STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

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

Order entered: 07/22/2021

ORDER DISMISSING CASE

In today's Order, a majority of the Vermont Public Utility Commission declines to adopt the proposal for decision issued by the hearing officer for the reasons discussed in Section VI, below, and dismisses this case.

The dissenting opinion of Chair Anthony Roisman is included after the majority decision.

PROPOSAL FOR DECISION

I. INTRODUCTION

On September 23, 2015, the Vermont Public Utility Commission ("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").

On September 12, 2019, I issued an order granting in part a motion for summary judgment filed by the Vermont Department of Public Service ("Department") on July 1, 2016 (the "liability order"). The liability order found that Mr. Blittersdorf violated the provisions of 30 V.S.A. § 246 by constructing a temporary MET tower to assess the suitability of his property for the installation of one or more grid-connected wind turbines without first obtaining a certificate of public good ("CPG"). In that order, I also denied a cross-motion for summary judgment filed by Mr. Blittersdorf on July 29, 2016.

In today's proposal for decision, I incorporate my proposed findings from the September 12, 2019, summary judgment liability order and recommend that the Commission adopt them and find that Mr. Blittersdorf violated 30 V.S.A. § 246 when he constructed his MET tower without a CPG. I further recommend that the Commission adopt the additional proposed

findings reported below and impose a civil penalty on Mr. Blittersdorf for that violation in the amount of $2,500 pursuant to the provisions of 30 V.S.A. § 30(a)(2).

II. PROCEDURAL HISTORY

On September 2, 2015, the Clerk of the 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 CPG authorizing construction of the meteorological tower.

On September 11, 2015, the Department filed comments stating that the respondent did not obtain a CPG from the Commission before 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 opening this investigation and directing the hearing officer[1] 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.[2]

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

Beginning on January 6, 2016, the parties engaged in various rounds of discovery among 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.[3]

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.

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[1] George Young, Esq. was appointed to serve as hearing officer in this proceeding. However, Mr. Young has since left the Commission and I was assigned to act as hearing officer following his departure.

[2] Case No. 8585, Order of 9/23/15.

[3] 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.

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.

On June 22, 2018, I issued an order denying both the Department's motion for summary judgment and the respondent's cross-motion for summary judgement.

On July 24, 2018, at the request of the parties, I issued an order staying this proceeding pending the decision of the Vermont Supreme Court in Case No. 2018-120, the appeal of Commission Docket 8561.[4]

The Vermont Supreme Court issued its decision in Case No. 2018-120 on April 26, 2019.[5]

On June 25, 2019, I convened a status conference. At the status conference, the parties requested that I reconsider the previous denials of the motion and cross-motion for summary judgment based on the information in the record and the Vermont Supreme Court's April 26, 2019, decision in Case No. 2018-120.

On July 3, 2019, I issued a series of information requests to the respondent. Mr. Blittersdorf filed his responses to those requests on July 19, 2019.

On August 2, 2019, the Department filed comments in reply to Mr. Blittersdorf's July 19 responses.

On September 12, 2019, I issued the liability order.

On September 24, 2019, Mr. Blittersdorf filed a "Motion for Commission Review and Reconsideration" of the Liability order.

On November 6, 2019, the Commission denied Mr. Blittersdorf's September 24 motion.

On January 28, 2020, Mr. Blittersdorf filed a motion to compel the Department to produce a witness for deposition and for recovery of the costs of the motion.

On February 7, 2020, the Department filed an opposition to Mr. Blittersdorf's January 28 motion as well as a motion for a protective order pursuant to V.R.C.P. 26(c).

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[4] Docket 8561 also involved the construction of a MET tower without a CPG. This case was stayed because the Vermont Supreme Court's decision in the appeal of Docket 8561 was expected to provide guidance to the parties and the Commission in resolving this matter.

[5] *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 (April 26, 2019) ("*Belisle*").

On February 28, 2020, I denied Mr. Blittersdorf's motion to compel and for recovery of costs.

On March 13, 2020, Mr. Blittersdorf filed a motion for reconsideration of my February 28 denial of his motion to compel.

On April 30, 2020, the full Commission denied Mr. Blittersdorf's motion for reconsideration.

