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March 9, 2018

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 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 in the above-referenced matter please find an original and six copies of Neighbors' Motion for Partial De Novo Hearing for Purpose of Cross-Examination of Experts before the Substitute Hearing Officer 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

**STATE OF VERMONT
PUBLIC SERVICE 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, for a 500 kW)
interconnected group net-metered solar electric)
Generation system in Middletown Springs, Vermont)**

**NEIGHBORS' MOTION FOR PARTIAL DE NOVO HEARING
FOR PURPOSE OF CROSS EXAMINATION OF EXPERTS
BEFORE THE SUBSTITUTE HEARING OFFICER**

NOW COME Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell, by and through their attorney L. Brooke Dingedine, Esq. of the firm Valsangiacomo, Detora & McQuesten, P.C. and joining in this request are *pro se* Neighbors Ted & Dana Fitzpatrick, Peter & Aileen Stevenson, Elizabeth Cooper, Karen Gutmann & Larry Springsteen, and Douglas Freilich & Julie Sperling (all collectively referred to herein as "the Neighbors") and hereby respectfully request that the newly assigned Hearing Officer convene a de novo hearing for the purposes of cross examination of the four expert witnesses as follows:

I. INTRODUCTION

The Proposed Project Site is located in the highly scenic area in Middletown Springs¹ known as Burnham Hollow which is located on the original historic Burnham farm established in 1796. This Proposed 500 kW Solar Array Project contains some 2,250 panels that will completely fill a 5 acre area and will be situated on a steep hillside in the dead center of the Coy Mountain view shed.²

With regard to Aesthetics, there are 4 different expert opinions and 18 Middletown Springs' landowners who have testified that the proposed project will cause an "undue" adverse impact.

With regard to Orderly Development, there are 2 different expert opinions and 18 Middletown Springs' landowners who have testified that the proposed project will unduly interfere with the orderly development of the region.

II. AESTHETICS: UNDUE ADVERSE IMPACT

The essential question that must be determined by the Commission is: Is the Proposed Project's adverse impact on the aesthetics and the scenic and

¹ Exhibit NN-41 – (45 day Notice of the Applicant) which contains the Applicants admission that Middletown Springs has exceptional beauty and aesthetic value, stating: "...we realize that this is very important due to the exceptional beauty of Middletown Springs, something invaluable to its residents and visitors."

² Spitalny pf Testimony at p.3.

natural beauty of the area “undue?” Because this contested case has conflicting opinions regarding whether the adverse impact on aesthetics and the scenic and natural beauty of the area is “undue,” the credibility of the witnesses becomes all the more critical for the hearing officer to determine.

Those conflicting opinions include:

1. The Applicant's expert who claims there is no undue adverse impact (Kane);
2. The Department's expert who opines that the project as proposed creates an undue adverse impact because it is shocking and offensive and offends the sensibilities of the average person. The expert believes the same about Applicant's revised landscaping plan. However, the expert created his own landscape mitigation for the project and claims that if the project is altered and changed from the project that is proposed to the different landscaping plan that he created, there would be no undue adverse impact (Owens);
3. The Neighbors' two (2) experts who clearly support the conclusion that the adverse impact is undue (Thomas and Lawrence);
4. All 18 of the Neighbors who testified and believe the project will cause an undue adverse impact on public and private views in the area because it violates clear written community standards in the town and regional plan, will be shocking and offensive to the average person, and because the Applicant has failed to take reasonable mitigation measures (Richard Spitalny, Elizabeth Cooper, Roy Cooper, Douglas Freilich, Julie Sperling, Ted Fitzpatrick, Dina Fitzpatrick, Karen Galloway, Robert Galloway, Karen Gutmann, Larry Springsteen, Daniel McKeen, Neil Russell, Thomas Russell, Peter Stevenson, and Aileen Stevenson); and,
5. One-hundred-twelve (112) other Middletown Springs townspeople signed a petition opposing the project because they believe that the project will adversely affect the aesthetics

and the scenic and natural beauty of the area, will unduly impact orderly development and negatively affect the character of Middletown Springs.³

Thus, it is incumbent on the fact finder to evaluate that conflicting testimony and to assess the reliability and credibility of the witnesses to determine how much weight to give their testimony, if any.

III. ORDERLY DEVELOPMENT: UNDUE INTERFERENCE

Similarly, because this contested case has conflicting opinions regarding whether the proposed project unduly interferes with the orderly development of the region, the credibility of the witnesses again becomes all the more critical for the hearing officer to determine. Those conflicting opinions include:

1. The Applicant's expert who claims that the project will not unduly interfere with the orderly development of the region. (Kane);
2. The Neighbors' expert who concluded that the project will unduly interfere with the orderly development of the region. (Thomas);
3. The 18 Neighbors who testified that they believe the project will unduly interfere with the orderly development of the region. (Richard Spitalny, Elizabeth Cooper, Roy Cooper, Douglas Freilich, Julie Sperling, Ted Fitzpatrick, Dina Fitzpatrick, Karen Galloway, Robert Galloway, Karen Gutmann, Larry Springsteen, Daniel McKeen, Neil Russell, Thomas Russell, Peter Stevenson, and Aileen Stevenson); and,

³ Exhibit NN-7 (Petition).

