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**

AFFIRMATION AND PRE-FILED TESTIMONY OF THOMAS MELONE

This document has been filed on ePUC

June 14, 2023

I, Thomas Melone, hereby declare under penalty of perjury:

1. I am the President of Allco Renewable Energy Limited ("Allco"). The facts set forth herein are based on my personal knowledge and as a witness I could competently testify thereto. I am submitting this declaration and pre-filed testimony in advance of the hearing in the above-captioned case scheduled for July 20, 2023, for the penalty phase of this proceeding.

2. I am an attorney in good standing licensed to practice law in the states of New Jersey and New York for approximately thirty-nine years. I am also an attorney in good standing licensed to practice law in the states of California, Massachusetts, Florida, Connecticut, Pennsylvania and Vermont. I have extensive experience as outside counsel in tax, energy and finance, including seven years practicing law with Cravath, Swaine & Moore in New York. I am currently a member of the litigation committee of the Board of Advisors of the Institute for Policy Integrity at New York University School of Law. I received my Juris Doctor with high honors from Rutgers Law School - Newark in 1983, my Master of Laws (LLM in taxation) from New York University School of Law in 1989 and my Certified Public Accountant certificate in 1980. I was a Revenue Agent for the Internal Revenue Service from 1978 to 1982.

3. I also have extensive experience with the business side of finance, specifically, financing utility assets that sell the energy produced to utilities under power purchase agreements. I have also testified in utility matters as an expert witness before the Massachusetts Department of Public Utilities. I also a licensed real estate broker in Florida, New York, Massachusetts and Vermont (although I am in inactive status in Vermont).

4. I am the President and sole member of PLH Vineyard Sky LLC ("PLH" or the "Landowner"), which is the entity that owns the real property that the Vermont Public Utility Commission ("PUC") enjoined any site activity on in this case.

5. I am providing this affirmation and testimony in order to address the PUC's concerns stated in its May 30, 2023, order regarding the declaration of Steve Broyer (which has been withdrawn), and in order to provide evidence with respect to this separate penalty phase of the proceeding.

6. The PUC's injunction has prevented the Landowner from all uses of its land that would potentially host a solar array (i.e., the 27-acre parcel), but also on the additional 5-acre parcel on which no solar facility has been proposed (collectively, the "Parcels" or the "Property").[1]

7. While the PUC's injunction is styled as being limited to site-preparation activities related to the proposed solar facilities, the PUC in this case has interpreted "site-preparation activities" to include any use of the Parcels while there is an intention to seek a certificate of public good under 30 V.S.A. §248 (a "CPG") for either the proposed Chelsea or Apple Hill Solar facility.

8. The PUC's injunction has effectively precluded the Landowner from using its land for any purpose. In making that statement, I am fully aware that in its order of May 30, 2023, at 5-6, the PUC states:

Mr. Broyer claims that, due to our injunction, the Developer has not had "the ability

[1] 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, 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).

> to use its land for any purpose." [citation] 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.

9. The statement that due to the PUC's injunction, the Landowner has not had "the ability to use its land for any purpose," is true and correct as I explain below, and as I testify to herein.

10. The PUC's rationale for the injunction hinges on its reference to my statement at the June 2020 hearing that you can't put solar on top to trees. All three agencies, the PUC, the Agency of Natural Resources ("ANR") and DPS, rely solely on that single reed as evidence that the Respondents[2] conceded that the clearing was "explicitly linked" to a plan to construct electric generation facilities. *See, e.g.*, Order Maintaining Injunction, April 1, 2021, page 24. The purported "explicitly linked" evidence is based solely on my answer on cross-examination to a physics question involving the Pauli Exclusion Principle posed by ANR's Attorney Einhorn. Attorney Einhorn's question asked no more than whether I agreed with the Pauli Exclusion Principle that no two objects can occupy the same space at the same time. Of course, I agreed that no two objects can occupy the same space at the same time. Thus, a solar module cannot be placed where a tree exists, nor could a house, a barn, a garage, crops, or a building of any sort. Nor could livestock graze on land occupied entirely by trees. But it is on that physics colloquy that the PUC's injunction and the agencies' arguments entirely rest. The actual testimony is as follows, June 26, 2020 hearing transcript at 89:

> Q. [Einhorn] And would you agree with me that, if the area wasn't cleared at all, you could not build the Apple Hill project, correct?
> A. [Witness] If there were trees there, yeah, we couldn't, we obviously could not put solar modules where trees were.
> Q. [Einhorn] Right. So the clearing is necessary to build the project?

[2] 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.

A. [Witness] Well, a cleared area is necessary to build the project.
Q. [Einhorn] The Apple Hill project location that's proposed requires that trees be cleared before the Apple Hill solar facility can be constructed, correct?
A. [Witness] Not as we amended it, no.
Q. [Einhorn] *I'm not talking about when, how, why they're cleared.* I'm simply saying, You would agree with me that, before you can build a solar project where you want to build one for the Apple Hill facility, trees will need to be cleared?
A. [Witness] I would agree that, if trees were there, they would have to be cleared; that's right.