After the parties to this proceeding were unable to agree on the process and scope of an evidentiary hearing to determine the amount of civil penalty to be imposed on Mr. Blittersdorf for the violation found in the liability order, I issued a series of procedural orders establishing the scope of the evidentiary hearing, a process for identifying witnesses and exhibits, and for parties to file objections in advance of the evidentiary hearing.

On March 18, 2021, I conducted an evidentiary hearing. Appearances were entered at the hearing by Eric Guzman, Esq. for the Vermont Department of Public Service; Kane Smart, Esq. for the Vermont Agency of Natural Resources; and Leslie Cadwell, Esq. for David Blittersdorf. However, while attorney Cadwell appeared on behalf of Mr. Blittersdorf, Mr. Blittersdorf himself did not attend or participate in the hearing even though it was Mr. Blittersdorf that requested the evidentiary hearing be held.

On April 9, 2021, the Department filed a brief setting forth its recommended penalty amount for the violation found in the liability order.

On April 23, 2021, Mr. Blittersdorf filed a response to the Department's brief.

On May 7, 2021, the Department filed a reply to Mr. Blittersdorf's April 23 response.

III. THE LIABILITY ORDER

Findings of Fact

On September 12, 2019, I issued the liability order. In that order I made the following findings of undisputed material fact based on the summary judgment record of the case as it existed at that point in time.[6] I incorporate these findings of fact from the liability order into this proposal for decision and recommend that the Commission adopt them in its final order.

[6] *See* Case No. 8585, Order of 9/12/19 at 6-7.

1. In October of 2010, Mr. Blittersdorf purchased his property in the Town of Irasburg, Vermont. David Blittersdorf ("Blittersdorf") pf. at 2; Department response to Respondent facts at ¶ 15.

2. When Mr. Blittersdorf purchased his property, he intended to build a cabin that would be powered completely by one or more residential wind turbines. Blittersdorf pf. at 2; Department response to Respondent facts at ¶ 15.

3. Mr. Blittersdorf installed a meteorological station on his property at 700 Kidder Hill Road in Irasburg in November and December of 2010. Respondent facts at ¶ 1; Department response to Respondent facts at ¶ 1.

4. On November 19, 2010, Mr. Blittersdorf transported the components for a 60-meter mast to the high point of his property. Respondent facts at ¶ 1; Blittersdorf pf. at 2; Department response to Respondent facts at ¶ 1.

5. On December 29, 2010, Mr. Blittersdorf raised the mast and completed its installation. Respondent facts at ¶ 1; Blittersdorf pf. at 2; Department response to Respondent facts at ¶ 1.

6. When Mr. Blittersdorf erected the mast, it was equipped with a lightning rod, multiple levels of wind direction vanes, wind speed anemometers, a heated anemometer, a data logger, and a solar panel located near the bottom of the mast. Blittersdorf pf. at 3, 4; Department response to Respondent facts at ¶ 18.

7. Mr. Blittersdorf erected his meteorological station with two purposes in mind. The first was assessing the wind resource on his property for the installation of one or more residential wind turbines to power his cabin via net-metering. The second was to engage in prototype testing in a private setting. Respondent facts at ¶¶ 3, 7; Respondent discovery response A.DPS:Resp.l-l; Department response to Respondent facts at ¶ 3.

8. At the time he installed the meteorological station, Mr. Blittersdorf was considering a residential turbine installation. Respondent facts at ¶ 7; Department response to Respondent facts at ¶ 7.

9. When Mr. Blittersdorf erected the meteorological station, he had no plans to take it down. Respondent facts at ¶ 2; Department response to Respondent facts at ¶ 2.

10. The prototype testing being performed by Mr. Blittersdorf requires the collection of long-term data. Respondent facts at ¶ 3; Department response to Respondent facts at ¶ 3.

11. The mast that Mr. Blittersdorf erected in December of 2010 is still in place and is being used to continue prototype testing. Respondent's answers to hearing officer information requests at 1-3.

12. The data collected from the meteorological tower was helpful to Mr. Blittersdorf in making the financial decision to install his residential wind turbines. Respondent facts at ¶ 10.[7]

13. Mr. Blittersdorf did not obtain a CPG from the Public Utility Commission before installing his meteorological station. Department facts at ¶ 5; Blittersdorf pf. at 4-5.

