay also interferes with the integrity of the Section 248 review process. Further delay thus does not serve the interest of the public. Rather, the public interest is served by bringing this matter to a conclusion. We are not persuaded that a further delay here would be reasonable. Rather, we conclude that a further delay only creates additional harm.

V. CONCLUSION

While we deny in part the Developer's Motion as discussed above, we also provide notice of the opportunity for the Developer to seek the admission into evidence in a limited evidentiary hearing of the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. If the Developer elects to file a revised version of Mr. Broyer's affirmation as suggested above and seeks its admission or seeks the admission of the affirmation previously filed on March 16, 2023, it must do so by June 14, 2023. Consistent with Commission Rule 2.216(D)(2), any objections to its admission would be due by June 22, 2023. The scope of the evidentiary hearing will be limited to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer's ability to pay a civil penalty. Mr. Broyer will not be permitted to offer live direct testimony at the hearing unless a timely filed motion requesting the opportunity for direct examination to support its admission has been granted. Should the Developer have Mr. Broyer offer an affirmation for admission, Mr. Broyer will then be available for cross-examination by ANR, the Department, and the Commission.

In addition, we agree that the parties should be provided with the opportunity to address the agencies' penalty recommendations at oral argument, and we provide notice here of that event. This part of the limited hearing event will be allocated one hour. The Developer will have 30 minutes to make oral argument including any time reserved for rebuttal, and ANR and the Department will have a combined 30 minutes (divided however they choose) to make oral

argument, including any time reserved for rebuttal. The Developer will begin, followed by ANR and the Department.

If the Developer seeks to enter an affirmation by Mr. Broyer into evidence, the limited evidentiary hearing followed by oral argument, will be held, pursuant to 3 V.S.A. § 811 and 30 V.S.A. §§ 10, 30, 248, and 209 on Thursday, June 29, 2023, beginning at 9:30 A.M. via Go To Meeting videoconference. If only an oral argument is to be conducted it will begin at 9:30. Participants and members of the public may access the hearing online at https://meet.goto.com/629357589or call in by telephone using the following information: phone number: +1 (571) 317-3116; access code: 629-357-589. Participants may wish to download the GoToMeeting software application in advance of the hearing at https://meet.goto.com/install. Guidance on how to join the meeting and system requirements may be found at https://www.gotomeeting.com/online-meeting-support.

Pursuant to 30 V.S.A. §§ 20 and 21, the Developer will be responsible for court reporter costs incurred by the Commission as a result of this evidentiary hearing and oral argument. Invoices for these costs will be mailed to the attorney(s) of record or the official representative(s) for the Developer.

SO ORDERED.

Dated at Montpelier, Vermont, this 30th day of May, 2023.

Anthony Z. Roisman)
) PUBLIC UTILITY
)
) COMMISSION
)
) OF VERMONT
Margaret Cheney)

OFFICE OF THE CLERK

Filed: May 30, 2023

Attest: _____
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)

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