

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-242

NOVEMBER TERM, 2020

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

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

In response to public comments and a request from the Agency of Natural Resources, on June 26, 2020, the Public Utility Commission (PUC) issued a temporary restraining order (TRO) prohibiting appellants Allco Renewable Energy Limited and its affiliates from clearing trees on the sites of Allco’s proposed solar electric generation facilities on Apple Hill in Bennington. The PUC set a hearing in July to determine whether to grant a preliminary injunction or dissolve the temporary restraining order. Appellants filed a motion to vacate the hearing for lack of jurisdiction. The PUC postponed the hearing while it considered appellants’ motion, which it denied on August 26, 2020. The PUC then set the preliminary injunction hearing for September but postponed it a second time after appellants sought discovery from the Agency of Natural Resources. Appellants did not object to the postponements, instead choosing to file this appeal.

A TRO is, on its face, an interlocutory order because it does not conclusively resolve whether the applicant is entitled to temporary or permanent injunctive relief. For this reason, TROs are not ordinarily appealable. See Romer v. Green Point Sav. Bank, 27 F.3d 12, 15 (2d Cir. 1994) (“As a TRO is interlocutory and is not technically an injunction, it is ordinarily not appealable.”). Appellants argue, however, that they are entitled to appeal the TRO and associated jurisdictional order pursuant to 3 V.S.A. § 815(a).

Section 815(a) of Title 3 provides that “a preliminary, procedural, or intermediate agency action or ruling is immediately appealable [to the Supreme Court] under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision.” 3 V.S.A. § 815(a). This exception to the final judgment rule is limited to those “extraordinary cases where the normal appellate route will almost surely work injustice, irrespective of this Court’s final decision.” In re Maple Tree Place Assocs., 151 Vt. 331, 333 (1989). Appellant bears the burden of demonstrating that an appeal from a final order will not provide an adequate remedy, and “we will subject to careful scrutiny those reasons offered as justification for appeals under § 815(a).” In re Cent. Vermont Pub. Serv. Corp., 142 Vt. 138, 139-40 (1982).

Here, the only harm identified by appellants is that they will be unable to conduct sheep or hemp farming activities in 2020 and have lost a licensing fee of an unspecified amount to grow hemp this year. However, appellants conceded at the TRO hearing below that they did not plan to begin any farming activities until the 2021 season. We are therefore not persuaded that adequate review is unavailable on appeal from a preliminary injunction, if one is granted.

For the same reason, we decline appellants' request to exercise our discretion to take the appeal pursuant to 30 V.S.A. § 15. See In re Investigation Into Gen. Order No. 45, 2013 VT 24, ¶ 2, 193 Vt. 676 (explaining that extraordinary relief under 30 V.S.A. § 15 “is left to this Court’s discretion”). And although appellants argue that the order is appealable as a collateral final order, appellants have not asked for or received permission to appeal under V.R.A.P. 5.1.

The appeal is therefore dismissed without prejudice to refile if a preliminary injunction is granted. We note that the temporary restraining order has now been in place for over four months. The preliminary injunction hearing therefore should take place without delay. See PUC Rule 2.406(C) (stating that preliminary injunction hearing ordinarily “shall be held within forty-five days”).

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice