STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CPG No. 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	

Order entered: 5/1/2019

ORDER DENYING LATTUCA MOTIONS FOR RECONSIDERATION, INTERLOCUTORY APPEAL, AND STAY OF THE PROCEEDINGS

I. INTRODUCTION

This case concerns an application filed with the Vermont Public Utility Commission (the "Commission") by Orchard Road Solar I, LLC (the "Applicant") on July 15, 2016, for a certificate of public good ("CPG"), pursuant to 30 V.S.A. §§ 219a and 248, to install and operate a 500 kW group net-metered solar electric power generation system in Middletown Springs, Vermont (the proposed "Project").

In today's Order, the Commission denies three motions filed by Russell Lattuca seeking:

(1) Reconsideration of that part of the hearing officer's Order of March 20, 2019, in which he determined to review the Applicant's request to amend the Project (the "Amendment Application") under the regulations and laws in effect on July 15, 2016, when the Applicant filed its application ("Motion for Reconsideration");

(2) Permission for interlocutory appeal of our decision in the first part of this Order to affirm the hearing officer's determination to review the Amendment Application under the regulations and laws in effect on July 15, 2016 ("Motion for Interlocutory Appeal"); and

(3) Stay of these proceedings while Mr. Lattuca appeals our denial here to the Vermont Supreme Court ("Motion for a Stay").

We return this case to the hearing officer to conduct the evidentiary hearing currently scheduled for May 14, 2019.

II. BACKGROUND

On May 17, 2018, the hearing officer issued a proposal for decision in this case recommending that the Commission approve the Applicant's application with conditions.

On July 20, 2018, the Commission issued an Order reopening the record in this case for a supplementary evidentiary proceeding regarding two alternate project sites. The Applicant has site control over these neighboring sites, and these sites would have different aesthetic impacts. In its argument that it reasonably mitigated the aesthetic impact of the Project, the Applicant asserted that it had considered and rejected these two sites because the first had considerable ledge and would unreasonably increase the cost of the Project and the second was a wetland and was unavailable for development.

On November 6, 2018, the Applicant filed the Amendment Application that seeks to amend the Project by moving it to the second of the two alternate sites, which upon further investigation proved not to present a wetland issue. The second site is located on the opposite side of Orchard Road from the originally proposed site. The Amendment Application was deemed administratively complete as an amendment because it included exhibits and testimony permitting its review under all the relevant Section 248 criteria.

On November 30, 2018, Mr. Lattuca filed comments, a motion to intervene, and a motion for an evidentiary hearing. In this filing, Mr. Lattuca asserted that because the amendment was a substantial change or major amendment of the Project the Commission should treat it as a new application and review it under the rules and laws in effect on November 6, 2018, when the Amendment Application was determined to be administratively completed and not those rules in effect in 2016 when the initial application was filed.

On March 20, 2019, the hearing officer issued an Order granting Mr. Lattuca an evidentiary hearing limited to the Project's effect on the orderly development of the region and aesthetics. The hearing officer also determined that the Amendment Application would be reviewed under the rules and laws in effect when the application was filed.

On March 28, 2019, Mr. Lattuca filed his motions for reconsideration, interlocutory appeal, and a stay in this proceeding.

On April 9, 2019, the Applicant filed objections to Mr. Lattuca's motions (the "Applicant's Reply").

On April 23, 2019, Mr. Lattuca filed a response to the Applicant's Reply that "repeats, incorporates, and reaffirms all arguments made in his prior motions."[1]

No other comments on these motions have been filed by any party.

III. POSITIONS OF THE PARTIES

Mr. Lattuca

Motion for Reconsideration

Mr. Lattuca argues that the Amendment Application is a substantial change to the Project and should be treated as a new project. Mr. Lattuca contends that the Applicant does not hold a vested right to the review of the Amendment Application under the rules applicable at the time the application was filed because CPG applications are not suits that are immune from statutory change and vested rights do not apply to a significantly changed project proposal.