(emphasis added).

11. Attorney Einhorn's statement that he does not care why the trees are being cleared reaffirms that all he was asking for related to the physics question of whether two objects can occupy the same space at the same time. But that does not answer the question of whether the Landowner's sitework was *for the construction of* an electric generation facility as opposed to *for an agricultural or other use*. Attorney Einhorn conceded that he did not care that the clearing was being done for the purpose of an agricultural use.

12. As I testified, and I reaffirm now, any other use would also require clearing, whether that would be a house, a barn, a garage, crops, livestock grazing, an educational facility or any other use permitted in the rural conservation district in Bennington. But the injunction prohibits all clearing (even of dead trees and invasive species), thus by extension prohibiting all uses. That fact is reinforced by the PUC's, ANR's and DPS's focus of the removal of brush and dead ash trees on the morning of June 27, 2020, before the forester was made aware that a written injunction had been signed late at night the evening before.

13. The Department of Public Service ("DPS" or the "Department"), ANR and the PUC all maintain that the forester (and by extension, the Respondents) violated the injunction by removing dead ash trees and related brush to create two parking spaces on June 27, 2020 (before he was made aware of the written injunction). On top of that, ANR and DPS also argue that clearing dead trees to enable a Landowner to have two parking spaces on its property "represents a significant aggravating circumstance." *See* DPS Brief, March 2, 2023 at 5.

14. If the Landowner cannot even remove dead trees and related brush, then that reinforces the fact that the PUC's injunction prohibited, and prohibits, all activity and thus all uses by the Landowner—unquestionably constituting a temporary taking under the Fifth Amendment to the United States Constitution. *See, e.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (temporary takings require compensation even if the regulatory prohibition is subsequently lifted).

15. At the December 4, 2020 hearing, in response to a question from Commissioner Cheney, Robert Kobelia, who was the forester, was very specific about what he was doing on the morning of June 27, 2020. He stated that what he started doing (but was not completed by the time he was told to stop), was to create a place to park one or two vehicles. He stated that the area contained "lots of invasives, very, very thick honeysuckle, autumn olive, and multiflora rose. It's a jungle." Tr. 49:3-5. "[M]y job on that Saturday was the first day I had to not do silt fence installation, but was to actually make a place to park one or two vehicles." Tr. 49:8-11.

16. If the Landowner cannot even create space to park two vehicles on its land, then that reinforces the fact that the PUC's injunction prohibited, and prohibits, all activity and thus all uses by the Landowner.

17. At the December 4, 2020 hearing, in response to a question from Commissioner Cheney, Robert Kobelia, was very specific about the area where he was attempting to make two parking spaces. "So there's some ash right at the very beginning that were maybe four- to eight-inch diameter trees that were dead. Incidentally, a large component of the trees are ash. Bennington was just notified that emerald ash borer is found in Bennington, so those, all those ash will be dead in three years if they're not already on their way. So that's, that's where I was clearing." Tr. 49:13-20.

18. Robert Kobelia reiterated that the work done on June 27, 2020, was clearing dead trees, which the PUC, ANR and DPS all claim was prohibited by the injunction. *See*, Tr. 63:9-25, 64:1-6:

> Q. … the 100-by-250 clearing area, which we've identified on the exhibit, most of that was cleared before the hearing on the 26th; is that correct?
>
> A. That is correct. I purposefully left those six-inch dead ash until a day when I had the bulldozer working perfectly, and that was the morning I was there working on those.
>
> Q. Okay. So that's the, those are the only things that you actually cleared from the area on Saturday, June 27th; is that correct?
>
> A. That is, that is correct. And I wasn't looking to excavate. That would be a further job. First, we took the little stuff when I first started. Then we took a few of these bigger trees. To get rid of all of the stumps, it would require a further use of an excavator that just would do it so quickly and then a final back-grading to be able to use it for agricultural use. So we were in step two.
>
> Q. Okay, great. And you had said that you looked up what the white arrowleaf aster looked like, correct, so you'd be able to identify it if you saw it?
>
> A. That is correct.

19. If the Landowner cannot even create space to park two vehicles on its property by clearing dead trees, then that reinforces the fact that the PUC's injunction prohibited, and prohibits, all activity and thus all uses by the Landowner.

20. If the Landowner cannot create space to park two vehicles on its property by clearing invasive species, then that reinforces the fact that the PUC's injunction prohibited, and prohibits, all activity and thus all uses by the Landowner.

21. All in all, the PUC's injunction does not allow the Landowner to use its land, either the 27-acre parcel or the 5-acre parcel, the latter of which there is and never was a proposal to construct an electric generation facility on.

