STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

Investigation into Meteorological Tower at 700)
Kidder Hill Road in Irasburg, Vermont)

RESPONDENT'S OBJECTIONS TO
DEPARTMENT OF PUBLIC SERVICE RECOMMENDATION
AND MOTION TO STRIKE

In accordance with Public Utility Commission Rule 2.216(C), Respondent in the above-captioned matter, by and through the undersigned counsel, objects to the Department of Public Service's Recommendation re: Civil Penalty filed on December 20, 2019. The *Recommendation* is commentary, not evidence, and it cannot be used as a basis for Commission's findings and conclusions on a penalty under 30 V.S.A. § 30(a)(2) and (c) in this matter. In the alternative, Respondent moves to strike the facts and opinions contained in the *Recommendation* pursuant to V.R.C.P. 12(f).

I. Respondent's Objections Per Commission Rule 2.216(C)

Pursuant to the Vermont Administrative Procedures Act, 3 V.S.A. §§ 800 et seq., agency decisions in contested cases must rest on findings that are grounded in admissible evidence and matters officially noticed. 3 V.S.A. § 809(g); *In re Twenty-Four Vt. Utils.*, 159 Vt. 339, 349-50 (1992). Any evidence relied upon by the Commission must first be admitted into the evidentiary record. *In re Twenty-Four Vt. Utils.*, 159 Vt. at 350.

In Public Utility Commission proceedings, evidence in the form of testimony and exhibits must be prefiled in advance of the evidentiary hearing on a date set by the Commission. Pub. Util Comm'n R. 2.213. Thereafter, parties objecting to the admissibility of the prefiled evidence must preserve their objections by filing them in writing with the Commission within the earlier of 30 days of filing or 5 days before the hearing. Pub. Util. Comm'n R. 2.216(C).

In this case, the parties agreed to a schedule, which the Hearing Officer adopted, that called for non-respondents' testimony by December 20, 2019. Prior to the deadline for prefiled testimony, on December 6, 2019, the Department supplemented its discovery responses, representing that it intended to call Edward McNamara, Director of Energy Policy and Planning for the Department, as a witness to testify on the penalty criteria applicable in this case. *DPS Supplemental Response to Blittersdorf First Set of Discovery Requests*, A.Resp:DPS.1-1-3 & A.Resp:DPS.1-1-4 (Supplemental) (Dec. 6, 2019).[1] Thereafter, on December 20, the Department did not, in fact, file testimony from Mr. McNamara, but instead submitted a document signed by Department counsel, entitled, "Department of Public Service's Recommendation Re: Civil Penalty" (*Dep't Recommendation*). As the record in this case reflects, no party prefiled testimony on the

[1] The Department's supplemental responses were not sworn as V.R.C.P. 33(a) requires. This glaring omission is ironic given the Department's position in this case that violations of law harm the credibility of the regulatory oversight process. Respondent expects the Department to remedy this omission when it supplements its December 6, 2019 *Supplemental Response to Questions 3 and 4 of Respondent's First Set of Discovery Requests* as required by V.R.C.P. 26(e).

penalty question on December 20, 2019; the Department's *Recommendation* is the only "evidence" that has been submitted in this phase of the proceeding.

Respondent objects to the Department's *Recommendation* because it is not sponsored by a qualified witness who will testify in person and under oath to the facts and opinions expressed therein. 3 V.S.A. §§ 809(g), 810; V.R.E. 702. For the Department's position to be the basis of Commission findings, it must be based on admissible prefiled evidence that is presented by a live witness at the evidentiary hearing provided for in the stipulated schedule. A "recommendation" signed by counsel that contains facts and opinions in support of a penalty is not admissible evidence that can be tested through cross examination at that hearing, a right afforded Respondent by law. 3 V.S.A. § 810(3); *see In re Hemco, Inc.*, 129 Vt. 534, 536 (1971) (concluding that it was not error to admit written statement read by witness under oath because witness was present at hearing and available for cross examination).

