STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-3587-NMP

Petition of Norwich Upper Loveland 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 (AC) group net-metering solar electric generation system in Norwich, Vermont	

Order entered: 06/12/2024

ORDER GRANTING MOTION FOR RECONSIDERATION

This case involves an application filed with the Vermont Public Utility Commission ("Commission") by Norwich Upper Loveland Solar, LLC ("Applicant") for a certificate of public good ("CPG") to construct and operate a 500 kW solar electric generation project in Norwich, Vermont (the proposed "Facility"). In this Order, we grant the Applicant's motion for reconsideration of our April 26, 2024, Order.

I. PROCEDURAL HISTORY

On April 26, 2024, we issued an order directing the Applicant to file evidence demonstrating that the Norwich Planning Commission and Norwich Selectboard ("Municipal Entities") continue to support the Facility location as a preferred site. Confirming municipal support, we explained, would resolve perceived ambiguities in the record related to whether the Municipal Entities received notice that the Facility layout had changed.

On April 30, 2024, the Applicant filed a motion for relief from the Commission's Order, arguing that the Order overlooked evidence in the existing record that demonstrated that the Municipal Entities have considered the Facility as currently proposed and continue to support the Facility location as a preferred site.

On May 14, 2024, the Vermont Department of Public Service ("Department") and Intervenors Stephen Gorman, John and Heather Benson, Jayoung Joo and Samin Kim, Dan & Jenn Goulet, Larry Ufford, and Joy Kenseth ("Intervenors") filed responses to the Applicant's motion. The Department agreed with the Applicant's requested relief and asked that the

Commission reconsider its Order. The Intervenors opposed the motion and argued that relief from the Commission's Order should not be granted.

II. THE PARTIES' POSITIONS

Applicant

The Applicant argues that requiring the Municipal Entities to reconfirm their support for the Facility site "would be contrary to the evidence, extremely prejudicial, and clear and reversible error."[1] The Applicant cites the Commission's Order in *Randolph Davis Solar LLC* for the applicable standard, which is that "[a]bsent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred."[2] The Applicant acknowledges that the Commission requested confirmation of preferred siting support in *Randolph Davis Solar*, but argues that "it is distinguishable because there the town had conditioned its support on the Applicant relocating the Project's solar panels to areas with slopes less than 25% and on the Applicant providing survey data to the town." The Applicant argues that there are no extraordinary circumstances nor any similar condition on the Municipal Entities' support here.[3]

The Applicant asserts that the Commission's Order is premised on an incorrect assumption and incomplete review of the evidence. According to the Applicant, a "key piece of material evidence, never mentioned in the Order," is a chronology that was purportedly prepared for the current Town Planning Commission Chair for a July 11, 2023, Planning Commission meeting. The chronology was included in exhibit NUL Reply Brief-5, which is the meeting packet for the Norwich Planning Commission's July 11, 2023, meeting. NUL Reply Brief-5 is not part of the evidentiary record but was recommended by the Hearing Officer for inclusion in the evidentiary record under 3 V.S.A. § 810(4).

The Department

The Department does not join in the Applicant's motion but agrees with the Applicant's primary assertion that the preferred-site letter should receive its full evidentiary weight. The

[1] Motion at 8.

[2] *Id.* at 1 (quoting *Petition of Randolph Davis Solar LLC for a certificate of public good*, Case No. 21-2939-NMP, Order of 10/11/23 at 31).

[3] *Id.* at 2.

Department argues that there are compelling reasons to limit the scope of review for preferred-site letters and asks the Commission to reconsider its Order.

The Department argues that the evidence supports finding that the preferred-site letter is valid. According to the Department, the record demonstrates that the Municipal Entities received the Facility layouts in the 45-day notice and complete application as required by the Commission's rules, and that the Municipal Entities heard from the Intervenors about their concerns about the changing Facility layout on several occasions after the application was filed with the Commission.

Requiring a new preferred-site letter, the Department argues, displaces the autonomy of towns and their decision-making processes, and potentially treads into areas that are outside of the Commission's review and that the Commission lacks the ability to resolve if a municipality is not a party to a proceeding. The Department suggests that an appropriate scope for reviewing preferred-site letters would be limited to whether the record reflects any form defects or ambiguities, evidence of specific misrepresentations or material misstatements, evidence of deficient notice to a municipality, or materials or filings from the municipality itself. Limiting the scope of review, according to the Department, will also help maintain a distinction between municipal entities' focus on whether a site is suitable for the development of net-metering systems and the Commission's review of the substantive merits of a proposed facility under Section 248.

The Department also asks that the Commission consider the burden on parties, municipalities, and State entities that could arise in the absence of limits on the Commission's review of preferred-site determinations. The Department notes that extensive proceedings have occurred in this case while pending, and that additional proceedings before the Municipal Entities will be needed for the Applicant to comply with the Commission's Order. Limiting the scope of review pursuant to its recommendations, the Department maintains, would reduce future burdens on parties and municipalities and limit the potential for abuse through extensive litigation over the validity of preferred-site letters. Limits on review would also minimize future arguments that preferred-site letters must be renewed by municipal bodies that have had subsequent changes in membership.

