

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 21-2939-NMP

Petition of Randolph Davis Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500-kW group net-metered solar electric generation system in Randolph, Vermont	
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**THE VERMONT DEPARTMENT OF PUBLIC SERVICE’S
COMMENTS ON THE PROPOSAL FOR DECISION**

I. INTRODUCTION

The Vermont Department of Public Service (the “Department”), through its undersigned counsel, submits the following comments in response to the proposal for decision (“PFD”) issued on June 5, 2023 in this matter. The PFD recommends that the Vermont Public Utility Commission (the “Commission”) deny Randolph Davis Solar, LLC’s (the “Petitioner”) application for a certificate of public good under 30 V.S.A. §§ 248 & 8010 for a 500-kW solar electric generation system in Randolph, Vermont (the “Project”). In support of denial, the PFD concludes that the June 2021 preferred-site letter (“Preferred Site Letter”), jointly signed by the Town of Randolph Selectboard (the “Selectboard”), the Town of Randolph Planning Commission (the “Planning Commission” and collectively the “Town”), and the Two Rivers-Ottawquechee Regional Commission (“TRORC”), is not consistent with the intent of Commission Rule 5.103. The PFD cites two primary bases for its conclusion: (i) the Preferred Site Letter does not demonstrate an agreement between the Petitioner and the Planning Commission about the “specific location” where the Project will be located, and (ii) the record does not demonstrate that the Planning Commission “supports” the Project.¹

¹ Proposal for Decision at 15 (June 5, 2023).

The Department respectfully disagrees with the PFD's conclusions. First, the Preferred Site Letter does designate a specific location as a preferred site, consistent with Commission Rule 5.103 – 0 Davis Road, Randolph, Vermont. However, the PFD argues that a subsequent condition agreed upon by the Petitioner and the Planning Commission presents critical ambiguity to the Commission Rule 5.103's requirement that a "specific location" be designated for the Project. Based on the record in this case, the Department concludes that the Petitioner and the Planning Commission reached a mutual understanding with respect to the condition at issue. Second, the PFD concludes that the Planning Commission's decision not to rescind the Preferred Site Letter was improperly influenced by representations made by the Petitioner and therefore does not reflect the "support" intended by Commission Rule 5.103. The Department concludes that the communication relied upon in the PFD in its analysis does not sufficiently demonstrate undue pressure or influence by the Petitioner and that the Planning Commission and Selectboard's review from November 2021 to March 2022 demonstrates continued support for the Project parcel's designation as a preferred site.

The Department recommends that the Commission decline to adopt the PFD's conclusions and remand this case to the Hearing Officer to evaluate the full merits of the Project, pursuant to the Section 248(b) criteria.

II. DISCUSSION

- A. The PFD erred in its reliance on the Petitioner's November 11, 2021 communication and its recount of the discussions between the Petitioner and the Planning Commission. The Preferred Site Letter and the associated condition properly designate a "specific location" required by Commission Rule 5.103.*

The PFD first concludes that the Preferred Site Letter does not designate a "specific location" required by Commission Rule 5.103. For a project to qualify as a "preferred site" under

the rule, a project must be located on “a specific location that is identified in a joint letter of support from the municipal body and municipal and regional planning commissions in the community where the net-metering system will be located.” The Petitioner provided a joint letter of support from the Randolph Selectboard, Planning Commission, and the TRORC designating the Project’s site, 0 Davis Road, Randolph, VT 05602” as a preferred site.² However, the PFD concludes that the Preferred Site Letter fails to clearly demonstrate whether the Project would be located on a preferred site due to the apparent ambiguity arising from a condition agreed upon by the Planning Commission and the Petitioner.³ In support of its conclusion, the PFD points to several email communications between members of the Planning Commission and the Petitioner to find that “there was never a mutual understanding between the [Petitioner] and the Planning Commission about whether the slope *in a specific location or an average slope of a general area* was the appropriate benchmark.”⁴ Upon review, the Department respectfully disagrees with the PFD’s conclusion.

On June 1, 2021, the Petitioner’s representative proposed a 500-kW solar array project to the Planning Commission and requested the Planning Commission’s approval for a preferred-site designation for 0 Davis Road, Randolph, VT.⁵ The Planning Commission voted to approve the

² Exh. RDS-MS-5, Preferred Site Letter executed by Randolph Planning Commission, Randolph Selectboard, and TRORC.

