

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

This document has been electronically filed using ePUC

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	
--	--

**VERMONT DEPARTMENT OF PUBLIC SERVICE’S RESPONSE
TO RESPONDENTS’ SECOND MOTION FOR HEARING**

On March 16, 2023, the Respondents in this matter filed a motion with the Vermont Public Utility Commission (“Commission”) seeking a new evidentiary hearing prior to a penalty assessment. Following responses from the Vermont Agency of Natural Resources (“ANR”) and the Vermont Department of Public Service (“Department”), the Commission issued an Order on May 30 granting an evidentiary hearing with the scope “limited to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer’s ability to pay a civil penalty.”¹ The Commission found that “unlike the other evidence the Developer seeks to admit,” these issues have not yet been litigated.² The Order also provided an opportunity for oral argument to address the penalty recommendations filed by ANR and the Department. The Commission denied Respondents’ request to present new evidence on other topics, finding that (1) “the specific evidence that the Developer proffer[ed] . . . [was] untimely and unnecessary,” (2) Respondents’ motion sought reconsideration of earlier conclusions without adequate justification, and (3) Respondents’ proposed schedule would create significant additional delay contrary to the public interest.³

¹ *Investigation pursuant to 30 V.S.A. §§ 30 and 209*, Case No. 20-1611-INV, Order of 5/30/23 at 8.

² *See id.* at 5.

³ *See id.* at 6–8.

On June 14, 2023, Respondents filed a second motion for an evidentiary hearing, seeking to “broaden the scope” of the limited evidentiary hearing set by the Commission and to introduce new testimony from Thomas Melone and Jim McClammer. The second motion seems to ask the Commission to reconsider its May 30 Order, noting that under 30 V.S.A. § 30, an entity subject to the supervision of the Commission who violates a provision of § 248 “shall be required to pay a civil penalty . . . after notice and opportunity for hearing.”⁴ This investigation, which has been conducted from the outset pursuant to 30 V.S.A. § 30, has included two evidentiary hearings and will include an opportunity for a third limited evidentiary hearing. This investigation has also included opportunities to address the weight of penalty factors in briefing – and will include an additional hearing for oral argument before the Commission makes any penalty determination. Despite these opportunities to be heard on the violation and the penalty assessment, Respondents suggest that more process is required before a penalty can be imposed under § 30.

The Department continues to defer to ANR on issues related to the environmental and natural resources criteria of § 248(b)(5), including evidentiary considerations and the appropriate penalty for any harms and potential harms. The Department’s focus continues to be the integrity of the regulatory process and execution of the laws under Title 30. For the reasons outlined in the Department’s reply brief of March 30, 2023, and its March 30 response to Respondents’ motion for hearing, the Department maintains that the existing record provides an adequate basis to impose a penalty for regulatory harm and there is no need to reopen the record to relitigate aspects of the violation itself.⁵ The process provided by the Commission, including an opportunity to submit evidence on the two penalty factors where additional information could be useful, and oral

⁴ See 30 V.S.A. § 30(a)(1)

⁵ See Department’s Reply Brief on Penalty Recommendation at 2–3, filed March 30, 2023; Department’s Response to Respondents’ Motion for Hearing, filed March 30, 2023.

argument on the penalty assessment more broadly, is sufficient and appropriate. Respondents' renewed motion for a broader evidentiary hearing should be denied.

There is one aspect of Respondents' motion that warrants further clarification. The motion correctly notes that the version of 30 V.S.A. § 30(b) in effect through June 30, 2021, contemplated a maximum penalty of \$40,000 for a discrete violation, while the version in effect July 1, 2021, increased that maximum to \$85,000.⁶ Although the Department's brief quoted the current version with a cap of \$85,000, the Department's recommended \$5,000 assessment for regulatory harm would remain the same under either version. This is because the recommendation is significantly informed by past penalty assessments.⁷ Within statutory limits, the total amount of the penalty to be assessed is ultimately a matter entrusted to the Commission's judgment.

Along with their motion, Respondents filed new testimony from Thomas Melone and Jim McClammer. The Department defers to ANR as to whether the Revised Affirmation of Jim McClammer is objectionable, however it is worth noting that the testimony appears entirely outside the scope of evidence contemplated in the Commission's May 30 Order.⁸ The Affirmation and Pre-Filed Testimony of Thomas Melone ("Melone testimony") appears to set forth legal arguments and covers a wide range of topics, including the factors under 30 V.S.A. § 30(c) which

⁶ See 30 V.S.A. § 30(b).

⁷ See, e.g., *Investigation pursuant to 30 V.S.A. §§30 and 209 and Public Utility Commission Rule 5.110(D) into the accuracy of information supplied on an application for an interconnected group net-metered photovoltaic electric power system in Ferrisburgh, Vermont, filed by Beach Properties Inc. d/b/a Basin Harbor Club*, Docket No. 8692, Order of 8/31/2017 at 10–11, 14 (assessing two \$5000 penalties for misrepresentations in application, where applicants should have known the violations existed and "acted in casual disregard of their obligations"); *Petition of Gasna 14P, LLC*, Docket No. 7632, Order of 5/21/14 at 1 (CPG holder for 2.0 MW solar project assessed \$5,000 penalty for transfer of ownership without approval); see also Department's Recommendation of Penalty Assessment at n.16, n.18, filed March 2, 2023 (citing examples of significant penalties where violations are not promptly reported or self-reported, and discussing *Charlotte Solar*, which involved several analogous considerations to the case here).

⁸ See Revised Affirmation of Jim McClammer, filed June 14, 2023; *Investigation*, Case No. 20-1611-INV, Order of 5/30/23 at 8.

may be considered in determining the amount of a penalty.⁹ The Commission’s May 30 Order granted an evidentiary hearing “limited to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer’s ability to pay a civil penalty.”¹⁰ The Melone testimony does address these issues, and the Department does not object to the admission of those portions.¹¹ The Department objects to all other portions of the Melone testimony as outside the scope of the limited hearing set by the Commission,¹² however – the Department has no objection to the testimony being considered as a legal brief.

Dated at Montpelier, Vermont this 28th day of June 2023.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: /s/ Ben Civiletti
Ben Civiletti, Special Counsel
112 State Street
Montpelier VT 05620
802-622-4388
benjamin.civiletti@vermont.gov

cc: ePUC Service List

⁹ See Affirmation and Pre-Filed Testimony of Thomas Melone, filed June 14, 2023.

¹⁰ *Investigation*, Case No. 20-1611-INV, Order of 5/30/23 at 8.

¹¹ Affirmation and Pre-Filed Testimony of Thomas Melone at 13-14, 15-16.

¹² See *Investigation*, Case No. 20-1611-INV, Order of 5/30/23 at 8.