

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Road Solar LLC for a
Certificate of public good, pursuant to 30
V.S.A. §§ 248 and 8010, authorizing the
Installation and operation of a 500kW group
Net-metered solar electric generation system in
Randolph, Vermont

Case No. 21-2939-NMP

**NEIGHBOR INTERVENORS' OBJECTION TO THE PUBLIC
COMMENT & EVIDENCE SUBMITTED ON JANUARY 9, 2024**

January 23, 2024

Now come Neighbor Intervenors Joan Allen and Michael Binder, *pro se*, and respectfully request the Commission reject, or give no weight to the evidence and public comment submitted on January 9, 2024 in response to the Commission's October 11, 2023 Order.

Exhibits

NI JA-MB-9 OCR version of Public Records Request

NI JA-MB-10 emails between Michael Binder and the Town of Randolph

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Introduction

The Commission (on October 11, 2023) ordered the Petitioner to submit new evidence that the Randolph Selectboard and Planning Commission have determined that the conditions in exhibit RDS MS-14 (a letter from Planning Commission Chair Sonny Holt to the Petitioner) have been satisfied. In response to that Order, on January 9, 2024 the Town of Randolph filed Public Comment and the Petitioner filed evidence.

The evidence and the public comment that were submitted do not indicate that the conditions in exhibit RDS MS-14 have been satisfied. In particular, Sonny Holt's letter states:

“We request that the onsite survey data mentioned above be provided to both the Town of Randolph and the Allen/Binders. We further request to see your final Solar Array plot plan prior to construction.”

The Petitioner went to the Town Selectboard (12/14/23) and Planning Commission (1/3/24) and had them evaluate a Site Plan that was filed with the Commission on February 25, 2022. That Site Plan, the third of six Site Plans that the Petitioner submitted to the Commission, is obsolete and it is not the final Solar Array plot plan. Both the arrangement of the solar array, and the slope layers are different in the final (sixth) site plan.

Site Plan Reference Page from Page 2 of exhibit NI MB-39 “A Slippery Slope”

Site Plan	Date Filed	Exhibit Name	revision date	Array	LoD	Contours Major/Minor	Source of Contour Lines	Source of 25% Slope Layer	Road Cut & Fill	Elevation Drawing
First	8/8/21	MS-2		1 group	11.9 acres	5 ft/1 ft	Everywhere - LiDAR	no slope layer	shown	Yes
Second	2/16/22	MS-2	2/9/22	rearranged into 2 groups	11.9 acres	5 ft/1 ft	Around Array - Survey Elsewhere - LiDAR	no slope layer	shown	No
Third	2/25/22	MS-2A	2/22/22	no change	11.9 acres	10 ft/2 ft	Around Array - Survey Elsewhere - LiDAR	Around Array - Survey Around Road - None Remaining LoD - None	shown	Yes
Fourth	4/19/22	MS-2B	4/18/22	no change	11.9 acres	10 ft/2 ft	Around Array - Survey Elsewhere - LiDAR	Around Array - Survey Around Road - LiDAR Remaining LoD - None	not shown	Yes
Fifth	6/24/22	MS-2	6/17/22	rearranged (still 2 groups)	11.6 acres	10 ft/2 ft	Around Array - Survey Elsewhere - LiDAR	Around Array - Survey Around Road - LiDAR Remaining LoD - None	not shown	No
Sixth	7/13/22	MS-2	7/13/22	no change	11.6 acres	10 ft/2 ft	Around Array - Survey Elsewhere - LiDAR	Around Array - Survey Around Road - LiDAR Remaining LoD - LiDAR	not shown	No

About the Quotations

The December 14, 2023 Randolph Selectboard meeting was recorded by Onion River Community Access. In the present Motion, quotations from the recording have time stamps in brackets. The discussion of this case begins at [1:29:45].

The recording may be seen/heard at: <https://www.youtube.com/watch?v=imvI5HnYjEo>

An Obsolete Site Plan

At the December 14, 2023 Selectboard meeting, Mr. Binder pointed out that Sonny Holt's letter (RDS MS-14) requested to see the final solar array plot plan, but the Petitioner showed an obsolete Site Plan to the Town (Site Plan 3) which was not the final plan (Site Plan 6).