³ The condition at issue is the following: “[T]he Randolph Planning Commission received your response on 13 Dec 2021 and accepts your guarantee that “prior to installation of the panels, [the Applicant] will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes. The parties have noted specific concern to the terrain on the eastern side of the array, and again, confirmation will be secured before any panels are installed in that location. The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%. The onsite survey data can be provided to the Town and the Allen/Binders upon request.” Exh. RD-MS-14, Planning Commission 12/14/21 Letter to Petitioner Accepting Assurances.

⁴ PFD at 17 (emphasis added).

⁵ Exh. MB-4, Randolph Zoning & Planning Commission 6-1-21 Meeting Minutes at 1-2.

host parcel's preferred-site designation.⁶ On October 21, 2021, the Intervenor submitted a letter to the Planning Commission, Selectboard, and TRORC requesting that the Town rescind its June 2021 Preferred Siting Letter.⁷ In support of their request, the Intervenor argued that the Randolph Town Plan prohibits the construction of the Project on lands over a 25 percent slope.⁸ The Intervenor provided a Natural Resources Atlas map from the Vermont Agency of Natural Resources to support their assertion that the Proposed Project site contains slopes greater than 25 percent.

On December 7, 2021, the Planning Commission held a regular meeting to, among other items, discuss the Intervenor's requested rescission of the Preferred-Site Letter.⁹ At the meeting, the Planning Commission determined to notify the Petitioner of the Project's claimed non-conformance with the slope prohibition via letter and consult with its legal counsel regarding the process and liability for rescinding a preferred site letter.¹⁰ On December 10, 2021, the Planning Commission sent a "Notice of Discrepancy" letter ("Notice Letter") to the Petitioner.¹¹ On December 13, 2021, the Petitioner's representative responded to the December 10, 2021 Notice Letter, indicating its commitment to confirm construction of the Project's solar array on slopes no greater than 25 percent through a pre-construction, site specific survey.¹² On December 14, 2021, the Planning Commission deliberated the Petitioner's response and voted via email to accept the Petitioner's proposed assurance and to maintain its preferred site designation for the Project site.¹³

⁶ *Id.*

⁷ Exh. MB-14, Oct 21, 2021 Letter to Planning Commission.

⁸ Exh. MB-5, Randolph Town Plan at 29.

⁹ Exh. RDS B, Randolph Planning Commission 12-7-21 Minutes.

¹⁰ Exh. MB-15, Audio of December 2021 Randolph Planning Commission Meeting, [01:01:45] – [01:02:35].

¹¹ Exh. MB-27, Binder Public Records Request at 32; Exh. MB-16, Letter from Planning Commission to Binder and Allen at 3-4.

¹² *Id.* at 56-7; Exh. MB-16, 5-6.

¹³ Exh. MB-27, Binder Public Records Request at 45 (Planning Commission member, Jeff Grout, abstaining from the vote but noting that "Norwich solar has shown they are aware of the slope issue and that panels will not be

On December 14, 2021, the Planning Commission chair issued a second letter to the Petitioner accepting the Petitioner's proposed assurance.¹⁴ The Planning Commission submitted a follow-up letter to the Intervenors notifying them of the Planning Commission's decision not to rescind its designation of host parcel as a preferred site and accepting the Petitioner's proposed assurances.¹⁵

The PFD cites primarily to two communications from the Petitioner in support of its conclusion that the Petitioner and the Planning Commission failed to reach a mutual understanding on the application of "average slope" or specific location to the slope condition – the Petitioner's November 11, 2021 email¹⁶ and the Petitioner's December 13, 2021 response letter.¹⁷ However, the PFD makes two critical errors in its review of the record informing its conclusions: (i) the PFD incorrectly references the Petitioner's November 11, 2021 email in framing the Petitioner's response to the Planning Commission and (ii) the PFD misinterprets the Petitioner's and Planning Commission's reference to the "average slope" of the Project site in their discussions.

