

**IN THE SUPREME COURT
OF THE STATE OF VERMONT**

DOCKET NO. 25-AP-005

In re Petition of Randolph Davis Solar LLC

PRIMARY BRIEF

of

Appellants Joan Allen and Michael Binder

On Appeal from

the Vermont Public Utility Commission Case No. 21-2939-NMP

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ISSUES PRESENTED

- I. Whether the Public Utility Commission (“PUC”) erred in finding that the Randolph Davis Solar Project met review criteria *30 VSA §248(b)(5)* and *10 VSA §6086(a)(1)(4)* regarding water pollution and soil erosion, where the PUC conflated ANR construction stormwater permit compliance with *30 VSA §248(b)(5)* compliance, adopted ANR's unreasonable informal interpretation of law, and based its decision on ANR "evidence" when ANR submitted no record evidence 11
- II. Whether the PUC erred in its application of PUC *Rule 5.103* and finding that the proposed Randolph Davis Solar LLC facility is a “preferred site” 23
- III. Whether the PUC erred in granting Randolph Davis Solar LLC a CPG, as the project does not meet review criteria *30 VSA §248(b)(1)* regarding orderly development..... 26

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STATEMENT OF THE CASE

Subject of Litigation

This action comprises an appeal from the PUC's 12 August 2024 Final Order Granting Net-Metering Certificate of Public Good (“CPG”) in Case No. 21-2939-NMP, Petition by Randolph Davis Solar LLC to construct a 500MW solar electric generation facility (“facility”) at 0 Davis Road in Randolph, Vermont **PC-4** and the November 22, 2024 PUC order denying Appellant’s Motion for Reconsideration. **PC-18**

Claims of the Parties

Appellants Joan Allen and Michael Binder assert that the Vermont Public Utility Commission (“PUC”) made material errors of law and acted arbitrarily and capriciously in issuing its Final Order and granting a CPG to the facility.

Appellees (presumably) claim that the PUC's Final Order and grant of CPG are appropriate.

Appellants’ Specific Claims of Error

The PUC misapplied PUC *Rule 5.103* in finding the site is a “preferred site”, and erred in finding that the project met review criteria 30 VSA §248(b)(1) and 30 VSA §248(b)(5) and 10 VSA §6086(a)(1)(4).

Statement of Facts and Procedure Below

Applicant Randolph Davis Solar LLC petitioned the PUC on August 11, 2021 pursuant to 30 VSA §248 and 30 VSA §8010 to construct a 500MW solar facility at 0 Davis Road in Randolph, Vermont. [Final Order p.1] **PC-4**

Previously, in June 2021 the Randolph Planning Commission, Randolph Selectboard, and the Regional Planning Commission signed a letter designating the project site a “preferred site.” [Exhibit RDS MS-5] **PC-121**

The project is described in detail in the Second Proposal for Decision (“PfD2”). **PC-400** The Project site is in the northwest corner of a 20± acre parcel located approximately 1500± feet from the intersection of Davis Road and State Route 14 in Randolph. [PfD2 p.8] **PC-407** The entire 11.6 acre Limits of Disturbance is subject to clearing of vegetation. [PfD2 p.9] **PC-408** The site is characterized by steep slopes [PfD2 p.21] **PC-420** and the facility will be accessed from Davis Road via a gravel access drive, to be constructed using cut and fill due to the slopes under the access roads’s path. [PfD2 p.9] **PC-408**

The project will operate under a Department of Environmental Conservation (“DEC”) Construction General Permit, but does not require an Operational Stormwater Permit. [PfD2 pp.27-9] **PC-426-8**

The original site plan located the solar array on slopes in excess of 25%. [PfD2 p.14] **PC-413** In October 2021 Appellant Intervenors brought to the Town’s attention the Town Plan prohibition against energy facility development on slopes greater than 25%. [Exhibit NI MB-14] **PC-206** In December 2021 the Town Planning Commission sent the applicant a “Notice of Discrepancy” letter pointing out the project’s noncompliance with the Town Plan and noting that it may have to rescind its preferred site letter. Letters were exchanged and the Applicant agreed to relocate the array onto slopes less than 25%. [Exhibit NI MB-16] **PC-208**

The Applicant modified their site plan several times [see “*Site Plan Reference Page*” Exhibit NI MB-39 p.2] **PC-228** and the Hearing Officer and PUC found that after modification the solar panels would no longer be installed on slopes in excess of 25%. [PfD2 p.14] **PC-413** Whether all of the panels have been relocated to areas with slope less than 25%, and the mode of measuring these slopes, remained in contention throughout the case.¹ It is, however, undisputed that portions of the access road, interconnection line, fence, and areas of tree clearing will occur on slopes greater than 25%. [PfD2 p.14] **PC-413** The Project’s access road is located on slopes as steep as 39%. [PfD1 p.13] **PC-373**

The PUC imposed conditions implementing recommendations of the Vermont Agency of Natural Resources (ANR), Vermont Agency of Agriculture, Food and Markets (AAFM) and the Vermont Department of Public Service (DPS) [PfD2 p.4] **PC-403**

¹ Final Order p.12 **PC-15** MB-39 **PC-227** MB-53 **PC-337**

From December 2021 to November 2022, the parties filed testimony, exhibits, and motions. Hearing was waived, and parties proceeded to briefs. [PfD2 p.5] **PC-404**

A central assertion of the Intervenor was that **post-construction**, the project would cause undue water pollution and unreasonable erosion.

In June 2023, the Hearing Officer issued the first proposal for decision (PfD1), recommending the CPG be denied because the project was not on a preferred site. [PfD2 p.5] **PC-404** After comments and oral argument, The PUC issued a Remand Order [PfD2 p.6] **PC-405** finding there was insufficient information in the record to determine if the Town's conditions for preferred site approval had been met. Petitioner filed a new letter from the Town indicating that the town was satisfied that the solar panels had been relocated onto slopes less than 25%. [PfD2 p.6] **PC-405** [Exhibit RDS MS-26] **PC-395**

After taking additional comments, the Hearing Officer issued the second Proposal for Decision (PfD2), recommending a CPG be granted. **PC-400**

After oral argument, the PUC issued its Final Order, which substantially adopted PfD2. **PC-4**

Appellants filed a Motion for Reconsideration. **PC-437** Appeal was taken after the PUC Order Denying Landowner Intervenor's Motion For Reconsideration. **PC-18**

ARGUMENT

Standard of Review

Appeal from an order of the PUC is pursuant to 30 VSA §12. The powers of the Vermont Supreme Court on review are set out in 30 VSA §14.

