STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CPG No. 16-0042-NMP

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

Order entered: 7/20/2018

ORDER REOPENING THE EVIDENTIARY RECORD

I. INTRODUCTION

On June 29, 2018, the Vermont Public Utility Commission ("Commission") held oral argument on this matter. The oral argument focused primarily on whether the evidence in the record supported siting the proposed Project in the location selected by Orchard Road Solar I, LLC ("Applicant"), rather than in one of two alternate sites identified by the Applicant.[1] The parties' responses to this inquiry did not satisfy the Commission that the issue had been adequately addressed in the evidentiary record.

In today's Order, we reopen the record and direct the hearing officer to oversee a supplementary evidentiary proceeding on whether the two alternate sites identified by the Applicant are "generally available" such that "a reasonable person" would select one of these sites "to improve the harmony of the proposed project with its surroundings."[2] Upon completion of this limited-purpose evidentiary proceeding, the hearing officer shall issue a new proposal for decision and include new findings and recommendations as appropriate.[3]

II. PROCEDURAL HISTORY

On December 29, 2015, Zapata Courage of the Vermont Agency of Natural Resources ("ANR") sent an email to Dori Barton, the Applicant's natural resources consultant, in which

[1] The first alternate site adjoins the Project site and is alleged to have ledge and the second alternate site is across the road from the Project site and is alleged to be a Class II wetland.

[2] *In re Halnon*, 174 Vt. 514, 515, 811 A.2d 161, 163 (2002).

[3] We offer no opinion at this time as to what ultimate recommendation should be made in the new proposal for decision.

Ms. Courage summarized a site visit she conducted with Ms. Barton at the alternate site. In Ms. Courage's email she states that the alternate site contained an extensive Class II wetland area and that it would be "highly unlikely that a project could avoid or minimize impacts to the wetland in this field, thus a wetland permit would unlikely be issued for construction."[4]

On July 15, 2016, the Applicant filed an application ("Application") with the Commission for a certificate of public good ("CPG"), pursuant to 30 V.S.A. §§ 219a[5] and 248, to install and operate a 500 kW solar group net-metering system project at Orchard Road in Middletown Springs, Vermont (the proposed "Project").

On February 22, 2017, the Commission issued an order granting an evidentiary hearing to develop an adequate factual record on which to review significant issues with respect to orderly development under 30 V.S.A. § 248(b)(1) and with respect to aesthetics and above-ground historic sites under 30 V.S.A. § 248(b)(5). The Commission appointed Lynn Fabrizio, Esq., to serve as the hearing officer for the significant-issues proceeding.

On April 10, 2017, a site visit was held. Commissioner Cheney accompanied the hearing officer and the Commission engineer on the visit.

On August 28 and 29, 2017, an evidentiary hearing was held. At the evidentiary hearing Rod Viens, the Applicant's project manager, testified about the Applicant's determination not to develop the Project at the alternate site. Mr. Viens referenced Ms. Courage's email and Ms. Barton's conclusions based on her visit to the site with Ms. Courage in November 2015.[6] Neither Ms. Barton nor Ms. Courage presented testimony at the evidentiary hearing.

Attorney Fabrizio left the Commission's employ in December 2017, and the case was reassigned to the current hearing officer, Michael Tousley, Esq., in January 2018.

On February 20, 2018, the new hearing officer conducted a second site visit.

On May 16, 2018, the hearing officer issued a proposal for decision to the parties for their comment, pursuant to 30 V.S.A. Section 8 and 3 V.S.A. Section 811.

On June 1, 2018, Richard Spitalny, Robert and Karen Galloway, Daniel McKeen, and Neil and Thomas Russell, through their attorney L. Brooke Dingledine, Esq. (collectively with

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[4] Exh. ORS-RV-8 at 2.

[5] 30 V.S.A. § 219a was repealed effective January 1, 2017. Having been filed on July 25, 2016, the Application remains subject to § 219a and the net-metering rules in effect before January 1, 2017.

[6] Tr. 8/28/18 at 51-52 (Viens).

pro se neighbors, the "Neighbors") filed a motion requesting that the Commission conduct another site visit and a motion requesting that the Commission schedule an oral argument on the Application. Elizabeth Cooper, one of the *pro se* neighbors, also requested a site visit and oral argument.

On June 15, 2018, Commissioners Roisman and Hofmann conducted a site visit.

On June 29, 2018, the Commission held oral argument on the Application.

