

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	
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Order entered: 06/11/2021

PROCEDURAL ORDER DEFERRING RULING ON REQUEST FOR STAY

I. INTRODUCTION

On April 1, 2021, the Vermont Public Utility Commission (“Commission”) issued an order in this proceeding finding that Allco Renewable Energy Limited and its affiliates (collectively, “Allco”) had begun site preparation without a certificate of public good (“CPG”), and we enjoined Allco from any further site preparation without a CPG (the “Injunction Order”). We also directed the parties to confer and file a proposed schedule for the penalty phase of this proceeding by no later than the close of business on Friday, April 16, 2021.

On April 2, 2021, Allco filed notice that it was appealing the Injunction Order to the Vermont Supreme Court. Allco also appealed our issuance of a temporary restraining order in this case. On November 5, 2020, the Vermont Supreme Court dismissed that appeal “without prejudice to refile it if a preliminary injunction is granted.”¹

On April 16, 2021, Allco filed a motion (the “Allco Motion”) requesting that the Commission stay the penalty phase of these proceedings because the “Commission has been divested on all matters relating to the scope of the Appeal.”²

¹ See *In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al.)*, Supreme Court Docket No. 2020-242, November Term, Entry Order of 11/5/20 at 2.

² Allco Motion at 2. This motion was signed by Michael Melone, Esq., on behalf of Allco Renewable Energy Limited. The motion was written as a request of Otter Creek Solar LLC, a subsidiary of Allco that is not a party in this proceeding. The Allco subsidiaries that are participating in this proceeding include Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, but not Otter Creek Solar LLC. We consider the reference to Otter Creek Solar LLC to be an administrative filing error and that the motion was requested by Allco Renewable Energy Limited, which is a party to this proceeding.

Also on April 16, 2021, the Vermont Agency of Natural Resources (“ANR”) and the Vermont Department of Public Service (“Department”) each filed responses to the Allco Motion. Both ANR and the Department disagreed with Allco’s assertion that the pending appeal divests the Commission of jurisdiction over the penalty phase but did not object to a stay of the penalty phase in this proceeding.

On April 21, 2021, the Intervenors³ filed comments responding to the Allco Motion. The Intervenors oppose the Allco Motion, disagree with Allco’s assertion that the Commission has been divested of its jurisdiction by Allco’s appeal, and recommend that the Commission proceed with the penalty phase without delay to preserve the integrity of the Commission’s permitting process.

As discussed below, we also disagree with Allco’s assertion that the Commission is divested of jurisdiction in this matter. Allco’s appeal of the Injunction Order is premature and would not result in a final resolution of this case. We therefore could proceed with the penalty phase of this proceeding. However, to avoid any complications that might arise from going forward while the case is also on appeal, the Commission defers ruling on the Allco Motion until after the Vermont Supreme Court determines whether it will hear Allco’s premature appeal of the Injunction Order. If the Vermont Supreme Court decides it will take jurisdiction of the appeal we will then address the merits of the request to stay the penalty phase of the case.

II. DISCUSSION

The Allco Motion seeks a stay of the penalty phase of this proceeding and contends that our jurisdiction over this proceeding has been divested by Allco’s appeal of the Injunction Order to the Vermont Supreme Court. We are not persuaded for two reasons. First, the Injunction Order is not a final order in this proceeding, and Allco’s appeal is therefore premature. We will issue a final order in this proceeding after a civil penalty is determined at which time our complete decision in this matter will be appealable. Second, even if Allco’s appeal were not premature, Allco has not met the standard for granting a stay. Thus, we cannot grant the Allco Motion at this time. Rather, for the reasons noted above, we defer a ruling on whether to proceed until the Vermont Supreme Court decides whether it will hear Allco’s appeal.

³ Apple Hill Homeowners Association, Mount Anthony Country Club, and Libby Harris.

A. The Allco Appeal Was Filed Prematurely

In Vermont, “when a proper notice of appeal from a final judgment or order of an administrative agency is filed the cause is transferred to the Supreme Court, and the agency is divested of jurisdiction as to all matters within the scope of the appeal.”⁴ Thus, not every appeal automatically divests an agency of jurisdiction. Rather, jurisdiction is removed from the agency only when there has been the filing of a proper notice of appeal “from a *final* judgment.”⁵ The Vermont Supreme Court has declared that “[t]he judgment rendered must *conclude* the litigation in the court below to the extent that if no exceptions were taken, the controversy would end, and the case would pass out of court.”⁶

This proceeding is an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2). The Injunction Order is not a final order in this proceeding, as it does not “conclude the litigation.”⁷ A final order requires our determination of a civil penalty amount.