Review of PUC decisions is restricted to the appellate function of reviewing the proceedings for legal error, or arbitrary and capricious action. *In re New England Telephone and Telegraph Company*, 131 Vt. 470 (1973).

This Court accords some categories of agency decisions substantial deference. *In re Conservation Law Found.*, 2018 VT 42, ¶15. This deferential standard of review extends to an agency's “interpretation of **[a] statute within its area of expertise**,” *Shires House, Inc. v. Brown*, 2017 VT 60, ¶9 (emphasis added), and “an agency's interpretation of **its own regulations**,” *Conservation Law Found. v. Burke*, 162 Vt. 115, 121 (emphasis added), 645 A.2d 495,499 (1993).

Despite this deferential standard, this Court must “conduct an independent review and will overturn an agency's interpretation of its own promulgated regulation that exceeds the authority granted under the state enabling statute, that conflicts with past agency interpretations of the same rule, that results in unjust, unreasonable or absurd consequences, or that demonstrates compelling indications of error.” *In re Petition of Acorn Energy Solar 2, LLC*, 2021 VT 3 ¶23, quoting *Conservation Law Found.*, 2018 VT 42, ¶16 (citations omitted) (quotations omitted). Similarly, the Vermont Supreme Court will overturn an agency's interpretation of a statute if there is a “compelling indication of an error” or if the interpretation is “unjust or unreasonable.” *Shires House Inc.*, 2017 VT 60, ¶9.

Summary of Argument

- I. The PUC erred in finding that the Randolph Davis Solar project met review criteria *30 VSA §248(b)(5)* and *10 VSA §6086(a)(1)(4)* regarding water pollution and erosion, because the PUC:
 - A) improperly conflated ANR permitting approval with compliance with *30 VSA §248* criteria; and,
 - B) deferred to and adopted ANR's unreasonable, informal interpretation of statute, compounded by the PUC's own misinterpretation of ANR stormwater permitting; and,
 - C) characterized ANRs arguments as evidence when ANR submitted no evidence.
- II. The PUC made an error of law and misapplied *PUC Rule 5.103* in finding that the project site is a "preferred site".
- III. The PUC erred in granting the Randolph Davis Solar LLC a CPG, as the project does not meet review criteria *30 VSA §248(b)(1)* regarding orderly development.

I. The PUC Erred in Conflating ANR Stormwater Construction Permit Compliance with 30 VSA §248 Compliance; in Adopting ANR's Unreasonable Interpretation of Statute Regarding Soil Erosion; and in Basing Their Determination on ANR "Evidence" When ANR Submitted No Evidence.

The PUC erred in finding the Randolph Davis Solar Project met review criteria *30 VSA §248(b)(5)* and *10 VSA §6086(a)(1)(4)* regarding water pollution and erosion, as the PUC...

- A) improperly conflated ANR permitting approval with compliance with *30 VSA §248* criteria;
- B) deferred to and adopted ANR's unreasonable, informal interpretation of statute, compounded by the PUC's own misinterpretation of ANR stormwater permitting; and
- C) characterized ANR's arguments as evidence when ANR had submitted no evidence.

Due to the steep headwater slopes underlying the proposed facility, soil erosion and protection of the nearby stream and river are critical issues in the present case.

A. The PUC erred in conflating ANR stormwater permitting approval with 30 VSA §248 criteria compliance

PfD2 [pp. 27-29] **PC-426-8** and PUC Final Order [pp. 6-9] **PC-9-12** and PUC Order Denying Reconsideration [pp. 3-4] **PC-20-21** miscast the question of whether the project meets the requirements of *30 VSA §248(b)(5)* and its incorporated statutes *10 VSA §6086(a)(1)(4)* as a question of whether the project complies with ANR stormwater permitting regulations.

Both ANR's brief **PC-353-6** and PUC Order Denying Motion for Reconsideration [p.4] **PC-21** express that "the Vermont Legislature has explicitly tasked ANR with developing rules to manage stormwater runoff". This statement commits fallacy by omission: While ANR is charged with developing stormwater management regulations, it is not the sole agency tasked with addressing water pollution and soil erosion.

The Legislature has directed the PUC to apply select provisions of the Act 250 statutes – not ANR stormwater regulations – in regard to soil erosion in *§248* cases. The Agency primarily tasked with interpreting Act 250 statutory provisions is the Land Use Review Board (LURB), not ANR. In primarily (nearly exclusively) grounding its decision on ANR interpretation of stormwater regulations, rather than on its duties to

assure energy facility compliance with the criteria contained in 30 VSA §248(b)(5) and its incorporated Act 250 criteria, the PUC committed reversible error.

The PUC is mandated to review energy projects for compliance with certain statutory criteria. Among those are environmental considerations including:

With respect to an in-state facility, will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in **10 V.S.A. §§1424a(d) and 6086(a)(1) through (8) and (9)(K)**, impacts to primary agricultural soils as defined in 10 V.S.A. §6001, and greenhouse gas impacts. 30 VSA §248(b)(5)

The Act 250 statutory sections incorporated into PUC §248 review obligations include:

10 VSA 6086(a)(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of the land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; *the slope of the land* and its effect on effluents; the availability of streams for disposal of effluents; and the applicable Health and Environmental Conservation Department regulations. [*emphasis added*]

10 VSA 6086(a)(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

This statute – 10 VSA §6086 – is not within the purview of ANR. Act 250 criteria are interpreted and administered by the LURB, a separate executive body which is independent of the ANR.

The provisions of 10 VSA §6086(a) include consideration of DEC regulations, added to the other required considerations by an “and”, meaning ANR's stormwater permit determination is only one of several factors to be considered by the PUC. The PUC must receive evidence on and consider, among other things, elevation, soils, slope, and whether the facility will cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. It must consider these things **in addition** to ANR's stormwater permitting program.

