

IN THE SUPREME COURT OF THE STATE OF VERMONT

DOCKET NO. 23-AP-346

*In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209 into whether the Petitioner
Initiated Site Preparation at Apple Hill in Bennington, VT
(Allco Renewable Energy Limited et al.)*

APPEAL FROM THE
VERMONT PUBLIC UTILITY COMMISSION
Case No. 20-1611-INV

Brief of Appellee Department of Public Service

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STATEMENT OF THE CASE

The question at the heart of this case is whether the Vermont Public Utility Commission (“Commission”) has the power to enforce the provisions of 30 V.S.A. § 248 prohibiting any company or person from “begin[ning] site preparation for or construction of an electric generation facility” in the State without a certificate of public good (“CPG”). 30 V.S.A. §§ 248(a)(2)(A), (B). After a thorough investigation, the Commission found that Appellants Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, and PLH Vineyard Sky LLC (collectively, “Allco”)¹ violated 30 V.S.A. § 248(a)(2)(A) by commencing site clearing without a CPG at Apple Hill in Bennington, Vermont. The Commission enjoined Allco from further site preparation and imposed a civil penalty for the violation.

The Commission’s decisions were in accordance with its authority under state law, consistent with the intent and purpose of 30 V.S.A. § 248, and supported by the record. Appellee Vermont Department of Public Service (“Department”) seeks an order from this Court affirming the Commission’s decisions.²

Procedural History

Allco has undertaken a years-long effort to build and operate two 2.0 MW solar electric generation facilities on Apple Hill in Bennington. In 2013 and 2014, Allco was awarded standard offer contracts for the electricity to be produced by the two facilities.³ PC 38–39. The contracts contained commissioning deadlines, which were later extended by the Commission. PC 38–40.

Allco then sought CPGs from the Commission for both facilities: the “Chelsea Solar” facility (alternatively referred to as the “Willow Road” facility) and the “Apple Hill” facility. PC 39. Both projects were slated to be developed on a 27-acre parcel off Willow Road (the “Willow Parcel”). PC 38, 46. Allco also proposed landscaping on a 5-acre adjoining lot (the “Orchard Lot”) to provide screening for the Apple Hill facility. PC 49. The Commission denied a CPG for the Chelsea Solar facility in February of 2016, and Allco later filed an amended petition for the project. PC 39–40. The Commission denied

¹ Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, and PLH Vineyard Sky LLC (formerly PLH LLC) are solely owned, directly or indirectly, by Thomas Melone. PC 49, 644–47. PLH Vineyard Sky LLC represents that it owns the properties at issue in this case. PC 523, 1381. These entities have been collectively referred to as “Allco” or the “Developer” in the proceeding below.

² The Department formally joins the arguments put forth in Appellee Vermont Agency of Natural Resources’ (“ANR”) brief as they relate to irreparable harm, ANR’s technical expertise in classifying rare plant species, ANR’s participation below, and the scope of the Commission’s injunction.

³ Vermont’s standard offer program is established under 30 V.S.A. § 8005a.

that petition in June of 2019, and this Court affirmed on appeal in 2021. PC 40; *In re Chelsea Solar LLC*, 2021 VT 27, ¶ 2, 214 Vt. 526.

The Commission granted a CPG for the Apple Hill facility in 2018, but neighbors appealed the decision and this Court reversed and remanded for further proceedings. PC 39–40; *In re Apple Hill Solar LLC*, 2019 VT 64, ¶ 1, 211 Vt. 54. In March of 2020, while the project was under consideration on remand, Allco moved to amend to its petition to account for plans to graze sheep on the Willow Parcel and to grow hemp on the adjoining Orchard Lot. PC 40 and n.18; SPC 6–7. While Allco’s original proposal for the Apple Hill facility contemplated tree clearing at the site, the amendment suggested that the clearing would now be carried out in connection with the sheep farming use and therefore “[n]o clearing is required by the solar use.” SPC 7. In May of 2020, the Commission issued its decision on remand denying a CPG for the facility and denying the motion to amend the petition. PC 41; *Petition of Apple Hill Solar LLC*, Docket 8454, Order of 5/7/20 at 5, 23–25 (Vt. Pub. Util. Comm.). Allco appealed, and this Court reversed and remanded. *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 1, 215 Vt. 523.

In June of 2020, a member of the public filed comments with the Commission. PC 41. The comments alleged that site clearing was taking place at the site of the proposed solar facilities and that areas set aside for rare, threatened, and endangered species were being disturbed. *Id.* On June 23, 2020, the Vermont Agency of Natural Resources (“ANR”) filed preliminary comments stating that it had “confirmed that site clearing activity is in fact occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed.” *Id.* ANR also noted concerns that the tree-clearing activity (1) was a violation of § 248 and (2) had not been reviewed to ensure that it did not have an undue adverse effect on the environment. *Id.* Specifically, ANR was concerned that the site clearing presented a substantial and immediate harm to “very rare” and “rare” plants at the site. *Id.* ANR requested a cease-and-desist order to prevent irreparable harm. *Id.*

On June 24, 2020, the Department filed comments stating that cause appeared to exist warranting further investigation into whether Allco initiated site preparation in violation of 30 V.S.A. § 248(a)(2). PC 41–42. Also on June 24, 2020, the Commission initiated an investigation into whether Allco conducted site clearing without a CPG in violation of § 248(a)(2). PC 96.

