

June 30, 2017

By Hand Delivery and E-Mail

Ms. Judith Whitney, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: **CPG #16-0042-NMP -- Application of Orchard Road Solar I, LLC**

Dear Ms. Whitney:

Enclosed please find Applicant Orchard Road Solar I, LLC's *Motion to Strike Portions of Neighbors' Prefiled Testimony* for filing in the above-referenced matter.

Please do not hesitate to contact us with any questions.

Sincerely,



Geoffrey H. Hand, Esq.
Victoria M. Westgate, Esq.

cc: Service List

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Application of Orchard Road Solar I, LLC for a)
certificate of public good, pursuant to 30 V.S.A.)
§§ 219a and 248, to install and operate a 500 kW) CPG #16-0042-NMP
group net metered solar electric generation facility)
located on Orchard Road in Middletown Springs,)
Vermont, to be known as the "Orchard Road)
Solar Project")

CERTIFICATE OF SERVICE

I, Grace Grundhauser, certify that on June 30, 2017, I forwarded copies of Orchard Road Solar I, LLC's *Motion to Strike Portions of Neighbors' Prefiled Testimony* to the service list below by the delivery method noted:

By Hand Delivery and E-Mail:

Ms. Judith Whitney, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

By E-Mail and First Class Mail:

Randy J. Miller, II, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

Stephanie Hoffman, Esq.
Vermont Public Service Department
112 State Street, 3rd Floor
Montpelier, VT 05620-2601

John E. Arsenault, Chairman
Middletown Springs Planning Commission
P.O. Box 1232
Middletown Springs, VT 05757

David P. Wright, President
Middletown Springs Historical Society, Inc.
10 Park Avenue, P.O. Box 1121
Middletown Springs, VT 05757

Brooke Dingleline, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
172 North Main Street
Barre, VT 05641
(for the Neighbors)

Ted & Dina Fitzpatrick
12525 Jot Em Down Lane
Odessa, FL 33556

Peter and Aileen Stevenson
97 Coy Hill Road
Middletown Springs, VT 05757

Karen L. Gutmann and Larry L. Springsteen
290 West Street
Middletown Springs, VT 05757

Douglas Freilich & Julie Sperling
PO Box 1041
Middletown Springs, VT 05757

Roy Cooper
327 West Street
Middletown Springs, VT 05757

Elizabeth W. Cooper
49 Rocks and Trees Lane
P.O. Box 1011
Middletown Springs, VT 05757

Richard Spitalny
24 Tanglewild Road
Chappaqua, NY 10514

Dated at Burlington, Vermont this 30th day of June, 2017.

By:

A handwritten signature in black ink, appearing to be 'GG' or similar initials, written in a cursive style.

Grace Grundhauser
Office Coordinator

STATE OF VERMONT
PUBLIC SERVICE BOARD

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)

ORCHARD ROAD SOLAR I, LLC
MOTION TO STRIKE PORTIONS OF NEIGHBORS PREFILED TESTIMONY

Pursuant to Public Service Board (the “Board” or “PSB”) Rule 2.216(C), Orchard Road Solar I, LLC (“ORS” or “Applicant”) hereby requests that the Hearing Officer strike portions of the prefiled testimonies of Neighbors Ted and Dina Fitzpatrick, Karen L. Gutman and Larry L. Springsteen, Richard Spitalny, Roy Cooper, and Peter and Aileen Stevenson, and exhibit of witness Todd Thomas on behalf of Neighbors, each dated May 31, 2017, to the extent that they address issues outside the scope of the above-referenced proceeding, lack personal knowledge or requisite expertise, or constitute hearsay. More specifically, ORS asserts that portions of these prefiled testimonies, identified below, present information that is not relevant to the issues before the Board pursuant to its February 22, 2017 Order Re: Significant Issues and Notice of Hearing (the “Order”), or otherwise violate the Vermont Rules of Evidence, as discussed more fully below. Therefore, ORS respectfully requests that the Hearing Officer strike these limited portions of Neighbors’ testimony and/or exhibits and not admit them into the record of this proceeding.

BACKGROUND AND STATEMENT OF LAW

In the February 22nd Order, the Hearing Officer ruled that the only significant issues in this Application that are subject to the present hearing concern orderly development, visual aesthetics, and above-ground historic sites. Order at 6-13. The Hearing Officer expressly rejected issues related to economic benefit, water pollution, public health and safety (including solar glare and sound levels), and necessary wildlife habitat as not significant and therefore not granted a hearing. *Id.* at 8-15. The Order further states that “[t]o the extent parties wish to submit testimony or evidence at a hearing *on orderly development, aesthetics, or above-ground historic sites*, they shall provide such testimony or evidence from witnesses with expertise on the relevant issues.” *Id.* at 16 (emphasis added).

Given the clear limitation of the current proceeding to these three issues (orderly development, aesthetics, or above-ground historic sites), the portions of the testimonies outside the scope of the issues before the Board are not relevant to the proceeding and are therefore not admissible evidence under Board Rule 2.216(C) and Rules 401 and 402 of the Vermont Rules of Evidence (“V.R.E.”).

Under Board Rule 2.216(C), “[o]bjections to the admissibility of prefiled testimony or exhibits” can be made “in writing not more than thirty days after such evidence has been prefiled.” In ruling on an objection to the admissibility of testimony “the Board does not decide whether particular testimony is compelling. Instead, the Board decides the more narrow question of whether that testimony should be allowed into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Board in 3 V.S.A. § 810(1).” *Petition of Georgia Mt. Community Wind, LLC*, Order Re: Motion to Exclude Prefiled Testimony and Exhibits, Docket 7508 (3/11/2011).