The LURB does not exclusively rely on ANR stormwater permitting to determine if a proposed project will contravene the erosion and stream protection provisions of *10 VSA §6086(a)*. Vermont first adopted stormwater permitting procedures in 1997. In cases considered since then involving steep slopes, the LURB has, in accordance with statute, looked at ANR stormwater regulation compliance *and* other statutory factors to determine compliance with this criterion. Even where an ANR stormwater permit has been obtained, or conformance with the Low-Risk Handbook is asserted by the applicant, the LURB makes *independent findings* as to the site-specific erosion measures to be used and how those measures will ensure that Act 250 criteria are met. The LURB does not conflate an ANR stormwater construction permit with *de facto* compliance with *10 VSA §6086(a)* criteria.

In *Re: Mark and Pauline Kiesel*, 1998 WL 569377 (1998), for example, the LURB denied an Act 250 permit for a residential development on, among other criteria, *§6086(a)* 1(A) and 4, pertaining to headwaters and erosion. Despite the fact that the developer would comply with ANR's *Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites*, the LURB made site-specific findings about soil types, steepness of the slopes (in excess of 10%, with some construction occurring on 25% slopes), depth to bedrock, and sensitivity of receiving streams.

In *Re: McLean Enterprises Corporation*, 2004 WL 2751139, the gravel-pit Act 250 applicant submitted a Stormwater Management and Erosion Control Plan in accordance with ANR stormwater regulations. The access road for the proposed project was located “on very steep slopes with the average slope greater than 25%”. (Finding of Fact 80) The LURB found that the access road would incorporate “Permanent stormwater management structures, such as culverts, check dams, culvert inlet and outlet protections, and energy dissipaters...”. (Finding of Fact 84)

In denying the Act 250 permit for the project on the grounds of non-compliance with *10 VSA §6086(a)(4)*, the LURB stated that “Erosion control plans used to satisfy Criterion 4 must be site-specific.” When Appellants there, as here, asserted that the proposed erosion control plans would not be sufficient on the steep slope where the access road was to be located, the LURB sought substantive, site-specific responsive evidence from the project applicant. The LURB concluded that “While the Permittee's Erosion Control Plan would likely work in most environments the Board concludes it would likely fail on this hillside” due to its excessively steep slopes. *Id. finding 35*.

Here, the project's access road is to be built on steep grades of up to 39%, far steeper than the hillside in *McLean* which the LURB declared "a difficult place to put a road". Yet here, there are no proposed culverts, check dams, ditches or other drainage structures [Exhibit RDS MS-2] **PC-217, 396-7** to be implemented on the access road.²

As set out below, the PUC decision repeatedly asserts that ANR's stormwater permitting decision is determinative of the project's compliance with the §248 criteria. The agency which is charged with interpreting and applying *10 VSA §6086(a)(4)*, the LURB, does not accept ANR permitting determinations as proof-positive of compliance with soil erosion criteria. Like the LURB, the PUC must make site-specific independent findings of fact regarding soil erosion. Had they done so here, in accordance with *McLean*, this far more egregious access road on steeper slopes, and with no drainage would surely have been denied.

ANR's Brief **PC-354** cited a statement by then-PUC Chair Roisman for the proposition that ANR has exclusive say on water, runoff and/or storm damage:

[speaking to an intervenor] ...If you have a concern about whether or not Mr. Hespos's wind turbine, either the road to it or the existence of it on the site now proposed for it, may have an impact in terms of water or runoff or storm damage, this is an issue that you should be pursuing with the Agency of Natural Resources.

Application of Michael Hespos, Case No. 20-3422-NM, 6/13/22-TR-13

Chair Roisman also indicated that the PUC would only address issues that are not addressed by ANR:

At this point you have not explained why it's not a matter that will be addressed in the permitting process in front of the Agency of Natural Resources. If you have some argument to suggest that that's not going to happen, that it's outside the scope of their jurisdiction, then we would address it. *id.* 6/13/22-TR-14

Hespos cannot stand as binding precedent where the PUC relied on ANR's unreasonable statutory interpretation of "impervious surface", (argued below). However,

² Almost half the length of the proposed road will have soil excavated from both sides of the road, creating a trench 6 feet deep and 37 feet wide with a 12-foot wide roadbed at the bottom. [demonstrative aid: Exhibit NI MB-50 pp.6-8] **PC-264-6** Surface water from the uphill side of the road will naturally flow down to the road. [demonstrative aid: Exhibit NI MB-35] **PC-213** Water on the roadbed, without ditches or culverts, has nowhere to go except further down the roadbed.

even if the *Hespos* principle is applied here, its essential meaning is that the PUC must address the risk of **post-construction** erosion in this case because ANR's **construction** stormwater permit does not address **post-construction** erosion.

Most importantly, compliance with *10 VSA §6086* is not within ANR's purview to determine. ANR is not entitled to deference on its interpretation of statutes pertaining to the LURB. Similarly, the PUC is not entitled to deference in its interpretation of statutes and regulations of the ANR. So much of the PUC's decision in this case as comprises deference to ANR and adoption of ANR arguments and informal positions is accordingly not entitled to deference by this Court, as it does not constitute “an agency's interpretation of **its own regulations**,” *Conservation Law Found. v. Burke*, 162 Vt. 115, 121 (emphasis added), 645 A.2d 495,499 (1993). The PUC committed an error of law by failing to conduct its own independent evaluation of §248 criteria and make independent findings of fact, especially in light of ANR's lack of evidence and unreasonable interpretation of statute, as set out in the following sections.

B. The PUC erred in relying on ANR's informal and unreasonable interpretation of statute.

Operational stormwater permits are not required when a project involves less than 1/2 acre of impervious surface. [PfD2 p.27] **PC-426** The definition of “impervious surface” is critical in this case as it determines whether the project requires permanent stormwater management practices included in an Operational Stormwater Permit, as opposed to the temporary measures utilized only during construction under an Construction Stormwater Permit.

Appellants stated in their Motion for Reconsideration: [p.10] **PC-446**

The solar array is an impervious surface. ...ANR's assertion that it has the authority to interpret "impervious" to mean "not impervious"is arbitrary, injudicious and absurd. ... No person can reasonably believe that rain passes through a solar panel as if it were not there.

