

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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| 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: 12/14/2022

PROCEDURAL ORDER DENYING REQUEST FOR STAY

I. INTRODUCTION

On November 4, 2022, Allco Renewable Energy Limited and its affiliates (collectively, “Allco”) filed a motion to stay these proceedings with the Vermont Public Utility Commission (“Commission”). In this order, we deny Allco’s motion and request that the Vermont Agency of Natural Resources (“ANR”) confer with the other parties and file a proposed schedule for the penalty phase of this proceeding by Friday, December 29, 2022.

II. BACKGROUND

On June 24, 2020, the Commission opened this investigation into whether Allco was conducting site clearing on Apple Hill without a certificate of public good (“CPG”) in violation of Section 248(a)(2) of Title 30.

On June 26, 2020, the Commission held an evidentiary hearing and issued an order temporarily restraining Allco from any further tree clearing on any of the property identified in applications for two solar projects in the Apple Hill area in Bennington, Vermont.¹

On September 8, 2020, Allco appealed the Commission’s temporary restraining order to the Vermont Supreme Court.

On November 5, 2020, the Vermont Supreme Court dismissed Allco’s first appeal “without prejudice to refile if a preliminary injunction is granted.”²

¹ Those applications are in Docket 8454 and Case No. 17-5024-PET.

² *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.

On April 1, 2021, the Commission issued an order in this proceeding finding that Allco had begun site preparation without a CPG and 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 April 16, 2021.

On April 2, 2021, Allco filed notice that it was appealing the Injunction Order to the Vermont Supreme Court.

On April 16, 2021, Allco filed a motion (the “First Allco Stay Motion”) requesting that the Commission stay the penalty phase of these proceedings because, according to Allco, the “Commission has been divested on all matters relating to the scope of the [a]ppeal.”³

On June 11, 2021, the Commission issued an order deferring a ruling on the request for a stay.

On December 3, 2021, the Vermont Supreme Court dismissed Allco’s second appeal because there was not yet a final appealable order from the Commission in this case.⁴

On October 3, 2022, the Commission directed Allco to file a proposed schedule for the penalty phase of this proceeding by October 21, 2022.

On October 20, 2022, Allco requested an extension to that deadline. On October 21, 2022, the Commission extended the deadline for Allco to file a proposed schedule for the penalty phase of this proceeding to November 4, 2022.

On November 4, 2022, Allco filed its second motion to stay the proceedings (“Second Allco Stay Motion”).

On November 18, 2022, ANR and the Vermont Department of Public Service (“Department”) filed responses to the Second Allco Stay Motion.

III. POSITIONS OF THE PARTIES

A. Allco

Allco has requested a stay because of its appeal of an ANR case to the Vermont Supreme Court.⁵ Allco asserts that the appeal will resolve the issue of “whether or not ANR has the

³ First Allco Stay Motion at 2.

⁴ 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.)*, 2021 VT 92, ¶ 1.

authority to regulate plants outside the parameters of the delegation of power set forth in 10 V.S.A. § 5402(a) (the “Vermont Endangered Species Law”).”⁶ Allco contends that, in this proceeding, it should not “have to spend . . . time and money defending against the purported impact [on] plants” when the Vermont Supreme Court may conclude that “ANR has no authority to regulate” those plants.⁷ Allco characterizes this as irreparable harm and also asserts that “[t]he stay will not substantially harm the other parties and will serve the best interests of the public.”⁸

B. ANR

ANR opposes the Second Allco Stay Motion because Allco’s claims have been dismissed and are not likely to be revived by the pending Vermont Supreme Court appeal:

[Allco] has not presented a valid reason to stay this proceeding, much less made out a clear case of hardship or inequity because, among other things, the Supreme Court is not poised to decide the extent of the Agency’s authority to seek to protect rare plant species in the pending appeal. Instead, the issue is whether the Superior Court properly dismissed [Allco’s] claims related to the Agency’s rare plant guidance documents because the documents were not reviewable there. The Superior Court did not decide the merits of [Allco’s] claims. Thus, even though [Allco] briefed the merits of its claims in the Supreme Court appeal, the merits are not actually before the Supreme Court and waiting for that decision is not expected to provide the relief that [Allco] now claims it will.⁹

C. Department

The Department “defers to the position advanced by the Vermont Agency of Natural Resources maintaining that the penalty phase should move forward.”¹⁰

IV. DISCUSSION

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

⁵ See *Otter Creek Solar LLC and PLH LLC v. Vermont Agency of Natural Resources, the Vermont Public Utility Commission, and the State of Vermont*, No. 169-2-20 Cncv, Decision on Motion to Dismiss (Vt. Super. Ct. Nov. 17, 2021) (dismissing complaint), *appeal pending*.

⁶ Second Allco Stay Motion at 1.

⁷ *Id.* at 5-6.

⁸ *Id.* at 6.

⁹ ANR Response to the Second Allco Stay Motion, at 2 (citations omitted).

