VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

AUG 30 2024

ENTRY ORDER

2024 VT 58

SUPREME COURT CASE NO. 23-AP-346

MAY TERM, 2024

In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al., Appellants)	}	APPEALED FROM: Public Utility Commission CASE NO. 20-1611-INV

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT:

Paul L Reiber

Paul L. Reiber, Chief Justice

Concurring:

Harold E Eaton Jr.

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy Jean Waples

Nancy J. Waples, Associate Justice

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions by email at: JUD.Reporter@vtcourts.gov or by mail at: Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801, of any errors in order that corrections may be made before this opinion goes to press.

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In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al., Appellants)	Supreme Court On Appeal from Public Utility Commission May Term, 2024

Anthony Z. Roisman, Chair

Michael Melone, Allco Renewable Energy Limited, New Haven, Connecticut, for Appellant.

Charity R. Clark, Attorney General, and David Golubock, Assistant Attorney General, Montpelier, for Appellee Agency of Natural Resources.

Ben Civiletti, Special Counsel, Montpelier, for Appellee Department of Public Service.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **REIBER, C.J.** Developer, Allco Renewable Energy Limited, and its affiliates, Chelsea Solar LLC, Apple Hill Solar LLC, and PLH Vineyard Sky LLC, appeal a permanent injunction and civil-penalty order issued by the Vermont Public Utility Commission (PUC). The PUC found that by clearing trees at the planned location of an electric-generation facility while its petition for a certificate of public good (CPG) was pending, developer had initiated site preparation without a CPG, in violation of 30 V.S.A. § 248(a)(2)(A). Developer argues that the tree clearing was intended not as site preparation but to support its agricultural activities, and it brings a host of jurisdictional, administrative, and constitutional arguments against the injunction and civil penalty. We conclude that the PUC had jurisdiction over developer's activities, that it acted within its authority in imposing the injunction and civil penalty, and that none of developer's remaining arguments have merit. Accordingly, we affirm the PUC's order.

I. Background

¶ 2. In 2013 and 2014, developer executed two standard-offer contracts under 30 V.S.A. § 8005(a) for solar-electric energy generation facilities at two sites, Willow Road and Apple Hill Road, located on a twenty-seven-acre parcel of land in Bennington, Vermont. Developer subsequently applied for the requisite CPGs by filing petitions with the PUC for each contract, pursuant to 30 V.S.A. § 248. The standard-offer contracts have been amended several times to extend their operational deadlines and have neither expired nor been relinquished. The PUC denied a CPG for the Willow Road site in 2016 and denied an amended petition in 2019, which this Court affirmed in 2021. See In re Chelsea Solar LLC, 2021 VT 27, 214 Vt. 526, 254 A.3d 156. The PUC granted a CPG for the Apple Hill Road site in 2018, but neighbors appealed, and this Court reversed in part and remanded for further proceedings. See In re Apple Hill Solar LLC, 2019 VT 64, 211 Vt. 54, 219 A.3d 1295.

¶ 3. Following the remand, developer filed an amended petition for a CPG for the Apple Hill Road site to reflect developer's intention to graze sheep and grow hemp on the Apple Hill Road site and an adjacent five-acre parcel, which the PUC considered part of the Apple Hill Road site. Developer's amended petition stated that the agricultural activities were "wholly unrelated to the proposed-solar [sic] use." On May 7, 2020, the PUC denied a CPG for the Apple Hill Road site on remand and denied the motion to amend the petition to reflect sheep grazing and hemp farming at the project site.

¶ 4. In June 2020, while developer's motion for reconsideration was pending, a neighbor filed a public comment with the PUC alleging that developer had begun clearing trees on the land, despite the CPG denial. In response, the Agency of Natural Resources (ANR) raised concerns that the site clearing threatened substantial and immediate harm to "rare" and "very rare" plants and requested a cease-and-desist order to prevent irreparable harm to the plants. The Department of Public Safety (DPS) also requested further investigation into whether developer initiated the tree-clearing activity as site preparation for the electric-generation facilities, in violation of 30 V.S.A. § 248(a)(2). The PUC subsequently initiated an investigation "pursuant to 30 V.S.A. Sections 30 and 209" and informed developer to "be prepared to address with affidavits (filed before the hearing begins) or live testimony whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30."

¶ 5. At the subsequent evidentiary hearing, Thomas Melone appeared on behalf of developer and testified about the tree clearing and proposed agricultural activities. While Melone insisted that the tree clearing was being done for agricultural purposes, he stated that the "primary aspect" of the sheep grazing would be to clear vegetation around the solar facility, and he agreed that it would not be possible to build a solar facility on the site "unless the trees are cleared." Based in part on this testimony, the PUC concluded that developer's "actions on Apple Hill continue to be part of [its] plan to develop the site for the two facilities that are the subject of its standard-offer contracts." The PUC therefore issued a temporary restraining order prohibiting site-preparation activities on both the twenty-seven-acre and five-acre parcels. Despite the order, developer continued to conduct site clearing activities the following day until a sheriff arrived and ordered all work to cease. Developer appealed the temporary restraining order, but we dismissed without prejudice to refiling if a permanent injunction was granted. See <u>In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209</u>, No. 2020-242, 2020 WL 6799008 (Vt. Nov. 5, 2020) (unpub. mem.) [https://perma.cc/8PF3-H3DN].

