

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 8585

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Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont	
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Order entered:

**ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

On September 23, 2015, the Vermont Public Utility Commission opened this proceeding to investigate the factual circumstances and legality of the site preparation, construction, and operation of a meteorological (“MET”) tower located in Irasburg, Vermont, and owned by David Blittersdorf (“respondent” or “Mr. Blittersdorf”).

In today’s order, for the reasons discussed below, I am denying a motion for summary judgment filed by the Department of Public Service (“Department”) on July 1, 2016, as well as a cross-motion for summary judgment filed by Mr. Blittersdorf on July 29, 2016. As a result of these denials of the two motions, I will be asking the Clerk of the Commission to contact the parties to this matter for the purpose of scheduling a status conference. The parties are directed to begin discussing among themselves mutually agreeable potential dates for the status conference.

**II. PROCEDURAL HISTORY**

On September 2, 2015, the Clerk of the Vermont Public Utility Commission (“Commission”) received a letter from the members of the Irasburg Selectboard concerning a meteorological tower located at 700 Kidder Hill Road in Irasburg, Vermont. The letter stated that the Selectboard found no evidence that the Commission had issued a certificate of public good (“CPG”) authorizing construction of the meteorological tower.

On September 10, 2015, Mr. Blittersdorf filed a letter stating that the meteorological tower was not subject to the Commission’s jurisdiction. The letter further explained Mr.

Blittersdorf's position that there was no incentive or potential gain from erecting a tower without first securing the necessary approvals.

On September 11, 2015, the Department filed comments stating that the respondent did not obtain a CPG from the Commission prior to constructing the tower. The Department recommended that the Commission open an investigation into the matter and provide the respondent "an opportunity to show cause why he should not be subject to penalties under 30 V.S.A. § 30."

On September 23, 2015, the Commission issued an order initiating this investigation and directing the hearing officer<sup>1</sup> to examine the facts surrounding the construction of the meteorological tower and whether the tower was lawfully constructed, with particular attention to whether the construction of the tower complied with the applicable requirements, if any, of Section 246 of Title 30.<sup>2</sup>

On December 18, 2015, the respondent prefiled testimony and exhibits.

Beginning on January 6, 2016, the parties engaged in various rounds of discovery amongst themselves.

On July 1, 2016, the Department filed a motion for partial summary judgment on the question of whether the respondent was liable for erecting the MET tower without first obtaining a CPG.<sup>3</sup>

On July 29, 2016, the respondent filed an opposition to the Department's motion and a cross-motion for summary judgment seeking dismissal of this investigation.

On August 11, 2016, the respondent filed a supplemental memorandum in support of his July 29 filing.

On August 24, 2016, the Department filed a reply to the respondent's July 29 and August 11 filings.

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<sup>1</sup> George Young, Esq. was appointed to serve as hearing officer in this proceeding. However, Mr. Young has since left the Commission and I have been assigned to act as hearing officer in this matter going forward.

<sup>2</sup> Case No. 8585, Order of 9/23/15.

<sup>3</sup> The Department's motion did not seek judgment on the amount of the civil penalty that should be imposed in the event it was successful in obtaining a ruling in its favor on the question of liability.

### **III. THE LEGAL STANDARD**

Pursuant to Commission Rule 2.219, Vermont Rules of Civil Procedure Rule 56 applies to Commission proceedings.<sup>4</sup> Under Rule 56, the Commission may grant summary judgment if the moving party demonstrates that “there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”<sup>5</sup> The standard for summary judgment is stringent.<sup>6</sup> When seeking summary judgment, the movant has the burden of proof, and the party opposing the summary judgment motion is to be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists.<sup>7</sup> Summary judgment “provides a mechanism for the disposition of issues, claims and defenses which do not merit a full trial.”<sup>8</sup> However, a trial is “absolutely necessary where there is a genuine issue as to any material fact.”<sup>9</sup> A fact is “material” when it affects the outcome of a case.<sup>10</sup>

### **IV. DISCUSSION**

#### **1. The Department Motion**

The Department contends that it is entitled to judgment on the question of liability under either § 246 or § 248 because Mr. Blittersdorf erected a MET tower on his property without first securing a CPG from the Commission. The Department states that Mr. Blittersdorf’s intent at the time he erected the MET tower is irrelevant to a determination of liability. The Department asserts that Mr. Blittersdorf admits in his prefiled testimony that data recorded by the MET station was used to evaluate the wind resource at his Kidder Hill property for construction of a net-metered facility consisting of two wind turbines, and for the potential construction of a commercial wind facility on the property.<sup>11</sup>

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<sup>4</sup> *Petition of Department of Public Service to impose penalties and other remedial action upon Vermont Gas Systems, Inc.*, Docket 7513, Order of 10/23/09 at 6.