22. The PUC's injunction is also without justification. The property on which the solar facilities are proposed have been thoroughly examined by experts and the agencies on a regular basis since 2013. At least in the present case, the stated justification for issuing an injunction is as follows: "If we did not have authority to enjoin illegal site preparation, then every applicant for a certificate of public good ('CPG') would have an incentive to bulldoze its proposed project site before submitting an application." But that alleged justification (even if valid, which it is not) has no applicability here for two clear reasons. First, as I just stated, the property on which the solar facilities are proposed has been thoroughly examined by experts and the agencies on a regular

basis since 2013. To appease ANR the applicants also had the site regularly examined, and the transplanted white arrow leaf aster conservation area reported on annually. Second, the PUC agreed in its orders denying and/or granting CPGs at various times over the past decade that there were no environmental issues with clearing the site based upon the memorandum entered into by the applicants and ANR.

23. At least in this case, the PUC had alternate, less intrusive means to address its stated concerns that unexamined sites could be bull-dozed by would-be CPG applicants.

24. In determining the amount of a fine under 30 V.S.A. §30(a), the Commission may consider any of the following factors, each of which I provide the following testimony.

25. The first factor is "(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."

26. Even assuming that there was a violation (which there was not), the purported violation did not cause (and had no real potential to cause) any harm to the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers. The PUC, DPS and ANR have engaged in a common refrain that there were "rare" (i.e., the Nimblewill) and "very rare" (i.e., the white-arrow leafed aster) plants in the area that might have been, or they allege were, harmed, which in their view by extension harms or would harm the environment, and thus not only justified an injunction to protect those species on private land that no Vermonters have any obligation to protect on their own land (and that no Vermonters have a right to view on the Landowner's property), but also justifies a penalty and the dedication of significant agency resources.

27. Let's just pause to consider that first in the context of the Nimblewill—a plant that ANR now concedes is entitled to no protection at all under any circumstance, and is simply now categorized by ANR's unscientific system as an "uncommon" plant. Vermont has now joined the

other 49 states and the federal government in acknowledging that the Nimblewill is a noxious weed.

28. The Nimblewill is a poster-child for the silliness of ANR's plant classification system and the lack of scientific basis for ANR's unlawful plant classification system. Simply because its single employee, Bob Popp, does not have a certain number of reports of the presence of the Nimblewill or the white arrow leafed aster, ANR labels it "rare" or "very rare."

29. The circumstance with respect to the white-arrow leafed aster (the "WALA") is not much better. ANR allows the brush-hogging of the WALA along the nearby State-owned rail corridor. The WALA is readily available at nurseries throughout the United States. While the WALA acts as a pollinator, especially butterflies and bees, so do many other plants that they could be planted on a solar farm, and those alternate pollinators would be much more beneficial because they could be planted widely and would not be subject to ANR's other unnecessary rules related to separating them in a different area and how they could be maintained.

30. ANR has never been able to answer the "so what" question. "So what" if the WALA is a very rare plant? How does its existence uniquely benefit the environment when located on private land? Without answers to those questions, there is no basis to conclude that removal of WALAs from the Landowner's property would or could cause any harm to the environment.

31. Even assuming that the removal of the WALA constituted "harm" to the environment (which it would not), the affirmation and testimony of Jim McClammer establishes (which the PUC has not yet admitted into evidence) that there is no evidence that any the WALAs were harmed, or that the WALA provides any benefit that is not easily replaced by other plants.

32. The testimony of Robert Kobelia establishes that he was able to recognize white asters, he looked for asters in the area to be worked on prior to working on it, and did not find any. As for trees, none of the trees are protected species, the ones downed on June 27, 2020 were dead, and Vermont law provides the Landowner with the absolute right to remove those trees on its land up to 40 acres. Not being allowed to remove the trees harms the human environment by not

allowing an alternative permitted use. Moreover, according to Nadine Unger, Assistant Professor of Atmospheric Chemistry in the School of Forestry and Environmental Studies at Yale University: "To Save the Planet, Don't Plant Trees."[3] According to Professor Unger in cold climates such as parts of the Northeast that includes Vermont, planting trees increases global warming.[4] Trees also release volatile organic compounds ("VOCs") that when combined with car exhaust combine to make ozone. *See, id*. ("In summer, the eastern United States is the world's major hot spot for volatile organic compounds (V.O.C.s) from trees. . . . Chemical reactions involving tree V.O.C.s produce methane and ozone, two powerful greenhouse gases.") That concern related to VOCs is particularly relevant here because the Landowner's property is at one of the busiest highway intersections in the State of Vermont. In addition, as Robert Kobelia testified the property is filled with "lots of invasives, very, very thick honeysuckle, autumn olive, and multiflora rose. It's a jungle," Tr. 49:3-5, and dead trees, Tr. 49:13-20 ("So there's some ash right at the very beginning that were maybe four- to eight-inch diameter trees that were dead. Incidentally, a large component of the trees are ash. Bennington was just notified that emerald ash borer is found in Bennington, so those, all those ash will be dead in three years if they're not already on their way. So that's, that's where I was clearing.")