The Intervenors

The Intervenors argue that the Applicant's motion should not be granted. The Intervenors dispute the accuracy of the chronology relied on by the Applicant, and cite to a public comment filed on May 5, 2024, by Jaan Laaspere, the author of the chronology, in which he states that he did not intend for the chronology to be a definitive or exact record of events. The Intervenors reiterate many of their arguments about the events related to the preferred-site letter and cite an email from the Norwich Town attorney as confirmation that the Planning Commission packet for the July 13, 2021, meeting did not include the third Facility layout moving the limits of disturbance over the eastern ridgeline on the Facility site.

III. DISCUSSION

A. The Standard of Review for the Applicant's Motion

The Applicant filed its motion pursuant to Commission Rule 2.221(B), which incorporates the language of Vermont Rule of Civil Procedure 60 and allows parties to request relief from a Commission order. The Department recommends that the Commission instead treat the Applicant's motion as a request under Rule 2.221(A), which incorporates the language of Vermont Rule of Civil Procedure 59 and is the provision that the Commission typically applies when deciding motions to reconsider.

We agree that Rule 2.221(A) is the appropriate provision for the review of the Applicant's motion. The Applicant argues that the order "is in error because it overlooks material evidence in the existing record."[4] Because the Applicant's motion is based on a "mistake or inadvertence of the [Commission], and not the fault or neglect of a party," the motion is a request for reconsideration, and we address it under the provisions of Rule 2.221(A).[5] Reconsideration under Rule 2.221 is only appropriate to avoid an unjust result due to the Commission's mistake or inadvertence.[6] Granting reconsideration is an extraordinary remedy to be used with great caution and a decision that is committed to the discretion of the Commission.[7]

---

[4] Motion at 1.

[5] *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588 (1996) (citing *In re Kostenblatt*, 161 Vt. 292, 302 (1994)).

[6] *Id.*

[7] *See Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970*, Docket 8643, Order of 11/3/16 at 2; *Alden v. Alden*, 2010 VT 3, ¶7.

B. Commission Review of Preferred-Site Letters

We recognize that the Commission has not previously questioned the validity of an unconditional preferred-site letter signed by a municipality. While we continue to adhere to the "extraordinary circumstances" standard articulated in our order in *Randolph Davis Solar*, we believe that the significant changes to the Facility site plan after the Planning Commission's review, the Planning Commission's stated interest in preventing impacts on the ridgeline, and the lack of clarity as to whether the Planning Commission and Selectboard understood the extent to which the Facility would impact the ridgeline counseled in favor of treating these circumstances as extraordinary and requesting confirmation of the Municipal Entities' support. We view our request for confirmation as respecting, rather than displacing, the autonomy of towns and their decision-making processes.

We agree with the Department that inquiries into preferred-site letters should be rare and, when warranted, limited in scope. We also agree that the list of bases for inquiry enumerated by the Department are all examples of potential extraordinary circumstances. However, we are reluctant to adopt a definitive list because we do not wish to foreclose the possibility that other extraordinary circumstances might arise. Extraordinary circumstances, as the term implies, are not amenable to precise definition.

The record here, for example, reflects significant changes to the extent of clearing and potential visibility of the Facility from what appears to have been described to the Planning Commission by the Applicant. While the Applicant's description of the Facility may have accurately reflected its understanding at the time the description was provided, it was not clear in the record that the Planning Commission was notified that a significant change to the Facility layout had occurred. We believe evidence that a municipal entity fundamentally misunderstood a proposed facility can in some circumstances rise to the level of extraordinary and justify additional inquiry.

C. Evidence that the Municipal Entities Received Notice

The Applicant relies on a chronology that was included in the Planning Commission packet for the July 11, 2023, meeting, which was held after all site plans were filed by the Applicant in this case. The meeting packet, submitted with the Applicant's post-hearing briefing

as exhibit NUL Reply Brief-5, was not offered as evidence at the evidentiary hearing, but has been recommended by the Hearing Officer for administrative notice under 3 V.S.A. § 810(4). We now adopt the Hearing Officer's recommendation and take notice of exhibit NUL Reply Brief-5 as the packet of materials that was provided to the Norwich Planning Commission for the Planning Commission's July 11, 2023, meeting.

Our notice of exhibit NUL Reply Brief-5, however, is limited to "judicially cognizable facts."[8] Judicially cognizable facts are facts that are not subject to reasonable dispute.[9] The Intervenors and the author of the chronology have both raised questions about the chronology's accuracy.[10] Because there is a reasonable dispute about the accuracy of the chronology, we have not relied on the chronology events as judicially cognizable facts for our decision in this order.

Also included in exhibit NUL Reply Brief-5 is a July 5, 2023, letter from the Applicant to the Municipal Entities.[11] We find that this letter resolves any ambiguity in the record about whether the Municipal Entities received notice of the currently proposed Facility layout. The letter discloses the sequence of layouts that evolved over the course of this proceeding, includes a comparison of the layout changes that occurred between the layout originally presented to the Planning Commission and the layout that was included with the Applicant's 45-day notice, and includes the site plan that the Applicant filed with the Public Utility Commission on August 31, 2021.[12] This letter was provided to the Planning Commission in the July 11, 2023, packet.

