

November 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 *Objection to Pro Se Neighbors' Motion to Supplement the Record* 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**

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, 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”)

**APPLICANT ORCHARD ROAD SOLAR I, LLC’S OBJECTION TO PRO SE
NEIGHBORS’ MOTION TO SUPPLEMENT THE RECORD**

Introduction

Applicant Orchard Road Solar I, LLC (“ORS”) hereby responds as follows to the “Motion to Supplement the Record Due to Changed Circumstances” filed by pro se Neighbors Doug Freilich, Julie Sperling, Elizabeth Cooper, Karen Gutmann, Larry Springsteen, Ted and Dina Fitzpatrick, and Peter and Aileen Stevenson (“pro se Neighbors”) on October 31, 2017. Pro se Neighbors move to supplement the record with photographs of the site taken during a recent event, which they argue constitutes a change in circumstances. ORS objects to these photos being admitted into the record on a number of grounds: (1) that the evidentiary portion of the proceeding is over and the case has been fully briefed, (2) that the photos are not highly material to the proceeding, and (3) that the photos themselves lack sufficient information and feature zoomed in views that do not accurately represent views of the Project site. For these reasons, discussed more fully below, ORS respectfully requests that the Hearing Officer deny pro se Neighbors’ motion.

Argument

I. The evidence offered by pro se Neighbors is untimely

Commission Rule 2.206 contemplates post-hearing motions, but expressly states 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.” The issue of the visual impact of the Project was initially raised by Neighbors in their initial comment letters to the Commission, on September 6, 2016—over a year ago. A site visit was held on April 6, 2017 and attended by many of the pro se Neighbors, in which the Commission and the parties specifically looked at the site from all of the locations requested by Neighbors, including some of the pro se Neighbors’ residences. Pro se Neighbors have thus had ample time over the last 16 months that this proceeding has been ongoing to take photos of the site during all seasons, and to submit any desired evidence of the visual impact of the Project. As a two-day evidentiary hearing has already been held for this Project, and the case is fully briefed and waiting a decision from the Commission, this late submission of evidence is unreasonable both with respect to the close of the evidentiary portion of the proceeding, and to the time in which the issue was first raised by Neighbors.

II. The evidence offered is not highly material

The Commission has previously held that it will “open a closed record for the admission of late material only if such material appear[s] to be highly material.” Docket No. 8302, *Petition of Chelsea Solar LLC*, Order of Apr. 14, 2017 at 16 (quoting Docket No. 5947, *Petitions of Alpine Haven Water Company, Inc.*, Order of Aug. 31, 2000 at 2); *see also* 3 V.S.A. § 810(1) (“In contested cases . . . Irrelevant, immaterial, or unduly repetitious evidence shall be excluded”). In this case, the evidence offered by pro se Neighbors is not highly material and is irrelevant and unduly repetitious of existing evidence in the record. Pro se Neighbors’ photos show a tent—which is not a comparable structure to a solar project in either color, form, or size—on the top part of the project

parcel, above where the Project is proposed. Similarly, to the extent pro se Neighbors are trying to draw any parallel between the Project and the cars parked on a portion of the Project site in some of the photos, this is not an accurate or material comparison to the Project. Moreover, the record already contains numerous photos of the Project from various sites, including many of the pro se Neighbors' properties. As a result, the photos offered herein are not highly material to the Commission's decision, are irrelevant to the evaluation of the Project's aesthetic impact, and are unduly repetitious, and at the same time less reliable than existing photos in the record. Therefore, this evidence should not be admitted into the record at this late stage.

III. *The evidence is not properly supported or accurate*

In addition to being untimely and not highly material, the evidence offered by pro se Neighbors is not properly supported and in many cases does not appear to be an accurate depiction of the views from pro se Neighbors' residences or other locations. First, the evidence offered has not been sponsored by a witness and therefore lacks any proper foundation for being admitted. *See* Commission Rule 5.110(C)¹ ("Any witness sponsoring an exhibit or testimony must file a notarized affidavit stating that the information is accurate to the best of their knowledge and have personal knowledge and be able to testify as to the validity of the information contained in the exhibit or testimony."). Without being sponsored by a witness, there is no potential verification of the evidence, or potential for cross-examination, which are basic tenets of evidentiary procedure.

Furthermore, even if the evidence had been properly submitted and sworn to through a witness, the accuracy of the evidence itself is questionable as it appears that many of the photos feature a zoomed in view of the project area using a telephoto camera lens, in which case the photo would not accurately portray the in-person view from any location. Additionally, although the

¹ The application in this proceeding is subject to the version of Commission Rule 5.100 that was in place at the time the application was filed on July 15, 2016.

photos indicate the general property they are taken from, there is no indication of where on the property. As a result, there are serious questions about the accuracy of the views of the photos and the lack of information accompanying them. Without the opportunity to evaluate or respond to these reliability issues in an evidentiary hearing, admission of this evidence would unfairly prejudice the other parties and contravene the basic principles of evidentiary procedure.

Conclusion

For the above-stated reasons, ORS respectfully requests that the Commission deny pro se Neighbors' motion to submit additional evidence and issue a decision in this proceeding as soon as possible.

DATED this 14th day of November, 2017 in Burlington, Vermont.

BY:



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located on Orchard Road in Middletown Springs,)
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CERTIFICATE OF SERVICE

I, Grace Grundhauser, certify that on November 14, 2017, I forwarded copies of Orchard Road Solar I, LLC's *Objection to Pro Se Neighbors' Motion to Supplement the Record* to the service list below by the delivery method noted:

By Hand Delivery and E-Mail:

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

By E-Mail and First Class Mail:

Randy J. Miller, II, Esq.
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John E. Arsenault, Chairman
Middletown Springs Planning Commission
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Richard Spitalny
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Chappaqua, NY 10514

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

By:

A handwritten signature in black ink, consisting of two stylized, cursive letters that appear to be 'G' and 'G'.

Grace Grundhauser
Paralegal