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October 17, 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 Neighbors' Motion for Second Site Visit and Motion for Leave to File Additional Limited Evidence* for filing in the above-referenced matter.

Please do not hesitate to contact us with any questions.

Sincerely,

for 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 group net metered solar electric generation facility located on Orchard Road in Middletown Springs, Vermont, to be known as the "Orchard Road Solar Project"	)	CPG #16-0042-NMP

CERTIFICATE OF SERVICE

I, Gillian Bergeron, certify that on October 17, 2017, I forwarded copies of Orchard Road Solar I, LLC's *Opposition to Neighbors' Motion for Second Site Visit and Motion for Leave to File Additional Limited Evidence* to the service list below by the delivery method noted:

By Hand Delivery and E-Mail:
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Vermont Public Utility Commission
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Montpelier, VT 05620-2701

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Dated at Burlington, Vermont this 17th day of October, 2017.

By:

Gillian Bergeron
Paralegal

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 group net metered solar electric generation facility located on Orchard Road in Middletown Springs, Vermont, to be known as the "Orchard Road Solar Project"	)	CPG #NMP 16-0042-NMP

Applicant Orchard Road Solar I, LLC's Opposition to Neighbors' Motion for Second Site Visit and Motion for Leave to File Additional Limited Evidence

Applicant Orchard Road Solar I, LLC ("ORS") hereby responds to the Motion for Second Site Visit and Motion for Leave to File Additional Limited Evidence filed by Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell ("Neighbors") on October 5, 2017.

I. Motion for Second Site Visit

The Neighbors request that the Hearing Officer and Public Utility Commission ("PUC" or "Commission") conduct a second site visit to view the site of the proposed Orchard Road Solar Project (the "Project"). There is no need for an additional site visit. A site visit was already conducted on April 10, 2017, which included visiting the individual Neighbors' properties. *See* PUC, *Memorandum re Net Metering Application 16-0042-NMP* (Apr. 7, 2017). In addition to the Hearing Officer, Commissioner Cheney attended on behalf of the Commission along with representatives of the parties.

An additional site visit would impose a significant burden on all parties and on the Commission, especially given that it is a four-hour round trip to the Project site from either Montpelier or Burlington. A member of the Commission has already viewed the site, and a substantial evidentiary record has been developed on the Project's aesthetics. Finally, the Neighbors

point to no justification for revisiting the site, other than to observe the alternative locations proposed by the Neighbors for the project. However, these locations were pointed out during the initial site visit, and thus there is no need for the Commission to hold another site visit for this purpose.

II. Motion for Leave to File Additional Limited Evidence

The Neighbors move to introduce 22 pages of photographs and maps into the record. The Commission should deny the Neighbors' motion. The Vermont Administrative Procedure Act ("APA") and Rules of Civil Procedure, as discussed further below, do not allow litigants to introduce evidence after trial that was available to them beforehand. All of the evidence proffered by the Neighbors relates to issues raised far in advance of the technical hearing, and was available to them at all times. Moreover, the PUC cannot admit evidence without holding an additional hearing, which would impose an entirely unjustified burden on the parties and waste the PUC's resources.

The only legal support that the Neighbors provide for their motion is Commission Rule 2.206. They claim that Rule 2.206 "leaves open the option for a party to file a posthearing motion in writing for leave to present additional evidence after a technical hearing has ended," and that the standard governing such a motion is whether "the evidence would be helpful to the Commission or hearing officer in making a final determination, and that it would not be unfair to the other parties to allow such additional evidence to be presented after the technical hearing." *Neighbors' Motion* at 4–5. In fact, Rule 2.206 does not provide any substantive standards that would be applicable to the Neighbors' motion. Rule 2.206 is a purely procedural rule requiring motions made outside of hearings to be made in writing, and supported by a memorandum of law in appropriate circumstances.

The actual standards governing the evidentiary record in Commission proceedings are to be found in the APA, 3 V.S.A. §§ 800–849, and the Rules of Civil Procedures. *See* PUC Rule 2.216 (incorporating 3 V.S.A. § 810 and the Rules of Civil Procedure). The Neighbors' motion to introduce new evidence after the hearing is essentially a motion for new trial under V.R.C.P. 59. As the Commission has explained, the "minimum standard that a movant must meet in order to be granted a request for a new trial" is to demonstrate that the proffered evidence was "not reasonably available to him, through the exercise of due diligence, at the time of the technical hearing in this docket." *Petition of Polewsky v. Washington Elec. Co-op., Inc.*, Docket No. 5735, 1994 WL 904849 (Vt. Pub. Util. Comm'n Oct. 20, 1994).