33. In addition, Kobelia testified that as a professional forester, he is able to identify a white aster. He testified that he inspected the areas before he worked on them and did not see any asters. *See, e.g*., Tr. 64:19-24.

> Q. …Bob, did you do a, an inspection of the 100-to-250-foot area before you cleared it?
> A. I did.
> Q. And did you see any white arrowleaf asters when you did that inspection?
> A. I did not find any.

34. The first factor weighs heavily in favor of no penalty.

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[3] *See*, https://www.nytimes.com/2014/09/20/opinion/to-save-the-planet-dont-plant-trees.html.

[4] *See id*. ("Climate scientists have calculated the effect of increasing forest cover on surface temperature. Their conclusion is that planting trees in the tropics would lead to cooling, but in colder regions, it would cause warming.")

35. The second factor is "(2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional."

36. ANR states that the Respondent was aware that it did not have a CPG. ANR Brief at 10. This is accurate although irrelevant. ANR also states that the Respondent knew that it was not authorized to commence the clearing. ANR Br. at 8. That statement is categorically false. Respondents were aware that they could not engage in site preparation *to construct* a proposed electric generation facility, but as explained *ad nauseam* throughout the duration of these proceedings, that is not what the Landowner was doing when it commenced clearing. PLH's actions were specifically **not** part of a plan by anyone to sell renewable energy generated by the proposed facilities. The solar facilities may never be built but the alternative use would have continued regardless of the existence of the solar facilities.

37. The PUC's approach for the past fifty years has been framed by an opinion of the Vermont Attorney General issued shortly after §248 and Act 250 were enacted, as explained in *Petition of Beaver Wood Energy*, 2011 Vt. PUC LEXIS 169 (April 1, 2011) ("*Beaver Wood II*") at *17-18:

> the Vermont Attorney General issued an opinion addressing the issue of what project components should be included as part of an electric generation facility subject to Section 248 jurisdiction, and thus not subject to Act 250 jurisdiction. The Attorney General concluded:
>
> > where a proposed improvement bears a reasonable relationship and can be considered to be part of an electric transmission or generation facility, having in mind the broad meaning to be ascribed to the word 'facility,' it is my opinion the exemption applies and no Act 250 permit can be required prior to construction.
>
> By way of example, the Attorney General's opinion states that "a separate Act No. 250 permit is not required for the construction of impoundments, roads, rail spurs and lagoons in connection with electric generation and transmission facilities." []
>
> This Board has followed the Attorney General's guidance and applied the "reasonable relationship" standard in determining whether a site improvement is part of an electric facility subject to Section 248 jurisdiction. However, as the Department correctly observes, the "reasonably related to" language is sufficiently vague that it can arguably support both sides of the issue before us. Therefore, it is important to recognize that the standard does not simply ask whether the site improvement in question is reasonably related to the generation facility. It also requires, in the words of the Attorney General, that the improvement "can be

> considered to be part of an electric generation or transmission facility," recognizing the broad meaning of "facility."

38. In *Beaver Wood II*, an applicant applied for a CPG for approval of a biomass energy facility and wood-pellet manufacturing facility. The applicant asserted that "its proposed wood-pellet manufacturing facilities are reasonably related to, and are a part of, its proposed electrical generation facilities." *Id.* at *6. The applicant "acknowledge[d] that the electric generation facilities could be constructed without the accompanying wood-pellet facilities, but [asserted] the wood-pellet and electric generation facilities are engineered to function as one unit, with the wood-pellet facility using waste heat and steam from the electrical unit, and the electrical unit using waste (i.e., bark) from the wood-pellet facility as fuel … and that therefore the wood-pellet facility's 'relationship to the electrical facility is the sole reason for its existence.'" *Id.* at *6-7. PC-175.

39. The PUC held that it did not have jurisdiction over the wood-pellet facility:

> the fact that co-locating the wood-pellet facility with the electric generation facility makes the overall use of the fuel more efficient does not make the pellet plant a part of the generation facility. Such synergistic sharing of inputs to the generation process, while potentially beneficial for society as well as for the financial interests of project developers, does not somehow convert the manufacturing process into an electric generation process.

40. Where an activity was a precursor to an electric generation facility, the PUC explained that it had jurisdiction when the activity had *no other purpose* except the construction of an electric generation facility. Thus, "temporary wind-measurement towers … were precursors to, and essential for the construction of, the wind generating facility, *and had no other purpose*." *Id.* at 29 (emphasis added). Similarly, in *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010), the PUC stated that the petitioner could proceed with construction of a component of an electric facility—a digester—based on the applicant's "representation that the digester had agricultural purposes apart from its use in the electric generation facility," even though the express purpose was to commence construction of the electric facility. *See, Petition of Beaver Wood Energy,* 2010 Vt. PUC LEXIS 565, *14 (December 9, 2010) ("*Beaver Wood I*").

