

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 21-2939-NMP

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Petition of Randolph Davis Road Solar LLC for a Certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the Installation and operation of a 500kW group Net-metered solar electric generation system in Randolph, Vermont	
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**NEIGHBOR INTERVENORS' REPLY TO  
PETITIONER'S RESPONSE TO MOTION TO STAY AND MOTION TO DISMISS**

Now come Neighbor Intervenors Michael Binder and Joan Allen, *pro se*, and reply to Petitioner's response (dated 3/16/2022) to Neighbor Intervenors' Motion to Stay and Motion to Dismiss.

Petitioner has failed to fully comply with the PUC's Net Metering Rule 5.107(c)(5) & (6) requirements within the 180 days of the date of filing of the advance submission (which was filed on 6/21/21, so 182 days later was Monday, December 20, 2021), and, in addition, they have failed to fully comply with the Rule even within 180 days of the date the Petition was filed (filed on August 11, 2021, so 180 later was February 2, 2022); therefore, Neighbor Intervenors respectfully requests that the PUC dismiss the Petition by treating the "the submission . . . as withdrawn without further action required by the Commission" pursuant to Rule 5.107(B)(4), which states in full:

(4) Timing of Advance Submission and Application. If, within 180 days of the date of the advance submission, the applicant has not filed a complete application for the project that fully complies with the filing requirements of this Rule, the submission will be treated as withdrawn without further action required by the Commission.

PUC NM Rule 5.107(B)(4).

PUC Net Metering Rule 5.107(C) lays out the filing requirements that must be adhered to in order to have an application deemed complete. The Rule states in relevant parts as follows:

(C) Filing Requirements. **Applications** for net-metering systems subject to this Section 5.107 **must contain the following information. Failure to provide any required information will result in the application being deemed incomplete:**

(5) Site plans. The applicant must provide a site plan for each project. A site plan **must include:**

(a) Proposed facility location and **any project features;**

(b) Approximate property boundaries and setback distances from those boundaries to the corner of the nearest project-related structure, approximate distances to any nearby residences, and dimensions of all proposed improvements;

...

(d) A description of any areas where vegetation is to be cleared or altered and a description of any proposed direct or indirect alterations to or impacts on wetlands or other natural resources protected under 30 V.S.A. § 248(b)(5), including the limits of disturbance and the total acreage of any disturbed area;

(e) **Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure;**

...

(g) **Plans of any proposed access driveway, roadway, or parking area at the project site, including grading, drainage, and traveled width, as well as a cross-section of the access drive indicating the width, depth of gravel, paving, or surface materials;**

...

(6) Elevation drawings.

(a) For each proposed structure, the applicant must provide elevation drawings.

...

(c) The applicant must include two elevation drawings of the proposed structures drawn at right angles to each other, showing the ground profile to at least 100 feet beyond the edge of any proposed clearing, and showing any guy wires or supports. **The elevation drawing must show height of**

the structure above grade at the base, and describe the proposed finish of the structure.

(d) The elevation drawing must indicate the relative height of the facility to the tops of surrounding trees as they presently exist.

...  
PUC Net Metering Rule 5.107(C)(5) & (6) (emphasis supplied).

Petitioner's site plan fails to comply with the requirements of the Rule because the revised plan shows only pictures of stone dams, silt soxx, and water bars, but nowhere indicates where on the site these structures are to be located, nor are there any culverts, specifications for culverts or even pictures of culverts shown on the site plan. Among other infirmities, Petitioner's revised site plan (RDS MS-2A) fails to comply with:

- **Rule 5.107(C)(5)(a)**'s requirement to depict in the site plan (a) "any project feature."
- **Rule 5.107(C)(5)(b)**'s requirement to provide "dimensions of all proposed improvements."
- **Rule 5.107(C)(5)(e)**'s requirement to provide "Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure."
- **Rule 5.107(C)(5)(g)**'s requirement to provide "Plans of any proposed access driveway, roadway, or parking area at the project site, including grading, drainage, and traveled width, as well as a cross-section of the access drive indicating the width, depth of gravel, paving, or surface materials"
- **Rule 5.107(C)(6)(c)**'s requirement to provide "The elevation drawing must show height of the structure above grade at the base."