The PUC has, relative to soil erosion, *30 VSA §248(b)(5)* and *10 VSA §6086(a)(4)* grounded its decision squarely on ANR's unreasonable interpretation of the statutory term “impervious surface” to exclude solar panels. The definition of impervious surface is *statutory*, not regulatory. *10 VSA §1264(b)(6)* states:

(6) “Impervious surface” means those manmade surfaces, including paved and unpaved roads, parking areas, roofs, driveways, and walkways, from which precipitation runs off rather than infiltrates.

Despite the fact that precipitation runs off the surface of a solar panel and does not infiltrate it, ANR has created an *ad hoc* exception to statute, a “legal fiction” that solar panels are not impervious. This interpretation has not been adopted by ANR as a rule or

regulation, and does not appear as a written policy or guidance document.³ It merely appears in ANR briefing in solar cases, unsupported by expert testimony or evidence.

ANR's position has in turn been adopted by the PUC as the foundation of its decision. The PUC Final Order and Denial of Motion for Reconsideration are replete with deference to ANR's permitting regulations. The Hearing Officer states as follows:

I recommend that the Commission find that the Facility's compliance with ANR's permitting requirements for stormwater control is sufficient to ensure that the Facility will not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. **ANR is the state agency charged with overseeing water quality issues**, and the Applicant has worked with ANR to receive authorization to discharge under General Permit 3-9020. The CPG will require the Applicant to obtain and comply with all necessary permits for work on the Facility site. **For these reasons, I recommend that the Commission find that the Facility will not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.** PfD2 p.29 **PC-428** [*emphasis added*]

³ Buried in its 9/1/2020 summary of responses to comments on General Permit 3-9050 for Operational Stormwater Permitting Draft General Permit, ANR admitted in writing that there are *no exemptions* from stormwater regulation for any projects – then went on to say that it does not count solar panels as impervious if water drips off of them onto vegetated ground. No evidence, authority, or support for this proposition is offered, nor any explanation as to why roofs, but not solar panels, are considered impervious even when water drips off of them onto a vegetated surface:

131. Comment: How does this General Permit relate to energy projects? Are energy development projects exempt from stormwater permit coverage and/or not included in a sites' impervious surface calculations?

Response: There are no exemptions for energy projects under the general permit, or under the Stormwater Permitting Rule or *10 VSA §1264*. With that said, when the Agency reviews solar projects the impervious surface associated with solar panels is calculated based on the material that covers the ground- that is, the base or foundation of the panel. The Agency does not consider an elevated solar panel to be impervious itself, provided precipitation coming off the panel comes into contact with vegetated ground surface. [Exhibit NI MB-52 p.44] **PC-317**

In the Denial of Intervenor's Motion for Reconsideration, [p.3-4] the PUC stated:

PC-20-21 [*emphasis added*]

In their motion for reconsideration, the Landowners reiterate their concerns related to soil erosion. **The Landowners argue again that the “solar array is an impervious surface”** and that an operational stormwater permit should be required. ...

...The Landowners assert that “ANR’s stormwater permitting regulations do not protect against **post-construction** erosion and the downstream effects of that erosion on the waters and water quality of the region.”

The Landowners argue that the Commission should not rely on “the erroneous assumption that ANR’s permitting requirements for **construction** are sufficient to control the risks associated with permanent, **post-construction** stormwater runoff.” ...

... In its response, ANR addresses the issues raised by the Landowners and asserts that “[t]hese concerns are not new.” ANR explains that it “regulates post-construction erosion through a litany of different stormwater permits.” ANR goes on to state that these **post-construction permits are “triggered by the creation of impervious surface because impervious surfaces increase stormwater runoff and its associated impacts.”** ANR asserts that because solar panels are not impervious surfaces, regulation under a **post-construction stormwater permit is unnecessary.**

As we recognized in our August 12 Order, **ANR is the state agency charged with overseeing water quality issues.** Stormwater permitting requirements and related issues fall squarely under ANR’s jurisdiction because the Vermont Legislature has explicitly tasked ANR with developing rules to manage stormwater runoff. **We also recognized that “ANR’s guidance on construction of solar energy facilities is that the impervious surface is calculated based on the material that covers the ground.”** Therefore, if a solar panel is elevated and precipitation coming off the panel reaches a vegetated ground surface, only the base or foundation of the panel is accounted for when calculating impervious surface area. ...

... ANR explained that the Facility does not meet the one-half-acre **impervious surface development threshold** that would trigger the need to secure an Operational Stormwater Permit 3-9050 because solar panels are not considered impervious surfaces. ...

The PUC adopted, and in substantial part based their decision on ANR's assertion that its informal interpretation, rather than statute or rule, controls what comprises an impervious surface for purposes of stormwater management, and, by bootstrap logic, compliance with §248. ANR's claimed authority to *sua sponte* create informal categorical exemptions to statute is unwarranted. While this Court's review of agency actions...

...is generally deferential, “we do not abdicate our responsibility to examine a disputed statute independently and ultimately determine its meaning.” *In re Swanton Wind LLC*, 2018 VT 141 ¶7, (quotation omitted). In our “independent examination, we employ our usual tools of statutory construction,” starting with the plain language of the statute. *Id.* In construing a statute, our “paramount goal ... is to give effect to the intent of the Legislature.” *In re Portland St. Solar LLC*, 2021 VT 67 ¶13 (quotation omitted).

In re Investigation Pursuant to 30 VSA §§30 and 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT 2024 VT 58¶9.

Here, the plain language of 10 VSA §1264(b)(6) could not be plainer: “Impervious surface” means those manmade things from which precipitation runs off rather than infiltrates. Solar panels are obviously impervious. The items listed by the legislature as “included” within the category of impervious surfaces – roads, roofs and so on – are, according to the Semantic Canons of Statutory Construction, illustrative, not exclusive. Valerie, Brannon C. *Statutory Interpretation: Theories, Tools and Trends*. Congressional Research Services, Library of Congress, 2023. p. 55.