As part of our response to Allco’s site-clearing activities, the Commission initiated this investigation, conducted two evidentiary hearings, and issued both a temporary restraining order and the Injunction Order. Based on the evidence in the record, we also concluded that Allco’s actions at the Apple Hill site were site preparation for an electric generation facility without a certificate of public good (“CPG”). Allco’s action thus violated 30 V.S.A. § 248(a)(2)(A), which requires a CPG before site preparation may begin. Consequently, as noted multiple times in our Injunction Order, Allco’s violation warrants additional process to address the issuance of a civil penalty for that violation of Section 248 under 30 V.S.A. § 30:

We also direct that Allco communicate with the other parties and file a schedule for the next phase of this proceeding. This next phase of the proceeding will determine the civil penalty Allco must pay under Section 30 of Title 30 for

⁴ *Petition of Ratepayers, et al.*, Docket 4701, Order of 6/7/85, at 2 (alteration marks omitted) (appeal of Commission order directing utilities to take preliminary corrective action was not a final order and did not divest Commission from taking jurisdiction to take further action in show-cause proceeding) (quoting *Kotz v. Kotz*, 134 Vt. 36, 38 (1975)).

⁵ *Id.* (emphasis added).

⁶ Docket 4701, Order of 6/7/85, at 3 (emphasis added) (quoting *Appliance Acceptance Co. v. Raymond*, 121 Vt. 153, 155 (1959)).

⁷ *Id.*

violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.⁸

Indeed, it is that same additional process—the determination of a penalty amount—that Allco seeks to have stayed during the pendency of the appeal. Because we have not yet begun, much less concluded, the penalty phase of this proceeding, the Injunction Order does *not* “conclude the litigation in the court below.”⁹ If Allco wished to appeal the Injunction Order, it should have requested the Commission’s permission to bring an interlocutory appeal to allow for piecemeal review by the Vermont Supreme Court before a final order is issued.¹⁰

The Allco appeal was prematurely filed and does not divest the Commission of its jurisdiction to address the penalty phase of this proceeding. Nevertheless, for the reasons noted earlier, we defer a ruling on whether to proceed at this time. We must first see whether the Vermont Supreme Court decides to hear Allco’s appeal.

B. The Allco Motion Does Not Meet the Standard for a Stay

Even assuming, for the sake of argument, that Allco had filed a proper appeal of a final order, Allco has not demonstrated that it meets the standard for obtaining a stay pending appeal. Under Vermont law, “neither the time for filing a notice of appeal nor the filing of a notice of appeal, . . . shall operate as a stay of enforcement of an order of the Commission unless the Commission or the Supreme Court grants a stay.”¹¹ As a general rule, when a court order

⁸ Injunction Order at 3; *see also id.* at 16 (“We direct the parties to propose a schedule for the proceeding to address an appropriate civil penalty to be issued against Allco pursuant to 30 V.S.A. § 30.”); *id.* at 30 (“To further substantiate the extent of that civil penalty, additional proceedings are required to document the factual basis for the amount of that penalty using the criteria addressed in 30 V.S.A. § 30. The parties are therefore directed to confer and Allco is directed to propose a schedule for the penalty phase of this proceeding by no later than the close of business on Friday, April 16, 2021.”); *id.* at 31 Order ¶ 3 (“The parties are directed to confer and Allco is directed to file a proposed schedule for the penalty phase of this investigation by no later than the close of business on Friday, April 16, 2021.”). Although the signature page of the Injunction Order contained the standard “appeal tag” giving notice to parties that any appeal must be filed within 30 days, our inclusion of that language was a clerical error, as is made clear by the fact that multiple other parts of the decision specify that further proceedings—to determine the penalty amount—are necessary.

⁹ *Petition of Ratepayers, et al.*, Docket 4701, Order of 6/7/85, at 3 (quoting *Appliance Acceptance Co. v. Raymond*, 121 Vt. 153, 155 (1959)); compare *State of Vermont Agency on Natural Resources v. Parkway Cleaners*, 209 Vt. 620, 637 (2019) (court issued final order that included injunction as well as findings as to environmental harm and penalty requiring compliance with statutory obligations).

