STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO COMPEL RE RULE 30(B)(6) DEPOSITION

David Blittersdorf, Respondent in the above-captioned matter, by and through the undersigned counsel, moves for reconsideration of the Hearing Officer's Order Denying Motion to Compel issued on February 28, 2020. Respondent seeks reconsideration of its Motion to Compel because the Hearing Officer's order overlooked and misapprehended material issues of law and fact as set out below.

The order denying Respondent's Motion to Compel makes two findings that are not supported by evidence or the law. First, the order finds that the "time, effort, and resources to be expended in the deposition of a Department employee, particularly in the absence of testimony from a Department witness, is disproportionate to the recommended $2,500 penalty." Order at 4. There was no evidence submitted by the Department on the time, effort and resources it would expend to produce a witness for the limited scope at issue in Respondent's motion. In fact, the deposition transcript for Andrew Perchlik's deposition taken in 2016 in this matter pursuant to Rule 30(b)(6) shows that it lasted only about two hours. There is nothing before the Hearing Officer

except assertions to support the finding that compelling the Department to produce a witness (as the Department previously intended to do, and who would presumably be a Department employee) is in any way too time consuming, expensive, or disproportionate to the needs of the case.

Second, the potential penalty Respondent faces is not the $2,500 penalty that the Department recommends in its unsolicited and unscheduled penalty recommendation, but what the law allows the Commission to impose under 30 V.S.A. § 30(a)(2), which is far more than $2,500. Under Section 30(a)(2), the Commission may order a penalty of up to $10,000 if it finds that Respondent's violation "did not cause or was not likely to cause" substantial harm to "the public health, safety, or welfare, the interests of utility customers, the environment, the reliability of utility service, or the financial stability of the company." 30 V.S.A. § 30(a)(2). The potential penalty increases if the Commission finds that the violation "substantially harmed or might have substantially harmed" those interests. *Id*. § 30(a)(2). In that case, it may impose a penalty up to $40,000. *Id.* §§ 30(a)(2), (b).

Penalties increase even further if the Commission finds that Respondent's failure to remove the met mast is a continuing violation, as the Department's legal position on the requirements of 30 V.S.A. § 246 suggests. In the case of a continuing violation, Respondent faces potential additional fines of $10,000 per day, up to $100,000 or "one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company, or corporation in the preceding year." 30 V.S.A. § 30(b)(1) & (2). Thus,

Respondent's potential liability for the violation of Section 246 that the Hearing Officer found via a preliminary summary judgment recommendation is up to $100,000, an amount far greater than the burden to designate a witness on the three penalty topics listed in Respondent's deposition notice.

The Hearing Officer's determination that it is still questionable whether Respondent will be required to pay any penalty at all because his summary judgment decision is only provisional until the Commission reviews and adopts it, see Order at 4-5, weighs in favor, not against, allowing Respondent's Rule 30(b)(6) deposition on penalty topics to go forward. It is the uncertainty about what will happen when this matter is presented to the Commission for decision that makes it necessary for Respondent to ensure that his right to discover relevant information about a penalty is protected and vindicated now.

Respondent sought a ruling on the summary judgment issue by the Commission so that the remainder of the proceeding could be clear in scope and managed efficiently. Summary judgment for Respondent would have ended this proceeding altogether and denying summary judgment for the Department would have allowed a hearing on all issues. Thus, Respondent's effort to enforce his right to discovery that was granted to him in 2016 is one consequence of the Commission's decision to defer consideration of the cross motions for summary judgment.

The final point about what is at stake when considering whether it is reasonable to preclude Respondent from taking the Rule 30(b)(6) deposition is that Respondent is still

at risk for penalties under 30 V.S.A. §§ 30(a)(1) and 247 if the Commission rejects the Hearing Officer's summary judgment decision and enters summary judgment that 30 V.S.A. § 248 applies to Respondent's installation. *See Order Opening Investigation and Notice of Hearing*, Case No. 8585, Order of 9/23/2015 at 2. The Commission's decision to defer review of the Hearing Officer's summary judgment decision leaves this claim and potential associated penalties unresolved. A Rule 30(b)(6) deposition is appropriate given the open issues in this proceeding.

The Hearing Officer also misapprehended the Department's obligation to designate a witness pursuant to Rule 30(b)(6) in 2016 if it "intended to present testimony on the penalty amount when it responded to the deposition notice" in 2016. Order at 6. The Department had a legal obligation under V.R.C.P. 30(b)(6) to designate a representative to address those topics irrespective of whether it intended to file testimony, and the Hearing Officer's order cites no law to the contrary. Respondent relied upon the sworn statement by Department's counsel that it did not have a witness "at that time." To excuse the Department from its discovery obligation now because it "apparently decided it did not need to present a witness" will encourage bad faith discovery practice and more litigation.

