Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-263

NOVEMBER TERM, 2017

In re Application of Gaines Farm Community Solar, LLC	}	APPEALED FROM:
	}	
	}	Public Utility Commission
	}	
	}	
	}	DOCKET NO. GPG #NM-7101

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

Applicant Gaines Farm Community Solar, LLC appeals an order of the Vermont Public Utility Commission[1] (PUC) denying applicant's motion to amend its application for a certificate of public good (CPG) to retain the renewable energy credits (RECs) associated with its project. We affirm.

In November 2015, applicant requested a CPG for a 150 kW photovoltaic group net metering system it proposed to build in Guilford, Vermont. The second page of the application form contained a section entitled Renewable Attribute Election, which asked the applicant to indicate whether it elected to retain ownership of any RECs associated with the system. The form stated: "If you select 'no' or do not make a selection, the renewable attributes will be transferred to your electric utility." Applicant did not make a selection on the form. On March 17, 2016, the PUC approved the application and issued a CPG subject to certain conditions, including identifying the members of the group system and addressing potential impacts on wetlands and natural areas.

On February 10, 2017, applicant sent a letter to the PUC clerk identifying certain "technical corrections" that needed to be made to the CPG and requesting an extension of time to complete the project. Applicant stated that it had incorrectly listed the address of the project site. Applicant also stated that although it did not select "yes" on the application form, applicant did intend to retain the RECs associated with the project. With its letter, applicant filed an amended CPG application reflecting the desired changes.

The PUC responded to applicant's letter in an order entered on April 6, 2017. It granted applicant's request for an extension of time and noted that it had already corrected the project address in a technical correction issued in April 2016. However, it denied applicant's request to

[1] Prior to July 1, 2017, the PUC was known as the Vermont Public Service Board. See 2017, No. 53, § 9. We refer to it as the PUC throughout this opinion for clarity.

change the REC election. The PUC treated the request as a motion to amend the CPG under Vermont Rule of Civil Procedure 60(b)(1), which provides that a court "may" amend a judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." V.R.C.P. 60(b)(1). The PUC found that good cause did not exist to grant applicant's request because the form warned applicant that failing to make a selection would result in the renewable attributes for the project being transferred to the utility. It therefore denied applicant's request to retain ownership of the RECs.

Applicant moved for reconsideration, arguing that it inadvertently overlooked the REC election because previous versions of the CPG application form did not require an applicant to state whether it wanted to keep the RECs, and the language was in plain typeface, surrounded by boilerplate, and did not call attention to itself in any way. Applicant argued that denying the amendment was unfair because it would result in applicant losing thousands of dollars per year over the life of the project.

The PUC denied applicant's motion. It explained that the governing statute required an applicant to indicate at the time of application whether it intended to retain the RECs, and PUC rules required applications for net metering projects to be complete. It rejected applicant's argument that the form was unclear or contained boilerplate language, noting that the REC election was set out in a separate paragraph, with a heading in bold font, and was followed by several pages of questions that applicant completed. Further, the PUC noted that applicant's representative had recently filed CPG applications for other unrelated projects and had successfully made a REC election on those forms. It found that applicant's failure to properly review and complete the application form was not excusable neglect under Rule 60(b)(1). The PUC recognized that losing the RECs would have financial implications for the project, but also recognized the value of RECs in reducing the costs of the net-metering program to ratepayers.

On appeal, applicant argues that the PUC abused its discretion by denying its request to amend its CPG to allow it to retain the RECs. We review the PUC's decision on a Rule 60(b) motion for abuse of discretion. See In re Waitsfield-Fayston Tel. Co., Inc., 2007 VT 55, ¶ 22, 182 Vt. 79 (holding agency application of Vermont Rules of Civil Procedure reviewable for abuse of discretion); Zinn v. Tobin Packing Co., 140 Vt. 410, 414 (1981) ("A motion for relief of judgment pursuant to V.R.C.P. [60(b)] is addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused."). "Abuse of discretion occurs when that discretion is exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable." In re Halnon, 174 Vt. 514, 517 (2002). Applicant has the burden of proving an abuse of discretion. R. Brown & Sons, Inc. v. Int'l Harvester Corp., 142 Vt. 140, 143 (1982).