The PFD asserts that following the Planning Commission's issuance of the December 10, 2021 Notice Letter to the Petitioner, the Petitioner engaged with the Planning Commission via email, challenging "both the Town's authority to adopt restrictions on steep slopes and [arguing] that the 'average slope of the array along [the Project's north-south axis] is 15.5% The average slope of the array along [the Project's east-west axis] is 10%.'"¹⁸ The PFD's referenced

installed on a slope 25% or higher."); *Id.* at 39 (Planning Commission member Miles Hooper stating agreement); *Id.* at 37 (Planning Commission Chair Sonny Holt stating agreement); *Id.* at 35 (Planning Commission member Perry Armstrong noting agreement and stating, "Norwich solar has now stated that they understand the slope issue and have expressed how they intend to hire a surveyor to address the issue."); *Id.* at 41 (Planning Commission member Camden Waters stating disagreement).

¹⁴ Exh. MB-16 at 7-8; Exh. MB-27 at 67.

¹⁵ Exh. MB-16 at 1-2.

¹⁶ Exh. MB-27 at 17-8.

¹⁷ Exh. MB-16 at 5-6.

¹⁸ PFD at 14, Finding 23; *Id.* at 16 (citing Exh. MB-27 at 17-8).

communication is the Petitioner's November 11, 2021 email to the Planning Commission, provided approximately one month prior to the December 10, 2021 Notice Letter. The November 11, 2021 email outlines the average slopes calculated within the Petitioner's site plan and elevations filed with its petition in August 2021. The November 11, 2021 email could not have been in response to the Planning Commission's December 10, 2021 Notice Letter. Following the Petitioner's November 11, 2021 email, the record demonstrates that the Planning Commission did not accept the application of the Project site's "average slope" to determine compliance with the Town Plan's slope prohibition.¹⁹ The Petitioner separately responded to the Planning Commission's December 10, 2021 Notice Letter on December 10, 2021 and again on December 13, 2021.²⁰ This distinction is important because it removes a key inference drawn in the PFD that the Petitioner's November 11, 2021 email was a reflection of the Petitioner's position that the "average slope" of the Project site be used to demonstrate conformance with the Town Plan. Additionally, and as further discussed below, this point also demonstrates that the Petitioner's November 11, 2021 email was not a challenge to the Planning Commission's December 10, 2021 Notice Letter. To the contrary, the Petitioner's December 13, 2021 response to the Notice Letter acknowledged the Town Plan slope prohibition's application to the Project's solar array and committed to additional assurances to construct the Project's solar array specifically on lands with slopes measuring no more than 25 percent.

The PFD errs in its reading of the Planning Commission and Petitioner's discussions regarding the use of "average slope" to determine compliance with the Town Plan. The Planning Commission's December 10 Notice Letter stated the Intervenor provided an ANR Natural

¹⁹ Exh. MB-27 at 62; Exh. MB-15 [00:23:15] – [00:24:30].

²⁰ Exh. MB-17, FOIA Selectboard and Planning Commission Correspondence at 65, 68; Exh. MB-16 at 5-6.

Resources Atlas map illustrating that “slopes over 25%. . .covered the majority of the 10 acres allowed for the project” and further noted that the map contained a disclaimer “that it is ‘for general reference only and data layers may or may not be accurate, current, or otherwise reliable.’”²¹ Acknowledging the Intervenor’s ANR Atlas map and its disclaimer, the Petitioner’s December 13th response also stated that the Project site’s average slope data is “sourced from LiDAR data from Vermont Center for Geographic Information.”²² The Petitioner goes on to state that “[w]hile we all are concerned with the potential erosion from installation of solar panels on slopes greater than 25% slopes, *all data presented to date is not site specific.*”²³ A plain reading of this statement indicates that the Petitioner is referring to both the Intervenor’s ANR Atlas map and the Petitioner’s reliance on the LiDAR data from the Vermont Center for Geographic Information in producing non-site specific information. The Petitioner’s reference to the “average slope” data is not in relation to the letter’s subsequent assurance to locate the Project’s solar array. To resolve the concern, the Petitioner proposed to “confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes.”²⁴ Importantly, the assurance states, “the parties have noted *specific concern to the terrain on the eastern side of the array.* . . . [t]he array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%.”²⁵ Following the Planning Commission’s acceptance of the Petitioner’s assurance, the Petitioner’s consultants

²¹ Exh. MB-16 at 3.

²² *Id.* at 5-6 (Explaining that the Project’s ground profile in north-south and east-west orientations is 15.5% and 10%).