This case is not at all like the case cited by the Hearing Officer, where the Department filed testimony and a party sought a Rule 30(b)(6) deposition on the same issues. There is no testimony filed in this case on the penalty issues. None. Respondent seeks Rule 30(b)(6) deposition testimony so exculpating evidence on the penalty issues

can be admitted at the evidentiary hearing without a sponsoring witness. V.R.C.P. 32(a)(2). The Department has the opportunity to make objections to specific questions just as in any other deposition and the admissibility of the evidence can be decided at the hearing when it is offered. V.R.C.P. 30(c). That was the obvious intent of the Hearing Officer's 2016 ruling on the Department's 2016 Motion to Quash and for Protective Order; it was not to give the Department another chance to prevent the deposition from going forward altogether.

The order denying Respondent's Motion to Compel must also be reconsidered and reversed because no consideration was given to the law on waiver of work product privilege. See, e.g., *United States v. Nobles*, 422 U.S. 225, 239 (1975); *Mitre Sports Int'l, Ltd. v. HBO, Inc.*, 304 F.R.D. 369, 371 (S.D.N.Y. 2015); *Trudeau v. N.Y. State Consumer Prot. Bd*, 237 F.R.D. 325, 339 (N.D.N.Y 2006); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 184 F.R.D. 49, 54 (S.D.N.Y. 1999); *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993). *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 278 (S.D.N.Y. 1995); *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87 (E.D.N.Y. 1981). The order does not distinguish this case from the cited case law or even acknowledge the existence of V.R.E. 510, which expressly addresses the issue of work product waivers.

To the extent the Hearing Officer did review the case law to reach his conclusion that "filing a complaint in civil action alleging the elements of a cause of action" would not waive work product or attorney client privilege, he misapprehended that case law.

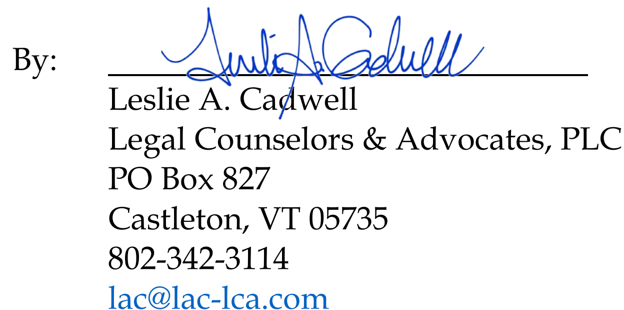
The law is precisely what the Hearing Officer says that it is not. Waiver can occur by filing a complaint that puts protected information at issue that is needed for the opposing party's defense. *See Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 502, 521 (Fed. Ct. Claims 2009) (explaining that waiver can occur if: "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense."). Even the assertion of an affirmative defense can waive a privilege. *Id.* at 522. At a minimum, the case law shows that a court faced with the question of waiver must do more than dismiss it out of hand as the Hearing Officer did here; an analysis of the applicability of the work product doctrine to specific items is required, as are the facts and circumstances of the waiver. The order denying Respondent's Motion to Compel is based on an incorrect interpretation of the law and should be reconsidered and reversed.

Finally, the Hearing Officer's decision violates Respondent's right to due process by deciding in advance of an evidentiary hearing what evidence the Hearing Officer wants to consider in deciding a penalty. The order states that the information Respondent seeks "is not of significant importance to resolving the issue at hand" because the case can "be resolved based on the facts that have already been presented in this proceeding." Order at 7. The Hearing Officer goes so far as to say that all relevant

information is in Respondent's possession. Order at 5. These statements are inconsistent with the procedural posture of this case as there are no facts that have already been presented in this proceeding because no evidentiary hearing has been held. There is a preliminary summary judgment decision on different issues, not on the issue of penalty or the factors that go into determining one. In addition, without discovery, it is unclear how the Hearing Officer knows that the Department does not possess any evidence that is relevant to the penalty issues before the Commission, other than relying on the Department's assertions. If the Hearing Officer has already decided what record he wants in support of an outcome, Respondent has not been afforded the right to a fair and impartial hearing as required by the Vermont Administrative Procedures Act, 3 V.S.A. § 809, or the Constitutions of the United States and the State of Vermont.

In sum, there is no evidence to support the Hearing Officer's findings to deny Respondent a Rule 30(b)(6) deposition on the penalty topics listed in his June 2016 deposition notice. The law supports Respondent's request, but most of all, fairness and due process dictate that Respondent have his opportunity to discover relevant information that may be used in his defense at hearing.

By:



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