

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

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

Order entered: 02/23/2021

**ORDER CLARIFYING SUMMARY JUDGMENT RULING,
OVERRULING OBJECTION, AND ESTABLISHING EVIDENTIARY HEARING GUIDELINES**

I. INTRODUCTION AND BACKGROUND

On September 12, 2019, I issued a summary judgment order finding that the respondent, David Blittersdorf (“Mr. Blittersdorf” or “Respondent”), violated the provisions of 30 V.S.A. § 246 by constructing a temporary meteorological (“MET”) tower without first obtaining a certificate of public good (“CPG”). Because that order dealt only with the question of liability, it was necessary to establish a process to determine the amount of a civil penalty to be imposed for the violation.

On October 29, 2020, I issued an order informing the parties that I would be scheduling an evidentiary hearing to be held via video conference to determine the amount of the penalty to be imposed for the violation identified in the summary judgment order (the “penalty hearing”).

On December 14, 2020, I issued a procedural order setting March 18, 2021, as the date of the penalty hearing and establishing a process for determining the identity of witnesses to be called at the penalty hearing. The order also set February 1, 2021, as the deadline for Mr. Blittersdorf to file evidentiary objections to the admissibility of a list of documents that the Department has stated it intends to offer into the evidentiary record of this proceeding. All of the documents identified by the Department had been previously filed in this case by Mr. Blittersdorf.

On February 1, 2021, Mr. Blittersdorf filed an objection to the December 14 order’s requirement that he file evidentiary objections.

On February 8, 2021, the Department of Public Service (“Department”) filed its response to Mr. Blittersdorf’s objection.

On February 10, 2021, the Department made a second filing seeking clarification of Mr. Blittersdorf's obligations under the December 14 order with respect to serving a subpoena on Department employee Andrew Perchlik.

On February 11, 2021, Mr. Blittersdorf filed a response to the Department's filing of February 10.

In today's order I:

- Provide clarification of the scope of my ruling in the September 12, 2019, summary judgment order.
- With two exceptions that I explain below, overrule Mr. Blittersdorf's February 1 objection and determine that Mr. Blittersdorf has waived his right to raise any further objections to the documents listed by the Department in its filing of November 24, 2020.
- Explain that Mr. Blittersdorf waived his right to present further evidence on the question of his liability under 30 V.S.A. §§ 246 and 248 for the operation of a temporary meteorological station as described in the summary judgment decision issued on September 12, 2019.

In an order issued on February 17, 2021, I addressed the status of a potential subpoena to be served on Mr. Perchlik and therefore do not address it here.

II. DISCUSSION

1. Scope of Summary Judgment Ruling

On September 12, 2019, I issued the summary judgment order. In that order, I determined that:

Mr. Blittersdorf installed a temporary meteorological station on his property to determine the suitability of that location for a grid-connected, residential, net-metered wind generation facility. Therefore, Mr. Blittersdorf's actions were subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 246, and the Department of Public Service is entitled to judgment as a matter of law on the question of Mr. Blittersdorf's liability for his failure to obtain a CPG prior to installing the station.¹

¹ Case No. 8585, Order of 9/12/19 at 15.

On September 8, 2020, Mr. Blittersdorf filed comments stating that the “preliminary summary judgment decision leaves several legal questions open, such as the applicability of 30 V.S.A. § 248 to Respondent’s installation and whether the scope of the Commission’s authority under 30 V.S.A. § 246 empowers it to order Respondent to remove the facility from his property.”² As a result, Mr. Blittersdorf has in part stated his intent to subpoena Mr. Perchlik to examine him on “matters relevant to Respondent’s liability under 30 V.S.A. §§ 246, 248 and 30(a)(2) and the penalty factors applicable thereto.”³

In issuing the September 12, 2019, summary judgment order, it was not my intent to leave unresolved the questions raised by Mr. Blittersdorf’s September 8, 2020 comments.

