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April 9, 2019

By Hand Delivery and Email

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
Objection to Lattuca Motions for Reconsideration, Interlocutory Appeal, & Stay

Dear Ms. Whitney:

Enclosed please find Applicant Orchard Road Solar I, LLC's ("ORS") *Objection to Lattuca Motions for Reconsideration, Interlocutory Appeal, & Stay of Proceedings*.

Please do not hesitate to reach out with any questions.

Sincerely,

Gillian Bergeron
Paralegal

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 facility located on Orchard Road in Middletown Springs, Vermont, to be known as the "Orchard Road Solar Project"	))))))	CPG #16-0042-NMP

CERTIFICATE OF SERVICE

I, Gillian Bergeron, certify that on April 9, 2019, I forwarded copies of Orchard Road Solar I, LLC's *Objection to Lattuca Motions for Reconsideration, Interlocutory Appeal, & Stay of Proceedings* to the service list below by the delivery method noted:

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

Dated at Burlington, Vermont this 9th day of April, 2019.

By: Gillian Bergeron
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 LATTUCA MOTIONS FOR RECONSIDERATION, INTERLOCUTORY APPEAL, & STAY OF PROCEEDINGS

Applicant Orchard Road Solar I, LLC ("ORS") hereby objects to the following motions filed by Russell Lattuca dated March 26, 2019: (1) Motion on Appeal for Reconsideration of Hearing Officer's 03/20/2019 Order (hereafter "Motion for Reconsideration"); (2) Motion for Interlocutory Appeal; and (3) Motion for Stay Pending Reconsideration and Interlocutory Appeal ("Motion for Stay"). Mr. Lattuca's motions should be denied because the Hearing Officer did not err in recognizing that ORS's application is vested in the version of the net-metering rule in place at the time it was filed in June of 2016, and this issue does not meet the requirements of the rules governing interlocutory appeals to justify departing from the well-established preference of keeping a case together for purposes of rendering a single final judgment. As a result, there is no cause to stay the proceeding, and all three of these motions should be denied.

I. *Mr. Lattuca's Motion for Reconsideration Should be Denied Because the Hearing Officer did not Err in Applying Vested Rights Doctrine*

The Hearing Officer properly found that the Vested Rights Doctrine applies in the context of a § 248 application to the Vermont Public Utility Commission, and Mr. Lattuca has not provided a reasonable basis to find otherwise. As ORS pointed out in its initial response to Mr. Lattuca's vested rights argument, the Commission has recognized this doctrine on a number of different

occasions, specifically noting that a petitioner's rights vest in the statute in place at the time a complete petition for a Certificate of Public Good ("CPG") is filed.[1] Furthermore, the Vermont Supreme Court had occasion to review the Vested Rights Doctrine in relation to the exact same rule change at issue here, and although it ultimately did not need to reach the issue, it assumed for purposes of that decision that it could apply to these proceedings.[2] While Mr. Lattuca acknowledges this statement by the Court, he argues that because the Court did not reach the issue, it should be presumed that a CPG applicant could *never* have a vested right in the regulations in place at the time of the application.[3] This is not only baseless but it would result in a nonsensical application of the doctrine that would undermine the very purpose of the Court's adoption of the doctrine in the first place.

When the Court first adopted the minority rule for the application of the Vested Rights Doctrine in Vermont, it did so in large part because it "serves to avoid a great deal, at least, of extended litigation," "makes for greater certainty in the law and its administration," and is "the more equitable rule in long run application."[4] If the Commission were to hold that Vested Rights Doctrine did not apply to CPG permit applications, it would create significant regulatory uncertainty, prolong and complicate ongoing litigation, and greatly prejudice applicants whose

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[1] See *Petition of N. Springfield Sustainable Energy Project LLC*, Case No. 7833, (Feb. 11, 2014) (holding that "assuming [Petitioner] filed a complete application on December 22, 2011, its rights vested in § 248 as that statute existed at that time, and not in § 248 as amended effective May 18, 2012."); *see also Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Final Order at 1 (Apr. 12, 2018) (addressing Vermont's adoption of minority rule for Vested Rights Doctrine*)*; *Application of Seneca Mountain Wind, LLC*, Case No. 7867, Order (Aug. 9, 2013) (Deciding that the pending ordinance doctrine did not apply to case "particularly in light of the great weight of the [Supreme] Court's precedent in other administrative proceedings that an applicant's rights vest at the time a proper application is filed.").

