

March 23, 2018

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 ("ORS") *Response to Neighbors' Motion for De Novo Hearing* 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)
group net-metered solar electric generation) CPG #16-0042-NMP
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 March 23, 2018, I forwarded copies of Orchard Road Solar I, LLC’s *Response to Neighbors’ Motion for De Novo Hearing* to the service list below by the delivery method noted:

Via Email and First Class Mail:

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

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

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

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

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

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

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

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

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

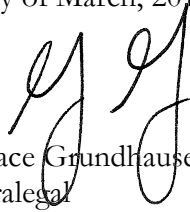
Elizabeth W. Cooper
49 Rocks and Trees Lane
P.O. Box 1011
Middletown Springs, VT 05757

Richard Spitalny
24 Tanglewild Road
Chappaqua, NY 10514

* Per his request to Applicant, Roy Cooper has been removed from Applicant’s mailing list.

Dated at Burlington, Vermont this 23rd day of March, 2018.

By:

A handwritten signature in black ink, appearing to be 'GG', written over the printed name and title.

Grace Grundhauser
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, 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 NEIGHBORS’
MOTION FOR PARTIAL DE NOVO HEARING FOR PURPOSE OF CROSS-
EXAMINATION OF EXPERTS BEFORE THE SUBSTITUTE HEARING OFFICER**

Introduction

Applicant Orchard Road Solar I, LLC (“ORS”) hereby responds as follows to the “Motion for Purpose of Cross Examination of Experts Before the Substitute Hearing Officer” filed by neighbors Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell and joined by *pro se* neighbors Ted & Dana Fitzpatrick, Peter & Aileen Stevenson, Elizabeth Cooper, Karen Gutmann & Larry Springsteen, and Douglas Freilich & Julie Sperling (“Pro-Se Neighbors”) (collectively “Neighbors”) on March 9, 2018 (hereinafter “Neighbors’ Motion”). Neighbors move for a de novo hearing for the sole purposes of providing the Hearing Officer with the opportunity to assess the credibility of the expert witnesses who previously testified regarding the issues of aesthetics and orderly development: Mark Kane (witness for ORS), Jeremy Owens (witness for the Department of Public Service), and Todd Thomas and Michael Lawrence (witnesses for Neighbors) (collectively, the “Expert Witnesses”) by observing them in person. ORS objects to the de novo hearing for the following reasons (1) the Expert Witnesses’ credibility may be discerned by a review of the record, and (2) a rehearing both significantly prejudices ORS and constitutes a waste of the

parties' resources and is an unreasonable burden. For these reasons, discussed more fully below, ORS respectfully requests that the Hearing Officer deny Neighbors' motion.

Procedural History

ORS filed its application with the Vermont Public Utilities Commission ("PUC") to install and operate a 500kW solar net-metering facility in Middletown Springs, Vermont on July 15, 2016. An initial site visit was held on April 10, 2017. Two full days of evidentiary hearings were held on August 28 and 29, 2017, at which the Expert Witnesses submitted to both direct and cross examination on the record. A transcript of the hearings was made pursuant to PUC Rule 5.122(F). Thereafter, the processing of this case was delayed by the departure of Hearing Officer Lynn Fabrizio in December 2017. In January 2018, the Hearing Officer Mike Tousley was appointed to the case by the Public Utility Commission and on February 20, 2018, a second site visit was held.

Argument

1. *The witnesses are experts and credibility may be discerned by a review of the record*

Neighbors argue that because the Expert Witnesses testified to conflicting opinions on the issues of aesthetics and orderly development, it is critical for the Hearing Officer to determine the credibility of the witnesses, and such credibility may only be by in-person observation of cross-examination of the Expert Witnesses. Neighbors recognize that a substitution of a hearing officer does not require a de novo evidentiary rehearing of testimony previously presented, but rather such a hearing is within an agency's "discretion to decide whether the hearing should be recommenced de novo." See *Neighbors Motion*, at pp. 6-7 (quoting 2 Am Jur 2d, Administrative Law § 312). Neighbors also reference *New England Coal. on Nuclear Pollution v. U. S. Nuclear Regulatory Comm'n*, 582 F.2d 87 (1st Cir. 1978) which upheld an agency's denial of a de novo rehearing of evidence where the

hearing officer was changed after an evidentiary hearing in respect to testimony presented by expert witnesses:

Though credibility of the conflicting experts must play a central role in the Licensing Board decision, that credibility is a function of logical analysis, credentials, data base, and other factors readily discernible to one who reads the record. SAPL has not demonstrated that this is an issue that turns on conflicting eyewitness reports or evaluations of the witnesses' demeanor or conduct. The Commission's interest in not holding new hearings is obvious and significant.

Id., at 100.

