

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CPG #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:

8/25/2017

ORDER RE: OBJECTIONS TO THE ADMISSIBILITY OF TESTIMONY AND EVIDENCE

I. INTRODUCTION

Prefiled testimony and exhibits have been filed in this proceeding by Orchard Road Solar I, LLC (the “Applicant”) in support of its proposed solar electric generation system in Middletown Springs, Vermont (the “Project”) and by numerous intervening neighbors to the Project (“Neighbors”).¹ Both the Applicant and the Neighbors have submitted “Motions to Strike” certain testimony and exhibits. Under Commission Rule 2.216(C), the motions are, in effect, timely objections to the admissibility of portions of prefiled testimony and exhibits submitted in this proceeding.²

In this Order, I sustain, in part, and overrule, in part, the objections to admissibility.

II. PROCEDURAL HISTORY

On May 31, 2017, the Neighbors filed with the Vermont Public Utility Commission (“Commission”)³ prefiled testimony and exhibits of 11 neighbor-intervenors and 2 expert witnesses.

1. On January 20, 2017, the Commission issued an order granting motions to intervene in this docket to the Town, the Middletown Springs Historical Society, Inc. (“MSHS”), and the following Neighbors: Richard M. Spitalny, Ted and Dina Fitzpatrick, Peter and Aileen Stevenson, Karen L. Gutmann and Larry L. Springsteen, Douglas K. Freilich and Julie A. Sperling, Neil and Thomas Russell, Roy Cooper, Elizabeth Cooper, Daniel McKeen and Ellen Secord, and Karen and Robert Galloway.

2. Commission Rule 2.216(C) states:

Prefiled testimony, if admitted into evidence, shall be included in the transcript. Objections to the admissibility of prefiled testimony or exhibits shall be filed in writing not more than thirty days after such evidence has been prefiled or five days before the date on which such evidence is to be offered, whichever is earlier.

3. Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board’s name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as

(continued...)

On June 28, 2017, the Applicant filed prefiled rebuttal testimony and exhibits of Rod Viens.

On June 30, 2017, the Applicant filed objections to the admissibility of portions of the Neighbors' prefiled testimony and exhibits.

On July 20, 2017, certain Neighbors⁴ filed their opposition to the Applicant's objections.

On July 28, 2017, the same Neighbors filed objections to the admissibility of portions of the prefiled rebuttal testimony and exhibits of Mr. Viens.

On August 2, 2017, the Applicant filed a surreply to the Neighbors' opposition to the Applicant's objections.

On August 14, 2017, the Applicant filed its opposition to the Neighbors' objections.

III. Objections to Admissibility and Responses

Applicant's Objections to Admissibility

The Applicant objects to the admissibility of portions of the prefiled testimonies of Neighbors Ted and Dina Fitzpatrick, Karen L. Gutmann and Larry L. Springsteen, Richard Spitalny, Roy Cooper, and Peter and Aileen Stevenson, as well as Exhibit NN-TT-2, a narrative of witness Todd Thomas on behalf of the Neighbors, and Mr. Spitalny's Exhibit NN, which is a petition signed by 118 residents of Middletown Springs in opposition to the Project. The Applicant asserts that the designated portions of these testimonies and exhibits present information that is beyond the scope of the issues before the Commission or otherwise violate the Vermont Rules of Evidence ("V.R.E.").

Specifically, the Applicant bases its objections on arguments that certain testimony and exhibits are: (1) beyond the scope of this proceeding, pursuant to the Commission's Order Re: Significant Issues and Notice of Hearing, issued on February 22, 2017; (2) statements by witnesses who lack personal knowledge or the requisite expertise; (3) hearsay pursuant to V.R.E. 801 and 802, where non-witnesses are unavailable to testify; or (4) more prejudicial than probative pursuant to V.R.E. 403.

3. (...continued)
activities of the Commission unless that would be confusing in the specific context.

