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October 20, 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 *Reply Brief* 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.

Encl.

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 20, 2017, I forwarded copies of Orchard Road Solar I, LLC's *Reply Brief* to the service list below by the delivery method noted:

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Richard Spitalny
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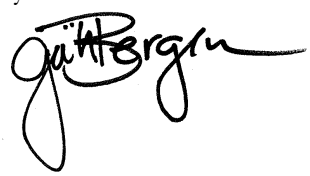
Chappaqua, NY 10514

Dated at Burlington, Vermont this 20th 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
POST-HEARING REPLY BRIEF

Applicant Orchard Road Solar I, LLC ("ORS") submits the following reply to the Initial Post-Hearing Brief filed by Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell ("Neighbors") on October 10, 2017.

As ORS is in general agreement with the position articulated in the Department of Public Service's brief, ORS does not specifically respond to the arguments offered in the Department's brief. However, ORS would note that it does not object to the proposed conditions offered by the Department on pages 2–3 of its brief, with one exception. Given that a shading analysis has not been conducted for the Department's suggested modifications to the revised mitigation planting plan, ORS would request that Condition 2(a) be changed to state: "The white pine plantings on the east side of the Project shall be planted approximately 75 feet from the nearest array structure, *unless this proximity will result in shading of the Project, in which case the white pine plantings shall be placed as close to the Project as possible without causing shading.*"

30 V.S.A. § 248(b)(l) – Orderly Development

The Neighbors argue that the Project would have an undue adverse impact with regard to orderly development under 30 V.S.A. § 248(b)(1). In support of this argument, they claim that the Project is not supported by the Middletown Springs Town Plan or the Rutland Regional Plan. This argument ignores the statutory standard governing the Public Utility Commission's ("PUC") determination under criterion (b)(1).

In a CPG proceeding, the PUC must determine that a proposed project "will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality." 30 V.S.A. § 248(b)(1). Neither the Middletown Springs Selectboard, Middletown Springs Planning Commission, nor the Rutland Regional Planning Commission have offered any official recommendations or position on the Project to the Commission in this proceeding.

Nor have the Neighbors identified any land conservation measures in either the Town or Regional Plan that are applicable to the Project site. As set forth on pp. 10–14 of its Initial Post-Hearing Brief, both ORS and DPS' experts agree that neither the Town nor Regional Plan contains land conservation measures applicable to the Project site. Tr. 8/29/17 at 118–19 (Owens); Exhs. ORS-MK-2, DPS-JO-2. The Neighbors point to the Highland Conservation Areas identified by the Town Plan as a land conservation measure. *Neighbors' Initial Brief* at 11. But the Neighbors' own expert agreed that the Project is not located in the Highland Conservation Area on the Future Land Use Plan within the Town Plan. (Thomas) 8/29/17 tr. at 251.

The Neighbors now point to the Regional Plan's Energy chapter, which includes "Proposed Regional and Community Standards for Energy Facility Siting & Development." *Id.* at 14. The PUC already determined that the Rutland Regional Plan's Proposed Energy Siting & Development standards "do not appear to be adopted." *In re Otter Valley Solar Farm, LLC*, Docket 8770, Final Order (Mar. 17, 2017). This assessment is borne out both by the heading that precedes the standards, which describe them as "proposed" standards, and by the text of the Regional Plan, which describes them as "a list of suggested regional and community standards for Act 250 and Section 248 proceedings." Exh. NN-80 (Rutland Regional Plan) at 162.

The Project is entirely consistent with the Town and Regional Plans; neither the Town nor the Regional Planning Commission have made any recommendation to the contrary. Thus, the Project will not have any adverse impact with regard to orderly development.

30 V.S.A. § 248(b)(5) – Aesthetics

The Neighbors claim that the Project would have an undue adverse impact on aesthetics under 30 V.S.A. § 248(b)(5) and 10 V.S.A. § 6086(1)(8). In particular, they argue that ORS "failed to provide evidence of valid consideration of suitable alternative sites to locate the Project," thus failing the third prong of the *Quechee* test.[1] *Neighbors' Initial Brief* at 26. In fact, ORS provided testimony and documentary evidence demonstrating that it considered two alternative locations for the Project, both of which were unsuitable.