With respect to his question as to whether liability for his actions might exist under Section 248, the summary judgment order stated that the portion of the Department’s motion for summary judgment seeking a finding of liability under Section 248 was denied.⁴ To the extent the summary judgment order was not clear, I write today to clarify that I intended the order to convey my conclusion that, based on the Vermont Supreme Court’s decision in the Belisle MET tower case,⁵ Commission jurisdiction does not attach under Section 248 to the installation of a temporary meteorological station installed to determine the suitability of a location for a grid-connected wind generation facility. In those circumstances, Commission jurisdiction attaches only under Section 246.

With respect to Mr. Blittersdorf’s question about the Commission’s authority under Section 246 to direct him to remove the MET tower now that it is no longer being used to temporarily assess the suitability of his property for a grid-connected wind turbine, I intended the summary judgment order to answer that question in the negative. The analysis underlying my finding of liability was based on the Vermont Supreme Court’s reasoning that “[a] meteorological tower’s role—gathering data—concludes” before the installation of a grid-connected wind turbine.⁶

The summary judgment analysis stated:

² Blittersdorf comments dated 9/8/20 at 1.

³ Blittersdorf comments dated 11/24/20 at 3.

⁴ Case No. 8585, Order of 9/12/19 at 1.

⁵ *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, 210 Vt. 27, 210 A.3d 1230 (“*Meteorological Tower*”).

⁶ *Meteorological Tower*, 2019 VT 20, ¶ 20, n.5.

Mr. Blittersdorf's meteorological station ceased gathering data for the purpose of assisting his decision to install net-metered wind turbines on his property when he ultimately made the decision to proceed with their installation.

In other words, their wind-resource-assessment purpose terminated with the installation of the turbines. Mr. Blittersdorf points to his continued usage of the tower as a support structure for testing prototypes of various instruments as evidence that the tower is a permanent structure. I find that his continued usage of the tower for prototype testing is not material to the question of whether the tower was temporarily used as a meteorological station under Section 246.⁷

To the extent the summary judgment order was not clear on this point, I write today to clarify that I intended to convey my conclusion that, under the circumstances of this case, the Commission's jurisdiction under Section 246 attached at the time Mr. Blittersdorf began using the tower to assess the wind resource at his property for the possible installation of one or more grid-connected turbines and ceased at the time Mr. Blittersdorf abandoned that use.

As I stated in my order dated October 29, 2020, I view these two questions as largely legal and driven by the Vermont Supreme Court's decision in *Meteorological Tower* and noted that I would directly address them in my overall proposal for decision in this matter. However, given the ongoing inability of the parties to arrive at consensus on what materials are relevant to the penalty hearing on March 18, and in the interest of judicial economy, I have decided to clarify for the parties the intended scope of my ruling in the September 12, 2019, summary judgment order. I will ensure that my proposal for decision is more direct on these points than was the summary judgment order.

Lastly, as I noted in the summary judgment order, after the penalty phase of this proceeding, I will issue a proposal for decision that incorporates the findings and analysis from the summary judgment order on the issue of liability. At that time, the parties will have the opportunity to file comments with and request oral argument before the Commission to challenge not only any penalty amount that I recommend, but also any of the proposed findings and conclusions on liability presented in the summary judgment order, as clarified in today's order.⁸

⁷ Case No. 8585, Order of 9/12/19 at 8.

⁸ Case No. 8585, Order of 9/12/19 at 2, n.2.

2. Mr. Blittersdorf's February 1 Objection

In the December 14, 2020, order I noted that the Department had provided a list of the documents that it intended to offer into evidence at the penalty hearing. I also stated that “[I]f Mr. Blittersdorf intends to object to the admission of any of those documents into the evidentiary record, he must file his objections and the reasons for those objections in writing no later than Monday, February 1, 2021.”⁹