The Commission held an evidentiary hearing on June 26, 2020, where it announced from the bench that it was issuing a temporary restraining order (“TRO”) restraining Allco from further site-preparation activity at the Apple Hill site. PC 48. A written order was issued the same day. *Id.* The next day, Allco resumed site-clearing work at the Apple Hill site. *Id.*

On September 1, 2020, Allco filed a notice of appeal to this Court seeking relief from the Commission’s TRO. PC 43. The Court dismissed the appeal without prejudice to refile if an injunction was granted. *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, No. 2020-242, 2020 WL 6799008, at *2 (Vt. Nov. 5, 2020).

On April 1, 2021, after a second evidentiary hearing and briefing from the parties, the Commission issued an Order Maintaining Injunction and Prohibiting Further Site Preparation (“Injunction Order”). PC 1, 43. The Commission concluded that Allco’s clearing activity without a CPG at the Apple Hill site violated 30 V.S.A. § 248(a)(2)(A), and enjoined Allco from engaging in further site preparation on the properties identified in its standard offer contracts or CPG petitions for solar electric generation facilities on Apple Hill. PC 38.

The Injunction Order stated that the injunction is temporally limited and will remain in place only until either (1) Allco receives a CPG for constructing an electric generation facility on the site; or (2) final orders from the Vermont Supreme Court or the Commission deny both CPG petitions in Docket No. 8454 and Case No. 17-5024-PET, any appeal periods or time limits for reconsideration expire, and both of Allco’s standard-offer contracts expire or are voluntarily relinquished. PC 66. The Commission also directed the parties to propose a schedule for a penalty phase to address an appropriate civil penalty pursuant to 30 V.S.A. § 30. PC 38. Allco appealed the Injunction Order, and this Court dismissed the appeal for lack of jurisdiction because there was not yet a final appealable order. *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington*, 2021 VT 92, ¶ 1, 216 Vt. 145.

Allco filed two unsuccessful motions with the Commission to stay the penalty phase of the investigation. PC 2. On December 14, 2022, the Commission denied Allco’s second motion to stay, requesting that ANR confer with the other parties and propose a schedule. *Id.* ANR proposed a one-month schedule for the penalty phase, while Allco proposed an extended schedule. The Commission rejected Allco’s proposal and adopted a briefing schedule on January 30, 2023. *Id.*

ANR and the Department each filed briefs with penalty recommendations. *Id.* Allco responded to the penalty recommendations and moved for a third evidentiary hearing. PC 2, 902, 913. On May 30, 2023, the Commission granted the motion for a third evidentiary hearing in part, limiting the scope to two penalty assessment factors under 30 V.S.A. §§ 30(c)(3) and (6). PC 2–3, 24. The Commission also scheduled an oral argument for the parties to address the agencies’ penalty recommendations. PC 31.

Allco then filed an additional motion to broaden the scope of the third evidentiary hearing significantly. PC 3, 1402. The Department and ANR recommended that this motion be denied, and the Commission did so at the limited evidentiary hearing and oral argument held on July 20, 2023. PC 3.

On September 19, 2023, following the limited hearing and oral argument, the Commission issued a Final Order imposing a civil penalty of \$5,000 (“Penalty Order”) for Allco’s violation of 30 V.S.A. § 248(a)(2)(A). PC 1. The Penalty Order included additional findings and evaluated the eight penalty assessment factors under 30 V.S.A. § 30(c). PC 7–18. After considering the relevant factors including: the extent of certain harms and potential harms reflected in the violation; whether the violation was knowing

or intentional; and the deterrent effect of the penalty, the Commission noted that Allco's conduct was "an intentional violation of the statute that undermined the effectiveness of the regulatory process" and determined that a \$5,000 penalty was appropriate. PC 9–18. Allco then appealed to this Court.

STANDARD OF REVIEW

The Court gives "great deference to the [Commission's] expertise and judgment" and will "accord a strong presumption of validity to the [Commission's] orders." *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2, 185 Vt. 296 (quotations omitted). Recognizing the Commission's role as factfinder, the Court "will affirm the [Commission's] findings unless they are clearly erroneous and its legal conclusions if they are rationally derived from a correct interpretation of the law and supported by findings." *Apple Hill*, 2019 VT 64, ¶ 27, 2011 Vt. 54 (quotations omitted). "Absent a compelling indication of error," the Court "will not disturb an agency's interpretation of statutes within its particular area of expertise." *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 9, 210 Vt. 27 (quotation omitted). The Commission's "decision to set and impose a penalty is within its discretion and will be upheld as long as it shows a thorough and fair evaluation of the various relevant factors." *Id.* ¶ 10 (quotation omitted).

ARGUMENT

The Commission rightly determined that Allco violated 30 V.S.A. § 248(a)(2)(A). Consistent with its supervisory obligations and enforcement authority, the Commission properly investigated, enjoined, and penalized Allco's unlawful conduct. This Court should affirm the Commission's decisions.

I. The Commission Correctly Determined that Allco Violated § 248(a)(2)(A) by Initiating Site Preparation for an Electric Generation Facility Without a CPG.

Section 248(a)(2) of Title 30 prohibits site preparation for an electric generation facility without a CPG, stating:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage; and

(B) no such company may exercise the right of eminent domain in connection with site preparation for or construction of any such transmission facility, energy storage facility, or generation facility, unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.