[2] *In re LK Holdings LLC*, 2018 VT 109, ¶ 28, 201 A.3d 373 (stating that "[a]ssuming this [vested rights] doctrine applies in proceedings before the Commission, applicant failed to establish a vested right in former Rule 5.100 by filing a proper and complete application before January 1, 2017" but not reaching the issue because its "conclusion that the Commission was correct in deeming applicant's December 9, 2016 application to be incomplete disposes of applicant's related argument that it had a vested right to proceed under the pre-2017 version of Rule 5.100").

[3] See Lattuca Motion for Reconsideration at 5.

[4] *Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 181–82, 436 A.2d 760, 761 (1981).

applications were in the process of review during a rule change. Under Mr. Lattuca's reasoning, no vested rights could ever be recognized in an ongoing CPG application, so that any time the Commission changed a rule that applies to permit applications, all ongoing proceedings that would be affected by that rule would need to immediately restart and be reviewed under the new version of the rule. Such an irrational result would go against all principles of judicial economy and efficiency.

Further, Mr. Lattuca's arguments that the Vested Rights Doctrine can't apply to a CPG proceeding because ORS is not the landowner, Section 248 is not a zoning statute, a CPG is not a "permit," and a Commission proceeding is not a "suit" are not grounded in either common sense or the law.[5] First, the Supreme Court has clearly stated that it has "adopted the rule that *a permit applicant* gains a vested right in *the governing regulations* in existence when a full and complete permit application is filed,"[6] and has applied the doctrine outside of zoning to Act 250 permits.[7] A CPG, although titled a "Certificate," is a permit; it permits the construction and operation of an electric generation facility in Vermont and such a facility cannot be built or operated without one.[8] And a proceeding before the Commission, like an Act 250 or zoning application, results in an order containing findings of fact based on evidence presented (and subject to the rules of evidence) that is appealable directly to a court.[9] Thus, although the Commission does engage in the legislative process of weighing the public good in issuing a CPG, it also engages in adjudication of the specific matters over which the Legislature has granted it exclusive authority to decide.[10] Mr. Lattuca is

[5] Lattuca Motion for Reconsideration at 5, 7 and 9-11.
[6] *In re Keystone Dev. Corp.*, 2009 VT 13, ¶ 5, 186 Vt. 523. Here, ORS is a permit applicant with a valid property interest in the site location through a lease option.
[7] *See, e.g., In re Ross*, 151 Vt. 54, 557 A.2d 490 (1989) (emphasis added).
[8] Black's Law Dictionary (6th Ed.) defines a permit as "any document which grants a person the right to do something," and the Supreme Court has referred to a CPG as a "permit." See, e.g., *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 14, 147 A.3d 621 (stating "[w]e have approved the use of the *Quechee* test by the Board in reviewing a permit for a CPG").
[9] See 30 V.S.A. §12 (authorizing appeal of Commission "final order, judgment, or decree" to Supreme Court).
[10] See 30 V.S.A. §248(a)(2)(A) ("no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility or

therefore wrong that the Vested Rights Doctrine could not apply to Section 248 permits in the same way that it applies to Act 250 permits and other regulations in place at the time a complete permit application is filed.