In response, Norwich Solar Technology's CEO, Jim Merriam said:

[1:42:30] "The third out of six was the drawing that was at the time when the letter [RDS MS-14] came out and is consistent with that."

[1:43:18] "This [referring to site plan 3] was the one that was consistent with the time when the letter [RDS MS-14] came out and the PUC was looking to complete the evidentiary record. We can provide 6 and we can provide 3 because I feel like if we provide 6 the question, and statement, would be: 'well that this is not the one that was at the time when the letter came out from the town'."

Later, Mr. Merriam reiterated:

[1:46:43] "It is at the time - that's why we put this drawing in here, at the time, it was to show the final, depending on how you want to look at final, that was the final drawing at that point" [interrupted]

Selectboard Chair Trini Brassard completed his sentence:

[1:47:05] "at the time Sonny wrote his letter."

Followed by Mr. Merriam proclaiming:

[1:47:07] "Right!"

Brendan Malley, representing the Petitioner, then spoke:

[1:48:26] "One thing I might say is just the condition that has to be met is the condition that at the time Sonny as Chair wrote his letter and that's the condition that we met by providing this site plan."

Michael Binder rebutted:

[1:56:07] "this [referring to site plan 3] is not the site plan that Sonny ever saw. Sonny saw the first site plan and requested that they make changes, which resulted in a second site plan and this is the third [gesturing to the screen] and there's been a fourth, fifth, and a sixth. Sonny only saw the first one and he requested to see the final one prior to construction."

A Condition that Can't be Met

Referring to Sonny Holt's request to see the final solar array plot plan prior to construction, Mr Merriam said:

[1:46:04] "it's a bit of a circular argument there, you can't go to construction"
[interrupted]

Chair Brassard, completing Mr. Merriam's sentence:

[1:46:09] "without their [the PUC] permit." ... "So it feels like what they're [the PUC] asking us to do [pause] is to confirm that a condition has been met that can't be met until you have their permit."

Town Manager Trevor Lashua asked:

[1:54:27] "Site plan 6 is the final solar array plot plan prior to construction?"

Mr. Merriam answered:

[1:54:36] "It's the final plan that is available right now."

Mr. Lashua, thinking out loud:

[1:54:42] "So until your permit is ready to go to construction you can't fully satisfy, but this is as close [pause] I'm just trying to figure out... [interrupted]"

Mr. Satcowitz:

[2:04:48] "Because like you said before, it's sort of a chicken or the egg kind of thing, we can't do one that requires the other and go back in time."

Chair Trini Brassard:

[2:07:43] "We won't have that [the final site plan] until they go to construction and they're not going to construction. They're in the PUC process right now, that plan could change again We're not going there because that one can't be met. They wouldn't ask us to confirm its been met when it can't be met."

Mendacity

Two years ago, at the January 2022 Randolph Selectboard meeting, Jim Merriam, CEO of Norwich Solar Technologies, described how his company had filed a letter with the PUC accepting, as a condition of their permit, that they would not place solar panels on slopes greater than 25%. He emphasized repeatedly that the Public Utilities Commission will enforce that condition.¹

¹ Exhibit NI MB-12 page 1, exhibit MB-22 at 0:51:09

The intervenors would be thrilled if Mr. Merriam was correct and the Commission will enforce the Town's slope requirement for a Preferred Site Letter.

In her PFD, the Hearing Officer felt that the Petitioner's mendacity, in its presentations to the Town about the project and about the Town's and the Commission's role in regulating the project, was so egregious as to warrant denying the project a CPG. However, the Commission explained:²

"Absent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred."

In rejecting the PFD and remanding the case back to the Hearing Officer, the Commission has telegraphed to the Petitioner that the Petitioner may continue to misrepresent this project (including the regulatory roles of the Town and the Commission) to the Town with impunity.