²³ *Id.* at 6 (emphasis added).

²⁴ *Id.*

²⁵ *Id.*

conducted an “on the ground” survey to prepare a revised site plan illustrating a solar array layout that avoids slopes greater than 25 percent at the Project site.²⁶

Additionally, there can be no doubt that at the December 7, 2021 meeting, the Planning Commission envisioned that a site-specific survey be performed and that the results of that survey would be incorporated into a revised site plan for the Project’s solar array layout to avoid slopes greater than 25 percent.²⁷ The Planning Commission acknowledged the shortcomings in the accuracy of the ANR Atlas map’s information and discussed requiring the Petitioner perform a site-specific survey.²⁸ Notably, throughout the length of this proceeding and following the Petitioner’s submission of its revised site plan, the Planning Commission took no action to rescind the Preferred Site Letter.

Considering the Petitioner’s and the Planning Commission’s record discussions regarding the Town’s slope prohibition, it is apparent that the Petitioner and the Planning Commission reached a mutual understanding that the Petitioner would perform a site-specific survey to confirm the Project’s solar array layout would avoid specific locations on the Project site where slopes are greater than 25 percent. That condition was subsequently satisfied by the Petitioner in its conduct of a survey study and submission of a revised site plan.²⁹ The PFD’s conclusion that ambiguity

²⁶ Rebuttal Testimony of Scott W. Homsted, Case No. 21-2939-PET at 2 (June 24, 2022); Exh. RDS-MS-12, Engineering Letters from Krebs & Lansing and Horizons (Noting fieldwork performed by Horizons Engineering on January 19, 2022 to certify slope measurements on the project site).

²⁷ Exh. MB-15 [00:37:50] – [00:38:40] (“I think before we rescind the letter, I think it’s upon [the Petitioner] to prove to us and so they can easily do that by hiring a surveyor and going in there and getting the appropriate information that we can review. It’s not that complicated. I’ve had to do this before. So, you know, if they really are dedicated to the process and they want the letter, it’s up to them to prove to us that they are not putting this on 25 percent slopes. Now, I’m not going to rely upon [the ANR Atlas map], okay. . . these are inaccurate. . . [t]hat to me is a guide. It tells you that maybe you should look at this.”).

²⁸ *Id.*; Exh. MB-16 at 3 (“The Planning Commission noted that the [ANR Atlas map] had a disclaimer stating that it is ‘for general reference only and data layers may or may not be accurate, current, or otherwise reliable.’”).

²⁹ Rebuttal Testimony of Scott Homsted at 2; Exh. RDS-MS-2A (rev. 2/25/2022).

exists around the condition errs in its account of the Petitioner's November 11, 2021 email with the Planning Commission and its review of the Planning Commission's deliberations on this issue.

The Department concludes that the Preferred Site Letter properly designates a "specific location" in accordance with Commission Rule 5.103. Furthermore, it is evident that the Petitioner and the Planning Commission reached a mutual understanding regarding the condition imposed, requiring the Project's solar array not be constructed on slopes greater than 25 percent at the Project site. The Department recommends that the Commission decline to adopt the PFD's conclusions on this issue.

B. The PFD errs in concluding that the Planning Commission does not "support" the Project for purposes of Commission Rule 5.103.

The PFD next concludes that the Planning Commission does not "support" the Project's site designation as a preferred site, in accordance with Commission Rule 5.103. In its analysis, the PFD considers whether the Petitioner's representations to the Planning Commission prior to and during its deliberations to designate a preferred site constituted "incorrect or misleading representations that inappropriately influenced the Town of Randolph's decisions."³⁰ The PFD found that the Petitioner's November 11, 2021 email to the chair of the Planning Commission "[gave] the impression that the Town was obligated to issue a preferred-site letter and prohibited from considering the Randolph Town Plan in its decision on whether to support of the Project."³¹ The PFD further found that "the influence of the [Petitioner's] incorrect descriptions of the applicable legal standard" resulted in inappropriate pressure on the Planning Commission to

³⁰ PFD at 19.

³¹ *Id.* at 20.

designate “a location as a preferred site using irrelevant arguments.”³² Upon review, the Department disagrees with the PFD’s conclusion on this issue.