As this Court has stated,

It is axiomatic that an administrative agency's power to promulgate regulations may extend only as far as its legislative grant of authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); see *In re Vt. Gas Sys., Inc.*, 150 Vt. 34, 39, 549 A.2d 627, 630 (1988) (“An administrative agency's rule-making authority cannot support an expansive interpretation of its own powers.”). Thus, while we generally presume the validity of regulations within the agency's authority, we will uphold an administratively adopted regulation only “where we can do so without compromising the intent of the statute which authorized it.” *In re Agency of Admin.*, 141 Vt. 68, 74, 444 A.2d

1349, 1351-52 (1982); *Vt. Ass'n of Realtors, Inc. v. State*, 156 Vt. 525, 530, 593 A.2d 462, 465 (1991)see (“[W]e will not countenance any agency rule that exceeds the authority delegated to the agency under its enabling act.”). If an agency operates outside the bounds, or for purposes other than those, authorized by the enabling legislation, “this Court will intervene.” *In re Agency of Admin.*, 141 Vt. at 75, 444 A.2d at 1352.

Martin v. State of Vermont Agency of Transportation Department of Motor Vehicles, 2003 VT 14 ¶15

ANR's interpretation of “impervious”, as adopted by the PUC, clearly compromises the intent of the statute, exempting a particular category of development – solar facilities – from statutorily mandated regulation. The PUC's wholesale adoption of ANR's legal fiction that solar panels are not impervious was arbitrary and capricious, and constitutes reversible error.

The PUC compounded its error by conflating Construction and Operational Stormwater permits and wrote: [Final Order p.8] **PC-11**

The Low-Risk Handbook requires the implementation of a variety of EPSC measures to control the risks associated with construction-related and **permanent stormwater runoff**, including development on moderate slopes such as at the Facility site. [*emphasis added*]

The statement is incorrect. The Low-Risk Handbook does **not** control risks associated with **permanent** (post-construction) stormwater runoff. The practices in the Low-Risk Handbook “serve as the required Erosion Prevention and Sediment Control Plan for **construction** activity...”. [Low-Risk Handbook] **PC-350** Permanent, post-construction stormwater management is governed by **operational** discharge permits. *id* **PC-352**

The PUC's Final Order states: [p.9] **PC-12**

We are satisfied that the Applicant’s *compliance with ANR’s permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site.*

This satisfaction is not justified because it depends on ANR's unreasonable interpretation of "impervious surface" to mean an Operational Discharge Permit is not required; and it depends on the PUC's plain factual error relying on **temporary**,

construction stormwater practices to control the risks of **permanent, post-construction** stormwater runoff from impervious surfaces.

C. The PUC erred in relying on ANR “evidence” where the ANR did not submit any evidence.

The Vermont Legislature directs ANR to appear and provide evidence in all §248 proceedings: (emphasis added)

The Agency of Natural Resources **shall appear as a party** in any proceedings held under this subsection, **shall provide evidence** and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding. 30 VSA §248(a)(4)(E)

While counsel for ANR did enter an appearance signifying agency participation as a party, ANR submitted no *evidence*.

Shortly after the Appellants submitted surrebuttal testimony and exhibits detailing the project's **permanent, post-construction** stormwater runoff and erosion issues, the Hearing Officer entered a Procedural Order Requesting Information (October 31, 2022):

I am requesting that ANR explain whether and how Vermont’s **stormwater management regulations** and the **Project’s design** will address Mr. Binder’s concerns about locating solar panels on steep slopes. [*emphasis added*] **PC-338**

ANR replied (November 10, 2022):

The Agency will respond to this request through post-hearing legal briefing.

ANR Response to Procedural Order Requesting Information **PC-340**

ANR’s brief **PC-353** was not responsive to the Procedural Order Requesting Information and did not explain how a construction stormwater permit might control the risks of post-construction water pollution or erosion.

The PUC noted its reliance on ANR “evidence” in its Denial of the Motion for Reconsideration: [p.4] **PC-21**

The Landowners allege that if the Commission defers to ANR’s permitting practices, it is “abdicating its responsibility to look at the evidence and determine where this project will cause unreasonable erosion. . .” We have **considered the evidence presented** by both the Landowners and ANR. We are more persuaded by the **evidence** and arguments presented by ANR and are satisfied that ANR’s stormwater-related regulations and permitting requirements are sufficient to prevent unreasonable soil erosion at the Facility site.

Yet, ANR submitted no “evidence”.⁴ ANR submitted briefs and comments, but no testimony. It is axiomatic that argument, whether oral argument or comments or a brief, is not evidence. In stating that it relied on ANR “evidence”, the PUC committed plain error. There was no ANR evidence to rely on, consider, or be persuaded by.

The Appellant Landowners are correct that the PUC abdicated its responsibility to consider the evidence and determine whether this project will cause unreasonable erosion. **PC-450**

⁴ ANR did submit three attachments, without introductory testimony, which it asserted were appropriate for judicial notice. [*ANR Request for the PUC to take Notice of Judicially Cognizable Facts*] **PC-341** ANR Attachment 1 is a construction stormwater permit issued to “Sunny Acres LLC”. **PC-345-8** Attachment 2 is the Petitioner’s site plan, and Attachment 3 is the DEC Low-Risk Site Handbook. **PC-349** None of these attachments pertains to **permanent, post-construction** water pollution or erosion, nor are they responsive to the Hearing Officer’s Procedural Order Requesting Information.

II. The PUC Erred In Finding The Proposed Facility Site Is A “Preferred Site”

Net-metered solar facilities of this size [*PUC Rule 5.104*] are only permitted if located on a preferred site. The PUC erred in finding the proposed facility is a "preferred site" [*PUC Rule 5.103*] at a *specific location* designated by a joint letter of the Town Planning Commission, Selectboard, and Regional Planning Commission.

The PUC found that the Preferred Sites Letter had conditions. The Town wrote:

The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%. The onsite survey data can be provided to the Town and the Allen/Binders upon request.