- **Rule 5.107(C)(6)(d)**'s requirement to provide "The elevation drawing must indicate the relative height of the facility to the tops of surrounding trees as they presently exist."

Furthermore, the Petitioner has failed to provide the information that was requested by the PUC Hearing Officer at the February 16, 2022 Status Conference<sup>1</sup>, despite being given additional time to complete its application and comply with the Rule by submitting supplemental testimony and a site plan slope overlay, as agreed to and promised by Attorney Kim Hayden, Petitioner's attorney, who specifically represented that the Petitioner would provide the "elevation detail and the layers that you [the Hearing Officer] just described . . . within about a week"<sup>2</sup>

However, instead of providing a site plan showing the entire parcel's slopes as promised at the Feb. 16 Scheduling Conference, Petitioner has provided an abbreviated slope layer encompassing only a tiny portion of the parcel. This refusal by the Petitioner, to provide a site plan showing the slopes layer over the entire parcel and covering, at a minimum, the entire

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<sup>1</sup> During the February 16, 2002 Scheduling Conference, Hearing Officer Andrea Poppiti stated:

"I would like to see also a layer on top of the site plan, if possible, elevation sloped so that it's easy to see where the -- where the slope is 25 percent or more."

Hearing Transcript p. 9, lines 21 – 24. (See attached Exhibit A – Hearing Transcript excerpt).

<sup>2</sup> Attorney Kim Hayden replied to the Hearing Officer's request:

"...so we believe we can do that within a week. . . . the petitioner could provide that testimony, elevation detail and the layers that you just described, and I'll have to read the transcript to confirm that I have got that, but we can file that within about a week."

Scheduling Conference Transcript, February 16, 2022, p. 9, lines 21 – 24. (See attached Exhibit A containing an excerpt of pages 8-11 of the hearing transcript.)

Limits of Disturbance as defined by the PUC Net Metering Rule<sup>3</sup>, is especially frustrating because Petitioner already possesses the slope information, which was contained on a map submitted to the Town of Randolph on October 22, 2021<sup>4</sup>, which shows that much of the parcel's land contains steep slopes greater than 25%.

Moreover, the refusal of the Petitioner to provide the required information, prejudices the other parties by preventing them from evaluating the mitigation of stormwater runoff and evaluating the Project's conformance with the Randolph Town Plan, which necessarily requires the location of these excavated structures to be known, the existing slopes of the terrain to be known, as well as the finished grades of the site to be known. This is essential information because the Randolph Town Plan prohibits "energy facility development" on steep slopes, that is on "lands over 25% slope." Consequently, unless there is a slope overlay of the entire site, including the "Limits of Disturbance" as defined by the PUC Net Metering Rule<sup>5</sup>, there can be

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<sup>3</sup> Vermont Public Utility Commission's Net Metering Rule 5.103 Definitions, states:

"Limits of Disturbance" means the boundary within which all construction, materials storage, grading, landscaping, and any other activities related to site preparation, construction, operation, maintenance, and decommissioning take place as a result of the net-metering system, including areas disturbed due to the creation or modification of access roads, utility lines, and the clearing or management of vegetation.

Public Utility Commission, Net Metering Rule 5.103 Definitions.

<sup>4</sup> [https://drive.google.com/file/d/1N3xHpfPfnLqUM8S8gIpxFZ2\\_JCeRSmGS/view](https://drive.google.com/file/d/1N3xHpfPfnLqUM8S8gIpxFZ2_JCeRSmGS/view), p. 24.

<sup>5</sup> Vermont Public Utility Commission's Net Metering Rule 5.103 Definitions, states:

"Limits of Disturbance" means the boundary within which all construction, materials storage, grading, landscaping, and any other activities related to site preparation, construction, operation, maintenance, and decommissioning take place as a result of the net-metering system, including areas disturbed due to the creation or modification of access roads, utility lines, and the clearing or management of vegetation.

Public Utility Commission, Net Metering Rule 5.103 Definitions.

no adequate analysis of the project and no ability to determine whether the project violates the Town Plan's strict prohibition against "energy project development" on "lands over 25% slope."<sup>6</sup> Therefore, Petitioner's violation of Rule 5.107 deprives Neighbor Intervenors of their constitutional rights to due process, equal protection and common benefits.