Below, Respondent addresses specific objections to the Department's statements and opinions on the penalty criteria in the order those statements and opinions appear in the *Recommendation*.

A. <u>The extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers.</u>

The Department addresses this criterion by opining that Respondent's action (1) deprived the Town of Irasburg and adjoining landowners their rights to advance notice

of Respondent's installation and an opportunity to participate in the permitting process and (2) diminished "the credibility of the regulatory oversight process," thereby "adversely affect[ing] the interests of utility customers." *Dep't Recommendation* at 1. The Department's *Recommendation* further "finds that the Respondent's violation caused harm but did not cause 'substantial harm," but still warrants a significant penalty. *Dep't Recommendation* at 2. These statements contain facts and opinions that should have been presented in prefiled testimony of a qualified witness who will appear at the schedule evidentiary hearing.

Although the Administrative Procedures Act allows the Commission to take official notice of the procedural requirements the Commission established to obtain a Section 246 certificate of public good (CPG), 3 V.SA. § 810, whether and to what extent the "credibility of the regulatory oversight process" was diminished by Respondent's conduct is a matter of opinion.[2] It is also a matter of opinion, or perhaps even mere conjecture, whether Respondent's met mast installation could somehow impact the interests of "utility customers" when the facility does not require and is not connected to a utility service under the Commission's jurisdiction. And finally, it is a matter of opinion on the extent of harm caused by Respondent's conduct.

[2] It is reasonable to believe that the "credibility of the regulatory oversight process" is actually diminished by, among other things, the length of time this case has been pending (4 years); the length of time it took the Hearing Officer to issue the first decision on summary judgment (2 years); the Hearing Officer's evolving theory of the case between summary judgment orders; and the fact that public's statutory representative in Commission proceedings has chosen not to prosecute its position on a penalty through prefiled testimony from a qualified expert witness, particularly after stating in discovery two weeks before filing its *Recommendation* that it would do so.

Opinion evidence is admissible and may be relied upon by the Commission if the evidence meets the requirements of V.R.E. 702. Rule 702 allows expert opinion evidence if it will assist the Commission in determining a fact in issue or otherwise understand other evidence admitted into the record. V.R.E. 702. For admission, the opinion evidence must be provided by a witness whose knowledge, skill, experience, education, or training qualify them to render the opinion. V.R.E. 702; *Investigation into: (1) petition of AARP, for the establishment of reduced rates for low-income consumers of Green Mountain Power Corporation and Central Vermont Public Service Corporation; and (2) as expanded to possibly include general applicability to all Vermont retail electric utilities*, Case No. 7335, Order of 5/5/2010. The Department offers no basis to admit the December 20, 2019 *Recommendation* into evidence under Rule 702 because there is no sponsoring witness whose qualifications can be evaluated for that purpose. As such, the Department's *Recommendation* for a "significant penalty" and its assertions that Respondent's action diminished "the credibility of the regulatory oversight process" and "adversely affected the interests of utility customers" is inadmissible opinion testimony that must be excluded from the record.[3]

Respondent further objects to the Department's assertion that Respondent's installation violated the rights of adjoining landowners in the absence of any evidence

[3] Respondent notes that the Department admitted in 2016 that it did not have any documents in its possession, custody or control that bear on whether Respondent's met mast installation substantially harmed or might have substantially harmed the public health, safety, or welfare or the interests of utility customers. *DPS Response to Blittersdorf First Set of Discovery Requests*, A.Resp:DPS.1-3-4 (Aug. 8, 2016).

on the existence of adjoining landowners or the location lands adjoining Respondent's Irasburg property in 2010 when the met mast was installed. Thus, the Department's *Recommendation* that the interests of adjoining landowners were harmed is a generalized assertion based on inadmissible speculation by the Department's counsel and it may not be used to support Commission findings on a penalty under 30 V.S.A. § 30(a)(2) or (c).

