

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209)	Case No. 20-1611-INV
into whether the petitioner initiated site)	
preparation at Apple Hill in Bennington, Vermont,)	
for electric generation in violation of 30 V.S.A. §)	
248(a)(2))	

**VERMONT AGENCY OF NATURAL RESOURCES RESPONSE TO ALLCO
RENEWABLE ENERGY LIMITED'S SECOND MOTION FOR HEARING**

The Vermont Agency of Natural Resources (“Agency”) submits the following response to the Developer’s June 14, 2023, motion for an evidentiary hearing (the “Second Re-Hearing Motion”).

The Developer, once again, seeks to reopen the record to relitigate issues that have been fully litigated, and for which the Public Utility Commission (“Commission”) has made findings and conclusions in this proceeding. The Developer’s Second Re-Hearing Motion should be denied for the same reasons discussed in the Agency’s March 30, 2023, reply brief and the Commission’s order of May 30, 2023, (the “Hearing Order”) issued in response to the Developer’s March 16, 2023, motion to reopen the record and relitigate the same issues (the “First Re-Hearing Motion”).

The Developer’s newly offered affidavits, addressed separately below, should also be rejected.

McClammer Affidavit

The Agency objects to the admission of the June 14, 2023, affidavit of Jim McClammer (consisting of 438 pages including attachments) for the same reasons the Agency opposed the Developer’s attempt to enter the March 16, 2023, affidavit of Jim

McClammer.¹ The Commission, in its Hearing Order, already determined that there is no basis to “relitigate” the issue of harm to the environment.² The Agency agrees with the Commission.

Melone Affidavit

The Agency objects to the admission of the June 14, 2023, affidavit of Thomas Melone because it discusses topics beyond the limited scope of those allowed by the Hearing Order (“economic benefit” and “ability to pay”) and because it appears to be an attempt to re-brief issues which the Developer already briefed on March 16. All sections of the affidavit which do not constitute firsthand testimony limited to the issues of “economic benefit” and “ability to pay” should be stricken.

Orderly Process

Throughout this proceeding, The Developer has persistently and repeatedly exhibited disregard for orderly process. For example, on January 26, 2021, the Developer filed two motions to supplement the record after the record was closed. On February 16, 2021, the Developer did it again. All three filings disregarded the Commission's post-hearing order of December 18, 2020, and were found to be “untimely and outside the scope of the limited information [the Commission] said could be submitted for the record.”³ Then, in March of 2023, the Developer, with its First Re-Hearing Motion, attempted yet again to introduce additional evidence concerning the

¹ See, Agency Reply of 3/30/23 at 2-3.

² See, Order of 5/30/23 at 6-7.

³ See, Order dated 4/1/21 at 10-11.

natural environment despite the Commission's prior rulings. The Commission appropriately denied that attempt.⁴

Now, on June 14, the Developer's Second Re-Hearing Motion offers more of the same, and the Agency is required to respond yet again. Such actions have resulted in an inefficient use of the Agency's, and the public's, resources as the Agency has had to repeatedly address filings which ignore Commission orders, filings which are duplicative, late filings,⁵ and incoherent filings.⁶

Penalty Amount

The Developer argues that the amount of the penalty which the Commission may impose should be governed by the version of 30 V.S.A. § 30 in effect in 2020, when the site clearing violation took place. At that time, the maximum penalty amount was \$40,000. It is now \$85,000. The Agency's recommended penalty of \$39,125.00 was based on the current version of Section 30. The Agency defers to the Commission to determine which version of Section 30 should apply in this case. If the Commission determines that the 2020 version applies, then the Agency's recommended penalty is

⁴ See, Order of 5/30/23 at 6-7.

⁵ See, Agency brief of 1/29/21 at 11-12 (discussing filings made on the eve of, and then morning of, an evidentiary hearing despite the Commission requiring them to be filed earlier, as well as late and inappropriate discovery requests and demands).

⁶ For example, the Melone 6/14/23 affidavit appears to argue for a reduced penalty claiming that the logger which the Developer hired to clear the Apple Hill site with a bulldozer in June of 2020, inspected the site for asters at that time and didn't see any. See, aff. ¶ 33. The problem with this line of reasoning is two-fold. First, the logger had no documented education, training, or experience which would qualify him to identify this morphologically complex species. Second, the McClammer 6/14/23 affidavit contradicts the argument when the Developer's own environmental consultant admits that even a qualified person such as himself would not be able to identify the aster in June: "I think it has been overlooked because it flowers in late Fall, is frequently obscured by foliage of other plants, and is morphologically similar to several other species that flower at the same time. When it is found, I believe it is often simply misidentified. The Aster is extremely difficult to distinguish from related species . . . and *flowering material is absolutely necessary to make a definitive identification.*" See, McClammer aff. ¶ 4. (emphasis added); see also, Mr. McClammer's testimony at the December 4, 2020, evidentiary hearing where he confirms that, based on his own experience, "it would be hard to even find [the aster]" in June. Tr. 12/4/20 at 90-91 (McClammer).

\$29,000.00. This amount is based on the same factors and analyses discussed in the Agency's March 2, 2023, brief and penalty recommendation.

CONCLUSION

For the reasons discussed above, the Agency respectfully asks the Commission to deny the Developer's June 14, 2023, Second Re-Hearing Motion; deny admission of the McClammer affidavit; and deny admission of the Melone affidavit in its present form. The Agency does not oppose allowing the Developer to submit a new (or revised) Melone affidavit which contains only firsthand testimony addressing "economic benefit" and the Developer's "ability to pay" a civil penalty, and nothing else. The new affidavit should be filed at least two weeks before the limited evidentiary hearing and oral argument scheduled for July 20, 2023.

Dated June 28, 2023, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources

A handwritten signature in blue ink, appearing to read 'D. Einhorn', with a long horizontal line extending to the right.

By:

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