30 V.S.A. §§ 248(a)(2)(A), (B). The Commission correctly concluded that Allco violated this prohibition.

Allco argues that its clearing activities at the Apple Hill site did not constitute site preparation for the construction of an electric generation facility within the meaning of 30 V.S.A. § 248(a)(2), because the clearing was undertaken solely to prepare for sheep farming or otherwise lawful purposes. *See* Appellants' Br. at 4–5. Allco suggests that the evidence on this issue is uncontroverted, that “[t]he mere potential of a future overlapping use of the land here does not change a farming activity to site preparation for an electric generation facility,” and that the Commission’s orders below were arbitrary and capricious. *Id.* at 5, 11. The crux of this argument is that the site clearing did not bear a “reasonable relationship” to a proposed solar facility such that it could be considered as part of the project. *See id.* at 2–5, 8–9, 11–12. Allco’s assertion ignores the distinct connections between the clearing and the proposed Apple Hill facility and relies on precedent that is easily distinguished from the case at hand. The Commission’s determination that Allco initiated site preparation without a CPG is supported by the record and is consistent with the principles outlined in prior cases.

A. The Commission’s conclusion is supported by the record.

In reaching its conclusion, the Commission made key findings including:

1. Allco’s forester had “cleared part of the site on Apple Hill” and “anticipated completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020.” PC 47 (citing PC 372–73)
2. “Allco plans to build two facilities with a combined 4.0 MW of solar generation at this site” PC 47 (citing PC 309, 313, 316, 327).
3. “Site clearing for a solar facility requires clearing trees.” PC 47 (citing PC 311–12, 334–36).
4. “Sheep grazing is compatible with a ground-mounted solar facility, and in this case Allco plans to use sheep as part of its solar development. Sheep are used primarily to control vegetative growth at a solar site. Sheep and solar go together as part of Allco’s business plan.” PC 47 (citing PC 310–11, 338–39, 675–76, 683).

As the Commission explained, Allco itself acknowledged “that tree clearing is an essential element of preparing a solar electric generation site and that the location it is clearing is the site of a proposed solar facility.” PC 58; *see also* PC 311–12, 334–35. Based on Allco’s live testimony, the Commission discounted the assertion that the site clearing activity was unrelated to the proposed solar projects, finding that “the primary purpose of placing sheep at [the site] is to keep down vegetative growth around the proposed solar facilities at [the site].” *See* PC 59–60 (emphasis omitted). The Commission also found it significant that Allco had proposed an amendment to its

petition for the Apple Hill facility, seeking to remove tree clearing from the plans because the site would already be cleared for sheep grazing. *See* PC 58; PC 324–25 (admitting the proposed amendment into evidence as Intervenors’ Exhibit 2); SPC 6–8.

The fact that Allco proposed the amendment indicated to the Commission that Allco understood that clearing trees “would prepare the site for a solar facility,” and that Allco knew it needed approval before it began that work. *See* PC 60–61 (“Allco in fact sought approval for the very work it began undertaking here, but the Commission denied that approval . . . when we . . . denied the motion to amend the petition to reflect grazing sheep at the project site.”). Allco went ahead with the site clearing, despite receiving denials for its proposed amendment and the underlying CPG petition, while continuing to seek approval for the Apple Hill facility through its appeal to this Court. *See* PC 61; *Petition of Apple Hill Solar LLC*, Docket No. 8454, Order of 5/7/20 at 1, 25 (Vt. Pub. Util. Comm.) (denying the proposed amendment and CPG); *Apple Hill*, 2021 VT 69, ¶ 1. Taken together, the evidence overwhelmingly supports the conclusion that Allco (1) began site clearing in furtherance of its plan to construct a solar electric generation facility, and (2) did so without a CPG. *See* PC 58–65 (finding a violation of § 248(a)(2)(A) and maintaining the injunction).

Allco does not offer any substantive reason to second-guess the Commission’s findings, conclusions, or rationale, all of which are firmly grounded in the record. Instead, Allco continues to insist that its activities at the site were solely for its sheep or hemp operations and therefore outside the scope of § 248’s prohibition on site preparation.

B. Allco misapprehends the reasoning in prior cases and advances an untenable interpretation of the “reasonable relationship” standard.

The cases Allco relies on to place its activities beyond the reach of § 248 can be readily distinguished and fail to demonstrate any flaw in the Commission’s analysis. Allco first points to the *Beaver Wood* case, where the Commission concluded that it lacked jurisdiction over proposed wood-pellet manufacturing facilities under § 248. *Petition of Beaver Wood Energy*, Docket Nos. 7678 and 7679, Order of 4/1/11 at 17 (Vt. Pub. Util. Comm.) (PC 227). There, the Commission evaluated the jurisdictional question by applying the “reasonable relationship” standard, which holds that § 248 jurisdiction attaches “where a proposed improvement bears a reasonable relationship and can be considered part of an electric transmission or generation facility, having in mind the broad meaning to be ascribed to the word ‘facility.’” *Id.* at 9 (quoting *Op. Vt. Att’y. Gen.*, No. 715 (Aug. 5, 1971)) (PC 222). While the wood-pellet manufacturing facilities would be integrated in some respects with electric generation facilities proposed on the same site, the Commission found that they were not reasonably related – in large part because the manufacturing facilities were not part of the electric generation process, would serve a separate purpose, and were “neither precursors to, nor essential to” the generation facilities. *See id.* at 12–14 (PC 223–25).