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.*

exhibit NI MB-16 [emphasis added] **PC-214**

The Hearing Officer issued an initial Proposal for Decision (PfD1) recommending denial of the CPG because the facility was not on a preferred site. **PC-361** The full PUC remanded the matter to her to pursue more information regarding the preferred site designation, stating:

The Town of Randolph’s letter of support is conditioned on the Applicant moving the proposed Project’s panels from areas where slopes exceed 25% and providing supporting survey data to the Town. **There is insufficient information** in the record to demonstrate that the Town’s condition has been met. Accordingly, **the Commission is unable to determine whether the proposed Project would be located on a preferred site.** Therefore, the Commission gives the Applicant 90 days to file evidence demonstrating that the Town of Randolph Planning Commission and Selectboard are satisfied that the condition stated in their letter dated December 14, 2021, Exh. RDS-MS-14, has been met.

Remand Order p.1 **PC-387**

...

As a general matter, the Commission strongly cautions against the use of conditional letters of support—particularly in a case like this where **the municipality has not intervened** in the proceeding to protect its interests—because conditions create uncertainty about whether a site is in fact a preferred site. [Remand Order p.31] **PC-391**

After the Remand, the site plan proffered to the Town by the Applicant was not the **final** site plan that the Town requested; it was the **third of the six** site plans on record at the time.⁵ The Town then expressed that its primary condition (panels relocated onto slopes less than 25%) was satisfied. [Exhibit RDS MS-26] **PC-395**

The slope layer shown to the Town after the Remand Order was contrived from inadequate survey data with intent to hide slopes greater than 25%. [Binder surrebuttal p2-3 **PC-219**, Exh. NI MB-39 **PC-227**, Exh. NI MB-53 **PC-337**] The PUC wrote in its Final Order:

The Landowners continue to question the Applicant’s methodology for measuring slope. However, in the Remand Order, we did not consider the method of measuring the slope to be an issue for the Commission to resolve. It is the Town that must determine whether the conditions in its **initial** preferred-site letter have been met [*emphasis added*] [Final order p 12] **PC-15** **see note**⁶

As the PUC correctly noted, the Town did not intervene in the process and did not submit evidence. Regardless of the Town's opinion – based on an outdated site plan – that its concern about slopes had been met, the burden should have remained squarely and solely on the Petitioner to place evidence in the record that assured the Town's slope conditions and its prohibition against solar facility development, including the road, were met. The PUC impermissibly shifted the burden of proof from the Petitioner to the Town, which was not even a party.

The duty of the PUC to resolve the question of method of measuring the slope, and to ensure that the Town had the **final** site plan in front of it, is underscored by the

⁵ Attached to the Town Letter [RDS MS-26] **PC-395-6** is the outdated site plan (file date 2/25/22) that was proffered to the Town. See the “*Site Plan Reference Page*” exhibit NI MB-39 p. 2 **PC-228**

⁶ There were no conditions in the Town’s **initial** Preferred Sites Letter of June 2021. [RDS MS-5] **PC-121** The slope conditions were negotiated in December 2021 and expressed in letters between the Applicant and the Town. [compiled in exhibit NI MB-16] **PC-208-215**

extraordinary circumstances under which the preferred site letter had been procured. In the remand order, the PUC admonished the Petitioner: [*emphasis added*]

Absent extraordinary circumstances, the PUC will not second-guess a municipal determination that a site is preferred. That said, the record shows, and the Applicant does not dispute, that the Applicant made factually incorrect verbal statements to the Planning Commission and Selectboard and that these statements were never explicitly corrected. The Applicant's defense that it contemporaneously supplied accurate information in its paper submissions hardly inspires confidence. **The Commission expects companies seeking a preferred-site letter to take more care when presenting the facts to a municipality.** [Remand Order p.31]
PC-391

Where the Town requested the **final** site plan for its review, and instead was proffered an outdated iteration of the site plan, on the heels of the PUC finding that the Applicant had made factually incorrect statements to the Town, the Petitioner did not comply with the Remand Order and meet its burden of proof that the facility location is a preferred site. In finding that the location is a "preferred site", the PUC made an error of law by misapplying *Rule 5.103*.

III. The PUC Erred in Granting Randolph Davis Solar LLC a CPG, as the Project Does Not Meet Review Criteria 30 VSA §248(b)(1) Regarding Orderly Development.

Prior to issuing a CPG, the PUC must find a project “will not unduly interfere with the orderly development of the region.” 30 VSA §248(b)(1). The PUC is required to give “due consideration” to the “recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.” *In re Acorn Energy Solar 2, LLC*, 2021 Vt. 3, ¶87 (quoting 30 VSA §248(b)(1)).

Here, no recommendations were made by the municipal or regional planning commissions or the municipal legislative body. [Remand Order p.31] **PC-391** “Preferred site letters” were filed, but as the Hearing Officer correctly found, “a letter merely stating that a site is preferred for purposes of *Rule 5.103* is not directly relevant to a facility’s impact on orderly development.” [PfD2 p.16] **PC-415**

A. Town and Regional Plan Solar Siting Prohibitions

Both the Town and Regional Plans contain prohibitions on solar development at specifically designated locations – sites with slopes of over 25% per the Town Plan, and sites mapped as unsuitable for solar development in TRORP 2020. These prohibitions are land conservation measures and while the Town’s prohibition is to be afforded due consideration⁷, that of the Regional Plan must be afforded substantial deference. [PfD2 pp.14-15] **PC-413-4**

⁷ The Town Plan has not received an affirmative determination of energy compliance under 24 VSA §4352 and its Land Conservation Measures are entitled to due consideration. *In re Petition of Apple Hill Solar LLC*, 2021 VT 69.

The Randolph Town Plan [page 29] prohibits energy facility development on lands over 25% slope: [Bold emphasis in original]

For all energy generation facilities, the following policies apply:

3. Prohibited Locations: Energy facility development shall have to meet principal structure setback for the relevant area in the town zoning, and shall be prohibited in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, *lands over 25% slope.* Exhibit RDS MS-6 **PC-144** [*italic emphasis added*]

Referring to the amount of renewable energy needed to meet Town goals:

While the numbers are large, the amount of land needed is comparatively small. Assuming we meet this need only with solar, we could generate only another 9% if we were able to use all of the roofs. *But we have sufficient land that does not have natural resources constraints, **nor is too steep**, to meet the goal nearly 45 times over.* [*emphasis added*]

Exhibit NI MB-5 *Randolph Town Plan* p.70 **PC-204**

The PUC correctly determined that Randolph's prohibition of energy facility development on slopes greater than 25% is a Land Conservation Measure, and that this project contravenes that measure. [PfD2 p17-18] **PC-415-6** In holding that the proposed facility would not have a regional impact despite its contravention of a land conservation measure in the municipal plan, [Final Order p.4] **PC-7** the PUC misapplied *30 VSA §248(b)(1)*.