Regardless, even if the Vested Rights Doctrine did not apply here, it has little bearing on the outcome of this case because (as noted by the Hearing Officer) the Commission has been mandated by the Legislature to review applications filed prior to the 2017 Rule 5.100 change under the old rule.[11] Thus, the Legislature itself has essentially created a vested right for applicants in the old rule, which provides an independent basis for the Commission's review of this application under the 2016 Rule 5.100, and in fact, the Commission could not do otherwise under a specific mandate by the Legislature. In other words, the Commission is acting under its Legislative authority to review this petition under the prior rule, and in interpreting its own rules (as it has substantial deference to do), has correctly determined that this application is properly considered under the prior Rule 5.100. Thus, even though the Vested Rights doctrine is sound and should continue to be applied to CPG applications before the Commission, it is not determinative as to whether or not this application is reviewed under the current or prior Rule 5.100; rather, that determination can be justly made by the Commission pursuant to the Legislative mandate in Act 99 and its authority to implement and interpret its own rules.

To the extent that Mr. Lattuca argues that this Legislative mandate is irrelevant because of the proposed relocation of the Project, Mr. Lattuca relies again on the current version of Rule 5.100

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electric transmission facility within the State that is designed for immediate or eventual operation at any voltage… unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect"); *see also Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 5, 20 A.2d 117, 119 (1941) (stating that "The Public Service Commission has 'the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts of law and equity in this state,' . . . subject to the right to an appeal to the Supreme Court").

[11] See Order at 8, FN 17 (Mar. 20, 2019) (citing 2013, No. 99 (Adj. Sess.) ("30 V.S.A. § 219a and rules adopted under that section shall govern applications for net metering systems filed prior to January 1, 2017.")

to suggest that the application has undergone a major change. In response, ORS again submits that the change in Project location should not be considered a major change when its primary purpose is as a mitigation measure to reduce the visual impact of the project on the surrounding area. Mr. Lattuca is incorrect that the amended site location has resulted in anything less than full and robust review under the full § 248 criteria; to the contrary, the amended site has undergone the same review as the prior site and will be further reviewed in the upcoming evidentiary hearing. It is also worth noting that allowing mitigating design changes in circumstances such as this case is good policy; if such changes were considered "major," it would have a dampening effect on resolving litigation issues as petitioners would be strongly discouraged from making any changes in project design in order to address other parties' concerns. If, however, the Commission does reconsider the relocation of the Project in these particular circumstances to be a major change, which it should not, ORS renews its request that the Commission issue a waiver pursuant to its authority under Rule 2.107.[12] The Commission already determined that submission of an application for the present location would be considered vested in the then existing net-metering rules,[13] and the Hearing Officer has properly noted that the change was proposed only for aesthetic mitigation purposes and therefore does not constitute a major amendment; but to the extent Mr. Lattuca argues otherwise, as a belt-and-suspenders approach, the Commission could grant a waiver for good cause even though it can interpret its own rules and that interpretation is entitled to substantial deference.

[12] "In order to prevent unnecessary hardship or delay, in order to prevent injustice, or for other good cause, the Commission may waive the application of rule upon such conditions as it may require, unless precluded by the rule, itself, or by statute."
[13] See Order Reopening the Evidentiary Record at 3 FN 8 (Jul. 20, 2018).

II. *Mr. Lattuca's Motion for Interlocutory Appeal Should be Denied Because the Requirements for Granting Interlocutory Appeal Are Not Met*

As the Commission has recognized, interlocutory appeals are intended to be an "exception to the normal restriction of appellate jurisdiction to the review of final judgments" that are "to be undertaken only in particular circumstances."[14] The Supreme Court has repeatedly expressed that "lower courts must be mindful of this Court's well-established policy of avoiding piecemeal appeals,"[15] which "causes unnecessary delay and expense, and wastes scarce judicial resources."[16] As such, there are "weighty concerns" against granting interlocutory appeal,[17] which alone should be grounds for denying Mr. Lattuca's motion. However, in addition to these policy considerations against it, the substantive requirements for granting permission for interlocutory appeal are not met here and the motion must therefore be denied. Under Vermont Rule of Appellate Procedure 5(b), there are two requirements that must be met in order to grant permission for interlocutory appeal: first, that "the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion," and "an immediate appeal may materially advance the termination of the litigation." The vested rights issue here does not rise to the level of either requirement and therefore no appeal on this issue can be granted.