First, the PFD relies upon a mistaken understanding of the sequence of communications between the Petitioner and the Planning Commission. As previously discussed, the Petitioner’s November 11, 2021 email did not follow and was not in response to the Planning Commission’s issuance of the December 10, 2021 Notice Letter.³³ Rather, the Petitioner’s email would have followed the Intervenor’s October 21, 2021 letter to the Planning Commission and subsequent notice of intervention on October 25, 2021. The Petitioner’s response to the Planning Commission’s December 10, 2021 letter was its December 13, 2021 letter.³⁴ This is critical because the November 11, 2021 cannot be read in the context of challenging the Planning Commission’s December 10, 2021 Notice of Discrepancy. Instead, the Petitioner’s December 13, 2021 response acknowledges the Town’s slope prohibition and agrees to relocate the Project’s solar array following a site-specific survey.

Reading the Petitioner’s November 11, 2021 email in full context, the email indicates the Petitioner sought guidance from its legal counsel in response to the Intervenor’s concerns regarding the slope prohibition. The Petitioner forwarded an email from the Petitioner’s counsel that sets forth several legal arguments for the expressed purpose of providing “further background to why [the Petitioner] arrived at [its] assessments submitted to the PUC.”³⁵ Additionally, the

³² *Id.* at 21.

³³ The PFD notes, “after the apparent conflict between the Randolph Town Plan and the Project was raised by the Landowners, the Randolph Planning Commission issued a letter titled “Notice of Discrepancy in the Davis Road Preferred Site Location for a Solar Array. . . [t]he applicant engaged with members of the Randolph Planning Commission and the town manager via email after the Landowners raised the steep slopes issue.” The PFD then cites to MB-17 at 17-18.

³⁴ Exh. MB-16 at 5-6.

³⁵ Exh. MB-27 at 17.

forwarded email specifically states that, based on those legal arguments, “the steep slopes language in the Randolph Town Plan does not and should not be considered to preclude the Town from designating the project site as preferred.” While the PFD disagrees with the substance of the Petitioner counsel’s legal arguments in the context of a preferred siting letter, this email communication alone does not sufficiently demonstrate inappropriate or undue pressure or influence by the Petitioner to impact the decision of the Planning Commission. The Planning Commission’s review of this issue in subsequent meetings and the communications between the Planning Commission contradict any inference of undue influence stemming from the Petitioner’s November 11, 2021 email.

Notwithstanding the Petitioner’s November 11, 2021 email, the Planning Commission commenced the following actions: (i) the Planning Commission held a regular meeting on December 7, 2021 to discuss further steps in addressing the slope prohibition issue. At this meeting, the Planning Commission resolved to enforce its slope prohibition and direct the applicant to demonstrate the Project’s compliance under threat of rescinding the Preferred-Site Letter.³⁶ The Planning Commission also resolved to seek legal counsel from the Town’s attorney to determine the Town’s associated liability if it were to rescind the Preferred-Site Letter³⁷; (ii) the Planning Commission issued its December 10, 2021 Notice of Discrepancy letter, stating that if the Project’s solar array prove to be located on slopes greater than 25 percent, “then the Town of Randolph may have to rescind our support for this site as being a ‘preferred’ site”³⁸; (iii) the Planning Commission deliberated via email on December 14, 2021 whether to accept the Petitioner’s condition to conduct an on-site survey to relocate the Project’s solar panels or

³⁶ Exh. MB-15 [00:37:50] – [00:44:20].

³⁷ *Id.* [00:57:10] – [00:58:06]; Exh. RDS-B at 1.

³⁸ Exh. MB-16 at 3.

withdraw the Preferred Site Letter.³⁹ Markedly, several of the Planning Commission's members noted their satisfaction with the Petitioner's acknowledgment of the slope prohibition's application to the Project and agreement to remove the Project's solar arrays from slopes greater than 25 percent⁴⁰; (iv) on December 20, 2021, the Planning Commission received guidance from its counsel addressing whether preferred siting letters may be rescinded and the associated liability for such action.⁴¹

Following the Planning Commission's review and decision not to rescind the Preferred Site Letter, the Selectboard convened on three separate occasions to discuss the Intervenor's rescission request. At the January 13, 2023 meeting, the Selectboard received a summary of the Town's counsel's response regarding the process and associated liabilities for rescinding a preferred site letter.⁴² The Selectboard decided to evaluate the rescission request at the February 2022 meeting after obtaining and reviewing additional necessary information.⁴³ On February 10, 2022, the Selectboard held a regular meeting to further discuss rescission of the Preferred Site Letter, which included reviewing the "location of the solar array, concerns over slope and whether or not they were addressed, the access road, what constitutes development, and alleged violations of open meeting laws."⁴⁴ The Planning Commission chair also provided a summary of the Planning Commission's actions in response to the Intervenor's rescission request and recommended that the

³⁹ Exh. MB-27 at 30-47.