<sup>5</sup> *Granger v. Town of Woodford*, 167 Vt. 610, 611, 708 A.2d 1345, 1346 (1998) (mem.); *Bacon v. Lascelles*, 165 Vt. 214, 218, 678 A.2d 902, 905 (1996); *Hoeker v. Department of Social and Rehabilitation Service and Sally Lindberg*, 171 Vt. 620, 621 (2000).

<sup>6</sup> *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26 (1992).

<sup>7</sup> *Price v. Leland*, 149 Vt. 518, 521 (1988).

<sup>8</sup> *Gore v. Green Mountain Lakes*, 140 Vt. 262, 264 (1987).

<sup>9</sup> *Sykas v. Kearns*, 135 Vt. 610, 612 (1978).

<sup>10</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>11</sup> DPS motion at 3-4.

The respondent argues that a number of facts set forth in the Department's statement of facts are disputed and/or unsupported by the record, thus requiring denial of the Department's motion.<sup>12</sup>

I am denying the Department's motion for summary judgment on the issue of liability because the Department has failed to establish a material fact that is needed to support its requested relief. There is no basis in the materials filed to date to conclude that Mr. Blittersdorf installed the MET tower for the purpose of assessing the site's suitability for a grid-connected wind turbine, either a residential net-metered turbine or a commercial generation facility. The purpose behind the construction of a MET tower is important for determining whether the Commission has jurisdiction over a tower because for jurisdiction to attach the tower must be "reasonably related" to a generation facility.<sup>13</sup>

I conclude that the information filed to date does not establish that Mr. Blittersdorf installed his MET tower for the purpose of gathering data in support of the future installation of any grid-connected wind turbines, either net-metered residential or commercial. I reach this conclusion because of the requirement that Mr. Blittersdorf be given the benefit of all reasonable doubts and inferences in assessing whether the Department is entitled to the summary judgment it seeks. To date, the information filed supports the relevant conclusions that: (1) Mr. Blittersdorf purchased his Kidder Hill Road property in October of 2010;<sup>14</sup> (2) at the time of the purchase, Mr. Blittersdorf intended to construct a cabin that would be powered by one or more small wind turbines;<sup>15</sup> (3) Mr. Blittersdorf erected a MET tower on his property in November and December of 2010 without first obtaining a certificate of public good from the Commission;<sup>16</sup> (4) he intended to use the MET tower to conduct prototype testing and to assess the wind resource at his property;<sup>17</sup> (5) the MET tower was not intended to be a temporary structure;<sup>18</sup> (6) in 2012, Mr. Blittersdorf installed two grid-connected, net-metered wind turbines

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<sup>12</sup> Blittersdorf response at 10-11.

<sup>13</sup> See, e.g., *Petition of UPC Wind Management*, Docket 6884, Order of 4/21/04 at 13-14. The Commission adopted the reasonably related standard rather than the more stringent "directly related" standard but determined that when a MET tower is a necessary precursor to a wind generation facility, both standards are met.

<sup>14</sup> Blittersdorf pf. at 2.

<sup>15</sup> Blittersdorf pf. at 2.

<sup>16</sup> Blittersdorf pf. at 2.

<sup>17</sup> Blittersdorf pf. at 4.