¶ 6. Following a second evidentiary hearing, the PUC concluded that developer's tree-clearing activity was site preparation for the proposed solar-electric-generation facilities and thus, without a CPG, violated 30 V.S.A. § 248(a)(2). The PUC found that (1) ANR observed site-clearing activity on the twenty-seven-acre parcel; (2) developer planned to build two solar-electric-generation facilities on the site; (3) clearing for a solar facility requires tree clearing; and (4) developer planned to use sheep as part of its solar facility development plan. The PUC therefore issued a permanent injunction order in April 2021 prohibiting developer "from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities," which included both the twenty-seven-acre and five-acre parcels. The order would remain in place until either "(1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions . . . and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished." Developer again filed an appeal, which we dismissed because it was not taken from a final appealable order. See In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209, 2021 VT 92, 216 Vt. 145, 274 A.3d 823.

¶ 7. The PUC conducted additional proceedings, including a third evidentiary hearing, to determine the amount of the civil penalty under 30 V.S.A. § 30. DPS recommended a civil penalty in the amount of $5000 while ANR recommended $29,000. Pursuant to 30 V.S.A. § 30(c), the PUC analyzed eight factors to determine the amount of the penalty. The PUC concluded that developer's failure to comply with its regulatory obligations harmed the credibility and integrity of the process, resulting in harm to the statutory scheme and potential harm to public safety and welfare, the environment, and utility customers. The PUC also found developer's claims that site preparation was done solely for unrelated farming purposes to be not credible given that developer knew that it did not have a CPG, that it was required to have one, that it needed to clear trees for site preparation, and that clearing had already been denied by the PUC. Finally, the PUC found that developer had sufficient resources to pay the fine and that the $5000 penalty would have specific and general deterrent effects. While the other statutory factors did not weigh against developer, the PUC concluded that based on these findings, a $5000 fine was appropriate. This appeal followed.

II. Discussion

¶ 8. Developer makes five main arguments on appeal. First, it contends that the PUC lacked jurisdiction over its tree-clearing activities because these activities were agricultural and not "site preparation for or construction of an electric generation facility." 30 V.S.A.

§ 248(a)(2)(A). Second, developer asserts that the PUC lacked statutory authority to initiate the investigation, enjoin the tree-clearing activities, and impose civil penalties. Third, developer attacks the injunctive order on various grounds, arguing that there was no irreparable injury, that the order was overly broad, and that the order was arbitrary and capricious. Fourth, developer argues that ANR's participation in these proceedings and its classification of rare and very rare plants exceeded its authority. Finally, developer brings several constitutional challenges to the proceedings, arguing that § 248 is unconstitutionally vague, that the delegation of authority to the PUC violates separation of powers, that developer was denied due process, and that it was denied the right to a jury trial.

¶ 9. In reviewing decisions of the PUC, we accord "substantial deference" and apply "a strong presumption of validity to the Commission's orders."[1] In re Vt. Gas Sys., Inc., 2024 VT 2, ¶ 15, __ Vt. __, 312 A.3d 519 (quotation omitted) (alteration omitted). The PUC's findings "will stand unless clearly erroneous," and we will neither "reweigh conflicting evidence nor reassess the credibility of witnesses." In re Acorn Energy Solar 2, LLC, 2021 VT 3, ¶ 23, 214 Vt. 73, 251 A.3d 899 (quotation omitted). However, while our review is generally deferential, "we do not abdicate our responsibility to examine a disputed statute independently and ultimately determine its meaning." In re Swanton Wind LLC, 2018 VT 141, ¶ 7, 209 Vt. 224, 204 A.3d 635 (quotation omitted). In our "independent examination, we employ our usual tools of statutory construction," starting with the plain language of the statute. Id. In construing a statute, our "paramount goal . . . is to give effect to the intent of the Legislature." In re Portland St. Solar LLC, 2021 VT 67, ¶ 13, 215 Vt. 394, 264 A.3d 872 (quotation omitted).

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[1] As discussed below, see infra, ¶ 30 n.6, nothing in our decision today implicates deference to an agency's "permissible construction" of an ambiguous statute. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). We therefore need not decide the impact on our jurisprudence of the U.S. Supreme Court's recent decision abrogating Chevron deference. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

A. The PUC's Jurisdiction

¶ 10. Developer first argues that the PUC lacks jurisdiction under 30 V.S.A. § 209 because its property is not subject to the supervision of the PUC under Chapter 5 of Title 30.[2] Developer contends that its tree-clearing activities were farming-related rather than site preparation for its proposed solar facilities and that these activities are therefore beyond the PUC's jurisdiction. We disagree. Section 209(a) of Title 30 provides in relevant part that "the [PUC] shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under [Chapter 5 of Title 30]." (emphasis added). Developer is a corporation that owns the property at issue in this case. Because it holds standard-offer contracts for two proposed solar-electric-generation facilities under 30 V.S.A. § 8005(a) and applied for CPGs for both proposed facilities under 30 V.S.A. § 248—a provision of Chapter 5 of Title 30—developer is subject to the supervision of the PUC under Chapter 5 of Title 30 and thus the PUC's jurisdiction under 30 V.S.A. § 209. See In re Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 21 n.6, 210 Vt. 27, 210 A.3d 1230 (holding that "by erecting a tower that required approval under § 246, a provision of Chapter 5 of Title 30, [property owner] subjected himself to PUC jurisdiction under [§ 209]").

¶ 11. To be sure, the PUC does not have jurisdiction over pure farming activity. See 30 V.S.A. §§ 203, 209 (describing general scope of PUC's jurisdiction); Acorn Energy Solar 2, 2021 VT 3, ¶ 114 (noting that "public administrative bodies have only such adjudicatory jurisdiction as is conferred on them by statute" (quotation omitted)). But the PUC has related jurisdiction as described in the statute. As the PUC found and the record reflects, developer's tree-clearing activities were still prohibited as "site preparation for or construction of an electric generation

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[2] Developer also argues that the PUC lacks jurisdiction under § 203. Because we decide that the PUC had jurisdiction under § 209, we need not decide this question.

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