41. But in all cases, the PUC agreed that section 248 did not provide jurisdiction over farming activities. *Beaver Wood II*, fn. 22 ("the legislature did not perceive a need to include a farming exemption from Section 248 because it did not intend Section 248 review to extend to the farming operations themselves).

42. Moreover, the PUC has stated that "a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board." *Petition of Georgia Mountain Community Wind, LLC*, Docket No 7508, Order of January 5, 2012 ("*Georgia Mountain*"). Because there was no CPG to conflict with, *Georgia Mountain* plainly states that the Landowner (who is not the petitioner for the CPG in any case) still has the right to "conduct otherwise lawful activities on its land."

43. The PUC has done a 180-degree turn in this case. But that does not mean that the Respondents would have been able to predict that the PUC would contradict in this case its previous position that "conduct otherwise lawful activities on its land," which site clearing for another use constitutes and the long-standing position of the Vermont Attorney General.

44. Based on PUC precedent in *Georgia Mountain, Beaver Wood* and *Monument Farms*, and the long-standing position of the Vermont Attorney General, there was no reason for Respondents to know or have reason to know that a violation existed, let alone a knowing and intentional one. ANR also argues that Respondents knew that site clearing without a CPG was a violation of Section 248 because it was clear by Respondents' March 2020 attempt to amend it pending Section 248 petition to account for the site clearing. The opposite is true. The March 2020 amendment request (which was denied on procedural grounds) was not an application to clear trees but rather a reconfiguration of the solar project based on the proposed changed conditions. The PUC denied the request to amend at the same time it denied the CPG. That denial was not and it could not have been in any case, an order that would have prohibited lawful activities of the Landowner at the property. The simple truth is that the Respondents were acting within the

confines of what was previously allowed for under *Georgia Mountain, Beaver Wood* and *Monument Farms* and the long-standing position of the Vermont Attorney General and should not be penalized for doing so.

45. ANR also makes the argument that Respondents knew that there were plants in the clearing area that ANR believes are "rare" and "very rare." What Respondents know is that ANR's categorization of the Nimblewill and the White Arrow Leafed Aster (which itself is an *ultra vires* act under the Vermont Endangered Species Law) is not based upon any scientific analysis or scientific evidence. Nor is their categorization related to the status of either species. ANR's categorization is based upon the absence of scientific evidence. What Respondents know is that the Nimblewill and the White Arrow Leafed Aster are not an endangered or threatened species, nor at risk for becoming endangered or threatened, and as such are not entitled to any protection under Vermont law. Respondents also know that the presence of the WALA was explained to Kobelia and he looked for but did not find any WALA in any area that he worked on or planned to work on.

46. The second factor weighs heavily in favor of no penalty.

47. The third factor is "(3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation." The agencies state that they are unaware of any economic benefit that resulted from the violation but then state, without any evidentiary support, that if Respondent were successful in this endeavor the potential economic benefit could have been substantial due to the Landowner avoiding the costs and limitations of environmental compliance. ANR provides no factual basis to demonstrate what that potential economic benefit could be, and is simply wrong. There would have been no economic benefit to the Landowner from the clearing vis-à-vis the section 248 process. To the contrary, there would have been a detriment because the type of clearing required for an agricultural use or a residential use would be more expensive that clearing for a solar use, because in a solar use, stumps, and other obstructions could still remain. The type of clearing required for the Horticultural and Farming Activities can be more than twice

as expensive as the clearing involved for a solar facility. In addition, because of the injunction the area that was cleared for installation of the silt fence and for the proposed area to park two vehicles would now be required to re-worked on to address the growth since the injunction was issued, causing additional costs on the Landowner. Moreover, the Property has been picked over and examined since 2013.

48. The third factor weighs heavily in favor of no penalty.

49. The fourth factor is "(4) the length of time that the violation existed."

50. The agencies argue that the length of time that the violation existed was 12 days. DPS states that the length of time is not particularly significant in this context. What is particularly significant, however, is that the agencies are insinuating that Respondent continued the clearing activities intentionally on June 27, 2020, in direct contravention of the TRO issued the evening before. That is false, the TRO was issued at 10:31pm on Friday night and as soon as it was seen by Chris Little on Saturday it was communicated to Robert Kobelia to stop the clearing. Although the PUC announced from the bench that it would be issuing a TRO, the scope of what was to be included in that order remained to be seen, and Vermont's rules are clear that such an announcement has no legal effect. Relatedly, the statement in the PUC's order of May 30, 2023, regarding the "limited nature of the injunction," re-affirms that no one can know what the PUC was intending until it actually issued a written order. In connection with this fourth factor it must be put in context of how the PUC addressed the violation in *In re Investigation Into Solarcity Corporation*, 2019 VT 23. In *Investigation Into Solarcity Corporation*, Case No. 17-4158-PET 2018 Vt. PUC LEXIS 83 *25-26 (Vt. Pub. Utils. Comm'n May 3, 2018), as to the fourth factor the Commission stated:

> The evidence of record indicates that the violations lasted for a substantial period of time. The net-metering systems were installed during a 20-month period beginning October 15, 2015, and ending June 3, 2017. [citation] SolarCity was made aware of this issue on June 16, 2017. On July 3, 2017, SolarCity attempted to cure its violations by filing registration forms with the Commission. However, on July 7, 2017, the Commission informed SolarCity that it would not accept many of those registrations because they were submitted using an outdated form. To date,

> SolarCity has still not filed registration forms for all of the systems at issue in this case. Therefore, this factor does not support the imposition of a zero penalty because some of these violations are still ongoing.