The statutory phrase “due consideration...to...the land conservation measures contained in the plan of an affected municipality,” *id.*, must, inherent to its context, be presumed to mean that noncompliance with town plan land conservation measures is an important and informative component of the question of adverse regional impact.

“Statutory construction... is a holistic endeavor.” Congressional Research Service, *Statutory Interpretation: Theories, Tools and Trends*, updated 2023, (citations omitted). If noncompliance with a town plan land conservation measure could not comprise an adverse regional impact, the directive to give due consideration to land conservation measures in a town plan would be mere surplusage. Under the statutory construction canon of surplusage, every word and every provision of a statute is to be given effect. “None should be ignored. None should needlessly be given an interpretation that causes it to ...have no consequence.” Garner, Bryan A., and Scalia, Antonin. *A Dozen Canons of Statutory and Constitutional Text Construction*. Judicature, Duke Law School, 2015.

Interpreting the statute in contravention of the canon of surplusage, the PUC determined that regardless of violation of a town plan land conservation measure, the project does not have an adverse regional impact. “Due consideration” does not mean that the tribunal can look at information and choose to ignore it. The words “upon due consideration,” in Vermont law, mean “consideration in the proper course of procedure.” *Hoyt v. Smith*, 83 Vt. 412 (1910). In the procedure of determining regional impact, town plan land conservation measures must be afforded the weight of contemplative inclusion; that is, they must be duly considered.

If each word and phrase of the statute is to have operative effect, Congressional Research Service, *Statutory Interpretation: Theories, Tools and Trends*, updated 2023, p.30-31, (citations omitted), then the statute must be read to mean that directly contravening a town plan land conservation measure is meaningful evidence that the action constitutes an adverse regional impact. 30 VSA §248(b)(1) directs the PUC to ask, relative to adverse impact on orderly development: Does the project contravene recommendations of the town and regional planning commissions and town selectboard? Does it contravene the town plan’s land conservation measures? Were these not determinative elements of the inquiry, they would not – need not – have been included in the statute. To interpret the statute otherwise is to rob these phrases of their meaning.

In noting that the Randolph Town Plan provision regarding energy facility development on slopes over 25% creates a specific land use conservation measure prohibiting the project, yet nevertheless granting a CPG, the PUC committed reversible error.

B. Lack of Record Evidence on Which to Base Orderly Development Finding

The Two Rivers Ottauquechee Regional Plan (TRORP 2020) declares:

Sites with raw solar potential are flat to gently sloping and face east, south or west. [p.241] **PC-185**

In the section “Hierarchy of Suitability”, TRORP 2020 declares:

As mentioned earlier, only lands with good exposure and gentle slopes make sense for solar development. [p.242] **PC-186**

These provisions are wholly consistent with the Randolph Town Plan prohibition against energy facility development on slopes over 25%.

TRORP 2020 specifies that preferred sites may include those designated by towns, **“provided that it is not located in an area identified as unsuitable by this Plan.”** [TRORP 2020 p.244] **PC-188** [emphasis added]

TRORP 2020 defines areas as “unsuitable” for solar development by mapping:

Hierarchy of Suitability

All of the lands within the Region have been analyzed on a rough scale using map data supplied by DPS to rank them in terms of areas of “raw potential”: areas that are unsuitable because of high value resources; areas with constraints; areas with no known or possible constraints (prime area); “preferred” areas. ...

Unsuitable (Prohibited Locations) [*italic emphasis added*]

The Regional Plan identifies some areas as poor locations for most forms of development due to their natural or scenic value or *to protect our citizens from potential natural disasters*. These areas have already been removed from consideration and are not shown in the constraint or prime areas on the maps. The policies displayed in this section state the unsuitable areas in the Region.

TRORP 2020 p. 242 **PC-186**

TRORP 2020 Solar Siting Map **PC-200** indicates sites that are suitable for solar development. Those areas left blank are those which, in the plain language of TRORP 2020, were removed from consideration “due to their natural or scenic value or *to protect our citizens from natural disasters*.”

The Petitioner (on whom the burden falls) provided no evidence that the project site is mapped as suitable. Under *PUC Rule 5.107(C)(8)*:

(8) Local and regional plans. The applicant must provide copies of the relevant sections of any town plan and regional plan in effect in the community in which the proposed facility will be located. The applicant must describe how the project complies with or is inconsistent with the land conservation measures in those plans.

PUC Rule 5.107(C)(8)

The Applicant’s “Aesthetics and Orderly Development” exhibit [RDS MS-6 p.9] **PC-130** does not identify any land conservation measures in either the town or regional

plan. It asserts, without specific references, that the project complies with the relevant plans and states that there is a preferred site letter.

The Petitioner failed to disclose that Randolph Town Plan contained a prohibition of energy facility development on slopes greater than 25%, or that the prohibition is a land conservation measure. The Petitioner failed to disclose that TRORP 2020 specifically maps suitable and unsuitable (prohibited) solar development sites, and did not submit the map into evidence⁸, and presented no evidence indicating that the project site is mapped as a suitable location. The Petitioner’s “Aesthetics and Orderly Development” exhibit **PC-130** does not minimally comply with *PUC Rule 5.107(C)(8)*.

It is truly an extraordinary circumstance that the project is prohibited by the Town Plan and there is no evidence that it is sited at a location where solar development is not prohibited under the Regional Plan. Lacking evidence that the site is “Suitable” (not prohibited) in the regional plan, the PUC erred in finding that the project would not unduly interfere with orderly development of the region.

C. The project is of regional significance, with regional impacts

This Court has previously held that *30 VSA §248(b)(1)* “relates to the orderly development of the region, not to a particular municipality within the region.” *In re Petition of Rutland Renewable Energy, LLC for Certificate of Public Good Pursuant to 30 VSA §248*, 2016 VT 50, ¶9, and that Intervenors must demonstrate, in regard to a violation of a town plan provision, “how such a violation would interfere with the orderly development of the region.” *In re New Haven GLC Solar, LLC*, 2017 VT 72, ¶33.