Beaver Wood considered whether approval could be issued under § 248 for manufacturing facilities; it did not relate to violations of the statute or whether clearing work constituted site preparation for an electric generation facility. *See id.* at 17 (PC 227). Furthermore, while Allco relies on *Beaver Wood* to show that its clearing activities were outside the scope of § 248, the case supports the opposite conclusion. The petitioner in *Beaver Wood* maintained that the manufacturing and electric generation facilities were interrelated such that they should be considered functionally one unit subject to § 248, but the Commission looked past the petitioner’s assertions and found otherwise. *See id.* at 4, 13–14 (PC 219, 224–25). In this case, the Commission looked past Allco’s assertion that the clearing was solely for agricultural purposes and found that it was, among other things, (1) a precursor to, (2) “explicitly linked” to, and (3) necessary for the construction of a proposed solar facility. *See* PC 58–60; *Beaver Wood* at 12–14 (PC 223–25). The Commission’s conclusion here is consistent with *Beaver Wood*, to the extent that case applies in this entirely different context.⁴

Allco next cites *Monument Farms* to suggest that the Commission previously endorsed the construction of a digester, a component of an electric facility, based only on representations “that the digester had agricultural purposes apart from its use in the electric generation facility.” *See* Appellants’ Br. at 3, 5 (quotation omitted). Reliance on *Monument Farms* is inapposite. The petitioner there was a CPG holder seeking to commence construction while its proposed CPG amendment was still pending. *Petition of Monument Farms*, Docket No. 7592, Order of 10/22/10 at 1 (Vt. Pub. Util. Comm.) (PC 208). Allco was not a CPG holder. The petitioner in *Monument Farms* sought approval to commence construction, while Allco proceeded in the face of an outright denial. *See* PC 61; *Monument Farms*, Order of 10/22/10 at 3 (PC 209). Most importantly, the Commission in *Monument Farms* was clear: “we cannot affirmatively authorize the commencement of site preparation and construction.” *Monument Farms* at 3 (PC 209).

While the petitioner there asserted that construction of the digester was outside the scope of § 248, the Commission lacked “both a sufficient factual record and a proper procedural foundation to issue a declaratory ruling.” *See id.* at 4 and n.7 (PC 210). For the same reason, the Commission could not conclude “that Monument Farms is barred from proceeding with construction of the digester.” *Id.* Given that the Commission did not have enough information to rule either way on the petitioner’s request to commence construction, the statement that “Monument Farms may proceed at its own legal and financial risk” was a simple acknowledgment of the status quo. *See id.* Allco chose to proceed at its own legal and financial risk in this case, and after two evidentiary hearings the Commission found that it initiated site preparation in violation of § 248(a)(2)(A).

Allco’s reference to the *Georgia Mountain* case is similarly unavailing. As stated there, “a petition filed under 30 V.S.A. § 248 does not terminate the ability of the

⁴ It is also worth noting that while the Commission in *Beaver Wood* found it lacked jurisdiction over the manufacturing facilities themselves, it retained jurisdiction to review the overall impacts at the site. *See Beaver Wood* at 16 (PC 226).

Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in [its] CPG.” *Petition of Georgia Mountain Community Wind*, Docket No. 7508, Memorandum of 1/5/12 at 3 (Vt. Pub. Util. Comm.) (PC 230). Yet, that general proposition simply does not apply to the case at hand. Setting aside the fact that *Georgia Mountain* related to potential CPG violations, not site preparation without a CPG, the logging activities considered there were being conducted in a separate location from the area to be used for an approved wind farm, on a parcel of approximately 700 acres.⁵ See *id.* at 3 and n.2 (PC 230). By contrast, Allco’s site clearing activities were conducted on a 27-acre parcel, at the site of a proposed solar facility. See PC 58.

For the reasons above, the contention that the Commission’s orders were arbitrary and capricious is without merit. See Appellants’ Br. at 11–12 (citing *Beaver Wood* and *Georgia Mountain* to argue that the Commission failed “to follow its long-standing prior approach”). Allco clings to the broad proposition that § 248 was not intended to cover farming or otherwise lawful activities, which is certainly true.⁶ However, the Commission did not seek to regulate Allco’s sheep or hemp operations. What Allco fails to address in any credible way is the Commission’s determination that the *site clearing* activity – the same activity on the same land that had been submitted for review under § 248 – was directly connected to Allco’s proposed solar facility, was unlawful, and threatened the integrity of the § 248 permitting process. See PC 58, 64.

Allco’s final argument with respect to site preparation illustrates the untenable nature of its position. Because it interprets the “reasonable relationship” standard to mean that a site improvement must be a physical part of a generation facility to fall within § 248 jurisdiction, and because the trees it removed from the site would not be a physical part of the solar facility, Allco contends that “[n]o [o]ffense [c]ould [b]e [c]ommitted.” See

⁵ The *Georgia Mountain* decision also scrutinized reported blasting activities as potential CPG violations, but found that “no credible information has been presented that blasting has occurred in relation to [the] wind farm project or in violation of [the] CPG. See *Georgia Mountain* at 4 (PC-231).

⁶ Allco also cites *Mollica v. Div. of Prop. Valuation and Review* in support of its argument that an overlapping use of land “does not change a farming activity to site preparation for an electric generation facility.” Appellants’ Br. at 5. That case simply has no relevance here. See *Mollica v. Div. of Prop. Valuation & Review*, 2008 VT 60, 184 Vt. 83. *Mollica* examined the eligibility of a building for enrollment in the “current-use” program for tax purposes, under the specific statutory criteria and definitions for that program. *Id.* ¶ 13–14. Allco appears to read *Mollica* as a blanket determination that any farming use on a property outweighs and supercedes other overlapping uses as a matter of law. See Appellants’ Br. at 5 (“[E]ven though the predominant use of the mobile home . . . was non-farm, this Court held that the use was for farm purposes.”). By that logic, Allco would not need a CPG for its proposed solar facility at all so long as it maintained a sheep farming business on the property.