The Neighbors' motion falls far short of this requirement. The Neighbors proffer evidence on three issues: the speed limit on Rt. 140; the historic and current use of Alternate Site #1; and public and private views of the Project. They do not assert that the proffered evidence, contained in 22 pages of photographs and maps, was unavailable to them prior to the hearing. And indeed, all three issues raised by the Neighbors' proffer were addressed in the Applicant's prefiled testimony and exhibits. The Aesthetics Assessment Report submitted by the Applicant on July 15, 2016—over a year before the technical hearing—states that "[t]he speed limit on Route 140 near Orchard Road is 40 miles per hour." Exh. ORS-MK-2 at 8. The presence of Class 2 wetlands on Alternative Site #1 was addressed in the June 28, 2017 rebuttal testimony of Rod Viens. Public and private views of the Project were addressed both in the Aesthetics Assessment Report and in the prefiled rebuttal testimony of Mark Kane. The Neighbors had sufficient time before the technical hearing to prepare evidence on each of these subjects, and chose not to do so.

The Neighbors indicate that the proffered evidence is "in direct response to the cross-examination testimony of witnesses at the technical hearing," *Neighbors' Motion* at 1, implying that introducing evidence after the close of the hearing is a proper response to cross-examination.

However, the Neighbors do not indicate why they did not avail themselves of the option of responding in redirect examination, which is the proper procedural channel. The Neighbors had ample notice of the issues to be covered during the technical hearing. They could and should have anticipated these issues and prepared their case accordingly.

Moreover, the PUC cannot simply admit new evidence without engaging in additional process. The APA requires the PUC to base its findings in a contested case "exclusively on the evidence." 3 V.S.A. § 809(g). *See also Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 349–50 (1992) (In a PUC case, "[t]here is no relaxation of the requirement . . . that evidence must be admitted before it is relied upon by the [PUC]."). At a minimum, all evidence must be authenticated—the Neighbors' proffer fails to meet this basic, threshold requirement. V.R.E. 901. The PUC must provide all parties an opportunity to present evidence and argument on all issues involved in a contested case, 3 V.S.A. § 809(c), and to conduct cross-examinations. *Id.* § 810(3). *See Plum Creek Maine Timberlands, LLC v. Vermont Department of Forests, Parks and Recreation*, 2016 VT 103, ¶ 90. Convening a technical hearing to authenticate the Neighbors' evidence and provide an opportunity for cross-examination would impose a great burden on the other parties to this proceeding and waste the Commission's resources. The Neighbors have not pointed to any circumstances that justify imposing this burden. Admitting new evidence also opens the door to a further round of rebuttal by the Applicant and the Department of Public Service, further prolonging the litigation.

Even if the Neighbors were correct that the PUC could decide their motion under Rule 2.206, without reference to the APA and Rules of Civil Procedure, their motion would fail. Rule 2.206 provides that "[t]he Commission may decline to consider a motion not made within a reasonable time after the issue first arises with respect to the moving party." Even if there were some excusable neglect justifying the Neighbors' failure to prepare their case for the technical

hearing, the moment for a motion to introduce additional evidence would have been at the technical hearing itself, after the cross-examination the Neighbors now cite. Instead, the Neighbors filed their motion on October 5, 2017—over a month after the technical hearing date of August 29, 2017, and well over a year after the petition in this matter was filed. It is clearly unreasonable to make a motion of this nature five weeks after the record has closed. *See, e.g., Amended Joint Petition of Central Vermont Public Service Corporation*, Docket No. 7770, 2012 WL 1901272 (Vt. Pub. Util. Comm'n May 22, 2012) (denying motion for leave to file sur-reply brief filed "nearly two weeks" after reply briefs were filed).

As the Commission explained in the *Polewsky* decision, "[g]ranting a request for additional evidentiary hearings in the absence of [the requisite] showing would . . . be unfair to opposing parties who have done the work necessary to present their case on the date scheduled for hearing. It would also serve to defeat the interests of administrative efficiency." Docket No. 5735 (Oct. 20, 1994). The same is true here. The Commission should deny their motion for leave to submit additional evidence.

Dated at Burlington, Vermont this 17th day of October, 2017.

ORCHARD ROAD SOLAR I, LLC

By: _____

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