And indeed, the Petitioner has continued to do so. At last month's Selectboard meeting (December 2023), Mr. Merriam told the Town that the Intervenors' slope concerns were not a matter for the Town, but for the Commission:

[1:42:45] "I think if you read the order, above the request for the order there is a pathway for landowners adjacent to adjudicate their grievances, which the PUC has clearly pointed out is within the PUC."

and he implied that the Commission will determine if the slopes under the panels are less than 25%:

[1:43:41] "All I am trying to do is meet the request of the Public Utilities Commission which has asked the applicant to come and simply show you the drawing, independent 3rd party survey drawing, that has not been discredited by the Public Utilities Commission. If the drawing is incorrect, that can be taken up with the Public Utilities Commission in the manner that they have expressed, in the order it should be done."

Mr. Merriam's view of the Town's and the Commission's regulatory roles was embraced by the Selectboard. Chair Brassard, referring to Mr. Binder's objection to evaluating Site Plan 3 rather than the final site plan, said:

[2:02:08] "I mean, if there's another version, that can be contested at their [PUC] level"

² Commission Order 10/11/23 page 30-31

Selectboard member Larry Satcowitz:

[2:02:46] "and if the survey data is wrong, if they did something wrong, then that's a whole other issue. We're not affirming whether the survey is done properly or not. All we would be affirming is that we have seen the survey and that the survey that we have seen indicates that this parcel conforms with our preferred site."

After Michael Binder asked:

[2:05:10] "May I present the evidence that the PUC has seen [exhibit NI MB-39] that shows that the panels are on greater than 25% slopes?"

Selectboard Chair Brassard answered:

[2:05:16] "I don't think we... that's not our" [interrupted]

Selectboard member Tom Ayers finished her sentence:

[2:05:17] "purview, That's their [the PUC] purview"

Responding again to Mr. Binder's charge that the site plan slope layer was defective, Selectboard Chair Brassard said:

[2:05:20] "I mean now you're getting [pause] we would need the other [pause] the surveyor here to counter what's being said. Are you a surveyor?"

Mr. Binder replied:

[2:05:28] "I worked as a surveyor, I'm not licensed"

Selectboard Chair Brassard responded:

[2:05:31] "now you're on an expert vs expert [pause] that's the PUC's job."

Without having seen any evidence that Mr. Binder offered to present, Chair Brassard reiterated:

[2:06:23] "I'm not able to tell whether you or their surveyor are the right party. I don't know if any of us has the technical skills to say you're right or they're right. What we have to rely on is this is a licensed surveyor that stamped this plan. If it's wrong you should take it up with the folks at the" [interrupted]

Mr. Binder, interrupting:

[2:06:49] "First of all, that's not a licensed surveyor's plan" ...

Motivation to Show Site Plan 3

At the February 2022 scheduling conference, the Hearing Officer requested that the Petitioner overlay a 25% slope layer on the site plan. It took 4 site plans and many requests³ over a period of 5 months before the Petitioner complied and produced a slope layer over the whole 11.6 acre Limits of Disturbance (site plan 6).

The reason for the Petitioner's reluctance⁴ (after site plan 3) to produce a slope layer over the whole Limit of Disturbance was because it would look ridiculous. The Petitioner contrived a 4 acre slope layer under and around the array (site plan 3) to hide the 25% slopes that would be seen on a LiDAR slope layer.⁵ The engineer (not a licensed surveyor) who produced the Petitioner's site plans admitted in Discovery that a LiDAR slope layer would reveal areas of greater than 25% slope that are not shown by his [contrived] ground-based survey slope layer.⁶

When the Petitioner contrived the 4 acre slope layer under and around the array in site plan 3, they painted themselves into a corner.⁷ When pressed to produce a more complete [11.6 acre] slope layer, the Petitioner's only option was to put a LiDAR slope layer **alongside** the contrived layer. Ultimately the Petitioner did so (site plan 6) and it looks ridiculous.

At the recent Town meetings (December 2023 Selectboard and January 2024 Planning Commission), the Petitioner's motivation not to show the most recent site plan (version 6) is clear: It looks ridiculous, and it appears obvious,⁸ even to a casual observer, that the slope layer under and around the array is contrived and does not have the appearance that a slope layer on a natural landscape would have.