4. The Neighbors' objections were filed on behalf of Richard Spitalny, Robert and Karen Galloway, Daniel McKeen, and Neil and Thomas Russell by and through their attorney.

Neighbors' Opposition to the Applicant's Objections

The Neighbors contend that concerns regarding sound, interference with electronic equipment, and solar glare relate to the issue of aesthetics because they will affect the use and enjoyment of the abutting neighbors' properties. The Neighbors further contend that evidence regarding property valuation has been "squarely put into play by the hearing officer," that under Vermont law, any landowner is statutorily deemed competent to testify regarding the value of his or her property, and that property value is relevant to the determination of the orderly development criterion under 30 V.S.A. § 248.

The Neighbors further oppose the Applicant's objections to Mr. Spitalny's Exhibit NN, a petition signed by 118 residents of Middletown Springs in opposition to the Project, as hearsay that is more prejudicial than probative. The Neighbors argue that the hearing officer and the Commission can easily assign whatever weight they deem appropriate to the exhibit.

Applicant's Surreply

The Applicant argues that individual property values are not within the scope of issues for which the Neighbors have been granted intervention or for which a hearing has been granted and, therefore, any evidence regarding property values is irrelevant and inadmissible. The Applicant further argues that testimony regarding sound, interference with electronic equipment, or solar glare as elements related to aesthetics on the basis that they that would affect the use and enjoyment of abutting neighbors' properties has not been adequately briefed and therefore should not be considered.

With respect to Exhibit NN, which the Applicant maintains is hearsay and more prejudicial than probative, the Applicant argues that the exhibit has the potential to confuse issues to the extent that it addresses issues outside the scope of the proceeding. Furthermore, the Applicant argues that because the Neighbors have not rebutted the argument that the exhibit should be excluded as hearsay, the objections should be sustained.

Neighbors' Objections to Admissibility

The Neighbors object to portions of the prefiled rebuttal testimony of Applicant witness Rod Viens concerning alternative site locations for the Project and his Exhibit ORS-RV-8, an email from

Zapata Courage of the Vermont Agency of Natural Resources (“ANR”). The Neighbors object on the basis that the witness lacks personal knowledge and does not possess the requisite expertise to provide an opinion concerning alternative site locations for the Project, and that the email exhibit constitutes hearsay.

The Neighbors argue that Mr. Viens lacks personal knowledge regarding alternative Project site locations and that his testimony is based on statements made by an ANR employee and on statements of “team members” and civil engineers of the Applicant, not Mr. Viens himself. The Neighbors further argue that Mr. Viens does not possess the requisite expertise to provide an opinion about wetlands science or civil engineering, and that the email from Ms. Zapata, who is not testifying in this case, constitutes hearsay.

Applicant Opposition to Neighbors’ Objections

The Applicant counters that the Neighbors are incorrect in their arguments, because Mr. Viens is an expert on solar siting and development and his testimony is based on his personal knowledge of the Applicant’s business reasons for not proposing to construct the Project on either of the alternative sites proposed by the Neighbors. The Applicant further argues that the email comprising Exhibit ORS-RV-8 is admissible under V.R.E. 803(8)’s public record exemption, “the Vermont Administrative Procedures Act, Commission Rule 2.216(A), and long-standing Commission precedent.”

IV. LEGAL STANDARD

V.R.E. 401 defines relevant evidence as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

V.R.E. 701 addresses opinion testimony by a lay witness and states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

V.R.E. 801 defines hearsay as follows:

- (a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
- (b) Declarant. A “declarant” is a person who makes a statement.
- (c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

V.R.E. 802 states the “hearsay rule” and, with some exceptions, disallows the admission of hearsay:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.

The Vermont Administrative Procedures Act (“APA”) provides such an exception and states at 3 V.S.A. § 810(1) that in contested cases the Commission may deviate from the Vermont Rules of Evidence, including the hearsay rule, and shall instead observe the following rule:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

V.R.E. 803(8) provides another exception to the hearsay rule with respect to documents or statements produced by a public office or agency:

Public records and reports. (A) To the extent not otherwise provided in (B), records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(B) The following are not within this exception to the hearsay rule . . . (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party . . .