¹⁰ *See* V.R.A.P. 5 & 5.1; 30 V.S.A. § 12 (“[T]he Commission, in its discretion and before final judgment, may permit an appeal to be taken by any party to the Supreme Court for determination of questions of law in such manner as the Supreme Court may by rule provide for appeals before final judgment from a Superior Court.”).

¹¹ 30 V.S.A. § 12.

imposes injunctive relief and requires the payment of a penalty, an appeal of that order to the Vermont Supreme Court does not stay an order on injunctive relief, but does stay the requirement that a respondent pay a penalty.¹²

Allco does not argue that it meets the standard for staying the Injunction Order. To prevail on a motion for a stay, the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public.¹³ A trial court (or, here, the Commission) has discretion in granting or denying a motion for stay pending appeal. Discretionary rulings will not be disturbed unless an abuse of discretion is clearly shown.¹⁴ As the moving party, Allco has failed to address the four-part test for a stay of these proceedings. Thus, Allco does not appear to be requesting that we stay the imposition of the Injunction Order. Rather, Allco requests only that we stay any further proceedings.

There is no basis for issuing a stay. We have not yet issued a final order addressing the appropriate civil penalty to be issued against Allco for its unpermitted site preparation activity on Apple Hill. Any delay in doing so would delay the ultimate resolution of this matter.

III. CONCLUSION

For judicial efficiency and in response to the requests of Allco, ANR, and the Department that we avoid proceeding with this case while an appeal is pending, we defer ruling on the Allco Motion until the Vermont Supreme Court determines whether it will hear Allco's appeal. If the Vermont Supreme Court decides it will take jurisdiction of the appeal we will then address the merits of the request to stay the penalty phase of the case.

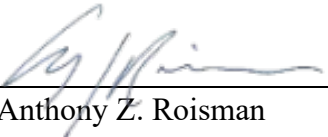
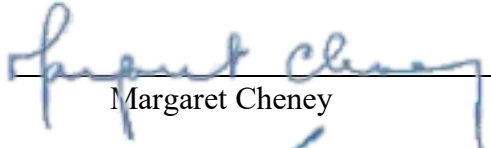
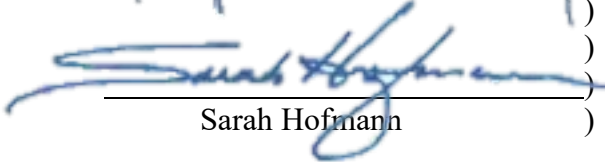
SO ORDERED.

¹² See, e.g., V.R.A.P. 8 (requiring a motion to stay injunctive relief pending appeal); 10 V.S.A. § 8013 (“An appeal by a respondent or the Attorney General to the Supreme Court shall not stay an order, but shall stay payment of a penalty.”); 4 V.S.A. § 1107(a) (“An appeal shall stay payment of a penalty . . .”); V.R.C.P. 80.6(h)(2) (payment of restitution in environmental case stayed pending appeal); see also, e.g., *ANR v. Persons*, 2012 WL 8880772 (Vt. Super. Ct. Env'tl. Div. Nov. 16, 2012) at 1. These statutory provisions and cases are further support for our holding above that Allco should have waited until the penalty phase of this proceeding concluded before filing an appeal.

¹³ *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) (citing *In re Insurance Servs. Office, Inc.*, 148 Vt. 634, 635, 537 A.2d 134, 134 (1987) (mem.)); *In re Allied Power & Light Co.*, 132 Vt. 554, 556, 326 A.2d 160, 162 (1974).

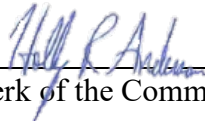
¹⁴ *Id.* (citing *Vermont Nat'l Bank v. Clark*, 156 Vt. 143, 145, 588 A.2d 621, 622 (1991)).

Dated at Montpelier, Vermont this 11th day of June, 2021.

 _____ Anthony Z. Roisman) PUBLIC UTILITY)))
 _____ Margaret Cheney) COMMISSION)))
 _____ Sarah Hofmann) OF VERMONT)))

OFFICE OF THE CLERK

Filed: June 11, 2021

Attest: 

Clerk of the Commission

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