Based upon the Commission's approach in *SolarCity*, the fourth factor weighs in favor of no penalty because there are no alleged ongoing violations. All activity at the site ceased on June 27, 2020.

51. The fourth factor does not weigh in favor of a penalty.

52. The fifth factor is "(5) the deterrent effect of the penalty."

53. The Respondents were acting within the confines of what was previously allowed for under *Georgia Mountain, Beaver Wood and Monument Farms* and the long-standing position of the Vermont Attorney General and should not be penalized for doing so. What the Department characterizes as a "knowing violation" and "persistent disregard for the Commission's orders" was the exact opposite. Respondents were relying on PUC precedent, not ignoring it, and announced its intentions months before starting. A penalty in this case will not act as a deterrent. Respondents have already borne a significant financial impact. The Landowner has suffered a financial impact from the inability to use its property, from the loss of fees paid for hemp-grow licenses, from the need to re-work cleared areas, and from the payment of taxes on land it cannot not use for any purpose. Importantly, a penalty here would only impact future activity on the Landowner's land. It would not have any deterrent effect beyond the unique facts here.

54. The fifth factor does not weigh in favor of a penalty.

55. The sixth factor is "(6) the economic resources of the respondent." The Respondents in Case 20-1611 are listed as only Apple Hill Solar LLC and Chelsea Solar LLC, which are the CPG applicants. *See*, *e.g.,* Order of May 30, 2023, Service List. PLH Vineyard Sky LLC, as the landowner, and Allco Renewable Energy Limited have participated in this case as their interests are affected. The entire reason this proceeding exists is because PLH decided that the time had come to put its land to productive use after nearly a decade of operating in the red. The ability to pay a potential penalty neither relates to purported environmental harm nor any other

action related to the purported violation of section 248. But the actual Respondents, Apple Hill Solar LLC and Chelsea Solar LLC, in this proceeding have no cash or assets to pay a penalty from unless and until a CPG is granted.

56. The sixth factor does not weigh in favor of a penalty.

57. The seventh factor is "(7) the respondent's record of compliance. Neither agency is aware of any prior Section 248 violations involving the Respondents or related parties because none exist. While it was clear to the Respondents based on PUC precedent that they would be permitted to clear the parcel in question for an activity unrelated to the electric generating facilities, the PUC has now made it clear that it is no longer abiding by its prior precedent.

58. The seventh factor does not weigh in favor of a penalty.

59. The eighth factor is "(8) any other aggravating or mitigating circumstance." There are several *mitigating* circumstances and *no aggravating* circumstances.

60. Mitigating circumstance #1 is no asters were identified. Robert Kobelia while not a botanist is a professional consulting forester. While he might not be able to provide the same expert testimony that a botanist could regarding the WALA, he testified that he would be able to identify a white aster. In response to question from Attorney Einhorn, Kobelia testified that he educated himself as to what they looked like, he looked for them while doing his work, and he did not see any. Tr. 52:23-25. He also testified that he would have continued to look for the asters and if he saw one would try to avoid it. Tr. 53:8-9. *See also*, Tr. 54:6-10 ("the way it was represented to me is that there's been five years' worth of prior opportunity to look for rare and endangered plants on the entire tract. So that's why I still was looking on my own, but I did not find any.") In response to a follow-up question from Commissioner Hofmann, Kobelia confirmed that he walked and inspected the entire area that he was going to work in on June 27, 2020 to look for those plants as well as other things prior to doing the work, and that he did not see any asters. Tr. 55:10-25, 56:1-2.

61. Mitigating circumstance #2 is Respondents Were Relying On PUC's And The Vermont Attorney General's Precedents. As the PUC stated in *Beaver Wood II*, it had "followed the Attorney General's guidance and applied the 'reasonable relationship' standard in determining whether a site improvement is part of an electric facility subject to Section 248 jurisdiction." Because "the 'reasonably related to' language is sufficiently vague … the standard does not simply ask whether the site improvement in question is reasonably related to the generation facility. It also requires, in the words of the Attorney General, that the improvement 'can be considered to be part of an electric generation or transmission facility.'"

