

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Application of Orchard Road Solar I, LLC for a)
certificate of public good, pursuant to 30 V.S.A.) CPG #16-0042-NMP
§§ 219a and 248, for a 500 kW interconnected)
group net-metered solar electric generation system)
in Middletown Springs, Vermont)

**THE PUBLIC SERVICE DEPARTMENT’S RESPONSE TO NEIGHBORS’ MOTION
FOR PARTIAL DE NOVO HEARING FOR PURPOSE OF CROSS EXAMINATION OF
EXPERTS BEFORE THE SUBSTITUTE HEARING OFFICER**

Now comes the Vermont Public Service Department (the “Department”), by and through its undersigned counsel, and hereby submits to the Vermont Public Utility Commission (the “Commission”) the following response to the Motion for Partial De Novo Hearing for Purpose of Cross Examination of Experts Before the Substitute Hearing Officer filed by neighbors Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell and joined by *pro se* neighbors Ted & Dana Fitzpatrick, Peter & Aileen Stevenson, Elizabeth Cooper, Karen Gutmann & Larry Springsteen, and Douglas Freilich & Julie Sperling (“Neighbors’ Motion”).¹ Neighbors request a de novo hearing based on the premise that live testimony from the aesthetics and orderly development experts is required for the Hearing Officer to assess these witnesses’ credibility. Neighbors’ request for partial de novo hearing should be denied.

Procedural History

The relevant procedural history regarding Neighbors’ Motion is as follows: Orchard Road Solar I, LLC (the “Applicant”) filed its application for a 500 kW solar net-metering facility in Middletown Springs, Vermont on July 15, 2016. The parties attended a site visit on April 10, 2017. Evidentiary hearings were held on August 28 and 29, 2017 before Hearing Officer Lynn

¹ The Department received this Motion via email at 9:00 p.m. on Friday, March 9, 2018. The Department did not receive a paper copy of the Motion.

Fabrizio. All witnesses, including those identified in Neighbors' Motion, submitted direct testimony and were subject to cross examination on the record, and a transcript of the proceedings was produced. In January 2018, Hearing Officer Mike Tousley was appointed to this matter by the Commission upon Hearing Officer Fabrizio's departure. On February 20, 2018, the parties attended a second site visit with Hearing Officer Tousley.

Argument

Further de novo hearing in this matter is unnecessary given the nature of the Commission's role as an administrative tribunal and the evidence regarding the outstanding legal issues in the case. First, the credibility concerns that Neighbors identify—with reference to lay jury instructions—do not pertain to administrative proceedings before the Commission. Cf. Investigation into: (1) Petition of AARP for the Establishment of Reduced Rates for Low-Income Consumers of Green Mountain Power Corp. & Cent. Vermont Pub. Serv. Corporation; and (2) As Expanded to Possibly Include Gen. Applicability to All Vermont Retail Elec. Utilities., Docket No. 7535, Order Re: AARP Objection to Expert Testimony, 2010 WL 2811079, at *12 (Vt.P.S.B. May 5, 2010) (“The *Daubert* test that is codified in V.R.E. 702 is primarily intended to protect inexpert lay juries in ordinary civil and criminal trials from being misled by ‘junk science’ or from giving undue deference to the ‘apparent’ expertise of witnesses testifying in regard to subjects with which jurors typically are not familiar. However, these judicial ‘gatekeeping’ concerns that were identified in *Daubert* and its progeny are not as pronounced in administrative proceedings, where the [Commission] is acknowledged to be an expert tribunal whose experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.” (quotations and citations omitted)). The Commission’s

ability to hear evidence and assess expertise is not akin to that of a lay juror's role, and, thus, does not require the same assessment that might accompany a change in a civil or criminal proceeding's factfinder: the juror.

Second, conflicting expert opinions do not present the same credibility implications that conflicting fact witness testimony does. Thus, where there is a hearing officer substitution and varying expert opinions, the transcript record is sufficient. See Petition of Gov't Access Bd. of Chittenden Cty., Docket No. 5358, 1990 WL 666686 (Apr. 11, 1990) ("This docket was originally assigned to Marjorie Power, Staff Attorney for the Board, and she heard the evidence and drafted the injunctive orders. She has since left the [Commission]'s employ, and the docket has been reassigned to me. Although I was not present at the hearing to evaluate the demeanor of the witnesses, the outcome of this docket does not depend on the truthfulness of witnesses and the credibility of their testimony—they are all credible and well motivated individuals. . . . No party is, therefore, prejudiced by the substitution of hearing officers, but all parties would be prejudiced by a rehearing of the facts.").

For the reasons provided above, the Commission should deny Neighbors' Motion for partial de novo evidentiary hearing.

Dated at Montpelier, Vermont this 26th day of March, 2018.

VERMONT PUBLIC SERVICE DEPARTMENT

By: 

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March 26, 2018

Judith Whitney, Clerk
Vermont Public Service Board
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Re: CPG #16-0042-NMP – Application of Orchard Road Solar I

Dear Ms. Whitney:

Enclosed for filing in the above-referenced matter, please find an original and one copy of the Public Service Department's Response to Neighbors' Motion for Partial De Novo Hearing for Purpose of Cross Examination of Experts before the Substitute Hearing Officer.

Thank you.

Sincerely,

Steph Hoffman
Special Counsel

cc: Attached Service List



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