Appellants' Br. at 8–9, 12. That narrow interpretation of the standard is unsupported and would be entirely unworkable if applied in this context. Because site clearing for a solar facility could never be a physical part of the facility itself, it would be impossible to violate the statutory prohibition on site preparation. *See* 30 V.S.A. § 248(a)(2)(A).

While Allco seeks to separate the question of whether it engaged in unlawful site preparation from the question of the Commission's general jurisdiction over its activities and the property at issue, its argument intertwines the two – and implicitly acknowledges the Commission's § 248 jurisdiction over companies or persons initiating site preparation for an electric generation facility without a CPG. The Commission's conclusion that Allco violated § 248(a)(2)(A) is correct, well supported, and consistent with precedent. Allco has not shown clear error, nor any other flaw in the Commission's findings or reasoning.

II. The Commission Correctly Determined that Allco and its Property at Apple Hill are Subject to Supervision under Title 30.

Allco raises a host of challenges to the Commission's authority and supervisory role, asserting that the Commission had no power to investigate, enjoin, or penalize its activities. *See* Appellants' Br. at 5–8. As a common thread throughout these arguments, Allco contends that neither it nor its property are subject to the supervision of the Commission under Title 30. *See id.* at 6–11. Allco makes this claim despite seeking and receiving two standard offer contracts to sell the electricity from the solar facilities it proposed on its property at Apple Hill, and despite spending years pursuing approval of those projects in various forms on the Willow Parcel and the Orchard Lot. *See* PC 38–40, 46, 49. In short: after submitting itself to and zealously availing itself of the statutory and regulatory framework, Allco seeks to place itself out of reach and refuses to acknowledge the most basic requirements.

The Commission found that it had jurisdiction over Allco under several provisions of Title 30, including 30 V.S.A. §§ 203, 209, and 248. PC 51. Sections 203 and 209 provide, in relevant part:

The Public Utility Commission and the Department of Public Service shall have jurisdiction over the following described companies within the State, their directors, receivers, trustees, lessees, or other persons or companies owning or operating such companies and of all plants, lines, exchanges, and equipment of such companies used in or about the business carried on by them in this State as covered and included herein. Such jurisdiction shall be exercised by the Commission and the Department so far as may be necessary to enable them to perform the duties and exercise the powers conferred upon them by law.

(1) A company engaged in the manufacture, transmission, distribution, storage, or sale of gas or electricity directly to the public or to be used

ultimately by the public for lighting, heating, or power and so far as relates to their use or occupancy of the public highways.

30 V.S.A. § 203; and

General jurisdiction. On due notice, 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. . . .

30 V.S.A. § 209(a).

Allco’s claim that it is not subject to the Commission’s jurisdiction under these statutes is dependent on a selective reading, devoid of context or any acknowledgment of past interpretations. As this Court has stated, “[t]he Legislature has granted the Commission oversight of electricity companies and electric-generation facilities.” *In re SolarCity Corp.*, 2019 VT 23, ¶ 11, 210 Vt. 51 (citing 30 V.S.A. § 203). Allco is a company that proposes to – and already does – “manufacture[]” and “sell[] electricity to be used ultimately by the public,” and is therefore within the jurisdictional scope of § 203. *See In re Proposed Sale of Vermont Yankee*, 2003 VT 53, ¶ 12, 175 Vt. 368 (citing 30 V.S.A. § 203) (quotation omitted); *see also In re Investigation to Review Avoided Costs that Serve as Prices for the Standard Offer Program in 2020*, 2021 VT 28, ¶ 8, 215 Vt. 140 (citing 30 V.S.A. § 8005a) (noting that “Vermont distribution utilities are required to buy the renewable power” generated by plants with standard offer contracts); PC 939 (“Respondents have three operational solar facilities in Vermont and a CPG for a fourth. . . .”). Likewise, “[b]ecause Allco is a corporation owning or operating . . . property subject to supervision under [Chapter 5],” Allco is subject to the Commission’s jurisdiction under § 209. *See* PC 52 (quotation omitted); 30 V.S.A. § 209(a).

Allco specifically argues that § 209(a) does not apply because its property is not “subject to supervision” under Chapter 5 of Title 30. Appellants’ Br. at 10. However, Chapter 5 includes 30 V.S.A. §§ 203, 209, and 248. Both Allco and its property at Apple Hill are squarely within the Commission’s regulatory authority under § 248 – and even dismissing §§ 203 and 209 altogether, § 248 provides an independent basis for jurisdiction.

Section 248 “sets forth the Commission’s authority and procedures respecting electric-generation facilities.” *In re SolarCity Corp.*, 2019 VT 23, ¶ 19, 210 Vt. 51. It reflects the Legislature’s determination that these facilities “are a matter of public concern that require government regulation, and it has explicitly entrusted the Commission, and only the Commission, with the authority to determine whether an electricity system will promote the public good.” *Id.* ¶ 19 (citing 30 V.S.A. § 248(a)(2)(B)). Section 248(a)(2) provides in part:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or

construction of an electric generation facility . . . within the State that is designed for immediate or eventual operation at any voltage

30 V.S.A. §§ 248(a)(2)(A).

As the Commission found, this applies to Allco because at the very least, Allco is a “person” as defined under 10 V.S.A. § 6001(14). *See* PC 53; 10 V.S.A. § 6001(14). By beginning site preparation that required Commission approval under § 248, Allco submitted itself to supervision under the statute. *See In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 21 and n.6, 210 Vt. 27 (examining closely analogous circumstances and finding that “[b]y erecting a tower that required approval under § 246, a provision of Chapter 5 of Title 30,” the appellant “subjected himself to [Commission] jurisdiction”). Indeed, Allco’s affirmative petition to build a solar project, encompassing its Willow Parcel and Orchard Lot properties, removes any doubt that it brought both itself and its property within the scope of § 248 authority. *See id.*; PC 46–47, 49 (making relevant findings).

