

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Norwich Upper Loveland Solar LLC)
for a certificate of public good pursuant to 30)
V.S.A. §§ 248 and 8010, authorizing installation) 21-3587-NMP
and operation of a 500 kW (AC) photovoltaic)
group net-metering system in Norwich, Vermont)

PETITIONER’S MOTION FOR RELIEF FROM JUDGMENT

NOW COMES Norwich Upper Loveland Solar LLC (the “Petitioner” or “Applicant”) and, pursuant to Vermont Public Utility Commission (“Commission”) Rule 2.221(B), moves for relief from judgment from the Commission’s April 26, 2024 order (the “Order”), which seeks to re-open the record on preferred siting and requests Petitioner to “file evidence demonstrating that the Norwich Planning Commission and Norwich Selectboard have considered the Facility as currently proposed and as presented to the Commission in the fourth site plan,¹ including the limits of clearing extending over the ridgeline, and continue to support a determination that the proposed Facility location is a preferred site.”² The Order is in error because it overlooks material evidence in the existing record that clearly establishes that the Norwich Planning Commission and Selectboard have already considered the Facility as currently proposed and continue to support a determination that the Facility location is a preferred site.

Memorandum of Law

As the Commission explained recently in *Petition of Randolph Davis Solar LLC*: “The general purpose of Rule 5.103 ... is to give municipalities flexibility to identify preferred sites beyond those identified in a town plan. *Absent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred.*”³ *Randolph Davis* is the only

¹ Although the Order references a fourth site plan, there were two site plans filed for the petition filing in this petition case: (1) Exhibit NUL MS-2, which was submitted on August 31, 2021, with the initial petition filing; and (2) Exhibit NUL MS-2 (rev. 1/17/23), which was submitted on January 17, 2023 with Petitioner’s rebuttal testimony and updated to correct the area of impervious surface; and (3) Exhibit NUL MS-2 (rev. 1/17/23) was re-submitted on April 26, 2023, to add the second page (erosion control specifications) that had inadvertently omitted when the 1/17/23 revision was initially filed.

² Order at 2-3. The order clarifies that the Commission is not reopening the evidentiary record beyond this clarification. Order at 2.

³ *Petition of Randolph Davis Solar LLC for a certificate of public good*, Case No. 21-2939-NMP, Order of 10/11/23 at 31 (emphasis added).

case of record where the Commission has addressed the weight to afford a preferred siting determination by a municipality. Although in that case the Commission did request confirmation of preferred siting support from the Town of Randolph, it is distinguishable because there the town had conditioned its support on the Applicant relocating the Project's solar panels to areas with slopes less than 25% and on the Applicant providing survey data to the town.⁴ No such conditional support was provided by the Town of Norwich in this case.

In this case, the Order does not claim, nor does there exist, any "extraordinary circumstance" that would warrant re-opening the evidence or questioning the Town of Norwich's decision to continue to support preferred siting for the Project. The sole basis for re-opening is the Commission's incorrect assumption that the Petitioner never came back after its July 14, 2021 Advance Notice to inform the Planning Commission and Selectboard of final Project changes.⁵ The problem is not that the municipal bodies were never informed, the problem is that, as the Order itself concedes, this inaccurate assumption of the Commission was based upon its admittedly incomplete review of the record evidence.⁶ As result, and detailed below, the Order overlooks key evidence that establishes that the Town of Norwich Planning Commission and Selectboard, having been provided a final site plan in August 2021, have already reconsidered their preferred siting support on multiple occasions and decided not to withdraw that support. The oversight of this material evidence was in error and justifies correction of the Order under Commission Rule 2.221(B)(provides that the Commission may correct an order based upon "errors arising from oversight or omission").⁷

The record of existing evidence irrefutably establishes that the Project site plan depicting the limits of clearing and array layout were finalized at the time the Petition was filed on August 31, 2021, nearly three years ago.⁸ Both the 45-Day Advance Notice and the Petition filing were

⁴ *Petition of Randolph Davis Solar LLC for a certificate of public good*, Case No. 21-2939-NMP, Order of 10/11/23 at 31.

⁵ Order at 2-3.

⁶ In its Order, the Commission states: "*We have reviewed the proposal for decision, the parties' comments, and some portions of the evidence* referenced in the parties' comments." Order at 1 (emphasis added).

⁷ Rule 2.221(B).

