

**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 MOTION FOR RELIEF FROM JUDGMENT**

On March 27, 2024, the Hearing Officer appointed on behalf of the Vermont Public Utility Commission (“Commission”) issued a Proposal for Decision (“PFD”) in the above-captioned matter recommending that the Commission conclude that the 500 kW solar facility (“Project”) proposed by Norwich Upper Loveland Solar, LLC (“Applicant”) complies with the applicable rules and criteria and will promote the general good of the State of Vermont. After extensive findings and discussion, the PFD also recommended a conclusion that “the Facility is on a preferred site” and that the joint letter of support (“preferred site letter”) signed by the Norwich Selectboard (“Selectboard”), the Norwich Planning Commission (“Planning Commission”), and the Two Rivers-Ottauquechee Regional Planning Commission should “receive its full evidentiary weight.”¹

On April 26, 2024, after receiving comments from the Vermont Department of Public Service (“Department”), the Vermont Agency of Natural Resources, and the Neighbor Intervenors (“Neighbors”), the Commission issued an Order finding “ambiguities in the record related to whether the [Planning Commission] and the [Selectboard] intend their preferred-site letter to apply

¹ See *Petition of Norwich Upper Loveland Solar, LLC*, Case No. 21-3587-NMP, 3/27/24 Proposal for Decision at 13.

to the Facility as finally proposed and currently before the Commission.”² The Commission therefore directed the Applicant “to file evidence demonstrating that the [Planning Commission] and the [Selectboard] have considered the Facility as currently proposed and as presented to the Commission in the fourth site plan . . . and continue to support a determination that the proposed Facility location is a preferred site.”³ On April 30, 2024, the Applicant filed a motion for relief from judgment pursuant to Commission Rule 2.221(B), arguing that the Commission erred by overlooking material evidence in the record. The Applicant requested that the Commission withdraw its Order of April 26 and instead adopt the Hearing Officer’s PFD.

The Department does not join the Applicant’s motion but agrees with its primary contention that the Hearing Officer’s conclusions on preferred site status were correct, well-reasoned, and should be adopted. The Department finds that (1) the evidence weighs against discounting the preferred site letter and (2) there are compelling reasons to set boundaries on the scope of review for letters issued under Rule 5.103. Therefore, the Department respectfully asks that the Commission exercise its broad discretion under Rule 2.221 and reconsider its April 26 Order after reviewing the Applicant’s motion, reexamining the evidence, and evaluating the significant concerns outlined below.

Rule 2.221(B) provides for relief from orders of the Commission and mirrors the relevant provisions of V.C.R.P. 60. Rule 2.221(A) provides for motions to alter or amend an order and mirrors the relevant provisions of V.R.C.P. 59. Given that the Applicant’s Rule 2.221(B) motion was made within the time limit under Rule 2.221(A), the Department submits that the Commission may treat the motion as one for reconsideration under Rule 2.221(A), using the standards

² *Petition of Norwich Upper Loveland Solar, LLC*, Case No. 21-3587-NMP, Order of 4/26/24 at 2.

³ *Id.* at 3–4.

previously applied to such motions under V.C.R.P. 59(e).⁴ In keeping with prior interpretations of V.C.R.P. 59, Rule 2.221(A) provides the Commission with broad power to alter or amend a judgment.⁵ While this is generally considered an extraordinary remedy, reconsideration is nonetheless within the Commission’s discretion and is appropriate to avoid an unjust result.⁶ Furthermore, under Rule 2.221(A) the Commission is free to reconsider its orders on its own motion and make alterations or adjustments “for any reason for which it might have . . . altered or amended an order on motion of a party.”⁷ With proper notice, the Commission may also grant a party’s motion “for a reason not stated in the motion.”⁸ With these principles in mind, the Department maintains that reconsideration is warranted.

I. The Evidence Supports a Determination that the Preferred Site Letter Should Receive its Full Evidentiary Weight

While the Commission found some ambiguity as to whether the Planning Commission and the Selectboard (collectively, the “Town”) intended their preferred site letter to apply to the Project location as finally proposed, the Town itself has never indicated otherwise. The only official statement by the Town in this proceeding is reflected in its unequivocal preferred site letter.⁹ As found by the Hearing Officer, the evidence suggests that the Town had all the information it needed to evaluate and take appropriate action regarding any changes to its preferred site decision. Over the course of nearly three years, the Town has never revoked or amended its letter, nor has it intervened or filed comments.