B. Whether the Respondent knew or had reason to know the violation existed and whether the violation was intentional.

The Department "finds that the record sufficiently indicates that Respondent had reason to know the violation had occurred," citing a variety of positions Respondent has held in the renewable energy industry. *Dep't Recommendation* at 2. Even if accepted as true, the facts about Respondent's work history set out in the Department's *Recommendation* are insufficient for the Commission to draw inferences about whether the Respondent "had reason to know" that his met mast could be subject to the Commission's jurisdiction. Whether someone with Respondent's work history should have known a Section 246 CPG was required for the met mast is a matter of opinion that is admissible only if it meets the requirements of Rule 702.

Respondent's CV, prefiled in 2015 as Exhibit DB-1, contains details about Respondent's roles and responsibilities that do not support the Department's suggested inferences and assumptions about what Respondent knew or should have known about met mast permitting in 2010. As clearly expressed on Respondent's CV, his business enterprises have been focused on manufacturing, research, product development, and

design, not utility regulation or met mast permitting. An expert witness is necessary to establish the foundation for what the Department contends someone with Respondent's work experience should have known about Vermont's met mast permitting regime in 2010.

Likewise, the Department's opinion about what actions Respondent should have taken prior to installing the met mast—i.e., undertaken a "reasonable investigation into basic regulatory requirements" or consult an attorney—is also subject to the requirement that a qualified expert witness render the opinion. V.R.E. 702. The witness and his opinion could be challenged on cross examination to reveal what advice the witness believes an attorney, the Department, or the Commission would have given Respondent if he undertook such due diligence, as well as the factual basis for that belief.

Cross examination would likely reveal that due diligence in consulting the Department or an attorney might not have made any difference. Indeed, the Department managed a grant for a program that installed met masts without Section 246 CPGs because the grant documents indicated that only local zoning would be required for those types of installations. *Prefiled Testimony of David Blittersdorf*, December 18, 2015, at 6; Exhibit DB-3 at 3 ("The towers are only temporary structures, so the permits are typically not difficult to obtain and are handled through the local governments such as the town zoning coordinator."). That met mast permitting under Section 246 has been uncertain since 2010 is further demonstrated by the Department's suggestion in this

proceeding *eight years later* to put the case on hold pending the resolution of an appeal in another dispute over the scope of Sections 246 and 248. *Status Conference Transcript*, Case No. 8585, 7/20/2018 at 4-5. In sum, the Department's *Recommendation* fails to meet the evidentiary standard for opinion evidence and deprives Respondent of his right to cross examination. Therefore, the *Recommendation* must be excluded from the evidentiary record.

C. <u>The length of time that the violation existed.</u>

On this criterion, the Department states that it "finds that this factor weighs in favor of a significant penalty," another matter of opinion that is inadmissible without a qualified witness. V.R.E. 702. Respondent thus also objects to the admission of this portion of the Department's *Recommendation* on that basis.

Respondent further objects on relevance grounds to the admission of the Department's statements that (1) "Respondent indicated the meteorological tower was upgraded with an AllEarth Renewables product in May of 2018[]", and (2) "There is no assertion by Respondent that the meteorological tower has been removed as of December 17, 2019." *Dep't Recommendation* at 3. These statements are not relevant to the Hearing Officer's determination on summary judgment that Respondent's violation arose from the temporary use of the met mast for jurisdictional purposes without a CPG. The Hearing Officer did not adopt with the Department's contention that Section 246 prohibits Respondent from maintaining the met mast on his property for other non-

jurisdictional purposes. *See Order Granting In Part Department's Motion For Summary Judgment And Denying Respondent's Cross-Motion For Summary Judgment* at 8 (Sep. 12, 2019) (hereinafter "*Second Summary Judgment Order*").