In summary, the Petitioner's refusal to provide the required information to complete its application is in direct defiance of Rule 5.107(c)(5) & (6) as well as the Hearing Officer's request of the Petitioner at the Feb. 16<sup>th</sup> Scheduling Conference to produce supplemental information, including a slope overlay on top of the site plan, to clearly show the areas of the site where the slopes exceed 25%. As a result, the failure of the Petitioner to complete its application that fully complies with the Rule 5.107 requirements, mandates that "the submission will be treated as withdrawn without further action required by the Commission," pursuant to Rule 5.107(B)(4).

Unfortunately, the inescapable conclusion to be drawn, is that the Petitioner is concealing the slope overlay information from the PUC, because such information definitively demonstrates

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<sup>6</sup> The Randolph Town Plan specifically prohibits "Energy facility development. . . in lands . . . over 25% slope" in **Chapter 6 – Energy**, regarding **Section 248 Certificates of Public Good** which states as follows:

**Chapter 6 – Energy**

**Section 248 – Certificates of Public Good**

...

**For all energy generation facilities, the following policies apply:**

...

1. **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.

Randolph, Vermont Town Plan, adopted September 25, 2019, at p. 29 (bold emphasis in the original, underlined emphasis supplied).

that much of the site, the access road, and the area within the Limits of Disturbance, contain steep slopes greater than 25%, in direct violation of the Town Plan's specific provision which prohibits "Energy facility development" on "lands over 25% slope." This strict prohibition is contained in the Randolph Town Plan's **Chapter 6 – Energy, Section 248 Certificates of Public Good** which lists the sensitive locations where "Energy facility development" "shall be prohibited," including in floodways, wetlands, near streams and, the provision most relevant in this case, lands with steep slopes over 25%. The crystal clear language of the Randolph Town Plan states as follows:

**Chapter 6 – Energy**  
**Section 248 – Certificates of Public Good**

...  
**For all energy generation facilities, the following policies apply:**

1. **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.

(underlined emphasis supplied, bold in the original).

As a result, until and unless the Petitioner provides a slope overlay for the entire parcel and at a minimum, for the entire Limits of Disturbance area, Neighbor Intervenors cannot prepare for a Technical Hearing, nor does the PUC have sufficient evidence upon which to make a determination of whether the proposed project violates the Randolph Town Plan's land conservation measures and whether the recommendations of the Town should be wholly disregarded. Therefore, the Petitioner should be ordered either to produce the site plan slope overlay and other missing information, or the Petition should be dismissed for failure to provide the requisite materials within the 180 day deadline. Any other result would deprive Neighbor Intervenors of their constitutional rights to due process, equal protection and common benefits.

In further response to the Petitioner's Response to the Motion to Stay and Motion to Dismiss, Neighbor Intervenors offer the following:

Rule 5.107(C)(5)(e) requires "detailed plans for any drainage of surface and/or sub-surface water." This includes structures which require excavation, such as a drainage swales, water bars, culverts and stone dams. Neighbor Intervenors have not requested the location details of temporary non-excavated structures such as silt fences.

The Petitioner's arguments about Neighbor Intervenors' interest in evaluating landscape resiliency and town plan compliance are irrelevant to the requirement that the site plan contain detailed plans for any drainage of surface and/or sub-surface. When the Petitioner fully complies with the site plan filing requirements, all parties may evaluate the project as they see fit.

Petitioner argues that the submitted site plan is similar or identical in nature and detail to the Site Plans and EPSC sheets regularly submitted to and accepted by the Commission. Neighbor Intervenors request that the Petitioner stop flouting Rule 5.107 (C)(5)(e) and provide the required "Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure."

Petitioner is proposing an energy facility development on a parcel with steep slopes above 25% in the Town of Randolph. Randolph's Town Plan contains language that makes it necessary for Neighbor Intervenors to have the requested and required information in order to adequately participate in this proceeding.



Neighbor Intervenors hereby renew their Motion to Dismiss the case because it does not fully comply with the filing requirements. In the alternative, Neighbor Intervenors renew the Motion to Stay this case until Petitioner provides the required and necessary information.

Thank you for your attention to this matter.

DATED Randolph, Vermont, March 23rd, 2022.

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