⁸ See *infra* n.1.

delivered to the Town Planning Commission and Selectboard at the official Town address. The only change to the array and clearing limits occurred between the time of the July 14, 2021 Advance Notice filing and the date the petition was just over one month later.⁹ The Hearing Officer concluded, based upon his full review of the voluminous record evidence, that the Town of Norwich Selectboard and Planning Commissions reviewed the Project multiple times after the final Project site plan was submitted on August 31, 2021, and decided to continue their support for preferred siting:

The evidentiary record confirms that the Facility layout changed between the date that the Applicant provided the site plans to the municipal and regional entities and the date that the Applicant filed the final site plan with the Commission. That the Facility changed, however, does not demonstrate misrepresentation or malfeasance by the Applicant. Design details often change over the course of the development process for a variety of reasons, including changes to reduce natural resource impacts as the Applicant claims here.

The record also shows that the Applicant told the Planning Commission when presenting the Facility at the July 13, 2021, Planning Commission meeting that layout changes to avoid wetland areas were possible, and that the Applicant would notify the municipal entities of the changes and provide the complete application as required by the Commission's rules.

I recommend that the Commission take judicial notice of the publicly available meeting minutes and document packets from the Selectboard and Planning Commission meetings that the Applicant and Landowner Parties have identified. These documents are not subject to reasonable dispute, are capable of accurate and ready determination, and are therefore appropriate for judicial notice. ***The municipal meeting packets and minutes provide further evidence that Norwich residents, including some of the Landowner Parties, voiced concerns about the Facility to the Planning Commission and Selectboard at meetings that occurred after the municipal entities signed the joint letter of support and after the application was filed with the Commission. The official documents show that the Planning Commission discussed the Facility at its July 23, 2023, meeting. The meeting was attended by members of the Landowner Parties***

⁹ *Id.*

group and their counsel, and a motion to reopen discussion on the designation of the preferred siting of the Facility failed. The Selectboard also revisited the Facility at meetings on May 23 and June 7, 2023, without any action on the letter of support. The meeting packets and minutes discussed above show the Selectboard and Planning Commission heard from the Landowner Parties about the Facility on several occasions after the application and fourth Facility layout was filed with the Commission, but the municipal entities did not withdraw their support for the Facility at its proposed location.¹⁰

A key piece of material evidence, never mentioned in the Order, that corroborates the Hearing Officer's assessment, is the current Town Planning Commission Chair's recent detailed chronology prepared for a July 11, 2023 Planning Commission meeting. The Chairman's chronology, inserted below, corroborates that on multiple occasions after July 14, 2021, in 2021, 2022, and 2023, both the Planning Commission and Selectboard re-visited the final Project and their preferred siting support and repeatedly decided not to rescind preferred siting:

From: Jaan Laaspere

To: Norwich Planning Commission

Date: July 5, 2023

Re: Abbreviated chronology of NST Upper Loveland Solar review process

May 6, 2021 - NST sent letter to neighboring landowners, including a schematic plan outlining property boundary and array locations.

June 29, 2021 - NST sent letter to Rod Francis addressed to the Norwich Planning Commission and Selectboard requesting preferred siting letter. Includes site plan that will go to PUC on 7/14/21. [See Exh. NUL Reply Brief-3 (preferred site request letter) & Exh. NUL Reply Brief 5 at (Planning Commission 7/11/23 meeting packet at 18-25)]

July 13, 2021 – Planning Commission meeting approves preferred siting letter with packet containing Rod Francis memo, viewshed analysis, and general items about preferred siting letters. Vote to approve is 6 - 0 with one abstaining. [See Exh. NN-JK-16]

¹⁰ Proposal for Decision at 10,12 (citing Exhibits NUL Reply Brief-5 (Norwich Planning Commission 7/11/23 Meeting Agenda and Packet); NUL Reply Brief-6 (Norwich Planning Commission 9/14/21 draft minutes); and NUL Reply Brief-7 (Norwich Planning Commission 7/11/23 Draft Minutes) to the Applicant's post-hearing briefing; and exhibits D (Norwich Selectboard 6/7/23 draft minutes); and E (video of the May 24, 2023, Norwich Selectboard Meeting) to the Landowner Parties' post-hearing briefing).

July 14, 2021 - NST initial filing to PUC, includes the site plan that was sent to the Planning Commission on 6/29. [See Exh. NN-JK-17]

July 27, 2021 - email from NST McBride to Francis and Durfee asking for letter and meeting with Selectboard.