³ exhibit NI MB-49

⁴ exhibit NI MB-39 page 24

⁵ exhibit NI MB-39 page 22

⁶ Exhibit NI MB-38 page 12

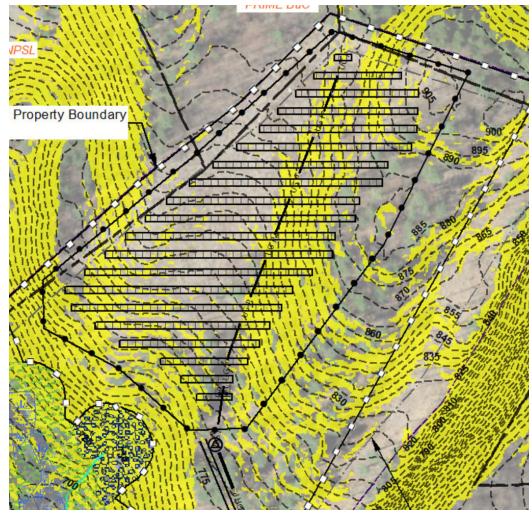
⁷ exhibit NI MB-39 page 24

⁸ exhibit NI MB-39 page 25

This LiDAR Slope Layer was Buried

When the Intervenor's first alerted the Town (October 2021) that the Preferred Sites Letters were issued in error, the Town requested the Petitioner overlay a 25% slope layer on the site plan. Inasmuch as a LiDAR slope layer can be added with the click of a mouse, the Town received the requested slope layer by email (see NI MB-33) a mere one hour and 34 minutes after requesting it.⁹ The overlay was placed on the preliminary site plan the Town had seen in June 2021.

from Exhibit NI MB-33



It is noteworthy that this preliminary site plan (NI MB-33), sent by email in October 2021 to Josh Jerome [zoning director and assistant to the Planning Commission], was not mentioned by Mr. Jerome or any members of the Planning Commission at the December 2021 Planning Commission meeting, at which meeting the Intervenor's struggled to convince the Planning Commission that the project was on impermissibly steep slopes.¹⁰ The Intervenor's learned of this LiDAR slope overlay after the December 2021 Planning Commission meeting and after the January and February 2022 Selectboard meetings. As of today, this LiDAR slope layer, which was produced by the Petitioner, has not been viewed at any Randolph Selectboard or Planning Commission meeting. Mr. Binder compared this LiDAR slope layer to the Petitioner's many site plans in Exhibit NI MB-39 "A Slippery Slope".

⁹ Binder RebT page 3

¹⁰ See Exhibit NI MB-30 page 9

To Whom the Order Applies

When Mr. Merriam emailed the Town¹¹ to schedule consideration of the present matter he wrote: [**Bold** emphasis in the original, underlined emphasis added]

Good Morning Trevor,

I am reaching out regarding a specific request from the Vermont Public Utilities Commission (PUC) concerning the Davis Hill Solar Project situated in Randolph.

In a recent Order, the PUC has stipulated that the Randolph Planning Commission and Select Board provide confirmation that the applicant, Norwich Technologies, has presented site plans that adhere to the requirement of not installing solar panels on slopes exceeding 25%. The PUC has mandated that this confirmation be submitted by January 11th. I have for convenience attached both the current Order from the PUC and the referenced documents in the Order which is the basis of the request. This information was a topic of discussion in previous meetings at the Selectboard and Planning Commission.

Understanding the significant impact on the municipal bodies in Randolph this project has created, I deeply appreciate the collaborative efforts extended by everyone involved to date. To alleviate any additional burden, I have prepared a **draft letter (ATTACHED)** that, once signed by the Boards, would satisfy the PUC's request.

I am seeking guidance on the most efficient and effective approach to meet the PUC's requirements and ensure compliance with the stated mandate. Your advice is greatly appreciated.

Thank you for your attention and prompt action on this matter.

The underlined wording in Mr. Merriam's email (above) gave the impression that the Commission was ordering the Town to look at the specific documents (including the obsolete site plan) that Mr. Merriam attached for the Town's convenience.

There was obvious confusion on the Selectboard about to whom the Commission Order was directed. More than 33 minutes into the discussion Chair Brassard said:

[2:03:14] "if the PUC wanted us to say [pause] if the PUC said to us 'evaluate version six' they should have included it. Right?"

Selectboard member Ayers asked:

[2:04:00] "So, I have a question of Michael [Binder], you're contending that this request is coming through Norwich Solar and not directly from the PUC?"