⁴ See *In re Central Vermont Public Service Corp.*, Docket No. 6946, 5/25/05 Order Re: Motions for Reconsideration at 2; *Application of Novus Montpelier Solar, LLC*, Case No. 16-0021-NMP, 6/23/16 Order on Reconsideration at n.1 (June 23, 2016).

⁵ See *Petition of Globalfoundries U.S. 2 LLC*, Case No. 21-1107-PET, Order of 4/14/22 at 3

⁶ See *id.* at 2–3.

⁷ Rule 2.221(A)(4)

⁸ See *id.*

⁹ See Exh. NUL-MS-5.

Considering the evidence, it becomes clear that the Town was confronted with concerns regarding the Project, including the concerns described by Neighbors regarding the preferred site issue, well after the Project proposal was finalized. The record does not reflect, nor is the Department aware of any formal Town actions on the preferred site issue since that time – in this proceeding or otherwise. Thus, the inference to be drawn is that the Town continues to stand by its letter. To the extent there is ambiguity, the Department submits that it should be resolved in favor of the Town and the Applicant considering that the only definitive statement in the record indicates support for the location as a preferred site.

From the Department’s perspective, the key evidentiary details are as follows. The Applicant presented the Project to the Planning Commission on July 13, 2021, including a viewshed analysis depicting what the PFD refers to as the “second facility layout”, and explained that the layout might change.¹⁰ After the presentation, the Planning Commission voted to recommend a preferred site letter of support.¹¹ The Applicant filed its 45-day advance notice on July 14, 2021, including a preliminary site plan reflecting what has been called a “third facility layout” with adjustments to configuration and the limit of disturbance as compared to earlier depictions.¹² There is no indication that the Planning Commission or the Selectboard did not receive the 45-day notice.¹³ In addition, this site plan was provided to the Selectboard in a meeting packet in advance of an August 11, 2021, meeting.¹⁴ At the August 11 meeting, the Selectboard

¹⁰ See Exh. NN-JK-15 at 8; Exh. NN-JK-21 at 3–8; *see also* Exh. NN-JK-16.

¹¹ Exh. NN-JK-21 at 8; Exh. NN-JK-16.

¹² See Exh. NN-JK-17.

¹³ See Certification of Compliance with Advance Submission Requirements, filed 8/31/21.

¹⁴ See Exh. NN-JK-20 at 28; Exh. NN-JK-21 at 13.

voted to provide a letter of support as recommended by the Planning Commission.¹⁵ The preferred site letter is signed by the Planning Commission and the Selectboard, dated August 20, 2021.¹⁶

On August 31, 2021, the Applicant submitted its application to the Commission, including a site plan reflecting what has been called a “fourth facility layout.”¹⁷ This change to the Project layout adjusted and reduced the limit of disturbance as compared to the 45-day notice, and showed a shift in location toward the nearest residence along with additional clearing extending over the eastern ridge.¹⁸ There is no indication that the Planning Commission or the Selectboard did not receive a copy of the application.¹⁹ Though the Applicant subsequently filed two revised site plans, these reflected technical corrections and did not change the array location, limit of disturbance, or proposed clearing.²⁰

As noted by the Hearing Officer, the draft minutes from a February 23, 2022, Selectboard meeting show that representatives of the Neighbors presented concerns about the Project and the Town’s review process well after the application was filed.²¹ A motion to discuss the issues at a later date failed.²² The additional materials recommended for judicial notice by the Hearing Officer provide further support for the conclusion that the Town was aware of concerns around the preferred site designation, and did not take further action.²³ Considering all of the evidence

¹⁵ Exh. NN-JK-18 at 2.

¹⁶ Exh. NUL-MS-5.

¹⁷ See Exh. NUL-MS-2.

¹⁸ See *id.*; Exh. NN-JK-17.

¹⁹ See List of Adjoining Landowners and Statement of Compliance with Commission Rule 5.107(E), filed 8/31/21.

²⁰ See Exh. NUL-MS-2 (rev. 1/19/23) (correcting cumulative impervious surface); Exh. NUL-MS-2 (rev. 4/26/23) (adding erosion control details).

²¹ See Exh. NUL-MS-13.