62. Here, even if clearing for a farming use and agricultural structures could be considered (as the PUC concludes) as bearing a reasonable relationship to the proposed solar facility and as a precursor, neither the clearing nor the structures are "part of an electric transmission or generation facility," Op. Vt. Att'y Gen., No. 715 (Aug. 5, 1971) at 172, and those activities are being done specifically for another purpose—farming, and not in preparation for the construction of an electric facility.

63. The Landowner was acting within the confines of what was previously allowed for under *Georgia Mountain, Beaver Wood and Monument Farms* and the long-standing opinion of the Vermont Attorney General should not be penalized for doing so. The Landowner was relying on PUC precedent and the long-standing opinion of the Vermont Attorney General, not ignoring it, and announced the intention months before clearing for an alternative use commenced. In analyzing this factor ANR states that "the clearing performed by the Developer in June 2020 was the very same clearing that the Commission said the Developer could not undertake, when, on May 7, 2020, the Commission denied the Developer's March 23, 2020 request to amend…" *See* ANR Br. at 14. As explained above, this is categorically false. The March 23, 2020, amendment request did not request permission to clear anything but rather demonstrated the changed conditions at the site that would have resulted from clearing that had already occurred, and requested that the PUC evaluate the petition under those changed circumstances. In any case, the

March 23, 2020, amendment was denied on procedural grounds rather than substantive. The PUC never said that the Landowner could not undertake the clearing.

64. Mitigating circumstance #3 is the Landowner Has Already Been Penalized By Its Inability To Use Its Property Because Of The PUC's Injunction. For the reasons, I explained above, the Landowner has been unable to use the land for any use as a result of the PUC's injunction which has already caused, and continues to cause, significant financial costs from the inability to use its land. The Landowner also lost $2,200 in fees paid to the Vermont Agency of Agriculture Food and Markets for the hemp growing licenses. During the time of the PUC's injunction the Landowner has also incurred carrying costs such as taxes for both the 27-acre and 5-acre parcel in the amount of $10,506 in property taxes.

65. Mitigating circumstance #4 is that the PUC's Purported Jurisdiction Is Questionable. Respondents had no reason to believe that the filing of a section 248 application or entering into a power sale contract would be consideration as a basis to create PUC jurisdiction over farming-related activities on a site. The PUC has concluded that "[w]e have jurisdiction over Allco pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65." Section 9 does not expand the PUC's jurisdiction. Rather it "grant[s] Commission authority to act as court of record in proceedings *under its jurisdiction*." *In re Investigation Into Solarcity Corporation*, 2019 VT 23, P11 (emphasis added.) Similarly, 30 V.S.A. §10 sets out procedural mechanisms for areas already under PUC jurisdiction. 30 V.S.A. §30(a) does not give the PUC jurisdiction because Allco is not subject to the supervision of the PUC, for the reasons previously explained. 30 V.S.A. §30(h) may apply but that requires DPS to initiate a process first, which was not done. 30 V.S.A. §203 provides the PUC with jurisdiction over "certain public utilities." No Respondent is a public utility or any type of the companies listed in §203. Neither a PUC rule nor the Vermont Rules of Civil Procedure can give the PUC jurisdictional authority that it does not possess under a statute.

66. The PUC's real claim to jurisdiction rests on §209. The PUC alleges two bases for alleged §209 jurisdiction. First, it claims that it has general jurisdiction under the first paragraph of §209(a). *See*, Order at 14 ("Because Allco is a 'corporation owning or operating . . . property subject to supervision under this chapter,' the Commission has jurisdiction over Allco and its activities at the sites where it seeks to build solar facilities.") The first part of §209 provides that "the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees *in all matters provided for in the charter or articles of any corporation* owning or operating any plant, line, or property subject to supervision under this chapter." (Emphasis added.) That sentence does not apply because (i) there is nothing at issue under either the Landowner's charter or articles of incorporation or any Respondent's charter or articles of incorporation, and (ii) neither the Landowner nor any of the other Respondents operate or own any plant, line or property subject to the supervision of the PUC under Title 30, Chapter 5. None provide any product or service to the public. None conduct a public service business. None own any property used in connection with the conduct of a public service business.

67. The PUC's second claim under §209 is that because "Allco signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont [it] became subject to the Commission's jurisdiction … pursuant to 30 V.S.A. § 209(a)(8)." Order at 17, PC-17.[5] That PUC theory of jurisdiction is plainly wrong.

68. First, once the standard-offer contract was signed, the PUC's regulatory role over the contract ended. At that point, sole regulatory jurisdiction over the contract rests with the Federal Energy Regulatory Commission ("FERC"). *See generally, e.g.*, *NextEra Energy, Inc. v. Pacific Gas and Elec. Co*., 166 FERC ¶61,049 (2019). The PUC's continuing role in standard offer contracts from the standpoint of federal law is not that of a regulator, but that of a *de facto* party because it controls the actions of the counterparty in the contract—VEPP Inc., and the

[5] The class of facilities covered by §209(a)(8) are what are called "qualifying facilities" or "QFs" under the Federal Power Act and PURPA.