According to the Hearing Officer, Respondent's met mast installation was temporary for purposes of Section 246 because his use "for the purpose of determining his property's suitability for the installation of two net-metered residential wind turbines was temporary." *Second Summary Judgment Order* at 8. The Hearing Officer also determined that Respondent ceased using the met mast for jurisdictional purposes "when he ultimately made the decision" to install the residential wind turbines. *Id*. Therefore, evidence of Respondent's use of the met mast subsequent to his decision to install residential wind turbines is not relevant to this criterion and is inadmissible.[4] V.R.E. 401, 402.

Respondent also objects to the Department's "finding" at page 3 of its *Recommendation* that this criterion "weighs in favor of a significant penalty" because it is opinion evidence without a sponsoring qualified expert witness. V.R.E. 702.

D. <u>The deterrent effect of the penalty.</u>

Respondent objects to the admission of the Department's *Recommendation* pertaining to the deterrent effect of a penalty under Section 30(c)(5). The Department offers several

[4] If the Hearing Officer's interpretation of Section 246 is wrong, then evidence of Respondent's continuing and multiple uses of the met mast would be relevant to whether Respondent violated Section 246. Respondent does not waive his right to a hearing on that issue if the Commission ultimately rejects the Hearing Officer's proposed summary judgment order on that question.

opinions about how a civil penalty might deter future similar conduct. First, the Department opines that the "greatest" deterrent effect will result from a significant penalty in relation to the maximum penalty authorized by Section 30(c). *Dep't Recommendation* at 3. Second, the Department opines that a significant penalty is appropriate because Respondent "has significant experience in renewable energy development, prior experience before the Commission, and [he] had substantial opportunity to seek clarification as to the necessary regulatory permitting requirements for a meteorological tower." *Id*. Third, the Department "finds" that a penalty of $2,500 is "necessary to ensure the credibility of the PUC regulatory process with respect to Respondent's future actions and those of other developers." *Dep't Recommendation* at 4. Finally, the Department opines that the penalty "must ensure that Respondent and other similarly situated individuals are responsible for strict compliance with state law and Commission rules." *Id*. As opinion evidence, this entire section of the *Recommendation* is not admissible under V.R.E. 702 and must be excluded from the record.

II. Respondent's Motion to Strike

The facts and opinions in the Department's *Recommendation* should be stricken from the record because they are immaterial and impertinent having been filed without leave from the Hearing Officer or consent of Respondent or other parties. The procedural schedule adopted by the Hearing Officer with the Department's agreement provided an

opportunity to prefile testimony, not pre-hearing comments by counsel. *Order re: Schedule*, Case No. 8585, Order of 11/25/2019.

Under V.R.C.P. 12(f), the Commission may strike from any pleading any immaterial, redundant, impertinent or scandalous matters upon motion by a party. V.R.C.P. 12(f). The *Recommendation*'s facts and opinions are impertinent and immaterial because there is no basis in the governing procedural schedule for filing pre-hearing comments that are not testimonial in form or substance and cannot be tested on cross examination at the scheduled evidentiary hearing. By filing its opinions in this manner, the Department seeks to influence the outcome of this proceeding while simultaneously depriving Respondent of his statutory right to cross examine a witness on those opinions. Striking the contents of the Department's *Recommendation* from the record is an appropriate response to the Department's strategic decision to seek a particular outcome from the Commission in this case without offering a witness or any other evidence in support of that outcome.

CONCLUSION

The Commission may not lawfully consider the Department's December 20, 2019 *Recommendation* in rendering a decision in this case. The filing is not evidence that can be admitted into the record or relied upon by the Commission under any reasonable reading of the Vermont Administrative Procedures Act and Commission rules. Admitting the *Recommendation* over Respondent's objection is unduly prejudicial to Respondent and deprives him of the right to challenge the Department's position on

cross examination. For the foregoing reasons, Respondent objects to the admission of the *Recommendation* into the evidentiary record and alternatively moves to strike the contents of the *Recommendation* from the record in this proceeding.

By: _____

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Dated: January 6, 2020

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