V: DISCUSSION

In ruling on objections to the admissibility of testimony or exhibits, the Commission does not decide the persuasive weight to be accorded to the testimony or the exhibits. Rather, it decides the more narrow question of whether the testimony or exhibits may be admitted into the evidentiary

record pursuant to the rules of evidence and the discretion accorded the Commission in 3 V.S.A. § 810(1). Relevant evidence in some degree must advance the inquiry and thus have probative value. The Commission's review of a project under 30 V.S.A. § 248 is as an expert body that is engaged in a "legislative, policy-making process."⁵ In administrative proceedings such as these, the Commission is the trier of fact and there is no jury to protect from unreliable evidence.

In this proceeding, the Neighbors were each granted intervention with the clarification that "this proceeding will not address the impact of the Project on individual property values, except to the extent that the aggregate impact of the Project on property values in the region may bear on the overall economic benefit analysis of the Project."⁶ The evidentiary hearings scheduled in this case are limited to the issues of orderly development under 30 V.S.A. § 248(b)(1), aesthetics under 30 V.S.A. § 248(b)(5) and 10 V.S.A. § 6086(a)(8), and above-ground historic sites under 30 V.S.A. § 248(b)(5) and 10 V.S.A. § 6086(a)(8).⁷ Given the nature of the testimony provided in this case, it is somewhat difficult to establish bright line standards for the admission of statements that fall outside the scope of the proceeding, for example, but that may be relevant to certain lines of inquiry and statements that appear to fall more clearly within the scope of the proceeding but that are presented by lay witnesses without relevant expertise to substantiate their statements. That said, it is well within the Commission's discretion to allow such testimony and evidence and grant it the weight it deserves in its decisionmaking.

Applicant's Objections to Admissibility

The Applicant objects to portions of the prefiled testimonies of certain Neighbors, as well as Exhibit NN-TT-2 of Todd Thomas, an expert witness testifying on behalf of the Neighbors. Generally, the Applicant objects to testimony regarding property values, interference with electronic equipment, public health and safety, solar glare, sound impacts, environmental issues, wildlife, water contamination, rare and irreplaceable natural areas, and economic impacts. The Applicant further

5. *In re Amended Petition of UPC Vermont Wind*, 2009 Vt. 19, ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 Vt. 69, ¶ 6).

6. *Application of Orchard Road Solar I, LLC*, Case No. 16-0042-NMP, Order of 1/20/17 at 10.

7. *Id.*, Order of 2/22/17 at 1.

objects to the lack of personal knowledge or expertise of much of the same portions of testimony provided by the Neighbors.

I sustain the Applicant's objections with respect to testimony concerning environmental issues, wildlife, water contamination, and rare and irreplaceable natural areas in the testimonies of Ms. Gutmann and Mr. Springsteen (toxic soil and radiation), Roy Cooper (wildlife and water contamination), the Stevensons (water contamination and rare and irreplaceable natural areas). These issues fall beyond the scope of the hearings on this Project.

In addition, I sustain the objections, in part, with respect to testimony concerning public health and safety, which also falls outside the scope of the hearings, including related portions of the testimony of the Fitzpatricks (health issues due to electromagnetic fields, solar glare, and sound), but overrule the objection, in part, to the extent that certain issues raised under the rubric of "public health and safety," such as solar glare and sound impacts, may be relevant to the assessment of perceived impacts on the use and enjoyment and, by extrapolation, the aggregate value of properties within the vicinity of the Project.

Finally, I overrule the Applicant's objection with respect to Exhibit NN-7 and the statements of Mr. Spitalny and Mr. Thomas pertaining to that exhibit, which consists of a copy of a petition in opposition to the Project. The petition was signed by numerous residents of Middletown Springs, including Mr. Spitalny and other Neighbors, and may provide probative value in the consideration of the Project's potential impacts under the orderly development criterion.