On February 1, 2021, Mr. Blittersdorf, rather than filing specific evidentiary objections to the documents that the Department intends to offer into evidence at the March 18 hearing, instead filed an objection to the requirement in the December 14 order that he file those objections at all.¹⁰ According to Mr. Blittersdorf, the December 14, 2020, order “turns the governing procedural schedule and the contested case procedures on their head” by “[e]xcusing the Department from its obligation [to] prefile evidence in support of its case” and requiring Mr. Blittersdorf “to file objections to evidence for which the Department has never made an offer of proof.”¹¹ Mr. Blittersdorf contends this leaves him “to guess as to the basis for the Department’s evidentiary offer” and is “unreasonable, unfair, and incompatible with the procedural schedule developed in accordance with the Commission’s rules on prefilings evidence and interposing objections thereto.”¹²

Mr. Blittersdorf objects to the requirements of the December 14, 2020, order because they would:

require Respondent to comb through each statement or fact in each of the documents that the Department wishes to offer into evidence at a hearing without a witness and with no offer of proof as to the purpose, relevance, and admissibility of the statement. Respondent’s counsel would have to guess as to the rationale for offering [each] statement or fact at issue.¹³

Mr. Blittersdorf characterizes the requirements of the December 14 order as “unprecedented and prejudicial.” Mr. Blittersdorf “objects to having to sift through the facts and statements in the documents” identified for admission by the Department without the Department

⁹ Case No. 8585, Order of 12/14/20 at 3.

¹⁰ Blittersdorf objection dated February 1, 2021 (the “Blittersdorf objection”).

¹¹ Blittersdorf objection at 2.

¹² *Id.*

¹³ Blittersdorf objection at 5.

“having to produce a sponsoring witness to explain the purpose and relevance of the evidentiary offer.”¹⁴

The Department argues that Mr. Blittersdorf’s filing “does not provide specific objections to any of the documents the Department is seeking to admit.”¹⁵ The Department describes Mr. Blittersdorf’s filing as “unresponsive” and “is instead an objection to the Order itself.”¹⁶ The Department contends that, as a result of the nature of his February 1 filing, Mr. Blittersdorf missed the deadline for him to file objections to the Department’s proposed evidence.¹⁷

Mr. Blittersdorf’s objection is misplaced. The December 14 order directed him to file evidentiary objections to the specific documents identified by the Department for admission into the record. The documents identified by the Department were previously filed in this matter by Mr. Blittersdorf and many were in part relied on by both parties in their summary judgment filings. Rather than raise specific evidentiary objections to the documents he himself filed, with the exception of giving a few examples, Mr. Blittersdorf instead objected to the requirement that he raise evidentiary objections at all because doing so without a sponsoring witness from the Department would require him to undergo a fact-specific review of the documents in question.

There is nothing unusual about a party to a Commission proceeding having to review in detail a significant volume of documents in the form of testimony and exhibits in order to raise objections to their admissibility under Commission Rule 2.216(C). Therefore, I find no merit in Mr. Blittersdorf’s claim that it is inappropriate for him to review the documents in question. His claim has even less support when one considers that, with the exception of objections to discovery requests drafted by his counsel, Mr. Blittersdorf was actually the author of all the documents in question.

I also find little merit in Mr. Blittersdorf’s contention that he is unfairly prejudiced by the lack of a sponsoring witness from the Department. The Department has made clear that it

¹⁴ Blittersdorf objection at 5-6.

¹⁵ Department response at 1.

¹⁶ *Id.*

¹⁷ *Id.* The Department also stated that, without waiving its current challenges to Mr. Blittersdorf’s failure to meet the objection deadline established by the December 14 order, the Department would update the list of documents it seeks to offer into evidence by identifying with specificity the discovery responses from Mr. Blittersdorf that it will offer at the March 18 penalty hearing. The Department indicated that it would file its revised list by February 22, 2021. The Department did not file its updated list as of the issuance of this order. I encourage the Department to update its list of documents as described in its February 8 filing as soon as possible, but in no event later than March 5, 2021.

intends to call Mr. Blittersdorf as a witness at the March 18 hearing to authenticate each of the documents in question, a process that is needed only because Mr. Blittersdorf refuses to stipulate to the admission into evidence of his own prefiled testimony, exhibits, and responses to information requests.