With respect to the first requirement in V.R.A.P. 5(b), there is no substantial ground for difference of opinion that the vested rights doctrine applies in this case. As discussed in Section I above, Mr. Lattuca has pointed to no case law that suggests that the vested rights doctrine does not apply to applications for a CPG before the Commission, despite the fact that as recently as last year,

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[14] See, e.g., *In re Amended Petition of VELCO*, Docket 7121, Order re: Request for Interlocutory Appeal (Aug. 22, 2008) (citing to *In re Pyramid Co. of Burlington,* 141 Vt. 294, 300-301, 449 A.2d 915, 919 (1982)).
[15] *In re Pyramid* at 305-306 (citing to: *Castle v. Sherburne Corp,* 141 Vt. 157, 446 A.2d 350 (1982); *Gay Brothers Fuel Service v. Travelers Indemnity Co.*, 133 Vt. 211332 A.2d 806 (1975); and *Isabelle v. Proctor Hospital*, 129 Vt. 500, 282 A.2d 837(1971)).
[16] *Id.* at 300.
[17] *Id.*

the Court implied that vested rights could apply to CPG proceedings.[18] The fact that the Court did not need to reach the issue in the *LK Holdings* case and therefore did not make an express holding with respect to the vested rights doctrine in Commission proceedings does not rise to the level of "substantial ground" for different opinions, as the Court has stated that "[t]rial courts should not be bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression."[19] Moreover, the Court has expressly stated that in interpreting this criterion, "courts should place little stock in the vehemence of disagreeing counsel" nor should they be "swayed by the unique character of a particular issue."[20] Rather, the standard for this criterion is whether the trial court believes that "a reasonable appellate judge could vote for reversal of the challenged order" and that "[u]nless an order triggers this degree of doubt in the mind of a trial judge," granting interlocutory appeal is improper.[21] As outlined above in Section I, the Hearing Officer's conclusions were both appropriate and entirely consistent with past decisions and there is no reasonable basis to believe that the appellate court here would reverse the Hearing Officer's determination that the vested rights doctrine does apply. As a result, the first criterion of V.R.A.P. 5(b) is not met, and the motion must therefore be denied.[22]

Even if the Commission did conclude that there is substantial ground for different opinions on the application of the vested rights doctrine here, which there is not, the second criterion of V.R.A.P. 5(b) is also not met and therefore the motion must be denied. As the Hearing Officer noted in his March 20th order, the current state of this application is the result of specific efforts made by ORS to respond to issues raised over nearly two years of litigation. Following ORS's

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[18] *LK Holdings*, supra note 2.
[19] *In re Pyramid*, supra note 8 at 306 (quotations omitted).
[20] *Id.*
[21] *Id.* at 306–07
[22] *See In re Pyramid,* supra note 8 at 302 ("A failure to satisfy any one of the V.R.A.P. 5(b) criteria nonetheless precludes certification and appellate decision; appeal in such a case would contradict the purpose of V.R.A.P. 5.").

supplemental application materials, the case is now approaching the very end of litigation with an evidentiary hearing ready to be scheduled. The hearing is limited in scope to select issues under just two criteria, and should take less than half a day to hear. Allowing the vested rights issue to be separately appealed at this juncture will not materially advance the termination of the litigation; it will significantly delay the termination of the litigation and will materially prejudice ORS and the other parties. This is contrary to the express direction of the Supreme Court, which has explained that "[a]n interlocutory appeal is proper only if it may advance the *ultimate* termination of a case" and that the trial court "must consider not only the time saved at trial, but also the time expended on appeal."[23] Resolution of a Supreme Court appeal will likely take well over a year. As this multi-year proceeding nears its end, a delay of at least a year, would directly contravene the requirement to advance the termination of the litigation. Even if the Court were to hear and decide the vested rights issue, this would not end the litigation. Rather, the Legislative mandate in Act 99 provides an independent basis for the Commission to review the application under the prior Rule 5.100, and thus the matter would continue through consideration of whether the major change requirements of the Rule should be waived. And if it is not feasible to site the project on the alternative location currently proposed, the proceeding could continue on for consideration of the original location. All of these issues are best addressed together, if necessary, in a final appeal after the substantive facts on the feasibility of the alternative location have been determined.[24] Therefore, because granting interlocutory appeal of this singular issue would delay, rather than advance, the termination of this

[23] *Id.* 305-306.