<sup>18</sup> Blittersdorf pf. at 4.

on his Kidder Hill Road property;<sup>19</sup> (7) the data collected from the MET tower was helpful to Mr. Blittersdorf in making the financial decision to install residential turbines;<sup>20</sup> and (8) at the time the MET tower was installed, Mr. Blittersdorf did not expect that the site would be suitable for a non-residential wind generation project.<sup>21</sup>

While I believe that it is possible to infer from the above facts that Mr. Blittersdorf had in mind the installation of net-metered turbines at the time he installed the MET tower, I do not believe that such an inference is appropriate in the context of a summary judgment motion where Mr. Blittersdorf is entitled to the benefit of all reasonable doubts and inferences. No information has been filed that directly demonstrates that Mr. Blittersdorf installed the MET tower for the purpose of assessing the viability of grid-connected turbines, net-metered or otherwise. Rather, the Department points to subsequent events – the installation of the two net-metered wind turbines and Mr. Blittersdorf’s pursuit of a commercial-scale wind generation project – in support of the inference that Mr. Blittersdorf’s installation of the MET tower was reasonably related to the development of a grid-connected generation facility. However, I conclude that relying on that information to draw an inference against Mr. Blittersdorf would run afoul of the requirements of Rule 56.

I am aware that the Commission recently granted a Department motion for summary judgment on the issue of liability in a similar case.<sup>22</sup> However, that case is distinguishable because of public statements made by the developer of the MET tower regarding his future intentions with respect to a grid-connected wind generation facility.<sup>23</sup> No such outwardly expressed intentions have been documented to date in this matter.

For the foregoing reasons, the Department’s motion for summary judgment on the issue of liability for constructing a MET tower subject to the Commission’s jurisdiction without first obtaining a CPG is denied.

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<sup>19</sup> Blittersdorf pf. at 9.

<sup>20</sup> Blittersdorf affidavit of 7/28/16 at 2.

<sup>21</sup> Blittersdorf pf. at 10.

<sup>22</sup> *Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the Construction and Operation of a meteorological Tower located in Swanton, Vermont*, Case No. 8561, Order of 2/22/18.

<sup>23</sup> Case No. 8561, Order of 2/22/18 at 20.

## 2. The Respondent's Motion

The respondent asserts that the Commission lacks jurisdiction over the MET tower under both §§ 246 and 248. According to the respondent, the Commission lacks jurisdiction under § 246 because the MET tower was intended to be permanent and § 246 only applies to temporary installations. The respondent further alleges that the evidentiary record does not support the conclusion that the tower was capable of collecting data on “atmospheric” conditions, as opposed to just wind speed and direction, a capability the respondent asserts is necessary for jurisdiction to attach under § 246. Lastly, the respondent asserts that jurisdiction does not attach under § 246 because there is no evidence that the MET tower was installed to determine the suitability of the site for the placement of a grid-connected wind turbine.<sup>24</sup>

The respondent also argues that jurisdiction did not attach under § 248 because that section applies only to generation or transmission facilities and neither of these categories encompasses construction of a MET tower. The respondent further contends that, prior to the enactment of § 246, the Commission exercised jurisdiction over MET towers under § 248 where a tower was a “necessary precursor” to a wind project and only if it was constructed for the sole purpose of evaluating the viability of a wind project. According to the respondent, he installed the MET tower to perform prototype testing and to assess the wind resource on his property, asserting that it was never considered a necessary part of any wind generation facility, residential or otherwise.<sup>25</sup>

The respondent claims that there are no genuine issues of material fact and the respondent is entitled to judgment as a matter of law.<sup>26</sup>

The Department argues that the MET tower is statutorily required to be temporary under the terms of § 246.<sup>27</sup> In further response to respondent's arguments, the Department states that the record supports the conclusions that the MET tower was used to record atmospheric conditions, including wind speed and wind direction, and that the data was used to determine the suitability of the site for multiple grid-connected wind turbines.<sup>28</sup>

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<sup>24</sup> Blittersdorf response at 3-7; supplemental response at 2-4.

<sup>25</sup> Blittersdorf response at 7-10; supplemental response at 5-6. Mr. Blittersdorf also filed a statement of undisputed material facts as well as challenges to the Department's statement of undisputed material facts.

<sup>26</sup> Blittersdorf response at 11.

<sup>27</sup> Department reply at 4-5.

<sup>28</sup> Department reply at 5-7.

Lastly, the Department argues that if jurisdiction over the MET tower is lacking under § 246, then jurisdiction can be asserted under § 248.<sup>29</sup>

I am denying the respondent's cross-motion for summary judgment because I am not persuaded by his jurisdictional arguments and because genuine issues of material fact exist.