Applicant has failed to demonstrate that the PUC abused its discretion in this case. The application form clearly stated that failure to make a selection would result in the RECs being transferred to the utility. Furthermore, the governing statute in effect at the time of the application provided that the electric company "[s]hall receive ownership of the environmental attributes of electricity generated by the customer's net metering system, including ownership of any associated tradeable renewable energy credits, unless at the time of application for the system the customer

elects not to transfer ownership of those attributes to the company." 30 V.S.A. § 219a(h)(1)(I) (2015) (emphasis added). Applicant was therefore on notice that it had to affirmatively indicate its intention to keep the RECs in the CPG application, or they would be forfeited. Applicant essentially argues that it should be excused for its representative's failure to carefully read and complete the form. The PUC did not err in denying relief on this basis. See Margison v. Spriggs, 146 Vt. 116, 120 (1985) (holding that attorney's "careless ignorance" of rules of procedure was not excusable neglect, and trial court did not err in denying Rule 60(b) motion (quotation omitted)); Public Utility Commission Rule 5.110(B) (2014) (requiring applicant to ensure that application form for net metering project is complete and contains all required information).

Applicant argues that the requested change was a mere technical correction and the PUC abused its discretion by refusing to allow applicant to change its REC election while at the same time allowing applicant to correct its address on the CPG. Again, we cannot conclude that this was an abuse of discretion. There is no indication that the requested correction to the address listed on the CPG resulted in an actual change to the location, scope, or finances of the project. The address change was a simple clerical error that had no effect on the parties. See V.R.C.P. 60(a) (permitting clerical mistakes to be corrected at any time). By contrast, the REC election had a significant impact on the project and the interested parties, as it determined whether valuable credits would go to applicant or to the electric utility, which would then retire the RECs to comply with its renewable energy obligations under state law. See 30 V.S.A. § 219a(h)(1)(I) (2015); 30 V.S.A. §§ 8004-8005. The utility did not file any comments in response to the original CPG application, but it might have done so if the application had stated that applicant intended to retain the RECs. Instead, the CPG was issued with the understanding that the RECs would be transferred to the utility. The PUC therefore did not err in concluding that changing the REC election after the CPG had been issued was not a mere technical correction.

Applicant claims that even if it did not qualify for relief under Rule 60(b)(1), the PUC should have granted the amendment under Rule 60(b)(6) in order to avoid the loss of a significant expected financial benefit to applicant. Rule 60(b)(6) permits a court to amend a judgment for "any other reason justifying relief from the operation of the judgment." This rule is designed "to prevent hardship or injustice." Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.). However, "[r]elief under Rule 60(b)(6) is available only when the proffered basis for relief . . . is not encompassed within the other provisions of the rule." TBF Fin., LLC v. Gregoire, 2015 VT 36, ¶ 25, 198 Vt. 607. Having already considered and rejected applicant's request for relief on the ground of inadvertence or excusable neglect, it would not have been appropriate for the PUC to grant relief under Rule 60(b)(6). Id. Furthermore, the PUC expressly acknowledged that applicant's inability to retain the RECs would have a financial impact on the project. It determined, however, that the public interest in reducing ratepayer costs by transferring RECs to the utility weighed in favor of its determination not to amend the REC election well after the CPG had been issued. It acted within its discretion in making this determination.

Finally, applicant argues that it was error for the PUC to decide applicant's motion without a hearing. While hearings are generally preferred for Rule 60(b) motions, the PUC acted within its discretion to deny the motion without a hearing when it found the motion to be without merit. See Sandgate Sch. Dist. v. Cate, 2005 VT 88, ¶ 12, 178 Vt. 625 (mem.) (stating that hearings on

Rule 60(b) motions "are at the discretion of the trial court and are unnecessary where the grounds for the motion are frivolous or totally lacking in merit," or "when a court finds that the explanations offered by a party are unreasonable"). Furthermore, there is no evidence that applicant requested such a hearing.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Karen R. Carroll, Associate Justice