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**

RESPONDENTS' SECOND MOTION FOR HEARING

As explained below, respondents move for a hearing in accordance with 30 V.S.A. §30(a) and provide new declarations reflecting the testimony of Thomas Melone and Jim McClammer for the penalty phase hearing. The declaration of Steve Broyer is withdrawn.

This proceeding was bifurcated by the Public Utility Commission (the "Commission" or 'PUC") with the first phase dealing with whether a violation occurred, and this second phase, i.e., the penalty phase, dealing with whether a penalty is appropriate, and if so the amount of such a penalty. 30 V.S.A. §30(a) provides respondents with the right to a hearing. Respondents are therefore entitled to introduce evidence at the hearing related to all factors and issues that are relevant to this penalty phase.[1]

On June 24, 2020, the Commission initiated this investigation. On June 26, 2020, the Commission held the first of two evidentiary hearings in this proceeding and issued a temporary injunction (the "TRO").[2] On December 4, 2020, the Commission conducted the second evidentiary hearing. On April 1, 2021, the Commission issued a permanent injunction and ordered

[1] The Respondents in Case 20-1611 are listed as only Apple Hill Solar LLC and Chelsea Solar LLC. PLH Vineyard Sky LLC and Allco Renewable Energy Limited have participated in this case as their interests are affected.

[2] The PUC's injunction is dated June 26, 2020, and appears on the docket on ePUC as of June 26, 2020. The injunction was issued late at night on June 26, 2020, [10:31p.m.] and the rules governing ePUC state that it would be considered filed as of the following business day, June 29, 2020. *See*, Standards and Procedures Applicable to Electronic Filing Using ePUC (as amended September 1, 2018), Section IX(e).

the parties to propose a schedule for the penalty phase. On January 30, 2023, the Commission issued an order establishing a schedule for the penalty phase of this investigation proceeding, beginning with March 2, 2023, as the date by which the state parties, the Department of Public Service ("Department" or "DPS") and the Vermont Agency of Natural Resources ("Agency" or "ANR"), file briefs with penalty recommendations. On March 2, 2023, the Department and the Agency each filed separate penalty recommendations (the "DPS Brief" and the "Agency Brief", respectively). DPS and ANR each claim that the actions taken by Allco Renewable Energy Limited, Apple Hill Solar LLC, Chelsea Solar LLC, and PLH Vineyard Sky LLC (collectively, for purposes of this motion, the "Respondents" (but see, footnote 1, *supra*)[3] resulted in harm to the environment and harm to the regulatory process, the later term of which is not defined or attempted to be defined by the state agencies). Neither DPS nor ANR, however, offer any factual evidence of such harm, and in the case of the regulatory process, neither explain what that means or what harm has allegedly been caused.

On March 16, 2023, the Respondents filed a motion for a hearing. On May 30, 2023, the Commission issued an order (the "May Order") denying most of the request regarding the hearing—limiting to the scope of the hearing to the Broyer affirmation.

The Respondents now move to broaden the scope of the hearing which due process requires and 30 V.S.A. §30(a) requires, substitute the Melone affirmation for Broyer's, and submit a revised McClammer affirmation. While one hearing was held in connection with the TRO and another hearing was held in connection with whether a violation occurred, neither is the hearing required by 30 V.S.A. §30(a), as the Commission bifurcated the penalty phase. The first part of the bifurcated proceeding only dealt with whether the "petitioner has begun site preparation without a CPG." See April 1, 2023 order at 1. The injunction proceeding did not depend on any of the 8 factors enumerated in 30 V.S.A. §30(c) or other relevant evidence. By denying the Respondents the ability to present evidence on each of those factors and whether a penalty is appropriate, the

[3] PLH Solar LLC is not an entity known to Respondents.

Commission is denying the Respondents the hearing and fair treatment that due process and 30 V.S.A. §30(a), require. It would be grossly unfair for the Commission to deny the Respondents the ability to present evidence on any one of those 8 factors and whether a penalty is appropriate, while in the end reciting the factor in an order imposing a penalty.

A. Statutory Background.

30 V.S.A. §30 (2020)[4] authorizes the Commission to impose a civil penalty under certain circumstances.[5]

30 V.S.A. §30(a)(1) authorizes the Commission after notice and opportunity for hearing to impose a penalty of not more than $40,000 on "a person, company, or corporation subject to the supervision of the Commission", which the Respondents are not, "who violates a provision of … section 231 or 248 of this title, … shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing." A pre-condition for a penalty under 30 V.S.A. §30(a)(1) is that the person sought to be penalized is a regulated entity (which none of the Respondents are).

30 V.S.A. §30(a)(1) authorizes the Commission after notice and opportunity for hearing to impose a penalty on any "person who violates a provision of chapter 3 [§§ 101 – 127] or 5 [§§ 201 – 271] of this title, except for the provisions of section 231 or 248 of this title." If the Commission determines that the violation substantially harmed or might have substantially harmed the public health, safety, or welfare; the interests of utility customers; the environment; the reliability of utility service; or the financial stability of the company, the Commission may impose a civil penalty as provided in subsection (b) of this section. If the Commission determines that the

[4] All references to 30 V.S.A. §30 herein are to the statute as in effect in 2020 when the purported violation occurred.

[5] The penalty recommendations submitted by ANR and DPS, neither of which are supported by any evidence or any credible explanation for the recommendations, are using the wrong version of 30 V.S.A. §30. Act 42 in 2021 changed 30 V.S.A. §30 to provide for the higher penalties stated by DPS and ANR. DPS' and ANR's recommendation to impose Act 42's higher penalties on a retroactive basis is would make the amendments made by Act 42 an ex post facto law that is patently unconstitutional.

violation did not cause or was not likely to cause such harm, the Commission may impose a civil penalty of not more than $42,500.00.