Allco asserts that jurisdiction under § 248 attaches only after a CPG is issued. *See* Appellants’ Br. at 11. This is an untenable interpretation. The Commission has “such powers as are expressly conferred upon it by the Legislature, together with such incidental powers . . . necessarily implied as are necessary to the full exercise of those granted.” *See Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7 (1941). The Commission’s jurisdiction, while limited, should not be subject to “an overly narrow interpretation . . . at odds with the overall reason and spirit of the law.” *Grice v. Vermont Elec. Power Co.*, 2008 VT 64, ¶ 13, 184 Vt. 132 (quotation omitted). The statute’s plain language, prohibiting “site preparation for or construction of an electric generation facility” without a CPG, “highlights the Legislature’s intent to bring within the statute’s purview proposed construction, i.e., a facility that has not yet been built.” *See* 30 V.S.A. § 248(a)(2)(A); *Vermont Yankee*, 2003 VT 53, ¶ 10 (assessing the “triggering conditions” of § 248(a)(2)).

Thus, the Commission correctly determined that “jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.” PC 54. To hold otherwise would render the prohibition meaningless, as “developers could begin site preparation in advance of receiving Commission approval, thereby mooting out all review under the Section 248 criteria” by the relevant State agencies and the Commission itself. *See id.*; *SolarCity*, 2019 VT 23, ¶¶ 19–20 (discussing the Commission’s authority and obligation to determine whether a proposal will “promote the public good”); *State v. Yorkey*, 163 Vt. 355, 358 (1995) (“[W]hen we construe a statute, we must do so in a manner that will not render it ineffective or meaningless.”). Allco subjected itself and its property to supervision under § 248, and the record illustrates that it did not abandon its proposed solar projects before initiating the site clearing. *See, e.g.*, PC 47, 309; *In re Audet*, 2004 VT 30, ¶¶ 11–14, 176 Vt. 617 (mem.) (examining abandonment in the Act 250 context). As such, Allco’s jurisdictional challenges have no basis.

III. Allco was Subject to the Commission’s Enforcement Authority, Including the Authority to Investigate a Potential Violation, Issue an Injunction, and Issue a Penalty.

Allco’s remaining challenges to the Commission’s authority suggest that the Commission had no power to (1) investigate a potential violation, (2) issue an injunction to prevent unlawful conduct and associated harms, or (3) issue a civil penalty for the violation of a statutory prohibition. *See* Appellants’ Br. at 7. As addressed below, these contentions are without merit.

A. The Commission has authority to investigate potential violations of § 248(a)(2)(A).

Allco argues that Commission lacked authority to open or maintain the investigation below, because its power “is limited to express statutory authorizations.” *Id.* As previously noted, the Commission also has “such incidental powers . . . necessarily implied as are necessary to the full exercise of those granted.” *See* Appellants’ Br. at 6 (quoting *Trybulski*, 112 Vt. at 7). The Commission is granted authority over electric generation facilities under § 248, which includes the prohibition on advance site preparation. *See* 30 V.S.A. § 248(a)(2)(A); *SolarCity*, 2019 VT 23, ¶¶ 18–19, 24. Through 30 V.S.A. § 30, the Commission is authorized to impose a civil penalty on “[a] person . . . subject to the supervision of the Commission . . . who violates a provision of section . . . 248.” *See* 30 V.S.A. § 30(a)(1); *Meteorological Tower*, 2019 VT 20, ¶ 14, 18, 210 Vt. 27 (discussing §§ 30(a)(1) and (2)). Finally, 30 V.S.A. § 8(a) authorizes “[o]ne Commission member or any officer or employee of the Commission duly appointed” to “inquire into and examine any matter within the jurisdiction of the Commission.” 30 V.S.A. § 8(a); *see also SolarCity*, 2019 VT 23, ¶ 4 n.5 (noting the same).

If the Commission is to evaluate a potential violation of § 248(a)(2) and consider an appropriate penalty under § 30(a)(1), it follows that it must have the authority to investigate the matter. Furthermore, if § 8(a) allows the Commission to appoint a hearing officer to investigate on its behalf, the Commission itself must have the same authority. *See SolarCity*, 2019 VT 23, ¶ 4 n.5; *Trybulski*, 112 Vt. at 7 (describing powers “necessarily implied”). The *SolarCity* case concerned violations of § 248 and began with a petition from the Department – yet the investigation was initiated by the Commission itself, and there is no reason why it could not do so *sua sponte* in fulfilling its responsibilities under Title 30. *See SolarCity*, 2019 VT 23, ¶¶ 4, 20 (discussing the Commission’s “statutory obligation” under § 248); *Investigation Pursuant to 30 V.S.A. §§ 30, 209, 247, 248, & 8010 into the Manner in Which SolarCity Corp. Conducts Its Business in Vermont*, Docket No. 17-4158-PET, 2017 WL 4467342, at *1 (Sept. 14, 2017) (opening the investigation).