14. On January 5, 2012, Mr. Blittersdorf was issued CPG #NM-1771, authorizing the installation of two net-metered wind turbines to be interconnected with the Vermont Electric Cooperative, Inc. distribution system. Department facts at ¶ 6;[8] Respondent markup of Department facts at ¶ 6.

15. In 2012, Mr. Blittersdorf installed two net-metered wind turbines at his Irasburg property with a combined capacity of 8.55 kW. Department facts at ¶ 7; Blittersdorf pf. at 9; Respondent markup of Department facts at ¶ 7.

16. Mr. Blittersdorf did not consider his meteorological station to be a part of his residential turbine installation. Respondent facts at ¶ 12; Department response to Respondent facts at ¶ 12.

Discussion

In the liability order I determined that the Mr. Blittersdorf violated 30 V.S.A. § 246 when he installed a meteorological tower on his property that was: (1) temporary; and (2) used to assess the suitability of his property for the installation of two grid-connected, net-metered wind turbines without first obtaining a CPG.[9] I incorporate the analysis from the liability order into this proposal for decision and recommend that the Commission adopt it in its final order.

Neither the liability order nor this proposal for decision recommend that the Commission find that Mr. Blittersdorf's failure to obtain a CPG also constituted a violation of 30 V.S.A.

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[7] The Department asserts that this fact is disputed. *See*, Department response to Respondent facts at ¶ 10. However, the Department's response does not actually dispute the fact that the information gathered at the station was helpful to Mr. Blittersdorf's financial decision to install his turbines. Rather, the Department says the data was also used to assess the suitability of the site for the turbines.

[8] The Department's statement of undisputed material facts incorrectly identifies the issue date of the CPG as January 1, 2012. However, it correctly cites the date of the order approving the CPG as January 5, 2012.

[9] *See* Case No. 8585, Order of 9/12/19 at 7-14.

§ 248.[10] In *Belisle*, the Vermont Supreme Court clarified that 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, the Court concluded that Commission jurisdiction attaches only under Section 246. Therefore, my recommendation in this proposal for decision is that the Commission find, consistent with the Supreme Court's decision in *Belisle*, that Mr. Blittersdorf's actions constituted a violation of 30 V.S.A. § 246.

This proposal for decision also does not recommend that the Commission find that it has continuing jurisdiction over the tower located on Mr. Blittersdorf's property now that it is no longer being used for the purposes described in 30 V.S.A. § 246.

In the liability order I found that Mr. Blittersdorf had two intended uses at the time he erected the tower on his property. The first was assessing the wind resource on his property for the installation of one or more residential wind turbines to power his cabin via net-metering. The second was to engage in long-term prototype testing in a private setting.[11] Per the Supreme Court's decision in *Belisle*, the first purpose — assessing the wind resource on his property for the installation of grid-connected turbines — ceased at the time that Mr. Blittersdorf erected his two net-metered turbines even though his second purpose —prototype testing — continued.[12]

If Mr. Blittersdorf's sole purpose for the tower at the time he installed it had been to assess the wind resource at his property for grid-connected turbines, I believe the Commission would have authority under Section 246 to direct that it be removed.[13] However, based solely on the unique circumstances of this case — that is the existence of Mr. Blittersdorf's second purpose for the tower *at the time he installed it* — I recommend that the Commission find that its authority to order removal of the tower existed only until the time Mr. Blittersdorf's wind resource assessment activities concluded. To be clear, this analysis does not affect the

[10] A violation of Section 248 subjects a respondent to potentially higher civil penalty amounts than does a violation of Section 246.

[11] Case No. 8585, Order of 9/12/19 at 6.

[12] "A meteorological tower's role – gathering data – concludes" before the installation of a grid-connected wind turbine. *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 20 n.5.

[13] *See* 30 V.S.A. § 246(c)(2) ("Upon expiration of the certificate [of public good], the meteorological station and all associated structures and material shall be removed, and the site shall be restored substantially to its preconstruction condition.").

