

August 14, 2017

By Hand Delivery and E-Mail

Ms. Judith Whitney, Clerk
Vermont Public Utility Commission
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 *Opposition to the Neighbors' Motion to Strike Portions of the Prefiled Rebuttal Testimony of Rod Viens* 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 UTILITY COMMISSION**

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, Emma Novins, certify that on August 14, 2017, I forwarded copies of Orchard Road Solar I, LLC’s *Opposition to the Neighbors’ Motion to Strike Portions of the Prefiled Rebuttal Testimony of Rod Viens* to the service list below by the delivery method noted:

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Chappaqua, NY 10514

Dated at Burlington, Vermont this 14th day of August, 2017.

By:

A handwritten signature in black ink that reads "Emma Novins". The signature is written in a cursive style with a large, looped initial "E" and a long, sweeping tail on the "s".

Emma Novins
Paralegal

**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)

**ORCHARD ROAD SOLAR I, LLC'S OPPOSITION TO NEIGHBORS' MOTION TO
STRIKE PORTIONS OF REBUTTAL TESTIMONY OF ROD VIENS**

Introduction

Applicant Orchard Road Solar I, LLC (“ORS”) hereby responds to the July 28, 2017 motion to strike portions of the prefiled rebuttal testimony of Rod Viens filed by Neighbors Richard Spitalny, Robert and Karen Galloway, Daniel McKeen, and Neil and Thomas Russell (“Neighbors”). Neighbors incorrectly argue for striking portions of Mr. Viens’ rebuttal testimony and Exhibit ORS-RV-8 on the basis that Mr. Viens does not possess the personal knowledge or expertise required for admission of his testimony. On the contrary, Mr. Viens is an expert in the subject of solar siting and development, his testimony does assert his personal knowledge of ORS’s business reasons for not proposing the Project on either of the alternative sites proposed by Neighbors, and the email comprising ORS-RV-8 is admissible under Vermont Rule of Evidence 803(8), the Vermont Administrative Procedures Act, Commission Rule 2.216(A), and long-standing Commission precedent. For these reasons, ORS respectfully requests that the Hearing Officer deny Neighbors’ motion.

Argument

Neighbors argue that Question 4 in Mr. Viens' rebuttal testimony should be stricken because 1) Mr. Viens lacks personal knowledge of facts because they are based on statements made by a Wetlands Ecologist from the Agency of Natural Resources, Ms. Zapata Courage, and statements of ORS team members, 2) Mr. Viens lacks requisite expertise to provide an opinion regarding wetlands science or civil engineering, and 3) that the email submitted from Ms. Courage is inadmissible hearsay because Ms. Courage is not herself a witness to the proceeding. We address each argument in turn.

First, Mr. Viens possesses significant knowledge and experience in the subject of solar siting and development, and therefore qualifies as an expert on this subject under Vermont Rule of Evidence 702 (stating that "[i]f 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."). As indicated on his resume, *Exhibit ORS-RV-1*, Mr. Viens has nearly 10 years of experience working for groSolar on solar development projects including overseeing the siting, engineering, procurement and construction of solar facilities, and he has testified before the Commission in many proceedings on projects he has overseen, including the GMPSolar Williston, Richmond, Hartford, Panton, and Williamstown Projects (Dockets No. 8562, 8564, 8580, 8637, and 8682) and most recently in the Mill Pond Road Solar Project (CPG #16-0059-NMP). Mr. Viens' testimony regarding ORS's siting of the Project will assist the Hearing Officer and Commission to determine that ORS has considered the alternative sites suggested by Neighbors, and to understand the reasons why ORS has determined that these locations are infeasible sites for the Project. His testimony is based upon sufficient facts, as supported by the accompanying exhibit from Ms. Courage, and is the product of reliable principles and methods, which Mr. Viens has applied reliably

to the facts of the case. Thus, Mr. Viens's rebuttal testimony fits squarely within the requirements of V.R.E. 702, and should be admitted as expert testimony.

As a qualified expert, V.R.E. 703 provides that Mr. Viens's testimony may rely on facts or data provided to him. Thus, to the extent that Neighbors suggest that Mr. Viens lacks personal knowledge of certain facts upon which his testimony is based, this is allowable under V.R.E. 703 and is therefore not a reason to strike any portion of Mr. Viens's testimony. Specifically, Mr. Viens relies on the attached email from Ms. Courage, and from the opinion of groSolar's civil engineering and project development staff who visited and reviewed the site. These facts are of a type reasonably relied on by solar siting experts when forming opinions or inferences as to whether a site is feasible for project development, and is therefore a sufficient and acceptable basis for Mr. Viens's testimony.

Furthermore, Neighbors do not clearly identify specific portions of Mr. Viens's testimony that they assert he lacks personal knowledge to support, when in fact most of his testimony in response to Question 4 is supported by personal knowledge. Mr. Viens recounts a series of facts that he has personal knowledge of: that ORS considered the sites suggested by Neighbors, that ORS took steps to investigate whether the Project could be located on either site, and the basis for ORS's decision not to pursue these sites for the Project, which included multiple site visits by ORS employees to the alternative locations. In these statements, Mr. Viens does not, nor does he attempt to, proffer an expert opinion as to the presence of wetlands or civil engineering requirements; rather, he is attesting to ORS's understanding of these characteristics of the alternative sites, which is appropriate and admissible under the Commission's evidentiary standards.