Mr. Blittersdorf's argument regarding the permanent nature of the MET tower<sup>30</sup> and the inapplicability of § 246 is unavailing because, even accepting that assertion as true, it would not remove the tower from review under § 248. As the Commission recently explained in response to a similar argument:

In 2007, the Vermont Legislature adopted Section 246. Contrary to the arguments advanced by the Respondent, Section 246 did not create a new set of standards for meteorological towers, create a new jurisdictional basis for considering such towers, or oust the Commission from its jurisdiction to decide such tower applications pursuant to Section 248. Rather, Section 246 directed the Commission to create a new and more streamlined process for reviewing applications for CPGs for such towers "under the provisions of Section 248" and to approve such applications when the Commission "determines that the applicant has met all of the requirements of Section 248."<sup>31</sup>

In short, § 246 is intended to provide a more streamlined process for the review of temporary MET towers because their effects, like the towers themselves, are also temporary. Denominating a MET tower as "permanent" does not mean the developer's proposal is then exempt from review entirely, it simply means that it is not eligible for the streamlined process established by § 246 and must instead undergo the more rigorous review found in § 248. As a result, I reject the respondent's contention that summary judgment must be granted in his favor due to a lack of Commission jurisdiction.

Additionally, in examining whether a genuine issue exists with respect to material facts, I am obligated to afford to the Department the benefit of all reasonable doubts and inferences because the Department is the non-moving party in the context of the respondent's cross-motion for summary judgment. In so doing, I conclude that a genuine issue exists with respect to Mr. Blittersdorf's intent when he erected the MET tower based on the following Department

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<sup>29</sup> Department reply at 7-8. The Department also filed a statement of undisputed material facts as well as challenges to Mr. Blittersdorf's statement of undisputed material facts.

<sup>30</sup> The town's treatment of the MET tower as permanent for tax purposes is not controlling as to whether the tower actually was or was not a permanent structure for Commission purposes.

<sup>31</sup> Case No. 8561, Order of 2/22/18 at 19 (*quoting and citing* 30 V.S.A. §§ 246(b) and (c)(2)).

assertions: (1) Mr. Blittersdorf had formed the intent to erect residential scale turbines to power his cabin before he erected the MET tower;<sup>32</sup> (2) his intent in constructing the MET tower was at least in part to assess the wind resource at his property;<sup>33</sup> (3) Mr. Blittersdorf subsequently installed two net-metered turbines to serve the property;<sup>34</sup> (4) the data acquired from the MET tower proved useful in making a financial assessment when deciding whether to install the turbines;<sup>35</sup> and (5) Mr. Blittersdorf subsequently petitioned the Commission for authority to install a utility-scale wind generation project on his Kidder Hill property.<sup>36</sup>

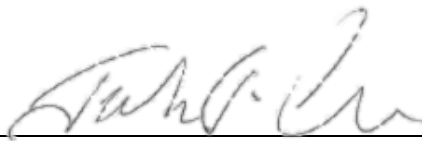
I also conclude that a genuine issue exists with respect to whether the MET tower constituted a “meteorological station” as that term is defined in 30 V.S.A. § 246 and whether the MET tower was a necessary precursor to the installation of the net-metered turbines on Mr. Blittersdorf’s property.<sup>37</sup>

For the foregoing reasons, the respondent’s cross-motion for summary judgment is denied.

The parties shall confer among themselves regarding mutually agreeable potential dates for a status conference and shall report any such dates to the Commission no later than close of business ten business days from the date of this order.

**SO ORDERED.**

Dated at Montpelier, Vermont this 22nd day of June, 2018.



John J. Cotter, Esq.  
Hearing Officer

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<sup>32</sup> Blittersdorf pf. at 2.

<sup>33</sup> Blittersdorf pf. at 4.

<sup>34</sup> Blittersdorf pf. at 9.


<sup>35</sup> Blittersdorf affidavit of 7/28/16 at 2.

<sup>36</sup> See PUC Case No. 17-3443-PET.

<sup>37</sup> See Department Response to Respondent’s Statement Of Undisputed Material Facts And Supplemental Statement Of Undisputed Material Facts at ¶¶18 and 10.

OFFICE OF THE CLERK

Filed: June 22, 2018

Attest:   
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Deputy 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](mailto:puc.clerk@vermont.gov))*

PUC Case No. 8585 - SERVICE LIST

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