Vermont Statutes and Rules of Evidence clearly allow for excluding irrelevant testimony from the record. *See* 3 V.S.A. § 810(1) (“[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded”) and V.R.E. Rule 402 (“Evidence which is not relevant is not admissible.”). Under V.R.E. Rule 401, relevant evidence means evidence “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” (emphasis added). As the Board has previously held, portions of testimony are therefore not admissible when “they are not relevant to the matters within the scope of [the] proceeding.” *Application of Green Mountain Power Corporation*, Order Re: Green Mountain Power Corporation’s Objection to Testimony, Docket NM-1646 (1/8/2014); *see also Application of Seneca Mountain Wind, LLC*, Order Re: Objections to Prefiled Testimony and Requests for Attorney’s Fees, Docket 7867 (1/16/13) (sustaining objections to prefiled testimony and exhibits to the extent they “fall outside the scope of the limited issues” determined by a previous order).

In addition to portions of testimony that fall outside the scope of the issues before the Board, ORS respectfully requests that the Hearing Office strike portions of the prefiled testimony and exhibits where the affiant lacks personal knowledge or lacks the requisite expertise to make the statement. The Vermont Rules of Evidence clearly allow for excluding testimony when the witness lacks personal knowledge of the matter or expertise. *See* V.R.E. Rule 602 (“The testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”); V.R.E. Rule 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion...”); and V.R.E.

Rule 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”).

Finally, ORS requests that the Hearing Officer strike exhibits and portions of prefiled testimony that are hearsay, pursuant to Rules of Evidence 801 and 802, or are more prejudicial than probative under Rule 403.

TESTIMONY TO BE STRIKEN

Based on the above cited Rules of Evidence and pursuant to its authority under Board Rule 2.216(C), ORS respectfully requests that the Hearing Officer strike the portions of prefiled testimonies and exhibits identified in the following table from the record. These statements either do not concern orderly development, above-ground historic sites, or aesthetics, and therefore are not relevant because they are outside the scope of the proceeding, or are hearsay, lack personal knowledge, or are non-expert opinion testimony.

Witness	Starting Line Reference	Ending Line Reference	Description/Basis
Ted and Dina Fitzpatrick	Page 3 at Line 14 starting with “This project...”	Page 3 at Line 15	Beyond Scope (<i>Statement regarding affiant’s property value</i>)
	Page 4 at Line 7	Page 5 at Line 6 ending with “health issues”	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding interference with residential electronic equipment and statements regarding public health and safety</i>)
Karen L. Gutmann and Larry L. Springsteen	Page 2 at Line 1	Page 2 at Line 8	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding sound impacts</i>)
	Page 3 at Line 10	Page 3 at Line 21	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding affiant’s property value, sound impacts, and environmental issues</i>)

Richard Spitalny	Page 17 at Line 23	Page 19 at Line 9	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding solar glare</i>)
	Page 26 at Line 6	Page 27 at Line 24	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding sound impacts and affiant's property value</i>)
	Exhibit NN-7 and Page 11, Lines 4-5		Statement regarding views and opinions of non-witnesses, as well as supporting exhibit, is hearsay and because non-witnesses are unavailable to testify, is more prejudicial than probative under Rule 403
Roy Cooper	Page 1 at Line 21 starting with "I am..."	Page 1 Line 24 ending with "borders it"	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding wildlife and affiant's property value</i>)
	Page 3 at Line 3 starting with "contaminate the water..."	Page 3 Line 3	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statement regarding water contamination</i>)
Peter and Aileen Stevenson	Page 3 at Line 4	Page 3 at Line 4	Beyond the Scope (<i>Reference to Rare and Irreplaceable Natural Areas Criterion</i>)
	Page 4 at Line 23 starting with "potentially..."	Page 4 at Line 24 ending with "rural economy"	Beyond Scope and Lack of Personal Knowledge/Non-Expert Opinion Testimony (<i>Statements regarding water contamination and economic impacts</i>)
	Page 5 at Line 6	Page 6 at Line 13	Beyond Scope (<i>Statements regarding property values</i>)
Todd Thomas	Exh. NN-TT-2 at Page 4, ¶ 4 starting with "This fact..."	Page 4, ¶ 4 ending with "in Middletown Springs"	Beyond Scope (<i>Statements regarding property values</i>)
	Page 5, ¶ 6 starting with "Meanwhile the Neighbors ..."	Page 5, ¶ 6 ending with "greatest asset"	Beyond Scope (<i>Statements regarding property values and economic impacts</i>)
	Page 7, last ¶ at Line – phrase "the property values"		Beyond Scope (<i>Statement regarding property values</i>)

CONCLUSION

Those portions of Neighbors' prefiled testimonies or exhibits concerning issues other than orderly development, above-ground historic sites, or aesthetics are outside the scope of this proceeding and are therefore irrelevant. ORS further objects to those portions of testimony and exhibits that are hearsay, lack personal knowledge, or are non-expert opinion testimony. For these reasons, ORS respectfully requests that the Hearing Officer approve this motion and strike the above-referenced portions of the prefiled testimony and exhibits offered by Ted and Dina Fitzpatrick, Karen L. Gutman and Larry L. Springsteen, Richard Spitalny, Roy Cooper, Peter and Aileen Stevenson, and Todd Thomas, and not allow these statements into the record.

Dated this 30th day of June, 2017 in Burlington, Vermont.



By:

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