Commission's authority to impose the civil penalty that I recommend today because the actions on which that penalty is based occurred at a time when the MET tower was subject to the Commission's Section 246 jurisdiction.

IV. CIVIL PENALTY FINDINGS AND ANALYSIS

A. Findings

Based on the evidentiary record developed at the hearing held on March 18, 2021, I present the following proposed findings of fact to the Commission pursuant to 30 V.S.A. § 8(c).

1. Mr. Blittersdorf erected his 60-meter meteorological tower ("MET tower") on his property at 700 Kidder Hill Road in Irasburg, Vermont in November and December of 2010. Exh. DPS-1 at 3.

2. On November 19, 2010, Mr. Blittersdorf used a Bobcat loader to transport the components of the 60-meter tower to the high point of his property on Kidder Hill Road. Exhs. DPS-1 at 2; DPS-3 at 2.

3. On December 29, 2010, Mr. Blittersdorf erected the tower at the high point of his property in an open field. Exhs. DPS-1 at 2; DPS-3 at 1, 2, and 4.

4. Installation of the tower began with securing a metal plate with rods pounded into the ground. The plate serves as a sort of foundation for the tower. Exhs. DPS-1 at 3; DPS-3 at 5.

5. The tower was then raised using a gin pole and a 12-volt electric winch. Exhs. DPS-1 at 4; DPS-3 at 4.

6. Once the tower was raised it was stabilized by guywires and anchors, with three anchors at each guy point. Exhs. DPS-1 at 4; DPS-3 at 4.

7. Mr. Blittersdorf did not apply for a CPG for his MET tower. Exh. DPS-1 at 4-5.

8. Mr. Blittersdorf installed two net-metered wind turbines on his property in 2012, after receiving a certificate of public good for their installation on January 5, 2012. Exh. DPS-1 at 10.

9. Mr. Blittersdorf has extensive experience and expertise in the renewable energy field in Vermont. He founded NRG Systems, Inc. and AllEarth Renewables, Inc., formerly known as Earth Turbines. He is a former managing member of Georgia Mountain Community Wind, LLC and former majority owner of the Georgia Mountain Wind Project. His is also a current member

and former treasurer and president of the Board of Directors of Renewable Energy Vermont. Exh. DPS-1 at 2; exh. DPS-2 at 1-2.

10. In 2008, Mr. Blittersdorf was involved in Commission Case No. 6154 in which his companies, NRG Systems and Earth Turbines, sought the transfer of a CPG held by a third company, Endless Energy, for an existing MET tower ("*Endless Energy*"). Endless Energy had completed its data collection for a potential grid-connected wind project and NRG Systems and Earth Turbines wanted to use the existing tower to study the performance of wind measurement equipment. The Commission dismissed the petition for lack of jurisdiction because the MET tower, as used by NRG Systems and Earth Turbines, would not be directly related to a grid-connected wind project.[14] Exh. DPS-1 at 8.

11. In September of 2014, a representative of Mr. Blittersdorf's company, AllEarth Renewables, assisted in the completion of an amended application for a net-metering project to be located in Ferrisburgh, Vermont. By order dated August 31, 2017, the Commission found that the application that AllEarth Renewables helped prepare contained two misstatements of fact, and as a result imposed a penalty on the CPG holder in the amount of $10,000. Case No. 8692, Order of 8/31/17 ("Basin Harbor").[15]

12. At the time the false information was provided in the application, Mr. Blittersdorf was the president and CEO of AllEarth Renewables. Exh. DPS-1 at 2; exh. DPS-2 at 1.

13. By order of November 29, 2017, in Case No. 8734, the Commission imposed a civil penalty on Georgia Mountain Community Wind, LLC ("GMCW") in the amount of $7,500 for violating its winter operating protocol on March 11 and 14, 2016. Case No. 8734, Order of 11/29/17 ("GMCW 1").[16]

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[14] *Petition of Endless Energy Corporation for an Amended Certificate of Public Good, Pursuant to 30 V.S.A. Section 248(j), for Installation of Three Temporary Wind Measurement Towers on Little Equinox Mountain in Manchester, Vermont*, Case No. 6154, Order of 12/11/08.