Motion for Interlocutory Appeal

Mr. Lattuca, pursuant to 30 V.S.A. § 12 and § 14, Rules 5(b) and 13 of the Vermont Rules of Appellate Procedure, and 3 V.S.A. § 815(a), requests that the Commission permit the interlocutory appeal of the hearing officer's decision as to the applicable rules if the Commission affirms the hearing officer's decision. Mr. Lattuca asserts that the Vermont Supreme Court has never ruled that vested rights theory applies to CPG applications.

Mr. Lattuca argues that litigation of the case to a final decision would be costly, time consuming, and unnecessary. He contends that the issue for which he seeks review would be dispositive of the case because the Project would be too large to qualify for net-metering under the rules applicable when the Application Amendment was filed.

Motion for a Stay

Mr. Lattuca asserts that a stay should be granted because his interlocutory argument has a substantial likelihood of success. He argues that failure to grant a stay would cause the Commission to take action outside of its lawful authority, which would cause irreparable harm. He contends that the "Applicant has no lawful right to the grant of a CPG in any particular time

[1] Mr. Lattuca's response to the Applicant's Reply at 1.

frame" and that no party would be harmed by a delay because interlocutory review will occur quickly "at an expedited pace, minimizing any delay in the Commission proceeding."[2]

The Applicant

The Applicant objects to Mr. Lattuca's motions and argues that:

> Mr. Lattuca's motions should be denied because the Hearing Officer did not err in recognizing that [the Applicant'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.[3]

IV. DISCUSSION

We do not agree with Mr. Lattuca that the hearing officer erred in determining to use the rules applicable when the application was filed to review the Amendment Application. We are not persuaded that because the new site is across the road from the initially proposed site and in Mr. Lattuca's viewshed we should treat the Amendment Application as a new project. To do so would be contrary to the public good.

Procedural Setting

Before separately addressing each of Mr. Lattuca's motions, we will reiterate the procedural setting in which these motions have arisen. After two years of litigation, the hearing officer issued a proposal for decision recommending approval of the Project as proposed by the Applicant with conditions. Comments on the proposal for decision from the intervening Neighbors,[4] who opposed the Project at the original site, resulted in an additional site visit by the Commission and oral argument before the Commission. The Neighbors asserted that developing the second alternate site would resolve their aesthetics concerns. The Commission then ordered

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[2] Motion for a Stay at 3.

[3] Applicant's Reply at 1.

[4] Richard Spitalny, Robert and Karen Galloway, Daniel McKeen, and Neil and Thomas Russell, through their attorney L. Brooke Dingledine, Esq., with the pro se neighbors, Doug Freilich and Julie Sperling, Elizabeth Cooper, Karen Gutmann and Larry Springsteen, Ted and Dina Fitzpatrick, and Peter and Aileen Stevenson.

a supplementary evidentiary proceeding regarding both alternate project sites that had been addressed in the case materials and were discussed in the proposal for decision.

In its review of the specific efforts of the Applicant to mitigate the aesthetic impact of the Project, the Commission was concerned that there was insufficient evidence in the record to support the Applicant's decision to disregard those alternate sites. The Applicant indicated that it did not select the first alternate site because the site had ledge and would require blasting. The Applicant stated that it did not select the second alternate site because the site was reported as containing a wetland that would make it undevelopable. The Commission found that the evidence in the record on these alternate sites to support the Applicant's conclusions was insufficient to address whether the adverse aesthetic impacts of the Project as proposed had been reasonably mitigated.[5] The Commission sought additional evidence so that it could determine whether it was reasonable for the Applicant to decide not to construct the Project at the two identified alternate sites.[6]

In our Order reopening the record of this case for additional evidence, we further stated:

> In these particular circumstances, if the Applicant determines that the Project can in fact be built at one of the alternate sites, we would treat an amended application as a continuation of the current Application for vested rights purposes, including the preferable rates that the Applicant is entitled to under its current Application.[7]

At that time, the parties agreed that from an aesthetics perspective the second alternate site was preferable. We foresaw the possibility that further evidence regarding the presence of wetlands at the second alternate site might indicate that it is in fact developable. The materials filed in the Amendment Application then did show that the second alternate site does not contain wetlands that would preclude development. The Amendment Application now seeks to build the Project at the second alternate site because it is preferable aesthetically.