III. DISCUSSION

To supplement the evidentiary record, we order a limited-purpose evidentiary proceeding and direct the hearing officer to admit new evidence and make supplementary findings and recommendations as appropriate.[7] We do so because of our concern that the record in this case is insufficient to address whether the Project as proposed would have an undue adverse effect on aesthetics. There is no real dispute in this case that the Project would have an adverse effect on aesthetics because it would be visible from various public and private views, and because it is out of context with the broader scenic view of a hillside. What remains unclear is whether that adverse effect would be undue.

The scope of the supplementary inquiry shall be limited to the evidentiary bases for the Applicant's determination not to construct the Project at either of the two identified alternate sites. The Neighbors have made clear that, in their opinion, both alternate sites are far preferable from an aesthetics standpoint to the selected site for the Project. The Applicant has also made clear that the only impediments to the two alternate sites are the alleged presence of ledge on one site, and the alleged presence of a wetland on the other site. Regarding the site with an alleged wetland, the Applicant in fact prefers to site the Project there if it can be done legally.[8]

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[7] *See, e.g., Vermont Electric Power Company v. Betty Bandel et al.*, 135 VT. 141, 147 (1977) ("Thus, it is clear that it is a proper and expected function under its legislative mandate for the [Commission] to examine the record, take additional evidence and, where required, rework the findings in the light of its own special competence.)

[8] Tr. 6/29/18, at 26 (Applicant's Counsel: "This was [Applicant's] preferred site. They would have rather have located the project on this site." Chair: "Is that still true?" Applicant's Counsel: "And that is still true I believe.") In these particular circumstances, if the Applicant determines that the Project can in fact be built at one of the alternate sites, we would treat an amended application as a continuation of the current Application for vested rights purposes, including the preferable rates that the Applicant is entitled to under its current Application.

In assessing whether a project, once found to create an adverse aesthetic effect, is unduly adverse, the Commission is guided by the well-established *Quechee* test. There are three questions in the *Quechee* test:

> 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area?
> 2) Does the project offend the sensibilities of the average person?
> 3) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?[9]

If any of these three questions is answered in the affirmative, a finding of undue adverse effect would result. The relevant question here is whether the applicant has met its burden to prove that it will "take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings."[10]

In this case, the Applicant has agreed to implement a landscaping plan and other measures to help mitigate the adverse aesthetic impact of the Project at the selected location but has not agreed to move the site to an alternate location because it believes that no other location on the leased land is possible. The question we must decide is whether the Applicant has carried its burden to prove that it has taken *all* generally available mitigating steps a reasonable person would take in these circumstances.

The two alternate sites identified by the Applicant are owned by the same person who has agreed to lease the land for the selected site to the Applicant. The first alternate site is directly adjacent to the selected site and was rejected by the Applicant because, according to the Applicant, it contains ledge that precludes siting the project there. The second alternate site is just across the road from the selected site. The Applicant has made clear that it would have actually preferred to site the Project across the road at the second alternate site, but determined that this alternate site was unavailable due to the alleged presence of a wetland.[11] The Applicant has put forth evidence noting that its natural resources expert, Ms. Barton, and a representative of ANR, Ms. Courage, visited the second alternate site in 2015 and concluded that the site was unlikely to obtain a permit from ANR due to the presence of a large Class II wetland. However,

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[9] *Halnon*, 174 Vt. at 515, 811 A.2d at 163.
[10] *Id.*
[11] *See, e.g.*, Tr. 6/29/18, at 26.

the Neighbors have challenged that conclusion, arguing that there is no credible evidence that the alternate site has a Class II wetland that precludes use of the site for this Project. The Neighbors have made clear that, while they oppose the current site of the proposed Project, they would support the Project were it to be located at this alternate site.

The Applicant argues that, following the Vermont Supreme Court's *In re Rutland Renewable Energy, LLC*[12] decision, there is no requirement that an applicant consider alternate sites to meet its obligation under the mitigation question of the *Quechee* test. We disagree. The Vermont Supreme Court's decision in *Rutland Renewable* did not overrule its earlier decision in *Halnon*.[13] In *Halnon*, the Court held that "[i]t was not an abuse of discretion for the [Commission][14] to dismiss Halnon's application" when the application "failed to present specific evidence supporting his contentions that siting the turbine at alternative locations caused problems and increased costs associated with the project."[15] In the Commission's Order that was the subject of the appeal to the Supreme Court, the Commission had concluded:

> We are faced in this case with having to evaluate alternative turbine locations based only on the Applicant's qualified assertions that there are some problems and some extra costs with the possible alternative sites. These assertions, however, are mostly not quantified. The Applicant also has not fully addressed the feasibility of other possible alternative locations that we observed at the site visit. Without a more comprehensive assessment of a reasonable range of alternative sites with detailed comparisons of problems and costs outlined for each, this evaluation cannot be sufficiently precise to effectively show us that the real costs of moving the turbine would significantly exceed the aesthetic benefits that such a relocation would achieve.[16]

In *Rutland Renewable*, the Supreme Court was careful to preserve the *Halnon* precedent and distinguished it from the case before it:

> The dissent seeks to expand *Halnon* into a burden to show that there is not a better alternative site anywhere in the town, or at least in any nonresidential area of the town, even though [the applicant] does not own or control the land on which the solar project might be sited. . . . The burden the dissent would impose on an applicant is unreasonable, and probably unmeetable. We can find no precedent

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[12] 2016 VT 50, 202 Vt. 59.