Vermont statute has assigned the decision-making for normal contracting party decisions, such as agreeing to amendments, to the PUC.

69. Second, 30 V.S.A. §209(a)(8) does not provide PUC jurisdiction over non-companies, siting issues or farming. Jurisdiction under §209(a)(8) is limited to implementing the PUC's responsibilities under §210 of the Public Utility Regulatory Policies Act ("PURPA") to implement the FERC's rules.[6] Section 210 of PURPA is what enables the standard offer program to proceed.

70. Third, there is no precedent to support the PUC's proposition that a generator executing a FERC-jurisdictional wholesale electricity contract with an agent of Vermont's utilities provides supervisory jurisdiction over the generator.

71. Fourth, the logical extension of the PUC's theory of its jurisdiction would, in turn, mean that the FERC, which has jurisdiction over *all* electricity wholesale sale contracts (which the standard offer contracts are), even those under PURPA, would also have the authority over siting of those projects in Vermont, and under the PUC's logic, farming activities proposed for such sites too.

72. Fifth, the PUC's theory of jurisdiction makes no sense from another perspective. If an applicant for a CPG had a wholesale electricity contract with a utility *outside of* Vermont, then the PUC's theory concedes that the PUC would have no authority to issue injunctive relief related to that project's site, no matter what activities the landowner was engaging in.

73. Sixth, the general supervisory authority that the PUC's Order claims is given to the PUC under §209(a)(8) would be pre-empted by §210 of PURPA, 16 U.S.C. 824a-3(e), and the FERC's regulations, 18 C.F.R. §292.602. Thus, even if the PUC's interpretation were correct (which it is not), such supervisory authority over Respondents would be pre-empted.

[6] The legislative history confirms that the purpose of §209(a)(8) was to provide the PUC with state law authority to exercise the power a "state regulatory authority" was given under PURPA to implement the FERC's PURPA rules. *See*, PC-113-132.

74. As the plain language of §209(a)(8) states, the subsection gives the PUC authority to regulate *the sale of electricity to* Vermont's electric companies under PURPA. Jurisdiction over wholesale electricity sales by qualifying facilties has nothing to do with siting authority for such projects, which is governed by 30 V.S.A. §248.

75. Similarly, the filing of a §248 application does not provide the PUC supervisory jurisdiction over either the applicant, connected persons, or the land. Nothing in §248 or Title 30 support such a notion. The PUC's jurisdiction is limited to making a decision on the application itself. Only if a CPG is issued might there attach conditions to the use of the land on which the solar facility sits, but until then, the PUC has no jurisdiction and no authority to issue an injunction to prevent a landowner from using its land for farming.

76. The PUC's questionable jurisdiction mitigates against any penalty.

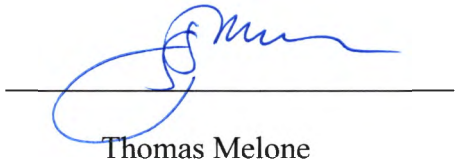
77. Mitigating Factor #5 is that the PUC's injunction and the PUC's application of the site-preparation prohibition under the facts of this case constitutes an unlawful taking under the Fifth Amendment of the United States Constitution and violates the prohibition of unconstitutional conditions (as the corresponding provisions of the Vermont Constitution).

78. There are no aggravating circumstances. ANR and DPS's claim that the work Kobelia did on the morning of June 27, 2020 is an aggravating circumstance ignores the facts. *First,* the TRO was electronically delivered via ePUC at 10:31pm on Friday night and as soon as it was seen by Chris Little on Saturday it was communicated to Robert Kobelia to stop the clearing. Although the PUC announced from the bench that it would be issuing a TRO, the scope of what was to be included in that order remained to be seen, and Vermont's rules are clear that such an announcement has no legal effect. Relatedly, the statement in the PUC's order of May 30, 2023, regarding the "limited nature of the injunction," re-affirms that no one can know what the PUC was intending until it actually issued a written order. *Second*, someone responsible for the TRO must also have realized that because of the near midnight issuance of the order on a Friday night (and ePUC's next business day rule) that no one might actually see it until sometime during the

weekend or on the next business day. No one in this proceeding has claimed responsibility for causing the injunction order to be physically served on Kobelia so the Respondents have been unable to ask about that issue. *Third,* Kobelia testified that the work he did on the morning of June 27, 2020, was removing dead ash trees and invasive species to make room for two parking places. Even if the Respondents had actual knowledge earlier than they did (which they did not), especially in light of the PUC's recent characterization of the injunction of being of a "limited nature," the Respondents would have had no reason to believe that the injunction would be intended to be so broad and all-encompassing that a Landowner would be banned from removing dead trees to make room for two parking spaces on its land.

Dated: June 14, 2023

I declare that the above statement is true and accurate to the best of my knowledge and belief. I understand that if the above statement is false, I may be subject to sanctions by the Commission pursuant to 30 V.S.A. § 30.



Thomas Melone