¹¹ Exhibit NI JA-MB-9 pages 3 - 4

A Respectful Suggestion

Intervenor respectfully suggest that the Commission issue an Order Requesting Additional Information. In particular, an Order requesting the Petitioner produce a (seventh) site plan with LiDAR contour lines¹² and a LiDAR 25% slope layer over the Limits of Disturbance. This would not be an onerous task for the Petitioner, LiDAR contours and slope layers can be applied with the click of a mouse.

In her PFD [page 26], the Hearing Officer wrote of competing slope evidence: [emphasis added]

“The difference between the competing evidence appears to be due to the parties measuring the slope of the land using different horizontal [sic] scale between data points. **There is not enough evidence in the record to determine which method is more appropriate in this context.**”

It is noteworthy that the competing evidence referred to in the PFD is the Petitioner's evidence competing with the Petitioner's evidence (the LiDAR slope layer in exhibit NI MB-33 competing with the contrived slope layer in site plans 3 through 6).

If the Petitioner produces site plan 7 with a LiDAR slope layer, and if the Commission will reject the public comment and evidence that are based on the Town's review of an obsolete site plan, then it would be reasonable and prudent for the Commission to order the Petitioner to go back to the Town with both site plans 6 and 7. Such an Order would mean the Town would see both the Petitioner's LiDAR slope layer and the Petitioner's contrived slope layer, and that evidence would inform the Town so that the Town might be able to determine if the conditions in RDS MS-14 have or have not been met.

An Order from the Commission for the Petitioner to show the Town a final site plan would not be entirely unexpected: Selectboard member Ayers asked:

[1:53:04] “Do you anticipate they may ask us to weigh in on [site plan] 6 too?”

Chair Brassard asked:

[1:58:16] “if they [Norwich Solar] went on [to create other versions] does that mean version 6 eventually has to come back and be given to the planning commission?”

¹² The first site plan had LiDAR contour lines throughout, but no slope layer.
See exhibit NI MB-39 “A Slippery Slope” page 2

Selectboard member Ayers asked:

[1:58:48] "is it within — you might know this better than the rest of us— is it within the PUC's purview to say 'we want version 6 to go back to the planning commission for a final review?'"

Chair Brassard said:

[2:08:19] "But the PUC's going to see that's what we made our decision on [site plan 3]. If they get to it and say whoa! this is so different from, we actually want the town to look at version 6 and tell us what they think of that, they'll send it back to us again."

The Planning Commission

The Randolph Planning Commission met in a special meeting on January 3, 2024 to consider whether the conditions in RDS MS-14 had been satisfied. Intervenor's do not have a recording. The Planning Commission was prepared to vote without any discussion until Mr. Binder protested the lack of discussion and was given 5 minutes to speak. The Planning Commission did not show or produce any site plans or other documents during the meeting.

The Intervenor's submitted some of their PUC exhibits and testimony to the Planning Commission¹³ in October 2023, and then again on December 31, 2023 and January 1, 2024 after being informed of the date (January 3rd) of the special meeting. The Intervenor's exhibits were not forwarded to members of the Planning Commission.¹⁴ The Planning Commission members, like the Selectboard members three weeks earlier, saw only what the Petitioner chose to show them.

¹³ see Exhibit NI JA-MB-10 emails between Michael Binder and Town

¹⁴ see Exhibit NI JA-MB-9 which is the response by the Town to the Intervenor's Public Records request for communications between and among Norwich Solar Technology, Town staff, and Town officials.

Conclusion

The Intervenors believe that the spirit and intent of the Commission's Oct 11, 2023 Order was NOT for the Town to determine if an obsolete site plan satisfies the conditions in Sonny Holt's letter [RDS MS-14]. The submitted evidence, because it is based on the Town's review of an obsolete site plan, should be rejected or given no weight and the project should be denied a CPG.

In the alternative, because the Town will only be informed by what the Petitioner chooses to show the Town, the Commission should order the Petitioner to show the Town a site plan with a LiDAR slope layer over the array so that the Town will be able to make an informed and credible determination that the conditions in RDS MS-14 have or have not been satisfied.

Dated at Randolph, Vermont this
23rd day of January, 2024

/s/ Joan Allen

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Dated at Randolph, Vermont this
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