[13] 174 Vt. 514 (2002).

[14] Since the decision, the Public Service Board was renamed the Public Utility Commission. Since that date, the Commission has, as a matter of practice, substituted "Commission" for "Board" in quotations from older cases.

[15] 174 Vt. at 517.

[16] *In re Tom Halnon*, CPG NM-25, Order of 3/15/01 at 25-26.

> that suggests that it is part of the *Quechee* test. . . . By comparison, in *Halnon*, the neighbor identified specific alternative sites on the applicant's property to which the applicant could move the proposed project, the issue was fully raised and joined before the hearing officer, and the Board denied the CPG.[17]

The Supreme Court went on to note that there was no basis provided in the record by the opponents of the project to support the claim that alternative sites were available for the project.[18] In this case, by contrast, the Applicant itself identified two alternative sites and did some evaluation of each. Thus, in this case the facts fit neatly into the *Halnon* precedent because there are at least two specifically identified alternative sites that would potentially accommodate the proposed project and the Applicant has access to both of these sites.[19] In *Rutland Renewable,* the Court also refers to this as "the *initial* burden" that falls on a project opponent "to demonstrate an alternative site."[20] Here, the Neighbors met that initial burden by noting that they preferred the alternate sites that the Applicant itself had already identified. At this point, the burden then shifted back to the Applicant.

The question is whether the Applicant has met its burden to prove that neither of the alternate sites is "generally available" and that neither site is one that a "reasonable person" would choose.[21] The record evidence is, at best, scant on this crucial issue.

Regarding the first alternate site, which is immediately adjacent to the proposed site but has less of an adverse aesthetic effect on certain neighbors, the record does not demonstrate whether ledge in fact prevents constructing the Project in that location. Except for an assertion by Mr. Viens that the first alternate site includes ledge, we can find no evidence in the record that there is ledge and, if so, how extensively the ledge covers the site or whether any alleged increased costs of constructing the Project in that location would be sufficiently great to make the use of this alternate site infeasible. To comply with the mitigation requirements of the *Quechee* test, the Applicant must produce credible evidence that this alternate site is either not

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[17] *Rutland Renewable*, 2016 VT 50, ¶¶ 27-28, 202 Vt. at 72-73.

[18] *Id.* ¶ 28, 202 Vt. at 73 (citing *In re Goddard College Conditional Use*, 198 Vt. 85 (2014) (appeal of Act 250 permit for woodchip heating plant based on lack of assessment of alternate sites denied because opponent did not meet opponent's initial burden to show alternative sites existed)).

[19] *See id.* ("[I]n *Halnon*, the neighbor identified specific alternative sites on the applicant's property to which the applicant could move the proposed project . . . .").

[20] *Id.* ¶ 28, 202 Vt. at 72 (emphasis added).

[21] *Halnon*, 174 Vt. at 515, 811 A.2d at 163.

"generally available" or would not be chosen by a "reasonable person."[22] Such proof could include, for instance, evidence of substantial excess cost, inability to obtain necessary permits, or lack of a reliable and affordable interconnection. That has yet to be shown here.

Regarding the second alternate site, it is unclear whether a Class II wetland exists that would prevent the Project from being built on this site. The Applicant has produced a brief email from Ms. Courage of ANR in which she indicates that there are extensive wetlands on the alternate site and that the Applicant would not be likely to obtain a wetland permit from ANR. This email provided no maps showing the location or extent of the wetlands, nor any field notes to support the conclusion that wetlands exist at this alternate site. The Applicant's witness, Mr. Viens, testified that he had been told by the Applicant's environmental expert, Ms. Barton, that she had done a field analysis of the alternate site and found hydric soils and wetland-type vegetation, but that there were no field notes or formal report from her and she did not testify to any of these matters at the evidentiary hearing.