Individual lay testimonies on the issues permitted by these rulings will be granted the weight they merit.

Neighbors' Objections to Admissibility

The Neighbors object to the admissibility of portions of the prefiled testimony of Applicant witness Rod Viens concerning alternative site locations for the Project and his Exhibit ORS-RV-8, an email from Zapata Courage of ANR. The Neighbors contend that Mr. Viens lacks personal knowledge and does not possess the requisite expertise to provide an opinion concerning alternative site locations. The Neighbors further contend that Ms. Courage's email constitutes hearsay.

I overrule the Neighbors' objection. As the Executive Vice President for the developer of the proposed Project, Mr. Viens is qualified to testify on the siting and development of solar facilities, as well as on the Applicant's business reasons for choosing or rejecting potential sites for the Project. I further find that Exhibit ORS-RV-8 is admissible pursuant to V.R.E. 803(8) as a public record exemption.

A summary of the above rulings is attached to this Order.

So Ordered.

Dated at Montpelier, Vermont, this 25th day of August, 2017.



Lynn Fabrizio, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: August 25, 2017

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)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and Order.

Summary of Rulings on Objections to Admissibility

Witness	Starting Line Reference	Ending Line Reference	Ruling
Ted and Dina Fitzpatrick	Page 3 at Line 14, starting with "This project . . ."	Page 3 at Line 15, ending with ". . . our way of life."	Objection overruled
	Page 4 at Line 7, starting with "We request . . ."	Page 5 at Line 6, ending with ". . . health issues."	Objection sustained
Karen L. Gutmann and Larry L. Springsteen	Page 2, Line 1, starting with "Contrary to . . ."	Page 2, Line 8, ending with ". . . qualities of the property"	Objection overruled
	Page 3 at Line 19, starting with "and concerns about the disturbance of"	Page 3 at Line 21, ending with ". . . whether well-founded or not."	Objection sustained with respect to "toxic soil" and "radiation"
Richard Spitalny	Page 11 at Line 4, starting with "The project would . . ."	Page 11 at Line 5, ending with ". . . [Exhibit NN-7]."	Objection overruled
	Page 17 at Line 23, starting with "Pursuant to . . ."	Page 19 at Line 9, ending with ". . . public health and safety."	Objection overruled
	Page 26 at Line 6, starting with "Q: Please provide. . ."	Page 27 at Line 24, ending with ". . . the property."	Objection overruled
Roy Cooper	Page 1 at Line 21, starting with "I am also concerned . . ."	Page 1 at Line 23, ending with ". . . and grouse."	Objection sustained
	Page 3 at Line 3, starting with "contaminate . . ."	Page 3, Line 3, ending with ". . . the water."	Objection sustained
Peter and Aileen Stevenson	Page 3 at Line 4, starting with "and Rare and . . ."	Page 3 at Line 4, ending with ". . . 10 V.S.A. § 6086(a)(8)."	Objection sustained
	Page 4 at Line 23 starting with "potentially . . ."	Page 4 at Line 24 ending with ". . . the water supplies . . ."	Objection sustained
	Page 5 at Line 6, starting with "The proposed . . ."	Page 6 at Line 13, ending with ". . . a lower Grand List."	Objection overruled
Todd Thomas	Exh. NN-TT-2 at Page 4, ¶ 4 starting with "This fact . . ."	Page 4, ¶ 4 ending with "in Middletown Springs"	Objection overruled
	Page 5, ¶ 6 starting with "Meanwhile the Neighbors . . ."	Page 5, ¶ 6 ending with ". . . its greatest asset"	Objection overruled
Rod Viens	Page 7, last ¶ at Line 3, the phrase "property values and"		Objection overruled
	Page 1, Line 13, Answer 4 in its entirety	Page 2, Line 12	Objection overruled
	Exhibit ORS-RV-8 (3-page email from Z.Courage/ANR)		Objection overruled