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December 18, 2018

HAND-DELIVERED

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' Response to Russell Lattuca's Motion to Intervene, Comments and Request for Hearing 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

L. Brooke Dingledine, Esq.

LBD/klc
Enclosures
cc: Service List

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' RESPONSE TO RUSSELL LATTUCA'S MOTION TO INTERVENE, COMMENTS and REQUEST FOR HEARING

NOW COME Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell (the "Neighbors"), by and through their attorney L. Brooke Dingledine, Esq. of the firm Valsangiacomo, Detora & McQuesten, P.C. and hereby respectfully submit the following Response to Russell Lattuca's Motion to Intervene, Comments and Request for Hearing.

I. INTRODUCTION

The Neighbors and the *pro se* neighbors, have worked tirelessly throughout this 2 ½ year process to protect the highly scenic and natural beauty of their historic enclave known as Burham Hollow and the aesthetics and orderly development of Middletown Springs. In response to the 45-day notice dated March 30, 2016 and the July 15, 2016

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Application, the Neighbors and the *pro se* neighbors, at the time all representing themselves as *pro se* litigants, filed comments, sought Intervenor status and requested an evidentiary hearing on a number of issues, presenting significant facts, evidence, analysis, photos, historical data and information, maps, a report by an aesthetics expert, excerpts of Town and Regional Plan language, and a Petition signed by over 100 community members. The Neighbors and the *pro se* neighbors were denied standing on or were deemed not to have raised a substantial issue on several criteria; however, they were granted a hearing on Aesthetics, Orderly Development and above-ground Historic Sites.

The Neighbors then hired legal counsel and a second aesthetics and orderly development expert and a third expert on historic sites, which has been a substantial financial burden, but one that produced competent and credible evidence in opposition to the original Project as proposed on the hillside location west of Orchard Road. Both of Neighbors' experts testified that there would be an undue adverse impact on the scenic and natural beauty of the area, aesthetics, and orderly development because, while this was a good project, it was proposed for a terrible location: a highly visible steep hillside in the center of the protected Coy Mountain viewshed that could not be effectively screened due to the site's 68' rise in elevation.

The Neighbors also argued that there was insufficient evidence of

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wetlands on Alternate Site #2 since no wetlands delineation was ever performed on that field. Alternate Site #2 is Landowner's adjacent field located on the east side of Orchard Road, directly across from the original proposed site. It is a level horse pasture that eliminates the fundamental problem of the steep topography of the original site's 68 foot vertical rise. Neighbors urged that by shifting the location of the array over one field, thereby removing it from the center of the Coy Mountain viewshed and avoiding the original location's 68' rise in elevation, would greatly reduce or mitigate, the Project's undue adverse impacts to scenic and natural beauty, aesthetics and orderly development. Moreover, with the implementation of an adequate landscaping/screening plan as is being proposed by DPS, any adverse impact caused by the Project could be adequately mitigated.

When the Public Utility Commission reopened the evidence in this case to permit the parties to determine the viability of the Alternate Sites, Neighbors hired a wetlands expert to work with ANR and Applicant's expert, all three of whom agreed that there were no Class II wetlands on Alternate Site #2. Thus, based upon the Neighbors and the *pro se* neighbors' agreement not to oppose the Project if it were moved to the level-graded horse pasture, the Applicant revised the Project Application to locate the array at Alternate Site #2.

II. MOTION TO INTERVENE

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Abutting landowner Russell Lattuca has moved to intervene as of right pursuant to PUC Rule 2.209(A)(3), as he claims a substantial interest that may be adversely affected by the outcome of the proceeding. PUC Rule 2.209(A)(3) reads as follows:

> (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

PUC Rule 2.209(A)(3). In the alternative, Mr. Lattuca seeks permissive intervention under PUC Rule 2.209(B) which reads:

> (B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

PUC Rule 2.209(B).

Aesthetics: The Neighbors believe that the relocation of the project to Alternate Site #2, addresses the concerns raised by their experts. However, the neighbors support Mr. Lattuca's participation for the purpose of providing input to DPS's aesthetic's expert for inclusion in the landscaping screening plan.

Orderly Development: The Neighbors believe that the

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relocation of the project to Alternate Site #2, addresses the concerns of orderly development.

Wetlands: The Neighbors' wetlands expert Errol Briggs concluded that the wetlands on Alternate Site #2 do not perform any of the functions protected under the Vermont Wetland Rules. Thus, he agrees with the delineations of Applicant's expert Dori Barton which was accepted by ANR's expert Zapata Courage, that there were no Class II wetlands on the site.

Streams and Water Supply: Neighbors' environmental consultant and wetlands expert, Errol Briggs also reviewed Mr. Lattuca's concerns regarding the stream near the project site and his well/water supply. Mr. Briggs indicated that in the case of both the original and currently proposed sites, Mr. Lattuca's well is on a hillside on the opposite side of the stream and the road and is unlikely to be affected by the project. As for potential impacts, he believes that Applicant's experts' testimony: Seth Goddard's answers 5, 6 & 7, and Dori Barton's answer 8, adequately address the issue. While none of these answers specifically address wells, they do address impacts to the stream and water quality. Even in situations where there are potential impacts (as in projects that involve blasting which this project does not), the applicant would merely do pre-project assessment of nearby wells so that any project impacts can be

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identified, measured and addressed, but it does not appear that his project rises to that level.