The Neighbors produced an equally incomplete record. They identified an ANR Natural Resources Map, produced by Ms. Barton in her prefiled testimony, that showed no mapped wetlands on the alternate site.[23] However, Mr. Viens correctly testified that the ANR map is not definitive because these maps are developed at the "30,000 feet" level.[24] While acknowledging that he is not a wetland expert, Mr. Viens stated that he "cannot rely on those [ANR Natural Resources] maps, so the protocol is that we go out with our wetlands advisor, our consultant, Dori Barton, and we actually have to map areas."[25]

What we have here is unnecessary hearsay which is substantially less than the best evidence from the Applicant regarding the alleged unsuitability of the two alternate sites. Furthermore, the opponents only offered marginally relevant evidence that ANR's Natural Resources map does not show a wetland at the location of the site that all parties prefer. Thus, we are left with a woefully inadequate record.

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[22] *Id.*

[23] Ex. ORS-DB-2 at Figure 1

[24] Transcript 8/28/17 at 51 (Viens). As the Vermont Supreme Court has noted, the wetland "rules expressly state that the maps denote the *approximate* location and configuration of significant wetlands," but that the "actual boundaries shall be determined in the field." *Agency of Nat. Res. v. Persons*, 2013 VT 46, ¶ 16, 194 Vt. 87, 92, 75 A.3d 582, 587 (emphasis added; quotation and alteration marks omitted).

[25] Transcript 8/28/17 at 51 (Viens).

However, we are charged with the responsibility of deciding whether a proposal will be, on balance, beneficial to the State and whether an applicant has demonstrated that a project will not cause an undue adverse aesthetic effect. We cannot perform that role where the record only hints at, but does not contain, all the relevant facts, particularly where, as here, it is apparent that more complete evidence is available. As the United States Court of Appeals for the District of Columbia wrote in a different, but analogous, situation faced by the Federal Power Commission, "This [public interest] role does not permit [the Federal Power Commission] to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."[26]

It may be that both of the alternate sites are in fact unsuitable for the Applicant's Project. On the other hand, it may be that the apparently cursory examination of these sites mistakenly concluded that they were unsuitable. Given that both the Applicant and the Neighbors would prefer to have the Project located on the second alternate site and that the current record is inadequate to ascertain whether the Applicant has met its burden of proving that neither alternate site is "generally available" and that a "reasonable person" would not choose either alternate site, we are today ordering this Docket reopened for the limited purpose of receiving evidence on several discrete matters related solely to these issues.

The hearing officer is directed to reopen the record and develop new evidence, findings, and recommendations, as appropriate, consistent with the limited scope of this Order. He will not receive evidence on any other issue, will not accept at this time any additional briefs, and will not hear further argument.

Specifically, the parties shall file testimony and exhibits with the Commission that address admissible *evidence* answering the following questions from the appropriate experts:

1. Regarding the first alternate site, what evidence is there that ledge prevents placing the Project on that site? If ledge exists, how extensively does the ledge cover the site? In other words, could the Project move partway toward the alternate site (and thus be less aesthetically adverse) before hitting ledge? If ledge exists, what evidence

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[26] *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965); *accord, Green Island Power Auth. v. F.E.R.C.*, 577 F.3d 148, 168 (2d Cir. 2009).

is there that it would increase the costs of construction so much as to make the use of this alternate site infeasible?

2. Regarding the second alternate site, what physical evidence did Ms. Barton obtain that supports her conclusion that the alternate site is a wetland? If such evidence does not exist, Ms. Barton can obtain such physical evidence and include it in a report. At a minimum, the physical evidence should include field notes, test results, and a map delineating the boundaries of the wetland.
3. Regarding the second alternate site, what opinion, submitted in the form of a report, does any other qualified expert, to be offered by any party, have regarding whether the alternate site is generally available for the Project proposed by the Applicant and what are the bases for that opinion? If necessary, the Applicant shall permit any such expert from any party to have access to the alternate site to evaluate the issue of whether and to what extent there is a wetland on the site. As with Ms. Barton, any expert who conducts a physical examination of the site shall produce field notes, a delineation of the extent of the wetland, if it is found to exist, and any other physical evidence gathered by the expert as part of the expert's report.

This additional information shall be produced no later than August 15, 2018. Objections to this additional information, requests to cross-examine the testifying witnesses, and/or rebuttal of any of this proposed evidence may be offered no later than September 12, 2018. Upon completion of this limited-purpose evidentiary proceeding, the hearing officer shall issue a new proposal for decision addressing the results of the proceeding and including evidentiary rulings, findings of fact, and recommendations, as appropriate.

SO ORDERED.

Dated at Montpelier, Vermont this 20th day of July, 2018.

Anthony Z. Roisman) PUBLIC UTILITY
)
Margaret Cheney) COMMISSION
)
Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: July 20, 2018

Attest: Judith C. Whitney
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)