Here, as in *New England*, Neighbors fail to demonstrate that the aesthetics and orderly development issues turn on conflicting eyewitness reports or witnesses' demeanor or conduct. Instead, Neighbors merely state the fact that the Expert Witnesses offer conflicting opinions and point to the Vermont Bar Association's Model Instructions from the Vermont Plain English Civil Jury Instruction Committee claiming, without support, that such instructions are "equally applicable to the PUC Administrative hearing process." *Neighbors Motion* at p. 5. The Vermont Bar Association preface to the Model Instructions acknowledges that the Model Instructions are drafted for "lay juries" and (1) are not approved or adopted by the Vermont Supreme Court, (2) are not required to be used as drafted, and (3) that they should be tailored to fit the circumstances of the trial. *See Model Instructions from the Vermont Plain English Civil Jury Instruction Committee.*¹

Indeed, the issues concerning aesthetics and orderly development do not require an in-person observation of the witnesses' demeanor to determine the credibility of the Expert Witnesses. Such credibility can easily be judged from the transcripts themselves, particularly where experienced counsel had ample opportunity to cross-examine the witness for an extended period. In fact, under

¹ available at <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/index.htm> (last visited Mar. 21, 2018).

PUC rules, many CPGs issued for net-metering projects are based solely on the evaluation of pre-filed testimony and exhibits whereby the Commission evaluates the credibility of the witness solely on paper. Moreover, for matters heard by Hearing Officers, the Commission itself typically issues decisions based solely on a reading of the evidentiary record as presented by the Hearing Officer, and only on some occasions hears the proceeding in-person. *See* 30 V.S.A. § 8 (authorizing a hearing officer to hold a hearing and to report his or her findings of fact in writing to the Commission). Using Neighbors' logic, no Commission order would be considered valid unless all Commission members heard each witness testify in person.

Here, as in *New England*, the Hearing Officer has more than sufficient information on the record to determine credibility of the Expert Witnesses based on the Expert Witnesses' resumes, pre-filed testimony and reports, and the transcript of the two days of hearings which gave all parties, and the previous Hearing Officer, ample opportunity to examine the Expert Witnesses. Thus, since the credibility of the Expert Witnesses can be determined from the record, Neighbors' attempt at a second bite at the apple must fail, as it serves only to delay the resolution of this matter by reopening the record after the evidentiary portion of the proceeding has been completed and the case fully briefed.

2. *A rehearing will significantly prejudice ORS and constitutes an unreasonable burden and waste of the parties' resources*

Not only is a second evidentiary hearing unnecessary and unwarranted, but Neighbors' request for a partial de novo hearing for cross examination of the Expert Witnesses unreasonably delays the resolution of ORS' application, which as noted above, was commenced over a year and a half ago. There has already been significant and meaningful public process in this case, including multiple site visits, public meetings, and a multi-day evidentiary hearing. Further unnecessary delay

substantially prejudices ORS, which cannot move forward on the Orchard Road Solar Project unless and until this case is resolved. The prior Hearing Officer provided opposing counsel a full opportunity to cross-examine each expert witness at the hearing, and, in fact, allowed Neighbors' cross-examinations to extend well beyond the time opposing counsel estimated would be necessary. The sole purpose of Neighbors' present motion is to seek a second opportunity to repeat these same, already belabored lines of examination. Such duplicative testimony is unnecessary given the extensive record, could create confusion or inconsistencies in the record, and will only further delay resolution of this case, which is prejudicial to ORS' interests.


Moreover, requiring the Expert Witnesses and the parties to commit to at least a half-day hearing for an unnecessary in-person credibility determination by the Hearing Officer constitutes a waste of the parties' and regulatory resources. The evidentiary hearings were almost seven months ago, and thus the Expert Witnesses will likely need to spend considerable time familiarizing themselves with the previously testified information, in addition to taking the time for travel to and attendance of the hearing in Montpelier. Furthermore, in addition to the costs from the Expert Witnesses, the parties will also have to cover the financial and time costs for the parties' own preparation and representation at the rehearing as well as to address any revisions to the previously submitted briefings that might arise from the rehearing. This would add significant expense to what has already been a lengthy and expensive proceeding. It is also important to note that in the event the Commission determines that additional evidence or hearings are necessary the Commission has the discretion to schedule additional hearings or request additional evidence thereby providing a method to address any issues of credibility that may arise.

Conclusion

For the above-stated reasons, ORS respectfully requests that the Commission deny Neighbors' motion for a de novo hearing and issue a decision in this proceeding as soon as possible.

DATED this 23rd day of March, 2018 in Burlington, Vermont.

BY:



Geoffrey H. Hand, Esq.
Victoria M. Westgate, Esq.
Dunkiel Saunders Elliot Raubvogel & Hand
91 College Street
Burlington, VT 05401
ghand@dunkielsaunders.com
802-860-1003 x 110
Attorneys for Orchard Road Solar I, LLC