Aug 10, 2021 – *Planning Commission meeting. Packet includes PUC July 14 filing and more details about aesthetic and environmental impact.*

Aug 11, 2021 - Selectboard meeting. 7/14 site plan included in packet. Selectboard approves preferred siting letter after topic was bounded by saying ANR is responsible for habitat. [See NN-JK-18(meeting minutes) and NN-Cross-5)(meeting packet)]

Aug 23, 2021 - *Letter to the town giving notification of site plan adjustment. Stating “We don't see any impact on the visual analysis - but are confirming the visual analysis as part of the full application.”*

Aug 31, 2021 - *Official filing of application with PUC after 45-day notice period, including modified site plan with changes noticed to town on 8/23/21*

Sept 14, 2021 - *Planning Commission meeting. Packet includes McBride 8.23 email in correspondence. Rod mentions the change in the plan by noting the correspondence was received.*

Oct 12, 2021 – *Planning Commission meeting. Draft minutes for 9/14/21 meeting included under correspondence section: “Norwich Technologies provided details of an environmental review of the Upper Loveland RD project site. There has been a minor adjustment to the location of panels in response to findings, but there will be no visual impact.”*

Aug 31, 2021 to present - *Hundreds of documents submitted to the PUC, including detailed aesthetic, land-use, legal, planning and natural resource analyses. These documents are public record and part of the PUC process, submitted by all sides. These include aesthetic impact studies submitted by the applicant, opponents and a separate aesthetics review commissioned by the PUC. All documents available here: <https://epuc.vermont.gov> - search by case number 21-3587-NMP*

Feb 9, 2022 - *Selectboard meeting. Concerns raised in correspondence section and discussed.*

Feb 23, 2022 - Selectboard meeting. *Extensive correspondence and discussion. Calloway moved to set a future SB agenda item on solar siting. No second. Interested parties pointed to the PUC. No action taken after this review.* [See Exh. NUL MS-13]

Mar 23, 2022 - Selectboard meeting - Correspondence on this topic but no discussion or action taken shown in the minutes.

For ease of reference, exhibit reference numbers to the exhibits submitted in this case have been inserted into the above chronology in brackets. Following the July 2023 meeting, the Planning Commission voted not to rescind its preferred siting support.¹¹ As the chronology reflects, the Selectboard also considered the matter multiple times after the final site plan was submitted and did not rescind. Contrary to the Order, the record establishes that there is no “uncertainty”¹² that the Petitioner did in fact inform and return to both municipal bodies, many times after July 14, 2021, to address the Project changes that led to the final site plan and its impacts.

The Order incorrectly overlooks all of this key evidence. There is no basis to reject any aspect of the Hearing Officer's findings and recommendation as to preferred siting, and certainly no extraordinary circumstance that would warrant second-guessing the Town of Norwich.

Petitioner also takes exception to footnote 5 of the Order, which alleges: “The timing of the Applicant's presentation of the second Facility layout to the Norwich Planning Commission on July 13, 2021, and release of the third Facility layout the next day also raises concerns that the Applicant did not present the Municipal Entities with the most current site plan and information regarding the clearing for the Facility.”¹³ This allegation is not accurate. As the Town Planning Commission Chair confirmed in his detailed three-year chronology included in Exhibit NUL Reply Brief-5, above: “June 29, 2021 - NST [on behalf of Petitioner] sent letter to Rod Francis [then Planning Commission Chair] addressed to the Norwich Planning Commission and Selectboard

¹¹ Exh. Reply Brief-7.

¹² Order at 3.

¹³ Order at n.5.

requesting preferred siting letter. *Includes site plan that will go to PUC on 7/14/21.*¹⁴ This fact is further corroborated by Exhibits NUL Reply Brief-5 (meeting packet at 18-25) and Reply Brief-3 (Petitioner's June 29, 2021 Preferred Site Letter to the Norwich Planning Commission), which attached a draft site plan (first image, below) that is the same as the site plan included in the July 14, 2021 45-Day-Advance Notice, Exhibit NN-JK-17 (second image)¹⁵:

Draft Site Plan for proposed solar project:

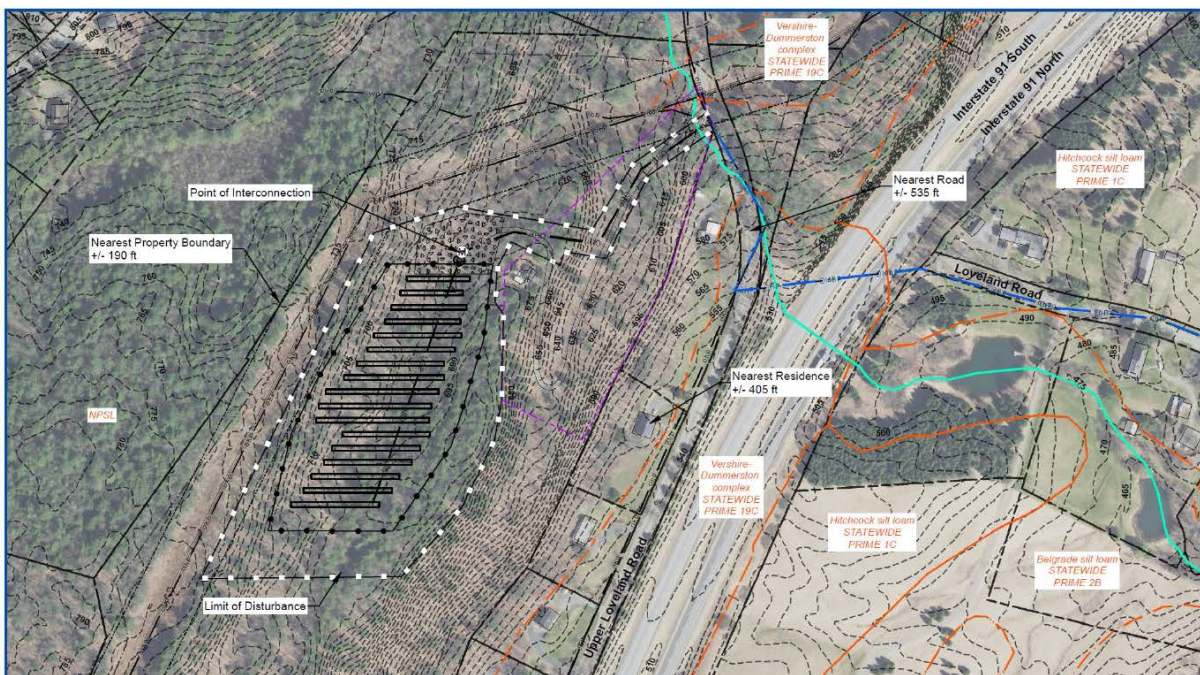


Exhibit Reply Brief-3 (Petitioner's June 29, 2021 Preferred Site Letter to the Norwich Planning Commission)

¹⁴ Exhibit NUL Reply Brief-5 at 11 (emphasis added).

¹⁵ Exhibit NN-Cross-5, Norwich Selectboard 8/11/21 meeting packet at page 2 includes Petitioner's 6/29/21 email forwarding and attaching Petitioner's 6/29/21 letter requesting preferred siting (the actual letter is included in Exh. NUL Reply Brief-3, discussed above).

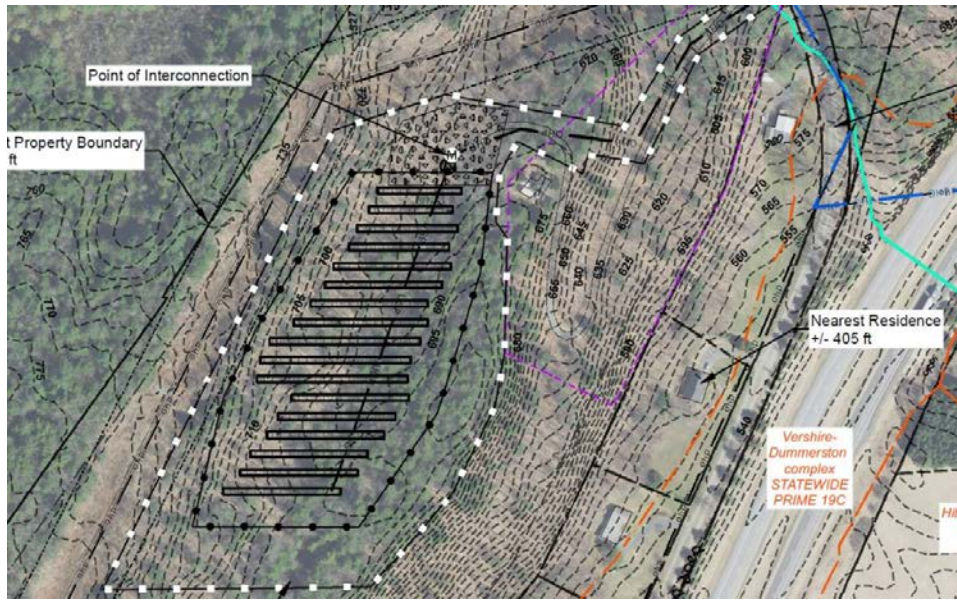


Exhibit NN-JK-17

Request for Relief

This renewable energy project has been pending before the Commission for three years, with clear record evidence proving the Town of Norwich already re-affirmed its preferred siting support. To arbitrarily re-open and second-guess the Town's very clear decision, made numerous times, would be contrary to the evidence, extremely prejudicial, and clear and reversible error.

Petitioner respectfully requests that the Commission withdraw its Order and instead adopt the Hearing Officer's Proposal for Decision.

DATED at Burlington, Vermont this 30th day of April, 2024.

Norwich Upper Loveland Solar LLC

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