

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 21-3587-NMP

Petition of Norwich Upper Loveland Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500 kW (AC) group net-metering solar electric generation system in Norwich, Vermont	
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**VERMONT DEPARTMENT OF PUBLIC SERVICE’S RESPONSE
TO NEIGHBORS/INTERVENORS’ MOTION TO DISMISS THE PETITION**

On June 1, 2022, intervening neighbors Dan and Jenn Goulet, Samin Kim and Jayoung Joo, Stephen Gorman, John and Heather Benson, Laurence and Shelley Ufford, and Joy Kenseth (together, “Neighbors”), filed a motion to dismiss the above-captioned Petition of Norwich Upper Loveland Solar, LLC (“Petitioner”). Neighbors also moved to impose sanctions, alleging that Petitioner has made fraudulent misrepresentations before the Vermont Public Utility Commission (“Commission”). The Vermont Department of Public Service (“Department”) hereby responds to Neighbors’ motion to dismiss the Petition.

Petitioner’s proposed project is to be sited on a parcel located at 201 Upper Loveland Road in Norwich, Vermont. Neighbors question the validity of the joint letter signed by the Town of Norwich Planning Commission, the Town of Norwich Selectboard (together, “the Town”), and the Two Rivers-Ottawquechee Regional Commission (“TRORC”) supporting the designation of the parcel as a “preferred site” pursuant to Commission Rule 5.103 (“Preferred Site Letter”).¹ Neighbors assert that the Town and TRORC reviewed differing site plans for the project before signing the Preferred Site Letter, and those plans in turn were significantly different from those eventually filed with the petition for a Certificate of Public Good (“CPG”).² Neighbors further contend that Petitioner misled the Town and TRORC by presenting these divergent plans at various points in the process, without adequate disclosures, to obtain each body’s support for the preferred

¹ See Petitioner’s Exhibit NUL-MS-5.

² Neighbors’ motion details a series of site plans from “A” (an early plan shown to some neighbors) to “D” (the current plans) illustrating revisions to the proposal over time. Among other things, the motion indicates that the distance between the array and the nearest neighbor has shifted from 500 feet to 325 feet, the array now sits further on top of a ridge and extends down its eastern side, and the limits of disturbance have increased to include significant tree clearing.

site designation.³ For these reasons, Neighbors argue that the Preferred Site Letter is fundamentally flawed and should not be credited by the Commission.⁴

While not entirely clear from the motion, it appears that Neighbors seek dismissal of the Petition pursuant to either (1) V.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted, or (2) Commission Rule 5.107(B)(4) for failure to file a complete application. The Department recognizes Neighbors' concern and agrees that trust and transparency are of critical importance in the regulatory process. Nonetheless, it is the Department's view that dismissal of the petition is not warranted pursuant to V.R.C.P. 12(b)(6) or Rule 5.107(B)(4).

Beginning with Rule 5.107(B)(4), the relevant provision states:

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.

A Preferred Site Letter is not a filing requirement under Rule 5.107⁵, however, Petitioner's proposed 500 kW solar facility must be on a preferred site to be eligible for a net-metering CPG.⁶ Petitioner submitted the Preferred Site Letter to demonstrate that the project meets Rule 5.103's definition of "Preferred Site" (7), and the Commission issued a memorandum on December 3, 2021 stating its determination that the petition was administratively complete. Because it appears that there is a complete application as required by Rule 5.107(B)(4), the Department suggests that dismissal is inappropriate: any cognizable issues concerning the sufficiency of Petitioner's materials or the project's compliance with applicable criteria should be addressed after further factual development.⁷

The same conclusion follows under the standard for dismissal pursuant to V.R.C.P. 12(b)(6). Under V.R.C.P. 12(b)(6), "[a] motion to dismiss a cause of action for failure

³ Neighbors also assert that the Petitioner presented a viewshed analysis to the Town based on "Site Plan B," but presented "Site Plan C" to TRORC, without a viewshed analysis.

⁴ To the extent Neighbors' motion raises additional issues going to the project's compliance with orderly development and aesthetics criteria under 30 V.S.A. § 248, the Department notes that an evidentiary hearing will be held on those issues.

⁵ See Rule 5.107(C)(1)–(13) (listing the requirements for a complete application).

⁶ See Rule 5.103 (defining "Category III Net-Metering System"); Rule 5.104.

⁷ See *Petition of Randolph Davis Solar, LLC*, Case No. 21-2939-NMP, Order of 4/15/22 at 3 ("[F]or purposes of Rule 5.107(B)(4), the Commission's determination that the application was complete is sufficient. If . . . the Commission [later] determines that the Petitioner's filings are . . . unreliable, then the Petitioner faces the risk that they will not carry their burden of persuasion.").

to state a claim . . . should be denied unless it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.”⁸ In reviewing such a motion, “the [Commission] must assume as true all factual allegations pleaded by the non-moving party. Furthermore, all reasonable inferences that can be drawn from the non-moving party's pleadings are accepted, and all contravening assertions in the movant's pleadings are assumed to be false.”⁹

Looking at the petition under this standard, the Department makes several observations. First, as required, the Preferred Site Letter is signed by “the municipal legislative body and municipal and regional planning commissions in the community where the net-metering system will be located.”¹⁰ Second, it appears that both the Town and TRORC received advance notice before the petition was filed, which (according to Neighbors) included the latest site plans up to that point, and both had the opportunity to provide comments or recommendations. Third, both the Town and TRORC received copies of the petition after it was filed with the Commission, including the current site plans and other application materials, and both had the opportunity to file comments, intervene, and request a hearing. Finally, despite opportunities to do so, neither the Town nor TRORC have submitted comments, notices of intervention, or other filings to indicate a change in their position with respect to the proposed site.¹¹

Given these observations, and considering the reasonable inferences to be drawn, it does not appear that “there exist no facts or circumstances” by which Petitioner could demonstrate preferred site status.¹² Therefore, the Department submits that dismissal pursuant to V.R.C.P. 12(b)(6) is not warranted. Though the concerns expressed in Neighbors’ motion should not be taken lightly, it appears to the Department that both the Town and TRORC have received notice of the project as currently proposed and have not withdrawn their support for the preferred site designation.

For the foregoing reasons, Neighbors’ motion to dismiss the petition should be denied.

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⁸ *Amended Petition of Vermont Elec. Power Co., Inc.*, Docket 7121, Order of 6/23/06 at 3 (internal quotations omitted).

⁹ *Id.* at 17–18.

¹⁰ See Rule 5.103 (stating that “‘Preferred Site’ means,” among other things, “a specific location that is identified in a joint letter of support” from the relevant municipal and regional bodies).

¹¹ It is also worth noting that the Preferred Site Letter appears to designate the parcel at 201 Upper Loveland Road as a preferred site, rather than a precise location on that parcel. See Petitioner’s Exhibit NUL-MS-5.

¹² See Docket 7121, Order of 6/23/06 at 3 (stating that under the 12(b)(6) standard, a petition “could not be dismissed unless it appears that [the Petitioner] could prove no set of facts in support of it”).

DATED at Montpelier, Vermont this 15th day of June 2022.

Respectfully Submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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cc: ePUC Service List