¹⁰ DPS Response to the Second Allco Stay Motion.

actions at the Apple Hill site were site preparation for an electric generation facility without a CPG. Allco's actions thus violated 30 V.S.A. § 248(a)(2)(A), which requires a CPG before site preparation may begin. Consequently, as noted in our Injunction Order, Allco's violation warrants additional process to determine an appropriate civil penalty 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 violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.¹¹

The Second Allco Stay Motion seeks a further stay of the penalty phase of this proceeding because, Allco argues, the Vermont Supreme Court will issue a judgment that might affect any civil penalty we might assess in this case. We are not persuaded.

Allco argues that it meets the standard for staying the proceeding. 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.¹² 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.¹³

The Second Allco Stay Motion does not meet the standard for staying the proceeding. First, the underlying complaint that Allco is appealing was dismissed by the Vermont Superior Court, and Allco has not identified any clear errors in the Court's ruling.¹⁴ This weighs against

¹¹ 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.”).

¹² *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).

¹³ *Id.* (citing *Vermont Nat'l Bank v. Clark*, 156 Vt. 143, 145, 588 A.2d 621, 622 (1991)); *see also In Re Woodstock Community Trust and Housing Vermont PRD*, 192 Vt. 474, 60 A.3d 686 (2012) (holding that this type of ruling is discretionary and will be overturned only if the discretion is “exercised upon grounds clearly untenable, or to an extent clearly unreasonable” (citing *Kokoletsos v. Frank Babcock & Son, Inc.*, 149 Vt. 33, 35, 538 A.2d 178, 179 (1987) (quotations omitted))).

¹⁴ Allco's contention that ANR's authority over rare and endangered plants is determinative of this case is flawed. The Commission has the authority to independently review whether a Project would have an undue adverse

concluding that Allco’s appeal has a strong likelihood of success on the merits. Second, there has been no showing that Allco will be irreparably harmed. Allco asserts that it “would have to spend time and money defending against the purported impact [on] plants that ANR has no authority to regulate.”¹⁵ To begin, the irreparable-harm standard requires more than a financial impact. Thus, any money that Allco might spend on litigating a matter is not irreparable harm. As for the time that may be spent on litigation, that also does not amount to irreparable harm. We have already issued findings addressing Allco’s impact on rare plants.¹⁶ Thus, we do not anticipate that any of the parties will need to spend substantial time further litigating that particular matter. Third, continued delay in this proceeding harms the parties because the delay also interferes with the integrity of the Section 248 review process. Fourth, the further delay thus does not serve the interest of the public. Rather, the public interest is served by bringing this matter to a conclusion.

We are not persuaded that a further delay here would be reasonable. Rather, we conclude that a further delay only creates additional harm. The Second Allco Stay Motion is denied.

V. CONCLUSION

There is no basis for issuing a stay. The penalty phase of this proceeding has already been substantially delayed. 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 in the summer of 2020. Any further delay in doing so would delay the ultimate resolution of this matter. Along with denying Allco’s motion, in order to expedite the resolution of this case, we request that ANR confer with the parties and propose a schedule for the penalty phase of this proceeding by the close of business on Friday, December 29, 2022.

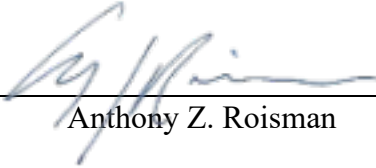
SO ORDERED.

effect on natural resources, pursuant to 30 V.S.A. § 248(b)(5). *See Application of Michael Hespos*, Case No. 20-3422-NM, Order of at 4-5 (“[I]n addition to whatever review ANR may conduct—if a person requires a CPG, then we have an independent obligation to review whether it would have an undue adverse effect on . . . air and water purity, the natural environment, [and] the use of natural resources.” (quotation omitted)).

¹⁵ Second Allco Stay Motion, at 6.

¹⁶ Injunction Order at 28 (“[W]e find that Allco’s activities have caused—and would continue to cause—substantial and immediate irreparable harm to rare and very rare species”) and Findings 2-4 and 16-20; *see also* ANR’s Response to the Second Allco Stay Motion at 2 (noting that ANR’s “recommendations, generally, and rare plants specifically, are just a portion of the Commission’s penalty considerations in this proceeding”).

Dated at Montpelier, Vermont, this 14th day of December, 2022.

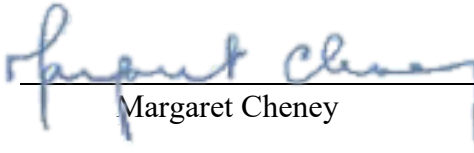

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Anthony Z. Roisman)

PUBLIC UTILITY)

COMMISSION)

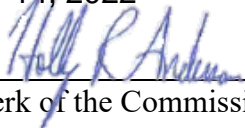
OF VERMONT)


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Margaret Cheney)

OFFICE OF THE CLERK

Filed: December 14, 2022

Attest: 
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Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

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