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July 28, 2017

Judith Whitney, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

RE: 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

Dear Ms. Whitney:

Enclosed for filing with the Board in the above referenced matter please find an original and six copies of Neighbors' Motion to Strike Portions of Orchard Road Solar I, LLC's Pre-filed Rebuttal Testimony along with a Certificate of Service evidencing service of same.

Thank you for your kind assistance in this matter.

Very truly yours,

L. Brooke Dingledine, Esq.

LBD/
Enclosures
cc: Certificate of Service

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

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)**

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

NOW COME Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, Neil & Thomas Russell, by and through their attorney L. Brooke Dingedine, Esq. of the firm Valsangiacomo, Detora & McQuesten, P.C. and pursuant to Public Service Board (the "Board" or "PSB") Rule 2.216(C), hereby request that the Hearing Officer strike portions of the rebuttal prefiled testimony of Orchard Road Solar I, LLC'S witness Rod Viens and Exhibit ORS-RV-8 (Email from Zapata Courage of Vermont ANR), because they are based upon facts that the witness lacks personal knowledge of, does not possess the requisite expertise to provide an opinion about, and that constitute hearsay as follows:

BACKGROUND AND STATEMENT OF LAW

In the February 22nd Order, the Hearing Officer ruled that "[t]o the extent parties wish to submit testimony or evidence at a hearing *on orderly*

development, aesthetics, or above-ground historic sites, they shall provide such testimony or evidence from witnesses with expertise on the relevant issues.” Order at 16 (emphasis added).

Under Board Rule 2.216(C), “[o]bjections to the admissibility of prefiled testimony or exhibits” can be made “in writing not more than thirty days after such evidence has been prefiled.” In ruling on an objection to the admissibility of testimony “the Board does not decide whether particular testimony is compelling. Instead, the Board decides the more narrow question of whether that testimony should be allowed into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Board in 3 V.S.A. § 810(1).” *Petition of Georgia Mt. Community Wind, LLC*, Order Re: Motion to Exclude Prefiled Testimony and Exhibits, Docket 7508 (3/11/2011).

Vermont Statutes and Rules of Evidence require the exclusion of evidence or testimony where the affiant lacks personal knowledge or lacks the requisite expertise to make the statement. The Vermont Rules of Evidence clearly allow for excluding testimony when the witness lacks personal knowledge of the matter or expertise. See V.R.E. Rule 602 (“The testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”); V.R.E. Rule 702 (“If 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..."); and V.R.E. Rule 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.").

TESTIMONY TO BE STRIKEN

Based on the above cited Rules of Evidence and pursuant to its authority under Board Rule 2.216(C), the neighbors respectfully request that the Hearing Officer strike Answer 4 from the Rebuttal Testimony of Rod Viens contained on pages 1, line 13 through page 2, line 12 because the testimony is hearsay, lacks personal knowledge, and is expert opinion for which Mr. Viens is not qualified to provide.

Specifically, the neighbors object to the following testimony provided by Mr. Viens:

Q4. Please describe the alternative locations that Neighbors proposed for the Project, and your review of these locations.

A4. Neighbors proposed two alternative locations for the Project, in the vicinity of the currently proposed site, and on land owned by the same landowner. The first alternative site is located on the east side of Orchard Road across the street from the current location. The second alternative site proposed was on the same side of Orchard Road as the current location but shifted farther east directly adjacent to Orchard Road. The first alternative site had been

considered by ORS when it initially designed the Project, and was reviewed by ORS's environmental consultant and state wetlands ecologist Zapata Courage from the Agency of Natural Resources during a site visit to the area. However, as indicated on the attached correspondence, **Exhibit ORS-RV-8**, the alternative site was deemed by Ms. Courage to contain an extensive Class 2 wetland area. As a result, Ms. Courage informed ORS that "it would be highly unlikely that a project(sic) could avoid or minimize impacts to the wetland in this field, thus a wetland permit would unlikely be issued for construction." Based on this feedback, ORS determined that the site was not a feasible location for the Project, and proposed the Project at the current site. For the second alternative site proposed by Neighbors, ORS conducted multiple site visits to review this location and determine whether it would be feasible to construct the Project in this area to reduce the viewshed of the Project. ORS construction team members and civil engineers reviewed the location but ultimately determined the topography would not support a project in this location. Grading was also considered but the extent of ledge in the area made the amount of required grading unfeasible.

Rebuttal Testimony of Rod Viens, Answer 4 contained on page 1, line 13 through page 2, line 12.

Thus, Answer 4 of Mr. Viens' rebuttal testimony, provides testimony regarding 1) the presence of wetlands in the first alternative location easterly of the site across the road which Neighbors proposed for the Project; and, 2) that ORS determined the topography would not support a project in the second alternative location which Neighbors proposed for the Project in the same field easterly of the site because other "team members" and engineers determined that grading was "unfeasible" because of the presence of ledge in

the area. All of this testimony violates the Vermont Rules of Evidence.

First, the testimony is based upon facts that the witness lacks personal knowledge of because it is 1) based upon statements made by an ANR employee; and, 2) based upon statements of "team members" and civil engineers of the Applicant, not Mr. Viens.

Second, the witness does not possess the requisite expertise to provide an opinion about either wetlands science or civil engineering.

Third, the testimony constitutes hearsay because they are "statements, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." VRE Rule 802(c). Ms. Zapata is not the declarant and she is not testifying at trial; therefore her oral or written statements are hearsay and cannot be admitted into evidence. Nor are the unnamed "team members" or engineers the declarant and they similarly are not testifying at trial; therefore their oral statements are hearsay.

Consequently, the Neighbors respectfully request that the Hearing Officer strike these limited portions of the Applicant's testimony and the exhibit and exclude them from the record of this proceeding.


CONCLUSION

Neighbors object to Answer 4 of Mr. Vien's rebuttal pre-filed testimony because it is hearsay, lacks personal knowledge, and is expert opinion

testimony for which Mr. Viens is not competent to testify. Neighbors also object to Exhibit ORS-RV-8 (Email from Zapata Courage of Vermont ANR), because it is hearsay. For these reasons, Neighbors respectfully request that the Hearing Officer approve this motion and strike the above-referenced portion of the rebuttal prefiled testimony and exhibit offered by the Applicant, and exclude these statements and document from the record pursuant to Rules of Evidence 602, 702, 703, 801 and 802, and because they are more prejudicial than probative under Rule 403.

DATED at City of Barre, County of Washington and State of Vermont
this 28th day of July, 2017.

Richard Spitalny, Robert & Karen Galloway,
Daniel McKeen, and Neil & Thomas Russell


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CERTIFICATE OF SERVICE

NOW COMES L. Brooke Dingledine, Esquire, of the law firm of
Valsangiacomo, Detora & McQuesten, P.C., and certifies that on July 28,
2017, I forwarded by electronic mail as noted on the attached Service List the
following document:

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

DATED at Barre, County of Washington and State of Vermont this 28th
day of July, 2017.



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