Based on the inclusion of the July 5, 2023, letter in the Norwich Planning Commission meeting packet, we conclude that the Applicant's motion for reconsideration should be granted. Our decision does not depend on the accuracy of the letter's contents, which we do not address. We rely only on the following judicially cognizable facts: The letter was provided to the Planning Commission in the materials for its July 11, 2023, meeting; the letter included the site

[8] 3 V.S.A. § 810(4) ("Notice may be taken of judicially cognizable facts.").

[9] *See* V.R.E. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

[10] Intervenor Response at 1.

[11] Exh. NUL Reply Brief-5 at 18-22. This letter is cited by the Applicant in its motion as corroboration of the chronology events.

[12] *Id.*

plan filed with the Commission on August 31, 2021; and the Municipal Entities have not altered their support for the Facility location.

Exhibit NUL Reply Brief-5 was not part of the evidentiary record when we issued our April 26, 2024, Order directing the Applicant to obtain confirmation of the Municipal Entities' support, and was not among the materials that we reviewed before issuing the order. After reviewing the exhibit and taking judicial notice of the facts described above, we conclude that it would be unjust to both the Applicant and the Municipal Entities to require the Applicant to confirm municipal support and that the preferred-site letter should receive its full evidentiary weight.

The Applicant's motion for reconsideration of our April 26, 2024, Order is granted, and we no longer require the Applicant to obtain confirmation of the Municipal Entities' support for the Facility site.

IV. THE INTERVENOR'S REQUEST FOR COMMISSION SITE VISIT

On May 10, 2024, the Intervenors confirmed that they are not requesting an oral argument in this case but have reiterated their request for a full Commission site visit. Site visits by the full Commission in Hearing Officer cases do occur in some cases, but they are not standard practice as stated by the Intervenors in their response.

The Intervenors' comments on the proposal for decision raise issues related to aesthetics and public safety concerns about the steep slopes in the area surrounding the Facility site. Because we conclude that a site visit will provide context for the Intervenors' arguments, we grant the Intervenors' request for a site visit by the Commissioners. The site visit will occur on July 9, 2024, beginning at 10:00 A.M.[13] We do not require the Applicant to mark each tree that will be cut as part of the clearing of the Facility site but do direct the Applicant to clearly mark the limits of disturbance on the eastern slope of the Facility site.

As a reminder, the purpose of a site visit is to provide the Commission with context for the evidence that has been filed in a case. Observations from the site visit are not evidence in the case, and the site visit is not an opportunity to make comments, objections, or arguments—

[13] The Clerk of the Commission will issue a separate notice for the site visit.

whether to the Commission or to the other parties.[14] The Commission will not engage in any substantive discussion about the proposed Facility during the site visit.

SO ORDERED.

[14] *See Petition of Babcock Solar Farm, LLC for A Certificate of Pub. Good Pursuant to 30 V.S.A. S 248 Authorizing Constr. of A 2.2 Mw (Ac) Photovoltaic Sys. in Brandon, Vermont.*, Case No. 18-2924-PET, Order of 10/24/18 at 1.

Dated at Montpelier, Vermont, this 12th day of June, 2024.

Edward McNamara) PUBLIC UTILITY
)
)
Margaret Cheney) COMMISSION
)
)
J. Riley Allen) OF VERMONT
)

OFFICE OF THE CLERK

Filed: June 12, 2024

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 21-3587-NMP - SERVICE LIST

Parties:

Benjamin Civiletti
Department of Public Service
112 State Street
Montpelier, VT 05620
benjamin.civiletti@vermont.gov

(for Vermont Department of Public Service)

*Alison Stone, General Counsel
Vermont Natural Resources Board
nrb.comments@vermont.gov

(for Vermont Natural Resources Board)

L. Brooke Dingledine, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
P.O. Box 625
Barre, VT 05641
lbrooke@vdmlaw.com

(for Stephen CN Gorman) (for Laurence and Shelley Ufford) (for Dan & Jenn Goulet) (for Joy Kenseth) (for Jayoung Joo) (for John and Heather Benson) (for Samin Kim)

Donald J. Einhorn, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
donald.einhorn@vermont.gov

(for Vermont Agency of Natural Resources)

Kimberly K. Hayden, Esq.
Paul Frank + Collins PC
One Church Street 05402
P.O. Box 1307
Burlington, VT 05401
khayden@pfclaw.com

(for Norwich Upper Loveland Solar LLC)

Kelly Hughes
Vermont Agency of Natural Resources
1 National Life Drive
Davis 2
Montpelier, VT 05620
Kelly.Hughes@vermont.gov

(for Vermont Agency of Natural Resources)

Aaron Lamperti, *pro se*
557 New Boston Rd
Norwich, VT 05055
aaron.lamperti@gmail.com

John C. Lewis, *pro se*
346 Palm Street
Hollywood, FL 33019
jlewis6577@aol.com

James McTaggart, *pro se*
71 Upper Loveland Road
Norwich, VT 05055-9417
mctagjim@aol.com