²² See *id.*

²³ See Exh. NUL-Reply-Brief-5, Planning Commission 7/11/23 Meeting Agenda and Packet (including information with detailed descriptions of the history and changes to the Project over time; briefing and materials from the CPG proceeding; and minutes of relevant municipal meetings); NUL-Reply-Brief-7, Planning Commission 7/11/23 Meeting Draft Minutes (reflecting extensive discussion, showing that representatives of the Neighbors presented their concerns, and showing that a motion to reopen discussion failed); Exh. E. to Neighbors’ Surreply to

discussed in the PFD, it is apparent that both municipal bodies heard concerns from the Neighbors and others after the preferred site letter was signed and after application was filed, yet neither body took action to rescind the preferred site letter, file comments, or otherwise communicate to the Commission that the preferred site letter should be discounted. In the absence of any evidence showing that the Town changed its position or lacked information regarding the changes to the Project, the Department continues to support the Hearing Officer's conclusion that the preferred site letter should be given its full evidentiary weight.

II. There are Compelling Reasons to Consider Appropriate Limits on the Scope of Review for Letters Issued Pursuant to Rule 5.103.

While the Commission's ability to review a preferred site letter for conformance with Rule 5.103 is not in dispute, the Department urges further consideration as to the appropriate scope of that review. In addressing this issue, the Department respectfully requests that the Commission evaluate the following concerns.

A. The Town's Autonomy and Decision-Making Process

The Department acknowledges the Neighbors' concerns regarding the sequence of events and review surrounding the preferred site letter, and certainly a more linear process would be easier to follow for all involved. Yet a town's review of a preferred site, by its very nature, will generally occur before a final application is filed with the Commission – and it is unlikely that parties will be able to reliably trace subsequent town deliberations through multiple municipal bodies. The development of renewable energy projects likewise involves multiple stakeholders and iterations. In this case, the Town has provided an express statement of support in its preferred site letter. The

Petitioner's Request for Judicial Notice, Video of May 24, 2023 Selectboard Meeting *beginning at 1:51:30, and see specifically 3:32:00* (after concerns surrounding the accuracy of Project information were discussed at length, no action was taken, but the Selectboard indicated that the matter would be discussed with the Town's legal counsel).

Department is not aware of any misrepresentations regarding the Project, within or outside of the record. This is not a case where the preferred site letter was conditional.²⁴ There is no evidence that the Town lacked information on the final Project proposal, and the evidence shows that the Town heard and considered the Neighbors' concerns well after the application was filed. The Commission has said that “[a]bsent extraordinary circumstances, [it] will not second-guess a municipal determination that a site is preferred.”²⁵

To dismiss an express statement of support and require what is essentially a new preferred site letter, based on ambiguities in the record of Town discussions and deliberations occurring over the course of years, would potentially displace the autonomy of the Town and its decision-making process. The Department asks that the Commission consider whether taking this step effectively invalidates the preferred site letter in the record and remands the issue back to the Town for further process. The Commission is not generally a forum with the jurisdiction or expertise to hear challenges or appeals of municipal decisions, nor does it have an official or complete record of proceedings at the Town on which to base its review.²⁶

Considering the above, the Department suggests that it is appropriate to limit the scope of review for letters issued under Rule 5.103 to avoid treading into areas that may be outside the

²⁴ See *Petition of Randolph Davis Solar LLC*, Case No. 21-2939-NMP, Order of 10/11/23 at 31 (noting that “conditions create uncertainty about whether a site is in fact a preferred site”).

²⁵ *Id.* at 30-31.

²⁶ See, e.g., *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7, 20 A.2d 117, 120 (1941) (noting that the Commission “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted”); *In re Doolittle Mountain Lots, Inc.*, 2007 VT 104, ¶ 6, 182 Vt. 617, 618, 938 A.2d 1230, 1232 (2007) (considering the Commission’s jurisdiction to determine whether a town properly discontinued a highway, finding that the Commission did not have jurisdiction to resolve what was a collateral dispute “between the petitioner, the Town of Vernon and the other abutting landowners” and had “no special expertise regarding the issue that the petitioner seeks to have it resolve”).

purview of the Commission and are not easily resolved with partial or limited information – particularly where the Town is not a party to the proceeding. The Department suggests that an appropriate scope of review could still include determinations as to whether the record reflects (1) any defect or ambiguity in the form of the preferred site letter under the requirements of Rule 5.103, (2) evidence of specific misrepresentations or material misstatements of fact, (3) evidence that the town did not receive notice of subsequent project changes, and (4) any actions or filings by the town in the Commission proceeding, among other things. In the absence of any of the indicators above or other extraordinary circumstances, none of which were found by the Hearing Officer in this case, the Department advocates against using an incomplete record of municipal proceedings and deliberations to second-guess a town’s intent.