⁴⁰ *Id.* at 45 (Planning Commission member, Jeff Grout, abstaining from the vote but noting that "Norwich solar has shown they are aware of the slope issue and that panels will not be installed on a slope 25% or higher."); *Id.* at 52 (Planning Commission Chair Sonny Holt acknowledging that the Petitioner has "accepted the town's requirement on steep slopes. . ."); *Id.* at 35 (Planning Commission member Perry Armstrong noting agreement and stating, "Norwich solar has now stated that they understand the slope issue and have expressed how they intend to hire a surveyor to address the issue.").

⁴¹ Exh. MB-17 at 87.

⁴² Exh. MB-22, Link to video of 1-13-22 Randolph Selectboard Meeting at [01:14:30] – [01:16:30].

⁴³ Exh. MB-18 at 3.

⁴⁴ Exh. MB-19, Randolph Selectboard 2-10-22 Meeting Minutes at 2.

Selectboard “keep in place the preferred siting letter granted to [the Petitioner] for the Davis Road solar array.”⁴⁵ The Selectboard took no action to rescind the Preferred Site Letter and noted that the Preferred Site Letter’s “issuance stands as approved in June 2021 at this time.”⁴⁶ The Selectboard considered the issue a third time, at the request of the Intervenors. The Selectboard consciously took no action to rescind the Preferred Site Letter.⁴⁷ The record demonstrates that the Selectboard considered the Intervenors’ requested rescission of the Preferred Site Letter with the benefit of both the Planning Commission’s review and recommendation and the Town’s counsel’s opinion regarding the process and associated liability for rescinding the Preferred Site Letter.

The PFD’s suggestion that the Petitioner’s November 11, 2021 email on its own amounts to inappropriate pressure or influence on the Town’s deliberative process to rescind its Preferred Site Letter fails to account for an accurate sequence of review and the substantive discussions had by the Planning Commission and Selectboard between November 2021 to March 2022 in addressing the Intervenors’ concerns. The Planning Commission and the Selectboard received substantial input from the Petitioner, the Intervenors, and the Intervenors’ present counsel at these meetings. Regardless of any appearance of undue influence that can be ascribed to the Petitioner’s November 11, 2021 representations, the record demonstrates that the Planning Commission took measures to enforce its slope prohibition, including consideration of rescinding the Preferred Site Letter, and was subsequently advised of its ability to do so by its own counsel. The PFD acknowledges that the intent of Commission Rule 5.103 “is to give a municipality the ability to

⁴⁵ Exh. MB-23, Link to video of 2-10-22 Randolph Selectboard Meeting at [00:29:21] – [00:35:13].

⁴⁶ Exh. MB-19 at 2.

⁴⁷ Exh. RDS-MS-16 at 1 (“[Selectboard Member Satcowitz] clarified that the [Selectboard] approved its support for a preferred siting letter for the project already and that the Planning Commission is asking the Selectboard to basically do nothing. There was agreement that, if the [Selectboard] was keeping its approval for the letter in place, no action would be necessary.”).

encourage development in areas deemed desirable by the municipality.”⁴⁸ The Planning Commission and Selectboard’s issuance of the Preferred Site Letter and ensuing deliberations not to rescind the Letter demonstrate a clear, expressed intent by the Town that the Project site be designated as an area desirable for solar generation development, consistent with Commission Rule 5.103.

While the Department does not dispute the Commission’s ability to review a preferred siting letter’s conformance with Commission Rule 5.103, the PFD errs in its dismissal of the Town’s expressed intent to develop a net-metered solar facility at the Project site and erroneously displaces the autonomy of the Town and its decision-making process.