We made the decision to further extend this already long proceeding because we believed it would be in the public good to assess the viability of the second alternate site in light of the Neighbors' support for it as preferable aesthetically.

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[5] 16-0042-NMP, Order of 7/20/19, at 3, 6.
[6] *Id.* at 7 (citing *In re Tom Halnon*, 174 Vt. 514, 515, 811 A.2d at 163 (2002)).
[7] 16-0042-NMP, Order of 7/20/18, at 3 n.8.

The second alternate site was an element of the Project proposal as reflected in the initial application. Assessing the viability of the second alternate site remains necessary to our findings and would resolve the lingering aesthetic concerns of the Neighbors.

At the time we issued the Order reopening the record for additional evidence, we knew that it would resolve whether the second alternate site was a wetland or not. If it was a wetland, then the Neighbors' aesthetics concerns could not be addressed by locating the Project at the second alternate site. If it was not a wetland and was therefore developable, we wanted to encourage the Applicant to make the additional investment to prepare an amendment to move the Project to a location with an apparently less adverse aesthetic impact and to do so in as expeditious a manner as practicable. For these reasons, we took the active step of stating how we would treat a filing such as the Amendment Application.

We also wanted to ensure that the Applicant could be confident of being eligible for the Project benefits envisioned when the application was filed in July 2016. This decision is also consistent with the Legislature's and the Vermont Supreme Court's direction that we review a project under the net-metering rules in place at the time an applicant filed an application.[8]

Mr. Lattuca did not participate as an intervenor with his neighbors when the application was filed. His potential view of the Project changed when the Applicant filed the Amendment Application. The hearing officer permitted Mr. Lattuca to intervene at this late stage in the proceeding so that Mr. Lattuca could articulate his concerns, as his neighbors did, about the impact of the Project on orderly development and aesthetics and do so at an evidentiary hearing.

Motion for Reconsideration

We are not persuaded by Mr. Lattuca's challenge to our determination to apply the rules in place when the application was first submitted. The vested rights doctrine is part of the Commission's jurisprudence and has been used by the Commission in cases like this one, where an applicant changes a project to address the concerns of the public and the neighbors.[9] Further,

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[8] *See* 2013, No. 99 (Adj. Sess.), § 10(f) ("30 V.S.A. § 219a and rules adopted under that section shall govern applications filed for net-metering systems filed prior to January 1, 2017"); *see also In re Stowe Cady Hill Solar, LLC*, 2018 VT 3 (overruling the Commission's dismissal of a net-metering application because the Commission did not observe the rules in place at the time the application was filed).

[9] *See, e.g. Petition of N. Springfield Sustainable Energy Project LLC*, Docket 7833, Order of 2/11/14 ("[A]ssuming [the Petitioner] filed a complete application on December 22, 2011, its rights vested in § 248 as that

use of the old net-metering rules to address the circumstances here was specifically directed by the Legislature in Act 99.

Finally, even if Mr. Lattuca were correct that this is a major amendment and the more recent net-metering rules and rates should apply, the Applicant has demonstrated good cause for a waiver pursuant Commission Rule 2.107.[10] Specifically, the amended Project could have a less adverse aesthetic impact, as evidenced by the support for the alternate site by the Neighbors, who raised the aesthetic concern with the original site. We also find good cause in encouraging developers, like the Applicant, to make further investments in project development to assess the viability of potentially less aesthetically adverse alternate sites without losing net-metering program benefits anticipated when the original application was filed. As we noted earlier, we specifically approved the filing of the Amendment Application under the "preferable rates that the Applicant is entitled to under its current application."

Further, as Mr. Lattuca has noted, applying the current net-metering rules to the Amendment Application, which we encouraged the Applicant to develop, would result in our disallowing the Project because of its size and location. We did not extend the Project's review to create this result. To apply our current rules, as Mr. Lattuca requests, would be unjust in these circumstances.

A waiver therefore serves the public good. For these reasons, we affirm the hearing officer's determination to review the Amendment Application under the rules and laws in effect when the application was filed and deny Mr. Lattuca's Motion for Reconsideration.

