

Site Preparation/Solar Electric-Generation Facilities: Vermont Supreme Court Addresses Challenge to Public Utility Commission Injunction



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The Supreme Court of Vermont (“Court”) addressed in a December 3rd opinion an issue involving two proposed solar electric-generation facilities (“Facilities”). See *In Re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether the Petition Initiated Site Preparation at Apple Hill in Bennington, Vermont, 2021 WL 5752376*.

The issue considered was whether an injunction issued by the Vermont Public Utility Commission (“PUC”) for alleged initiation of site preparation for the Facilities could be challenged.

Allco Renewable Energy Limited (“Allco”) sought to construct two 2.0 MW Facilities on a 27-acre parcel in Bennington, Vermont. The company is stated to have obtained two standard-offer contracts for its proposed Facilities in 2013 and 2014. The PUC is stated to have extended deadlines in the contracts multiple times and ongoing litigation is also noted.

An individual is stated to have in June 2020 filed public comments with the PUC alleging that site-clearing was occurring on the Bennington parcel. The comments also alleged that an area set aside for rare, threatened and endangered species was being disturbed.

The Agency of Natural Resources (“ANR”) is stated to have filed comments confirming site clearing activity was occurring without a certificate of public good (“CPG”). ANR sought a cease-and-desist order to prevent irreparable harm.

The PUC opened an investigation and held an evidentiary hearing. It issued a temporary restraining order (“TRO”) prohibiting Allco from engaging in any further tree-clearing activity on the parcel.

Allco moved to vacate a preliminary-injunction hearing and dissolve the TRO. The PUC denied its request and rejected the assertion that it lacked jurisdiction or that it lacked authority to grant injunctive relief.

The PUC is stated to have enjoined Allco from “site preparation for . . . an electric generation facility” without first obtaining a CPG. Such injunction prohibited Allco from further site preparation unless certain criteria were satisfied. Allco challenged the PUC’s injunction order.

A second evidentiary hearing was subsequently held in which Allco was found to have engaged in site preparation without a CPG. The PUC also determined that an injunction remained necessary to prohibit the unlawful conduct. It also stated that the findings established a factual basis for issuance of a civil penalty.

Allco filed a notice of appeal with the Court moving to stay the penalty phase of the proceeding based on its argument that the PUC had been divested of jurisdiction on all matters within the scope of its appeal. This argument was rejected on the basis that jurisdiction is only divested when a party files a proper notice of appeal from a final judgment. Allco's notice of appeal was argued by the PUC to be prematurely filed as proceedings before that body had not been concluded (i.e., the civil penalty calculation).

The Court agrees with the PUC that there is not yet a final appealable order. It notes that:

. . . [t]o be final and appealable an order must end litigation on the merits or conclusively determine the rights of the parties, leaving nothing for the court to do but execute the judgment. . .

The Court held that the injunction order did not conclude the proceedings before the PUC. Since the PUC determined that a civil penalty was warranted and it would hold a hearing to determine the amount, this was considered ongoing proceedings. As a result, the Court found no jurisdiction over the appeal.

A copy of the opinion can be downloaded [here](#).