For a non-regulated entity that allegedly violates section 248, the only penalty process available is under 30 V.S.A. §30(d) which was not followed here.

In determining the amount of a fine under 30 V.S.A. §30(a), the Commission may consider any of the following factors:

(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;

(2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;

(3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;

(4) the length of time that the violation existed;

(5) the deterrent effect of the penalty;

(6) the economic resources of the respondent;

(7) the respondent's record of compliance; and

(8) any other aggravating or mitigating circumstance.

I. As A Fundamental Matter Of Due Process And Fairness, Respondents Must Be Allowed To Introduce Relevant Evidence Without Restriction At A Hearing.

30 V.S.A. §30(a)(1) entitles Respondents to a full hearing in this penalty phase of this bifurcated proceeding. The Commission bifurcated this proceeding into two phases—determination of whether a violation occurred and if so, there would be a penalty phase. 30 V.S.A. §30(a)(1) states that a person, company, or corporation subject to the supervision of the Commission [which the Respondents are not] "who violates a provision of … section 231 or 248 of this title, … shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing." Because there has been no hearing to date with respect

to the penalty, or the factors that the Commission may consider with respect to a penalty, or the constitutional requirement of demonstrated rough proportionality, or whether the "rare" and "very rare" classification is statutorily authorized, the Respondents are entitled to a full hearing.

In addition to Respondents' statutory right to a hearing, due process and fundamental fairness requires that the Respondents be allowed to introduce at the penalty phase hearing, all relevant evidence that Respondents seek to introduce.

While actual harm to the environment (which none occurred here) is not a literal requirement for a penalty under 30 V.S.A. §30(c)(1) on its face, it is in relation to the constitutional requirement of rough proportionality. The Commission stated in the May Order, "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.'" (Emphasis in original). That is a correct reference to the statute but misinterprets the "might have" language. For example, if a truck carrying hazardous material diverts from its approved course of travel and takes a short-cut through a residential area, greater harm to the public or environment might have occurred if the truck had some type of a spill. That is an example of what the "might have harmed" language means. This is not that case. Here, the Respondents seek to introduce evidence that shows that no harm came to the environment because no harm *could have come* to the environment by the clearing that occurred or the clearing that would have occurred if the injunction had not been issued. That evidence relates not only to the specific factors but also to the constitutional requirement of demonstrated rough proportionality. *See also, e.g.*, *In re Central Vt. Pub. Serv. Corp.*, 141 Vt. 284 (Vt. 1982) ("The exclusion of relevant evidence in an administrative proceeding is presumptively invalid").

II. The Respondents' Request Is Not Untimely.

The Commission denied Respondents' first request for a hearing based upon its conclusion that the Respondents' request is untimely. The request is not untimely for two reasons. First, as explained above neither the TRO hearing or the section 248 violation hearing related to the penalty or the factors related thereto. Granted there is some evidence from those hearings that relates to the issues in the penalty phase, but that cannot substitute for the Respondents' right to a separate hearing in the penalty phase. Second, when the PUC bifurcated these proceedings, it separated these proceedings into two separate proceedings. In its notice bifurcating the proceeding into two separate proceedings, the Commission could have but did not say, by the way, make sure you present all the evidence related to the penalty phase now, just in case we get there.

III. The PUC Must Consider Whether ANR's Classification System Is Authorized.

In the Reply Brief, Respondents, pursuant to the instructions of the Vermont Supreme Court in Case No. 22-AP-048, requested that the Commission address the issue of what statutory authority, if any, ANR's has to regulate "rare" and "very rare" plants in Vermont. See Reply Brief at 9. In its May 30, 2023 order, the Commission understood that Respondents have been challenging and continue to challenge the authority of ANR to regulate "rare" and "very rare" plants in Vermont:

> 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.
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> See Order at 7 (emphasis added).

However, Respondents are not asking the Commission to reconsider this particular issue. The Commission cannot reconsider an issue it has never decided. Only the Superior Court has weighed in on ANR's authority to regulate "rare" and "very rare" plants in Vermont stating that "the exact statutory source for [ANR's] authority remains unclear," (*see* page 27 of the Superior Court Order in

Case No. 22-AP-048), 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." (*Id.*). The Respondents respectfully request that the Commission rule on the issue of whether ANR has the statutory authority to classify plants in Vermont outside of the authority given to ANR in the Vermont Endangered Species Law.

IV. A Full Hearing Is Necessary To Address The Recommendations Of The Agencies As Well As To Provide Evidence Related To The Relevant Factors.

The Respondents cannot fully address the recommendations from the agencies without a full hearing. The Vermont Supreme Court has recognized that the exclusion of relevant evidence runs counter to the purpose of the regulatory system and the public interest. See, *In re Central Vt. Pub. Serv. Corp.*, 141 Vt. 284, 293 (Vt. 1982) ("The exclusion of relevant evidence in an administrative proceeding is presumptively invalid…In the end, all parties to the ratemaking process will be harmed if decisions are based upon conjecture rather than fact.") The same is true here.

The Respondents need the opportunity to at a minimum include the testimony of Jim McClammer and Thomas Melone contained in the accompanying declarations, which all are relevant to the specific factors and issues under this bifurcated penalty phase.

Dated: June 14, 2023 Respectfully submitted,

/s/Michael Melone
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