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statute existed at that time, and not in § 248 as amended effective May 18, 2012."); *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 4/12/18 (addressing Vermont's adoption of minority rule for Vested Rights Doctrine and its application in a Commission case); *Application of Seneca Mountain Wind, LLC*, Docket 7867, Order of 8/9/13 (deciding that the pending ordinance doctrine did not apply to that 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"); *see also 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"); and *In re Jolley Associates*, 2006 VT 132, 181 Vt. 190, 915 A.2d. 282 (developer gained vested right to zoning bylaw that existed at time it filed its complete application); and *In re Keystone Dev. Corp.*, 2009 VT 13, ¶ 5, 186 Vt. 523 (Act 250 permit applicant gained vested right in governing regulations in existence when a complete application is filed).

[10] Applicant's Reply at 5.

Motion for Interlocutory Appeal

Interlocutory appeals are intended to be an "exception to the normal restriction of appellate jurisdiction to the review of final judgments" and are "to be undertaken only in particular circumstances."[11] The Vermont Supreme Court has repeatedly expressed that "lower courts must be mindful of this Court's well-established policy of avoiding piecemeal appeals,"[12] which "causes unnecessary delay and expense, and wastes scarce judicial resources."[13]

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, "the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion," and second, "an immediate appeal may materially advance the termination of the litigation."[14] The vested rights issue here does not meet either requirement. Therefore, we deny Mr. Lattuca's request for interlocutory review.

We are not persuaded by Mr. Lattuca's arguments that there is a substantial ground for difference of opinion and that an immediate appeal may advance the termination of this case. The vested rights doctrine is appropriately a part of Commission proceedings, and an appeal to the Vermont Supreme Court would only serve to further extend the nearly three years of litigation by a year or more. This would be contrary to the express direction of the Vermont 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."[15]

The issue appealed here is not a controlling issue of law. Even if Mr. Lattuca were correct that the Amendment Application is a "major amendment" and therefore subject to the new net-metering rules, we have already determined that a waiver of the "major amendment" rule is appropriate here. Thus, the Applicant has a right to proceed under the rules in effect at the time of its original application.

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[11] *In re Amended Petition of VELCO*, Docket 7121, Order of 8/22/06, at 3 (citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 300-301, 449 A.2d 915, 919 (1982)).

[12] *In re Pyramid*, 141 Vt. at 305-306 (citing *Castle v. Sherburne Corp*, 141 Vt. 157, 446 A.2d 350 (1982); *Gay Brothers Fuel Service v. Travelers Indemnity Co.*, 133 Vt. 211, 332 A.2d 806 (1975); and *Isabelle v. Proctor Hospital*, 129 Vt. 500, 282 A.2d 837(1971)).

[13] *Id.* at 300.

[14] Vermont Rule of Appellate Procedure 5(b)(1).

[15] *In re Pyramid*, 141 Vt. at 305-306.

Further, the matter is set for an evidentiary hearing in two weeks. In these circumstances, granting interlocutory appeal would delay, rather than advance, termination of this proceeding. All of these issues are best addressed together in a final appeal after the substantive facts on the feasibility of the alternative location have been determined.[16]

Motion for a Stay

Because we are denying Mr. Lattuca's Motion for Reconsideration and Motion for Interlocutory Appeal, there is no need to stay the proceedings and Mr. Lattuca's Motion for a Stay is also denied.

We return this case to the hearing officer to conduct the evidentiary hearing currently scheduled for May 14, 2019, where Mr. Lattuca will have an opportunity to exercise his right to challenge the Project on substantive grounds.

SO ORDERED.

[16] *See* Docket 7121, Order of 8/22/06, at 4 (concluding that interlocutory review requires a court to "decide legal questions in a vacuum, without benefit of factual findings," and, therefore, "interlocutory appeals impair this Court's basic functions of correctly interpreting the law and providing justice for all litigants" (citing *In re Pyramid*, 141 Vt. at 301)).

Dated at Montpelier, Vermont, this 1st day of May, 2019.

Anthony Z. Roisman) PUBLIC UTILITY

Margaret Cheney) COMMISSION

Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: May 1, 2019

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

16-0042-NMP Service List

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