B. Ensuring a Distinction Between Preferred Sites and the Merits of a Project under Section 248.

Setting reasonable boundaries on the Commission’s review of preferred site letters may also provide important guidance to parties and municipalities to help ensure that review of preferred sites is not conflated with the substantive review of a proposed project under the Commission’s rules and 30 V.S.A. § 248. Under the relevant provision of Rule 5.103 in effect when the Project was proposed, a joint letter of support must identify a “specific location.”²⁷ In this case, the letter designates the “Location” as “the parcel located at 201 Upper Loveland Rd, Norwich, VT 05055, approximate latitude and longitude of 43.723836, -72.292770” and states the “desire to have the Location designated as a Preferred Site.”²⁸ The letter also states that the signing entities “take no position on the Project’s compliance with any requirement of Rule 5.100 or of

²⁷ Rule 5.103 Preferred Site (7) (effective July 1, 2017).

²⁸ Exh. NUL-MS-5.

other applicable provisions of Vermont law.”²⁹ The recently amended version of Rule 5.103 adds further requirements for a preferred site letter, providing that the signing entities must determine that the location is “suitable for the development of a net-metering system consistent with the applicable policies in their respective plans” and must be “based on their evaluation after having received the 45-day notice for the project.”³⁰

While a town may need to consider certain attributes of a proposed project in determining whether a proposed location complies with applicable planning documents, it is important to maintain some distinction between a “specific location” suitable for development and a review of the project itself. Though the Commission itself has not conflated these two separate inquiries, the Department is concerned that the narrative surrounding the Project in this case and the discussions at the Town reflect a muddying of the waters in this area and the potential for preferred site determinations to be seen as a town’s approval of a project. This is not the intent of the rule, nor is it the purpose of preferred site letters, which typically include express disclaimers as to the merits of a project.

In the Department’s view, the Commission’s Order of April 26 discussing whether the Town continues to “support the final Facility layout” and whether the preferred site letter applies “to the Facility as finally proposed,” may be misconstrued in a way which could exacerbate this issue.³¹ The Commission has recently considered the application of preferred site requirements in different context, stating: “our net-metering rules embody carefully balanced policy considerations, and we are reluctant to create ambiguity in the application of those rules that could

²⁹ *Id.*

³⁰ Rule 5.103 Preferred Site (7) (effective March 1, 2024).

³¹ See *Petition of Norwich Upper Loveland Solar, LLC*, Case No. 21-3587-NMP, Order of 4/26/24 at 1–2.

upset that balance.”³² The Department asks that the Commission consider whether certain boundaries or clarifications are warranted here, to avoid creating further ambiguity as to the scope, purpose, and validity of municipal preferred site determinations.

C. The Burden on Parties, Municipalities, and the State

As a final point of concern, the Department asks that the Commission consider the significant burdens placed on parties, municipalities, and the State in the absence of any limits on the Commission's review of municipal preferred site determinations. In this case, the record illustrates that various aspects of the Project have been contested and evaluated in two separate forums – the Commission and the Town – over multiple years. It is apparent that the Applicant and the Neighbors have participated in extensive proceedings before the Town, implicating a significant expenditure of time and resources on their part and a heavy burden on the Town, though the Town has not sought to participate in the case or opine on the Project beyond issuing the preferred site letter. Requiring additional confirmation of support for the preferred site designation would ask the Town to reopen the issue once again, inviting further advocacy from the parties and necessitating the commitment of additional resources, without any indication from the Town that it wishes to revisit the matter.

Establishing reasonable limits on the scope of review at the Commission would provide critical guidance as to when a preferred site letter may be relied upon – enabling municipalities and parties to focus their efforts to address any concerns arising after the letter is issued. This would help to avoid prolonged municipal proceedings, and in turn, would conserve the resources

³² *Petition of Bay Ridge Apartments*, 24-0536-NMP, Order of 4/25/24 at 9.

of the parties and the State by reducing the need for extensive litigation surrounding a town's intent or the validity of its decisions. Furthermore, reasonable limits could help to curb the potential for prejudice under the current process, where an applicant may need to seek new affirmation of support from municipal bodies whose membership and priorities have changed in the intervening years.

For the foregoing reasons, the Department agrees with the Applicant that the Hearing Officer's conclusions on preferred site status were correct, and respectfully asks that the Commission reconsider its Order of April 26. Even if the Commission declines to revisit its Order, the Department submits that there must be a point in time or an evidentiary threshold at which the parties can reasonably rely on a preferred site letter and asks that the Commission consider clarifying the appropriate scope of review for future cases.

DATED at Montpelier, Vermont this 14th day of May 2024.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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