There is ample evidence in the record that this project would unduly interfere with orderly development on a regional scale. TRORP 2020 [pp. 277-9] states that energy facilities that require §248 approval are projects of regional significance. **PC-192-4**

The site is located in Headwaters characterized by steep slopes, and within a regionally designated Surface Water Protection Area for Royalton Fire District 1. [Pfd2 p21] **PC-420** TRORP 2020 declares that substantial impact on public water supply

⁸ Excerpts of TRORP 2020 were included in Exhibit RDS MS-6. TRORP 2020, including the maps, was admitted into evidence as Appellants’ exhibit NI MB-3.

watersheds and aquifer protection areas constitutes substantial Regional Impact.⁹ [p 278] **PC-193** Therefore, even if unreasonable erosion were localized and confined to the project site, it would still have undue adverse Regional Impact. When eroded sediments are not confined to the site, they will be carried by steep headwater streams into the nearby¹⁰ White River where they will have further undue adverse regional impact.

The Hearing Officer found: [PfD2 p.14 Finding 25] **PC-413**

The Facility's impact on land use and slopes greater than 25% are **localized** and do not have a regional impact. [*emphasis added*]

In finding the impact to be "localized" she cited the "orderly development" analysis in exhibit RDS-MS-6 at 9, **PC-130** as the basis of her finding. The PUC's Final Order [page 4] **PC-7** adopted the Hearing Officer's findings on this point.

The Petitioner's "orderly development" exhibit **PC-130** asserts the low profile of the project will not interfere with orderly development from an aesthetics point of view; asserts generically, without specific references and without identifying any land conservation measures, that the project complies with relevant plans; and states that there is a preferred site letter. The "facts" attributed by the Hearing Officer to the Applicant's exhibit are mere assertions without evidence. The Hearing Officer, and subsequently the PUC, arbitrarily and capriciously found "facts" which do not exist in the record.

In determining that the facility's impacts are "localized," [Final Order p.4] **PC-7** the PUC arbitrarily and capriciously inverted the application of 30 VSA §248(b)(1). Towns and Regional Planning Commissions adopt plans and land use conservation measures under the authority of Vermont law with the precise purpose of ensuring that land development projects, including energy facilities, will not have an undue adverse regional impact. The Regional Plan's prohibition of solar development on unsuitable sites while expressing that suitable sites are those that are "flat to gently sloping", the Town Plan prohibition against energy facility development on slopes over 25%, the State protection of Headwaters, and the application of Surface Water Source Protection Areas,

⁹ TRORP 2020 is entitled to substantial deference. [PfD2 p.14-15] **PC-413-4**
Under 24 VSA §4345a(17), a regional plan definition of "substantial regional impact" is to be given substantial deference in state regulatory proceedings.

¹⁰ Site is 450 ft from the White River corridor and 500 ft from the River shoreline. Exhibit RDS DB-2 pages 5-6 **PC-115-6**

all coalesce for one very clear purpose: “to protect our citizens from potential natural disasters”. That is, to prevent undue adverse impacts on a regional scale.

The PUC's errors regarding soil erosion further taint its findings regarding orderly development:

The hearing officer set out the correct standard for evaluating a regional impact; appropriately recognized that even small facilities can have a regional impact based on their character and nature; and gave due consideration to the Town of Randolph’s land conservation measure prohibiting energy facility development on slopes greater than 25% – but, finally, properly concluded that *the Facility’s impacts were localized and adequately controlled by ANR’s regulations*. **Therefore**, we do not agree with the Landowners’ argument that the hearing officer failed to give due consideration to the land conservation measure contained in the Town Plan.

Final Order p.4, **PC-7** [*emphasis added*]

...

[W]e agree with the hearing officer and ANR that *the requirements of ANR’s stormwater permitting regulations are sufficient to protect surface waters*. **Therefore**, we do not accept the Landowners’ argument that the Facility will unduly interfere with the orderly development of the region because it is within a surface water source protection area. [*emphasis added*] Final Order p.5-6 **PC-8-9**

The use of the word “Therefore” indicates that the PUC, if not for its erroneous opinion that the **Post-Construction** impacts of the project would be localized and adequately controlled by ANR’s **Construction** Stormwater Permit, would have found this project unduly interferes with orderly development of the region.

As stated above, under the common rules of statutory construction this Court must read 30 VSA §248(b)(1) in a manner which gives meaning to each phrase. Giving due consideration to land conservation measures in this context means recognizing that local land conservation measures – particularly those contextualized in harmony with meaningful attempts to avert disaster in Vermont’s devastating floods – are critically important to prevent adverse regional impacts. The PUC’s determination that the project impacts are “local” despite contravening specific prohibitions in the Town and Regional plans and precautions like headwaters and water protection areas is arbitrary and capricious and a misapplication of law and must be reversed.

CONCLUSION

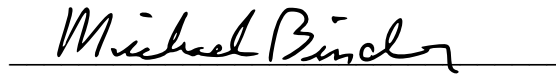
For the foregoing reasons, the Final Order issued by the PUC must be rescinded and the CPG denied; or, alternatively, the Final Order should be set aside and the matter remanded to the PUC; or such other relief granted as this Court deems necessary and appropriate in the interests of justice.

Dated at Randolph, Vermont this Eleventh day of April, 2025.



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Certificate of Word Count Compliance

I hereby certify that this Brief of the Appellant complies with the word-count limitations of the Vermont Rules of Appellate Procedure Rule 32(a)(7)(D) and contains 8727 words including the cover page and exclusive of the statement of issues, table of authorities, table of contents, the signature block, this certification, and the certificate of service, utilizing Apple's Pages word processor on a Mac Computer.

/s/Michael Binder

DATE: April 11, 2025

Certificate of Service

I, MICHAEL BINDER, on behalf of JOAN ALLEN and MICHAEL BINDER, do hereby certify that this date I served the foregoing PRIMARY BRIEF OF APPELLANTS upon the parties by filing the same electronically this date.

/s/Michael Binder

DATE: April 11, 2025