THE REMAINING CRITERIA and REQUEST FOR HEARING

Neighbors believe that Mr. Lattuca's points on the remaining criteria (30 VSA 248(b)(3), (4), and (5), and 10 VSA 6086(a)(4), (5), (7), and (8)) have been adequately protected by the other parties. Granting Intervention or a Hearing on these issues without the requisite showing, will unduly delay the proceeding or prejudice the interests of existing parties.

As the Hearing Officer's 2/22/2017 Order in this case explains:

> Rule 5.110(B)(3) establishes the legal standard for the submission of comments and requests for hearings in Board proceedings addressing applications for net-metering projects, as follows:
>
> > If a person requests a technical evidentiary hearing, the person must make a showing that the application raises a significant issue regarding one or more of the applicable criteria listed in Section 5.108. Such a showing must go beyond general or speculative claims, and provide specific information regarding potential impacts for the criteria or the criteria conditionally waived in that section.

PSB Rule 5.110(B)(3).

Mr. Lattuca has asserted that the revised Application requires a new 45-day notice period within which to respond with Comments but

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that he was given only 21 days to respond. Neighbors see no harm in the Hearing Officer providing additional time and opportunity for Mr. Lattuca to file Comments, in order to remedy any claimed procedural infirmity. However, Neighbors believe that the PUC already recognized that the Applicant enjoys vested rights in this case, if they were to choose to shift the location of the array to Alternate Site #2, the Landowner's horse pasture east of Orchard Road. It is important to note that the Applicant and the Neighbors have relied upon that holding and expended additional resources to engage wetland experts while the Applicant has expended even more resources to revise the project location to the next field over on Landowner's parcel, directly across the road from the original site. Thus, the Neighbors believe that the revision of the Project's location does not substantially alter the potential impacts of the Project, except to reduce, mitigate or eliminate those potential impacts. Thus, the Neighbors believe that the Applicant enjoys vested rights under the prior legal process and that the 7/1/17 net metering rules are NOT applicable to this proceeding.

III. VESTED RIGHTS

The vested rights doctrine, which is recognized in Vermont, is based upon a determination of the point at which

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a landowner or land developer has sufficiently changed position in reliance upon government approval of their development plans, so that it is unfair to allow the government to enforce new land use legislation against them. Essentially, the doctrine of vested rights restrains any government action which treats a "vested development" as an illegal use of land, providing a right to proceed that cannot be taken away without due process. Grayson P. Hanes and J. Randall Michew, *On Vested Rights to Land Use and Development,* 46 Wash. & Lee L. Rev. 373, 386 (1989). Vermont is an "early vesting" state, giving the developer vested rights in the law as it stood at the time of the application for a permit.

The Vermont Supreme Court first embraced the early vesting rule in *Smith v. Winhall Planning Commission,* 436 A.2d 760 (1981). In that case, the Court considered whether a landowner's application for approval of a subdivision should be governed by zoning regulations in effect at the time of the application or by later amendments. The Court held that the applicant's rights vest under the "then existing regulations as of the time when proper application is filed." Id. at 761. See also *In re Appeal of Jolley Associates,* 2006 VT 132, 181 Vt. 190, 915

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A.2d 282 (2006), *In re Preseault,* 132 Vt. 471, 321 A.2d 65 (1974), *In re Ross,* 151 Vt. 54, 557 A.2d 490 (1989), *Smith v. Winhall Planning Commission,* 140 Vt. 178, 436 A.2d 760 (Vt. 1981), and *In re Taft Comers Associates, Inc.,* 160 Vt. 583, 632 A.2d 649 (1993).

In the case at bar, Neighbors believe that Vermont Supreme Court precedent on vested rights theory relating to land use regulations is grounded on sound public policy and is appropriately applied to the land use permitting process of electric net-metered projects governed by the PUC. This is particularly so where the Applicant is willing to make revisions to the Application in order to reduce or remedy the potential adverse impacts and resolve the underlying conflict with the community. Thus, because the revised Application in this case in fact reduces and mitigates the potential impacts of the original project location, the Applicant should enjoy vested rights under the prior legal process and not be subjected to the 7/1/17 net metering rules.

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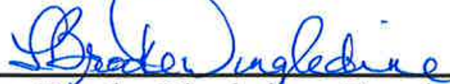
DATED at City of Barre, County of Washington and State of Vermont this 18th day of December 2018.

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



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STATE OF VERMONT
PUBLIC SERVICE BOARD

CPG #16-0042-NMP

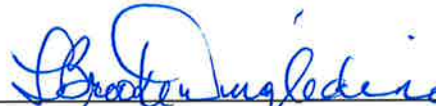
Application of Orchard Road Solar I, LLC for a)
certificate of public good, pursuant to)
30 V.S.A. §§ 219a and 248, for a 500 kW)
interconnected group net-metered solar electric)
Generation system in Middletown Springs, Vermont)

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' Response to Russell Lattuca's Motion to Intervene, Comments and Request for Hearing

DATED at Barre, County of Washington and State of Vermont this 18th day of December, 2018.



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