[24] See *In re Amended Petition of VELCO*, supra note 8 (stating "Finally, we cannot conclude that an immediate appeal 'may materially advance the termination of the litigation.' On the contrary, as we have explained above, it is highly likely that an immediate appeal would serve only to prolong this litigation. Technical hearings are set to commence the week of August 28, 2006, and a final order from the Board could be expected in due time shortly after that. We do not see how an appeal here would improve on the schedule currently in place."); *see also In re Pyramid*, supra note 8 at 305-306 (stating that this criterion was not met where the trial court could "foresee[] that certification of this appeal guaranteed piecemeal appeals and the attendant delay of this litigation").

case, the second requirement for granting Mr. Lattuca's motion is not met, and the motion must be denied.

In sum, interlocutory appeals are only appropriate in limited and extreme cases. This is not one of them. Mr. Lattuca fails to show how the vested rights issue provides either substantial ground for a difference of opinion beyond the opinion of Mr. Lattuca himself, or how the piecemeal appeal of this issue would materially advance a proceeding that is nearly at its end. As a result, the Commission cannot and should not grant interlocutory appeal under V.R.A.P. 5(b).

III. *Mr. Lattuca's Motion for Stay Should Also be Denied Because Interlocutory Appeal is not Warranted and the Requirements for a Stay are Not Otherwise Met*

As explained fully in Sections I and II, Mr. Lattuca's motions for reconsideration and interlocutory appeal should be denied. As a result, there is no need to stay the proceeding for an appeal of the Vested Rights issue. In the absence of an interlocutory appeal, Mr. Lattuca has not shown that he meets the requirements for a stay under 3 V.S.A. § 815, as established by the Supreme Court. Mr. Lattuca notes that among these requirements are "a strong likelihood of success on the merits," "irreparable injury if the stay is not granted," "the stay will not substantially harm other parties," and "the stay will serve the best interests of the public."[25]

Here, Mr. Lattuca has not shown a strong likelihood of success with respect to either motion, as discussed above. Moreover, he has not shown how he would be irreparably injured if a stay was not granted; proceeding to a final order would not prevent Mr. Lattuca from appealing the issue of vested rights at that point if a CPG is granted. On the other hand, allowing a stay at this point would substantially harm the other parties, who have invested significant time and resources in reaching this stage of litigation and who are prepared to have a hearing on the issues specifically

[25] Lattuca Motion for Stay at 2 (citing *Gilbert v. Gilbert*, 163 Vt. 549, 664 A.2d 239 (1995)).

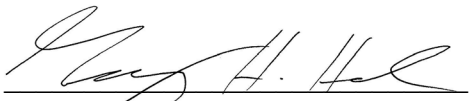
requested by Mr. Lattuca. It is in the best interests of all parties and the public to continue to a hearing and final decision on this case without delay. Thus, the requirements for a stay are not met, and the Hearing Officer should deny Mr. Lattuca's motion and proceed to scheduling the evidentiary hearing as soon as possible.

Conclusion

For the reasons stated above, ORS respectfully requests that the Commission deny Mr. Lattuca's Motions for Reconsideration, Interlocutory Appeal, and Stay of Proceedings. However, in the unlikely event that on reconsideration the Commission deems this Project to have undergone a major change, ORS requests that the Commission issue a waiver pursuant to its authority under Rule 2.107 to allow for review of the application under the 2016 Rule 5.100 for good cause in these particular circumstances where the change is a mitigation measure taken in response to concerns from other parties.

DATED at Burlington, Vermont this 9th day of April, 2019.

BY: ORCHARD ROAD SOLAR I, LLC



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