Additionally, the PFD also finds that the Petitioner’s description of the Project to the Selectboard was not consistent with the Petitioner’s materials submitted within this proceeding. The PFD cites to its Findings 19 and 20 stating that the Petitioner represented to the Selectboard the Project “would require between 4 and 5 acres of clearing and modest improvements to an existing road.”⁴⁹ The Project as proposed to the Commission states that the Project’s “proposed clearing and limit of disturbance (LOD) will be approximately 11.9 acres” and “access via a gravel drive off Davis Road.”⁵⁰ As such, the PFD concludes that it is “unclear whether the [Town] would support the Project as it has been proposed to the Commission.”⁵¹ The Department disagrees.

The Planning Commission’s December 10, 2021 Notice Letter specifically considered the Project’s 11.9-acre limit of disturbance.⁵² The Planning Commission chair also presented a

⁴⁸ PFD at 21.

⁴⁹ *Id.* (citing Findings 19 and 20).

⁵⁰ Prefiled Direct Testimony of Martha Staskus, Case No. 21-2939-NMP at 4-5 (Aug. 11, 2021).

⁵¹ PFD at 22-3.

⁵² Exh. MB-16 at 3 (“To bolster their claim Allen and Binder presented a colored map showing, in red, slopes over 25% that covered the majority of the 10 acres allowed for the project.”) (emphasis added).

summary of his findings and recommendations to the Selectboard and expressly noted consideration of the Project's access road's slope.⁵³ The Planning Commission declined to rescind the Preferred Site Letter.⁵⁴ Additionally, the Selectboard discussed the Project access road's improvements and location on slopes greater than 25 percent at certain locations.⁵⁵ Following those discussions, the Selectboard took no action to rescind the Preferred Site Letter.⁵⁶ Both the Planning Commission and the Selectboard considerations on the issues presented by the Intervenor involved knowledge and discussion of Project's limit of disturbance and access road improvements as submitted in the Petitioner's application materials filed with the Commission on August 11, 2021. Considering the record evidence in this matter, it is clear that the Town supports the designation of the Project parcel as a preferred site and that neither the Project's 11.9-acre limits of disturbance nor the improved, existing access road's location on the site were controlling in the Town's assessment of the Project parcel's preferred-site designation.

III. CONCLUSION

Based on the foregoing, the Department concludes that (i) the Preferred Site Letter properly designates a "specific location" as required by Commission Rule 5.103, 0 Davis Road, Randolph, VT, as a preferred site, (ii) the Town and the Petitioner reached a mutual understanding with respect to the agreed-upon conditions to locate the Project's solar array on slopes no greater than 25 percent, and (iii) the Planning Commission and Selectboard, through their issuance of a Preferred Site Letter and subsequent meetings to address the Intervenor's request for rescission, have expressed clear support for the Project site's preferred-site designation. The Department

⁵³ Exh. MB-23 [00:29:50] – [00:30:25].

⁵⁴ Exh. MB-16 at 1-2.

⁵⁵ *Id.* at [01:08:30] – [01:16:05].

⁵⁶ Exh. MB-19 at 2; See also Exh. RDS-MS-16 at 1.

disagrees with the PFD's reliance on the Petitioner's November 11, 2021 email to demonstrate a failure of mutual understanding or undue influence upon the Town's decision-making process. Such an analysis diminishes a municipalities' autonomy and decision-making process and establishes a concerning precedent regarding the scope of review for letters issued under Commission Rule 5.103.

As the PFD properly explains, Commission Rule 5.103 is "an optional way for towns to guide development of large net-metering systems" and "intended to afford municipalities and regional planning bodies greater input into the siting" of those facilities.⁵⁷ Upon review of the record, it is apparent that the Town engaged in a full and purposeful process to address the Intervenor's concerns, ensure the Project's conformance with the Town Plan, and maintain its ongoing support for the Project parcel's preferred-site designation. The Department advises against disturbing the expressed support by the Selectboard and Planning Commission to guide solar development in Randolph, VT, principally disturbing such support based on those findings made in the PFD.

As such, the Department recommends that the Commission decline to adopt the PFD's conclusions and remand this matter to the Hearing Officer to evaluate the full merits of the Project, pursuant to the Section 248(b) criteria.

[SIGNATURE ON NEXT PAGE]

⁵⁷ PFD at 20.

DATED at Montpelier, Vermont this 20th day of June 2023.

Respectfully Submitted,

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