Public Utility Commission Rules state that the Vermont Rules of Civil Procedure and Vermont's Administrative Procedures Act ("APA") govern evidentiary matters before the Commission. See Commission Rule 2.216(A) (stating that [e]videntiary matters are governed by section 810 and Civil Rules 43, 44, and 44.1). Section 810 of the APA incorporates Vermont's

Rules of Evidence, but also provides for the admission of evidence “[w]hen necessary to ascertain facts not reasonably susceptible of proof under [evidence] rules . . . if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” 3 V.S.A. § 810(1); *see also In re Smith*, 169 Vt. 162, 173, 730 A.2d 605, 613 (1999) (“Although agencies must generally follow the rules of evidence, Administrative Procedure Act (APA) relaxes the rules of admissibility for agency proceedings.”); *In re Joint Petition of Vermont Elec. Power Co., Inc. et al.*, Docket no. 7373, Order re Ferenbachs’ Motion to Strike Portions of Petitioners’ Prefiled Testimony (Aug. 21, 2008) (“In general, the rules of evidence applicable to civil cases in a Vermont superior court are followed in proceedings before us although we have discretion under certain conditions to allow evidence not admissible under the rules of evidence.”). Under this standard, it is common practice for the Commission to admit testimony by a representative of a company as to the company’s actions and reasons for such actions, and indeed, Commission Rules require such testimony in some instances. *See, e.g.*, Commission Rule 5.107(C)(11) (requiring an applicant to file a document with a net metering petition summarizing comments received by applicant and actions taken by applicant to address comment concerns or an explanation as to why applicant has not addressed concerns). Mr. Viens’ testimony regarding ORS’s understanding of and decisions regarding the alternative sites suggested by Neighbors should therefore be admitted.

Similarly, the email from Ms. Courage submitted by Mr. Viens is admissible under both the Rules of Evidence and the Commission’s long standing precedent of accepting and relying on such emails as evidence. First, the email sent by Ms. Courage is a record of a regularly conducted and recorded activity by a public agency as allowed under Rule of Evidence 803(8)(A)¹. Thus, it is admissible under the public record exemption to the hearsay exclusion.

¹ Evidence Rule 803 states that “The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) 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

Even if this email did not qualify under Rule 803(8), which it does, the Commission regularly accepts correspondence from agencies, towns, commissions, and interconnecting utilities evidence of a compliance with Section 248 criteria, and Commission Rules even contemplate such evidence. *See, e.g.*, Commission Rule 5.107(C)(9) (requiring net metering applicants to provide either a wetlands delineation by a qualified consultant “or a letter from the district wetland ecologist . . . stating that no delineation is necessary”); Commission Rule 5.107(C)(10) (“For net-metering systems with a capacity greater than 150 kW, the applicant must file as part of the application a letter from the electric company stating that the proposed net-metering system may be safely interconnected with the company’s distribution grid without having an adverse impact on system stability or reliability. The letter must also describe all improvements to the grid necessary to interconnect the net-metering system.”); *In re Petition of GMPSolar – Hartford, LLC*, Docket no. 8580, Final Order (Jun. 30, 2016), Finding 18 (quoting letter attached to Mr. Viens’ prefiled testimony from Two-Rivers Ottauquechee Regional Commission in finding that project complied section 248 criterion (b)(1)).

Moreover, as a policy matter, not allowing this type of correspondence from state agencies would lead to the perverse result of requiring applicants to subpoena state agency witnesses, or town representatives and regional planning witnesses to testify in every proceeding in which their correspondence is provided. Such a procedural hurdle would add significant burden to state agencies and unduly interfere with the efficiency of the Commission’s section 248 review process.

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: (i) investigative reports by police and other law enforcement personnel; (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; (iii) factual findings offered by the government in criminal cases; (iv) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. .” V.R.E. 803 (8).

Thus, Ms. Courage's email should not be excluded because it is of a type of relevant evidence regularly called for and accepted by the Commission under the discretion afforded it by the APA.

Conclusion

In summary, Neighbors' motion to strike portions of Mr. Viens' testimony should be denied. Mr. Viens is an expert in the subject of solar siting and development, and his testimony and reliance on the opinions of ANR and ORS team members is allowed under V.R.E 702 and 703. Furthermore, the majority of the statements made by Mr. Viens regarding the alternative sites proposed by Neighbors convey his personal knowledge of ORS's actions and business decisions. Finally, the email accompanying Mr. Viens' testimony from a District Wetlands Ecologist is admissible under both the Rules of Evidence and the Commission's own Rules and evidentiary precedent under APA § 810(1). For these reasons, ORS respectfully requests that the Hearing Officer deny Neighbors' motion and allow the admission of Mr. Viens' rebuttal testimony and exhibits, which attest to ORS's consideration and review of the alternative sites suggested by Neighbors and the reasons why ORS considers those sites unfeasible.

Dated this 14th day of August, 2017 in Burlington, Vermont.

By:



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