The Department has also made clear that it views the documents in question as containing admissions by Mr. Blittersdorf that are relevant to this case. Rather than address this contention with specific evidentiary objections, Mr. Blittersdorf objects to the process set forth in the December 14 order.¹⁸ I again find little merit in Mr. Blittersdorf's complaint when the Department's position on these various documents has been made abundantly clear during the course of this proceeding. The Department relied on at least some of those documents in making its summary judgment case for why Mr. Blittersdorf should be liable for his failure to obtain a certificate of public good before constructing his meteorological station and again when the Department filed its penalty recommendation in December of 2019.

I do make two exceptions to my ruling and sustain Mr. Blittersdorf's "objection" to the admission of his responses to question 4 of the Town of Irasburg's First Set of Discovery Requests dated February 5, 2015, and question 1 of the Town of Irasburg's Second Set of Information Requests dated March 16, 2016.¹⁹ On their face, I am unable to see the relevance of these two questions to the matter at hand.

3. Limits on Evidence Offered Under 30 V.S.A. §§ 246 and 248

In his filing of November 24, 2020, Mr. Blittersdorf stated his intent to examine Mr. Perchlik on "matters relevant to Respondent's liability under 30 V.S.A. §§ 246, 248 and 30(a)(2) and the penalty factors applicable thereto."²⁰ While I agree that Mr. Blittersdorf may introduce factual evidence related to Section 30 and the penalty factors described in that section, Mr. Blittersdorf will not be allowed an opportunity to introduce evidence beyond that which he has already filed regarding his liability under Sections 246 or 248 for operating a temporary

¹⁸ Mr. Blittersdorf also waited more than six weeks to make his objection to the process, waiting until the afternoon of the deadline for him to file his evidentiary objections before making known his objections to the process established by the December 14 order.

¹⁹ I place the term "objection" in quotation marks because Mr. Blittersdorf did not specifically object to the admission of these two discovery responses, but merely gave them as examples of what he calls the "absurdity" of the requirement that he raise evidentiary objections as described in the December 14 order.

²⁰ Blittersdorf comments dated 11/24/20 at 3.

meteorological station, all as described in the September 12, 2019, order on summary judgment. Moreover, given the clarification described in today's order on the scope of the September 12, 2019, summary judgment ruling, it is not clear what purpose such evidence would serve.

Further, earlier in this proceeding Mr. Blittersdorf waived his opportunity to present any additional evidence on these questions.

By agreement of the parties, this investigation was stayed pending the Vermont Supreme Court's decision in *Meteorological Tower*.²¹

On April 26, 2019, the Vermont Supreme Court issued its decision in *Meteorological Tower*.

On June 25, 2019, I convened a status conference to take recommendations from the parties on how to proceed in light of the Supreme Court's decision. The parties all agreed that I should reconsider their original cross-motions for summary judgment that I had previously denied on June 22, 2018.

After reconsidering those motions, I issued the September 12, 2019, summary judgment order and established a process for the penalty phase of this case. My decision on summary judgment and efforts to move this case through the penalty phase and to its conclusion have given rise to several disagreements between the parties.

My review of the case materials in light of the parties' current disagreements included a review of the transcript of the June 25, 2019, status conference.

During that status conference counsel for Mr. Blittersdorf stated:

So our position, I say ours, Mr. Blittersdorf's position is that the Vermont Supreme Court did provide some guidance for us in this case. It held that a temporary met mast is subject to 246 and not Section 248, and we think it further clarified the Commission's 248 jurisdiction, particularly in light of the footnote regarding the Solar City case that was decided the same day. ***The facts are unchanged*** except that Mr. Blittersdorf's property is now in current use.²²

Counsel for Mr. Blittersdorf continued:

If Mr. -- ***I don't think there's any set of facts that -- or any evidence*** that could demonstrate that Mr. Blittersdorf's met mast is temporary and subject to 246. I suspect the Department and ANR don't have any evidence to demonstrate otherwise. So the question is whether 248 applies. We don't think it does. 248

²¹ Case No. 8585, Order of 7/24/18.