Allco’s contention that an investigation must be opened by the Department under 30 V.S.A. § 30(h) is misplaced. *See* Appellants’ Br. at 5–7. Subsection 30(h) states that “the Department may issue an administrative citation to a person the Department believes

after investigation violated section . . . 248.” 30 V.S.A § 30(h). As the Commission has previously found, “subsection 30(h) does not override the provisions of subsections (a) and (b). It simply provides an alternative mechanism for enforcement.” *Investigation Pursuant to 30 V.S.A. §§ 30 & 209 into Alleged Violation of Otter Creek Solar, LLC’s Certificates of Pub. Good*, Docket No. 19-1596-INV, 2021 WL 1270242, at *3 (Apr. 1, 2021). It is evident from the plain language that § 30(h) is permissive. *See* 30 V.S.A. § 30(h); *State v. Boyajian*, 2022 VT 13, ¶ 22, 216 Vt. 288 (“The plain, ordinary meaning of the word ‘may’ indicates that a statute is permissive and not mandatory.”) (quotation omitted). The Commission was well within its authority to open and carry out the investigation.

B. The Commission had authority to issue the injunction.

Allco’s argument that the Commission lacked the power to issue an injunction fails as well. As set forth under 30 V.S.A. § 9, the Commission has “the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction.” 30 V.S.A. § 9. This includes the ability to “render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.” *Id.*; *see also* *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293 (1996) (the Commission “has all the powers of a trial court” in matters within its jurisdiction). Vermont’s courts are unquestionably authorized to issue injunctions, and the Commission has promulgated rules governing its process for issuing temporary restraining orders, preliminary injunctions, and permanent injunctions. *See* Commission Rule 2.406 (18-1-1 Vt. Code R. § 2.406).

Allco appears to suggest that pursuant to 30 V.S.A. § 32, injunction proceedings for any alleged violations must be initiated by the Department in Superior Court. This is unsupported: § 32 is permissive rather than mandatory and relates to the Department’s authority rather than that of the Commission. *See* 30 V.S.A. § 32. Moreover, this Court has considered the Commission’s powers in other contexts and found that “the [Commission] and the superior court had concurrent jurisdiction.” *See, e.g., Barnet Hydro Co. v. Pub. Serv. Bd.*, 174 Vt. 464, 467 (2002) (affirming the Superior Court’s deferral to an ongoing Commission proceeding). The Commission had ample authority to enjoin Allco from continuing site preparation activities.

C. The Commission had authority to issue the civil penalty.

Allco’s final challenge to the Commission’s authority concerns its ability to issue a civil penalty pursuant to 30 V.S.A. 30(a)(1). *See* Appellants’ Br. at 8; PC 1, 8–18 (imposing a \$5,000 penalty). Section 30(a)(1) states:

A person, company, or corporation subject to the supervision of the Commission . . . who violates a provision of . . . section . . . 248 of this title . . . shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing.

30 V.S.A. § 30(a)(1).

In unambiguous language, “Section 30(a)(1) provides a penalty for violations of § 248.” *Meteorological Tower*, 2019 VT 20, ¶ 14. Allco’s sole argument to the contrary is that it is not “subject to the supervision” of the Commission, and therefore no penalty could be imposed. *See* Appellants’ Br. at 8. As discussed at Section II of this brief, there is no question that Allco is subject to the Commission’s supervision as a person, company, or corporation who was developing electric generation facilities and who violated the statutory requirements for the same.⁷ Despite actively participating in the regulatory framework under Title 30 and seeking to avail itself of the associated benefits, Allco forcefully contends that it shoulders none of the attendant responsibilities. This is not so, and the Commission appropriately investigated, enjoined, and penalized its unlawful conduct.

IV. Allco’s Constitutional Arguments are Unavailing

The remaining issues to be addressed here are Allco’s constitutional challenges, alleging violations of due process and fair notice, the separation of powers, and the right to a jury trial. Each of these are unavailing.

A. Allco has not shown a violation of due process or fair notice requirements with respect to the penalty phase or the applicable terms of §§ 248(a)(2)(A), 30(a)(1).

Allco suggests that it was required to speculate as to the meaning of § 248(a)(2)(A) regarding site preparation and did not have fair notice of the penalty it would receive. *See* Appellants’ Br. at 12 (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)). Yet § 248(a)(2) unmistakably establishes a blanket prohibition on site preparation for an electric generation facility without a CPG. *See* 30 V.S.A. §§ 248(a)(2)(A), (B); *Vermont Yankee*, 2003 VT 53, ¶ 9 (noting the “unambiguous terms” of § 248(a)(2)). Likewise, § 30(a)(1) clearly states that a person who violates § 248 “shall be required to pay a civil penalty.”

⁷ Allco appears to argue that its wholesale standard offer contracts preempt Commission supervision altogether because Allco’s proposed facilities are qualifying facilities (“QFs”) under the Public Utility Regulatory Policies Act (“PURPA”). *See* Appellants’ Br. at 8. This is unsupported. As relevant here, PURPA governs the purchase or sale of electricity from QFs under certain circumstances. *See generally* 16 U.S.C. § 824a-3; *Allco Fin. Ltd. v. Roisman*, No. 2:20-CV-103, 2020 WL 6150971, at *3–5 (D. Vt. Oct. 20, 2020) (describing the “statutory and regulatory framework” under PURPA as well as Vermont’s Standard Offer program). Further, “under Vermont’s implementation of PURPA, the Legislature’s grant of power to the [Commission] is very broad.” *Vermont Elec. Power Producers*, 165 Vt. 282, 289 (1996) (quotation omitted); *see also Allco v. Roisman*, No. 2:20-CV-103, 2020 WL 6150971, at *4 (citing 30 V.S.A. § 209(a)(8)) (“The [Commission] has adjudicative jurisdiction over Vermont’s qualified facilities.”).

