

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Chelsea Solar, LLC pursuant]	
to 30 V.S.A. § 248, for a certificate of public]	Docket No. 17-5024-PET
good authorizing the installation and]	
operation of a 2.0 MW solar electric generation]	
facility located off Willow Road in]	
Bennington, Vermont]	

**REPLY TO PETITIONER’S OPPOSITION TO TOWN’S EMERGENCY MOTION TO
STAY PROCEEDINGS**

NOW COMES intervenor Town of Bennington (“Town”), by and through its attorneys, Woolmington, Campbell, Bernal & Bent, P.C., and submits the following reply in support of its emergency motion to stay proceedings in the above-referenced docket.

Petitioner seems to misread the Town’s motion to stay. Petitioner ignores the stated purpose and reasoning for the request for a stay, and instead makes baseless accusations of nefarious motivations on the part of the Town. The truth of the matter is, the Complaint itself is an obvious attempt to intimidate the Town in order to continue efforts to skirt the rules and regulations to which everyone else adheres. Aside from numerous legal deficiencies, the Complaint raises factual issues that are common to this Docket, and which should be litigated before the Superior Court or the PUC, but not both simultaneously.

As stated in the Town’s motion and ignored in the Opposition, the reasons that the Town has requested the stay are as follows:

- To avoid unnecessary expenditure of resources and time while the Superior Court determines what it does/does not have jurisdiction over;

- The Town should not be forced to litigate in front of two different bodies until the jurisdiction questions are resolved, and the only way for that to happen is to stay this proceeding until the Superior Court rules issues a ruling on that issue. Petitioner ignores these points in arguing that the Town is taking opposing or illogical position—that is simply not true. The Town’s position is consistent with the stated purpose of obtaining a determination as to jurisdiction as to the issues over which the PUC *does* have authority before it proceeds in any venue.

Petitioner also misses the point with respect to the Town’s primary jurisdiction argument. The Town is not taking the position that the PUC has jurisdiction over the constitutional issues—rather, it took the position that the issues are so intertwined, and there are so many common issues to be decided, that the PUC needs to address the matter first under the primary jurisdiction doctrine. Additionally, there are no constitutional issues at all until the PUC renders a determination regarding the effect of the Plan(s) and Ordinance(s) at issue.

In *Committee to Save the Bishop’s House v. Medical Center Hospital of Vermont, Inc.* (136 Vt. 213, 218, 388 A.2d 827, 830 (1978)), the Court held that a “court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of the question arising in the proceeding before the court.” Because the issues raised in the Complaint concern the same nexus of issues before the PUC, namely the same statutes, ordinances, and municipal planning tools to be considered in the CPG petition, *Bishop’s House* applies. As it stands, until such determinations are made, Petitioner’s as-applied constitutional claims are not ripe. And should the PUC determine that they have no effect on Petitioner, those claims would be moot.

For example, if the PUC determines that Act 174 does not apply to the proceeding

before it, then no alleged injury could arise from the Town's application of the statutes making up the Act. The same goes for constitutional questions. If the PUC renders a decision which does not apply the challenged Plan or Ordinances, then no argument remains that such municipal planning has resulted in an as-applied constitutional violation. Likewise, a tort is not actionable in the absence of damages, thus there could be no damages to consider (let alone causation) unless and until the PUC renders a determination. Because the Complaint fails to distinguish the claims as between the various Defendants, Plaintiffs, and/or relief sought, it is impossible to discern which of the Town's alleged actions Chelsea Solar LLC, in particular, is challenging.¹ Thus, on the face of the Complaint, Petitioner is challenging the Town Plan, the Town's Act 174 certification process, the Town screening ordinance, and the Town Energy Amendment. The Schedule 1 submitted by the Petitioner reflects the same.

It is important to avoid two different adjudicatory bodies considering and rendering determinations regarding the legal effect of the same facts. Again, to avoid this, the PUC should first address the issues before it. Once the jurisdictional issues are determined by the Superior Court, these proceedings should resume, with the parties keeping those determinations in mind.

Petitioner does not seem to appreciate why this matter is distinct from *In re*

¹ Because the Complaint makes no such distinction, the Schedule 1 provided by Petitioner must be ignored. None of that information is reflected in Petitioner's pleadings before the Superior Court, and it is of no legal effect. Petitioner asserts that this is the Town "ignoring" Schedule 1. The truth is, the Petitioner's Complaint makes no effort to plead which parties are involved with which suit. Unless and until the Petitioner amends the Complaint to reflect what it now claims in Schedule 1, the Town simply cannot rely on Schedule 1. Even if Schedule 1 *did* apply, it makes it very clear that the Petitioner in this docket is challenging the municipal plan(s), amendment(s), ordinance(s), and statutes that the Commission must construe.

Woodstock Community Trust & Housing Vermont PRD (2012 VT 87, ¶ 36 192 Vt. 474, 492, 60 A.3d 686, 701 (2012)). The Town’s argument does not solely concern the expenses of trial, but rather, the correct procedural order for determining the issues that are common among the two dockets. Thus, the distinction is that in *Woodstock*, the issues to be decided were those of law. In this instance, there are a multitude of common factual issues that must be addressed.

Accordingly, a stay is also appropriate under *Stone*, because the request for the stay is not intended to “operate as a bar to the action, but only as a suspension of proceedings until the question” of the jurisdiction of the Superior Court (and of the PUC) has been determined by that Court. *Stone v. Briggs*, 112 Vt. 410, 410 26 A.2d 828, 830 (1942).

Finally, and of critical importance, **is the fact that Petitioner is suing potential witnesses in this docket.**² The pending litigation against these witnesses will have the effect of chilling their ability to testify before this body, and thus proceedings should be stayed until the Superior Court has the opportunity to address their motion to dismiss, as well.

Dated at Manchester this 9th day of February, 2018.

TOWN OF BENNINGTON

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² Petitioner improperly sues various members of the Town’s siting committee in an individual capacity in violation of 24 V.S.A. §§ 901 and 901a, in what appears to be an effort to intimidate those individuals with regard to their testimony in this docket.

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