²² Case No. 8585, tr. 6/25/19 at 4-5 (emphasis added).

only applies to electric generation facilities, and I think the Supreme Court clarified that site preparation and construction are the triggers and not some precursory search activity to the extent that one could consider Mr. Blittersdorf's erection of the met mast to be that.

So we suggest that the Hearing Officer reconsider the motions for summary judgment in light of the Supreme Court's decisions. If the Commission -- the hearing officer's recommendation and the Commission ultimately determines that Mr. Blittersdorf's met mast is subject to 248, we would take an appeal and let the Supreme Court decide that issue finally. This way it may keep the proceeding going longer, but *what it does do is eliminates the burden on the parties to undergo discovery and hearing. So that's what we would suggest.*²³

When prompted by the hearing officer with the following question, no party requested an opportunity to submit additional evidence:

If I understand then, the parties think that the facts that are necessary for the Commission to make a decision on summary judgment, the motions that are all filed, that everything is there and that no additional factual information is necessary, and that the law as described by the Vermont Supreme Court should be informing the Commission's decision; is that correct?²⁴

During the June 25, 2019, status conference, Mr. Blittersdorf made clear his belief that *Meteorological Tower* required a ruling in his favor on the previously denied summary judgment motions and that there could be no factual showing that would bring his meteorological station within the Commission's jurisdiction under either Section 246 or Section 248. However, now that Mr. Blittersdorf has received a summary judgment decision that found him liable for violating Section 246 when he erected his meteorological station for the temporary purpose of assessing the wind resource at his property for a grid-connected turbine, he appears to be seeking to supplement the evidentiary record on that question.

I do not find that this constitutes a sufficient reason to reopen the evidentiary record at the penalty hearing for supplementation on the question of Mr. Blittersdorf's liability as described in the September 12, 2019, summary judgment ruling, particularly in light of the clarifications in today's order. Mr. Blittersdorf took the position that there was no set of facts that could be presented that would cause him to incur liability under either Section 246 or Section 248, and that proceeding with reconsideration of the previously denied cross-motions for summary judgment would eliminate the burden of the parties having to go forward with discovery and an

²³ *Id.* at 5-6 (emphasis added).

²⁴ *Id.* at 6-7.

evidentiary hearing on the question of liability. When prompted by the hearing officer about the possible need to provide more factual information on the question of liability, Mr. Blittersdorf remained silent.

Given the clarifications in today's order and my review of the case materials in this matter, I find that Mr. Blittersdorf waived his opportunity to submit additional evidence on the question of his liability under either Section 246 or Section 248. In light of this finding, I have also reconsidered the statement in my October 29, 2020, order that the parties would be provided an opportunity to present evidence at the penalty hearing on the questions of potential liability under Section 248 and ongoing Commission jurisdiction under Section 246 "to the extent I am convinced that there is factual information that has not already been filed in this proceeding that is relevant and material."²⁵ Absent a compelling reason to the contrary presented at the penalty hearing, evidence offered at that hearing will be limited to factual evidence on the application of 30 V.S.A. § 30 to the violation found in the September 12, 2019, summary judgment order.

SO ORDERED.

Dated at Montpelier, Vermont this 23rd day of February, 2021.



John J. Cotter, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: February 23, 2021

Attest: 
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)

²⁵ Case No. 8585, Order of 10/29/20 at

PUC Case No. 8585 - SERVICE LIST

Parties:

Leslie A. Cadwell, Esq.
Legal Counselors & Advocates, PLC
P.O. Box 827
Castleton, VT 05735
lac@lac-lca.com

(for David Blittersdorf)

Eric B. Guzman
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov

(for Vermont Department of Public Service)

Dr. Robert R. Holland
Town of Irasburg
PO Box 88
4328 Route 14
Irasburg, VT 05845
kcf.rrh@gmail.com

(for Town of Irasburg)

James Porter, Esq.
Vermont Department of Public Service
112 State St
Montpelier, VT 05620
james.porter@vermont.gov

(for Vermont Department of Public Service)

Kane Smart, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
kane.smart@vermont.gov

(for Vermont Agency of Natural Resources)