IV. CREDIBILITY OF WITNESSES

The Vermont Bar Association Civil Jury Instructions provides guidance for factfinders (juries) in our state court system and which is equally applicable to the PUC Administrative hearing process where Hearing Officers must assess the credibility of witnesses, including so-called “battling experts.” The Vermont Civil Jury Instructions provide:

F. Credibility of Witnesses

You must consider all of the evidence. This does not mean that you must believe all of the evidence. It is up to you, and only you, to decide whether the testimony of a witness was reliable, as well as how much weight to give the testimony.

The following factors may help you to evaluate the testimony of witnesses:

- did the witness have an interest in the outcome of the case?
- how did the witness behave while testifying?
- did the witness seem candid?
- did the witness seem to have a bias?
- does the other believable evidence in the case fits with the witness’s testimony, or is it inconsistent with it?
- how well could the witness see or hear the facts about which he or she testified?
- did the witness seem to have an accurate memory?

You may believe as much or as little of each witness’s testimony as you think appropriate. Keep in mind that people sometimes forget things, and sometimes they make honest mistakes. You must decide whether an omission or a mistake is innocent or minor, or whether it is something more serious that affects the rest of their testimony.

G. Expert Witnesses

Some witnesses testify as experts. This means that they have special knowledge, training, or experience that qualifies them to give an opinion on a certain matter. You should evaluate the opinion of an expert witness the same way you would consider any other testimony. Then, you should evaluate whether the opinion is based on the facts proved at trial and supported by their knowledge, training, or experience.

Vermont Civil Jury Instruction Committee, Plain English Jury Instructions,
General Jury Instructions.

**V. REQUEST FOR PARTIAL DE NOVO HEARING BASED UPON
SUBSTITUTION OF HEARING OFFICER**

In the instant case, the issue of Credibility of Witnesses, particularly the credibility of the four expert witnesses is paramount. However, because there has now been a substitution of the hearing officer in this case, there is no way for the new hearing officer to assess the credibility of the witnesses at trial, because he was not present at the trial to observe the witnesses' behavior and demeanor. Simply reading a transcript and written testimony documents, does not provide the fact finder with any opportunity to observe and determine the credibility of the witnesses from those all-important factors that bear on the tribunal's assessment of candor, bias and believability of witnesses.

"If the substitution of administrative law judges is necessary, an agency has the discretion to decide whether the hearing should be recommenced de

novo.” 2 Am Jur 2d, Administrative Law §312 (citing *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Com.*, 582 F2d 87 (1st Cir.), 8 ELR 20707, 51 ALR Fed 451). “Such a decision generally turns on whether credibility determinations must be made, and whether the decision may be made on the record of prior proceedings.” *Id.*; see also *Van Teslaar v. Bender*, 365 F. Supp 1007 (Dist. MD).

Because the substitute hearing officer has not had the opportunity to observe the witnesses in this case testify, he has no basis for assessing the credibility of their testimony, which is necessary to determine who to believe. In order to remedy this fundamental problem, the Neighbors respectfully request that the new hearing officer convene a ½ day hearing to allow cross examination of the four expert witnesses on the issues of aesthetics and orderly development. This is the only way for the hearing officer to determine the credibility of the experts with conflicting opinions - that is, to hear each expert cross-examined so the hearing officer can see, hear and observe the witnesses testify which is essential to a fundamentally fair due process.

The Neighbors' specific request for a partial de novo hearing is for cross examination of the expert witnesses only and is limited to a maximum of 30 minutes of cross examination for each expert (4 experts on aesthetics is 2 hours and 2 experts on orderly development is 1 hour, for a total of 3 hours).

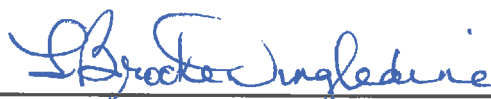
This request was narrowly tailored so as not to expend excessive resources of any of the parties.

VI. CONCLUSION

WHEREFORE, the Neighbors respectfully request that the Hearing Officer set this matter for a ½ day hearing to allow live cross examination of the 4 expert witnesses with a maximum of 30 minutes per witness in order to provide the Hearing Officer with the opportunity to assess the credibility of the expert witnesses and in order to provide a fundamentally fair due process.

DATED at City of Barre, County of Washington and State of Vermont this 9th day of March, 2018.

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 this date, I
forwarded by electronic mail as noted on the attached Service List the
following:

Neighbors' Motion for Partial De Novo Hearing for Purpose
of Cross-Examination of Experts before the Substitute
Hearing Officer.

DATED at Barre, County of Washington and State of Vermont this 9th day
of March, 2018.



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CPG #16-0042-NMP - SERVICE LIST

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