See 30 V.S.A. § 30(a)(1). The maximum penalty is expressly provided under § 30(b), with the precise amount to be determined by the Commission after considering the relevant factors under § 30(c). *See* 30 V.S.A. §§ 30(b), (c).

Having voluntarily petitioned for approval of a solar facility at the Apple Hill site, Allco should have known that initiating *any* site preparation work while the review was pending would violate the statutory prohibition and risk the imposition of a commensurate penalty. *See In re Palmer*, 171 Vt. 464, 472 (2000) (“Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices will satisfy due process.”). With respect to the penalty phase of the investigation, Allco was certainly put on notice when the Commission opened the proceeding “pursuant to” § 30 and later directed the parties to prepare for the penalty phase. *See* PC 98, 66.

Allco’s arguments as to the vagueness of “site preparation” under § 248(a)(2)(A) are predicated on a facial challenge and must fail. *See* Appellants’ Br. at 12, 14–15 (asserting that the statute is unconstitutionally vague and standardless). Allco contends that § 248(a)(2)(A) lacks sufficient guidance and “seeks to invalidate the provision outright.” *See In re Investigation to Review Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019*, 2020 VT 103, ¶ 43. As this Court recently explained, “the Commission lacks jurisdiction to adjudicate a facial challenge to a statute.” *In re Petition of Apple Hill Solar LLC*, 2023 VT 57, ¶ 33. To the extent Allco argues that the Commission has abandoned longstanding precedent or misapplied the “reasonable relationship” standard, those arguments are addressed at Section I above.

B. Allco has not shown a violation of the separation of powers with respect to the Commission’s Injunction Order.

Asserting that the power to enjoin “a use of private real property” would be an impermissible delegation, Allco appears to argue that 30 V.S.A. § 9 is unconstitutional. *See* Appellants’ Br. at 17; 30 V.S.A. § 9 (granting the powers of a court of record). For the reasons described above, this argument fails as a facial challenge. *See Apple Hill*, 2023 VT 57, ¶ 33. Further, the authority under § 9 “specifically relate[s] to those matters within [the Commission’s] jurisdiction . . . to be exercised in the interest . . . of the general public.” *See Trybulski*, 112 Vt. 1, 8. As in *SolarCity*, the proceeding here concerned a violation of § 248 and “did affect the public interest.” *See SolarCity*, 2019 VT 23, ¶ 19. The Commission was not carrying out a purely judicial function “to decide a question of private right,” it was fulfilling its supervisory obligation “in the interest and for the welfare of the general public.” *See Trybulski*, 112 Vt. at 8. As such, the Commission’s Injunction Order did not offend the separation of powers. *See id.*

C. Allco has not shown a violation of due process with respect to the Commission's Penalty Order.

While Allco suggests that the Commission violated its due process rights by denying in part its request for a third evidentiary hearing, Allco's brief does not actually include an identifiable argument to that effect. *See* Appellants' Br. at 17–18; PC 28, 31 (granting a limited evidentiary hearing related to certain penalty factors). Instead, Allco challenges the determination that its unlawful conduct harmed the regulatory process, which formed part of the basis for the Commission's penalty assessment. *See* PC 9–12, 18. This was not unprecedented or unauthorized.

The Commission's Penalty Order speaks for itself, setting forth its reasoning with numerous references to prior cases. *See* PC 10 (“When an entity acts within the Commission's jurisdiction but without Commission approval, such conduct undermines the integrity of the regulatory review process, which exists to protect the public from harm.”) (quotation omitted). Within certain bounds, the exact amount of a penalty is left to the Commission's discretion. *See* 30 V.S.A. 30(c) (outlining factors that “may” be considered); *In re Citizens Utilities Co.*, 171 Vt. 447, 457 (2000) (considering a penalty issued outside of the § 30 framework and stating: “ultimately the amount must be based on the seriousness and nature of the grounds, and what action is necessary to prevent reoccurrence”). Allco has not shown a due process violation nor any reason to disturb the Commission's determination.

D. Allco was not entitled to a jury trial under the Vermont Constitution.

Allco's final argument is that it was deprived of the right to a jury trial. This claim is easily dismissed. The right to a jury trial in Vermont does not apply in equitable proceedings, and environmental enforcement actions seeking injunctive relief and civil penalties have been found to be “essentially equitable in nature.” *See State v. Irving Oil Corp.*, 2008 VT 42, ¶ 1, 183 Vt. 386 (holding that “the right to trial by jury does not attach”). In *State v. Irving Oil Corp.* this Court examined civil penalty assessment factors very similar to those under 30 V.S.A. § 30(c), finding “a legislative intent to assign the careful balancing of equities” to “the agency traditionally entrusted with such decisions: a judge rather than a jury.” *See id.* ¶ 18. Allco's argument has no merit. *See PLH Vineyard Sky LLC v. Vermont Pub. Util. Comm'n*, No. 2:23-CV-154, 2024 WL 1072017, at *12 (D. Vt. Mar. 12, 2024) (finding “no right to a jury trial in the proceedings before the [Commission]”).

CONCLUSION

For the foregoing reasons, the Commission's decisions should be affirmed.

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CERTIFICATE OF COMPLIANCE

Ben Civiletti, Special Counsel for the Vermont Department of Public Service, hereby certifies that this brief complies with the word-count limit in V.R.A.P. 32(a)(4). According to the Microsoft Word processing software used to prepare this brief, the text of this brief contains 7,968 words.

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