At the outset, the Neighbors' premise—that consideration of alternative sites is required under *Quechee* analysis—is false. The Vermont Supreme Court has rejected the argument that evaluation of other properties is part of the *Quechee* test. *In re Rutland Renewable Energy*, LLC, 2016 VT 50, ¶ 28, 202 Vt. 59 ("We can find no precedent that suggests that [alternative site analysis] is part of the Quechee test. Moreover, even if the evaluation of other properties were part of the Quechee test, the initial burden to demonstrate an alternative site is on the opponents, not on the applicant."). The Neighbors incorrectly gloss *In re Halnon,* 174 Vt. 514 (2002), as requiring Section 248 applicants to "show that alternative sites that reduce the adverse aesthetic effect [of a Project] are unavailable." *Neighbors' Initial Brief* at 28. In fact, as the Commission has made clear, *Halnon*

> dealt with the proposed installation of an approximately 111-foot-high wind turbine which would have obstructed the neighbors' primary viewshed. The [Commission] stated that if a project developer could not site a wind turbine in a way that would not have such an impact, then the developer should consider using an alternate technology to meet his or her needs.

[1] The Neighbors also argue that the Project violates the first two prongs of the *Quechee* test. ORS addressed these issues on pp. 22–31 of its Initial Post-Hearing Brief.

Petition of Rutland Renewable Energy, LLC, Docket No. 8188, 2015 WL 2251229, at *13 (Vt. Pub. Util. Comm'n May 6, 2015) (citing *In re Tom Halnon*, Docket No. NM-25, 2001 WL 514402 (Vt. Pub. Util. Comm'n Mar. 15, 2001)). The Commission explicitly distinguished a wind turbine, which might block a neighbor's viewshed, from "a photovoltaic project, the majority of whose infrastructure will be no more than 12 feet high and will not interfere with long-range views." *Id.* Moreover, the applicant in *Halnon* failed to address the feasibility of alternative sites identified by the Commission during a site visit. *In re Tom Halnon*, 2001 WL 514402, at *13. By contrast, as discussed below, ORS assessed both alternative locations proposed by the Neighbors and introduced significant evidence demonstrating their unsuitability.

ORS considered two sites suggested by the Neighbors: one located on the east side of Orchard Road across the street from the current location ("Alternative Site 1"), and one on the same portion of the parcel as the proposed location but shifted farther to the east ("Alternative Site 2"). Viens reb. pf. at 1.

Alternative Site 1 was reviewed by ORS' environmental consultant and state wetlands ecologist Zapata Courage from ANR during a site visit to the area. However, Ms. Courage determined the site contained an extensive Class 2 wetland area such 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." Viens reb. pf. at 1-2; Exh. ORS-RV-8. The Neighbors' claim that ORS "provided unsupported claims that Alternative Site #1 contains a wetlands," *Neighbors' Initial Brief* at 27, is directly contradicted by this evidence. Similarly, Ms. Courage's email indicating that a wetlands permit application for Alternative Site 1 would likely be denied undermines the Neighbors' statement that "ANR routinely issues permits to Applicants to build solar arrays in Class II Wetlands." *Id.* Moreover, as the Hearing Officer ruled at the technical hearing, wetlands permits for other solar projects are not relevant in judging the steps ORS took to assess alternative sites. Tr. 8/28/17 at 87–89.

ORS also reviewed Alternative Site 2, and determined that the topography in that location would not support a project. The Neighbors argue that "not one scintilla of evidence" supports ORS' assessment of Alternative Site 2. This argument ignores the unrebutted prefiled and live testimony of two witnesses. As Mr. Viens testified, grading would likely not be possible without blasting, rendering the site unfeasible. Viens reb. pf. at 2; tr. 8/28/17 at 90–91 (Viens). Mr. Kane corroborated Mr. Viens's assessment of the steep topography on Alternative Site 2. Tr. 8/29/17 at 55 (Kane). Moreover, Mr. Kane gave his opinion that moving the Project onto Alternative Site 2 would not eliminate its visibility from the locations of concern to the Neighbors. *Id.*

Thus, even if ORS were required to demonstrate that it considered alternative sites in order to satisfy the *Quechee* test, which it is not, the record demonstrates that ORS gave full consideration to the two sites identified by the Neighbors, and that it is infeasible to relocate the Project to either site.

For the reasons stated above and in ORS' initial brief, Neighbors are incorrect that the Project does not meet the Section 248 criteria for orderly development of the region and aesthetics. The evidence in the record shows that the Project meets all applicable criteria of Section 248, and should be issued a Certificate of Public Good.

Dated at Burlington, Vermont this 20th day of October, 2017.

ORCHARD ROAD SOLAR I, LLC

By: _____

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