[15] Pursuant to 3 V.S.A. § 810(4), I am taking official notice of the August 31, 2017, order in case No. 8692. Any party that wishes to contest the material being noticed must do so at the time that party files its comments on this proposal for decision. *See, also* 30 V.S.A. § 30(c)(7) (listing a respondent's record of compliance as a relevant factor in a Section 30 proceeding).

[16] Pursuant to 3 V.S.A. § 810(4), I am taking official notice of the November 29, 2017, order in case No. 8734. Any party that wishes to contest the material being noticed must do so at the time that party files its comments on this proposal for decision.

14. When the violations that were the subject of Case No. 8734 occurred, Mr. Blittersdorf was the managing partner and majority owner of GMCW. Exh. DPS-1 at 2; exh. DPS-2 at 1.

15. By order of February 1, 2018, in Case No. 17-2571-INV, the Commission imposed a civil penalty on GMCW in the amount $10,000 for violating its winter operating protocol on January 3, 2017. Case No. 17-2517-INV, Order of 2/1/18 ("GMCW 2").[17]

16. When the violations that were the subject of Case No. 17-2571-INV occurred, Mr. Blittersdorf was the managing partner and majority owner of GMCW. Exh. DPS-1 at 2; exh. DPS-2 at 1.

17. By order of April 11, 2018, in Case No. 8774, the Commission imposed a civil penalty on Mr. Blittersdorf in the amount $10,000 and accepted relinquishment of Mr. Blittersdorf's CPG #NM-1771 as full resolution of allegations that Mr. Blittersdorf violated that CPG by constructing one of two net-metered turbines in a location different from the location authorized in the CPG. No finding was made of wrongdoing by Mr. Blittersdorf. Case No. 8774, Order of 4/11/18 ("NM Turbines").[18]

B. The Legal Standard

Section 30(a)(2) of Title 30 of the Vermont Statues provides that:

> A person who violates a provision of chapter 3 or 5 of this title, except for the provisions of section 231 or 248 of this title, shall be required to pay a civil penalty after notice and opportunity for hearing. If the Commission determines that the violation substantially harmed or might have substantially harmed 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, the Commission may impose a civil penalty as provided in subsection (b) of this section. If the Commission determines that the violation did not cause or was not likely to cause such harm, the Commission may impose a civil penalty of not more than $10,000.00.

[17] Pursuant to 3 V.S.A. § 810(4), I am taking official notice of the February 1, 2018, order in case No. 17-2571-INV. Any party that wishes to contest the material being noticed must do so at the time that party files its comments on this proposal for decision.

[18] Pursuant to 3 V.S.A. § 810(4), I am taking official notice of the April 11, 2018, order in case No. 8774. Any party that wishes to contest the material being noticed must do so at the time that party files its comments on this proposal for decision.

In the liability order I determined that Mr. Blittersdorf violated the requirements of 30 V.S.A. § 246 when he failed to obtain a CPG before erecting a temporary meteorological tower to assess the suitability of his property for the installation of one or more grid-connected wind turbines. A violation of Section 246 brings Mr. Blittersdorf within the penalty provisions of 30 V.S.A. § 30(a)(2).

Subsection 30(c) identifies eight factors the Commission may consider in determining the amount of a civil penalty:

> (1) 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;
> (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
> (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
> (4) the length of time that the violation existed;
> (5) the deterrent effect of the penalty;
> (6) the economic resources of the respondent;
> (7) the respondent's record of compliance; and
> (8) any other aggravating or mitigating circumstance.

Based on the recommended findings above and the reasons discussed below, I recommend that the Commission impose a civil penalty on Mr. Blittersdorf in the amount of $2,500.

C. Analysis under Applicable Factors

1. 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.

The Department asserts that Mr. Blittersdorf's failure to apply for a CPG for his MET tower: (1) deprived adjoining landowners, nearby residents, and the Town of Irasburg of the right to receive notice of, and comment on, the MET tower before construction, and the opportunity to participate in the permitting process, and (2) adversely affected the interests of utility customers because the failure was unnecessarily burdensome and diminished the credibility of the regulatory process.[19] The Department contends that the harm from Mr. Blittersdorf's failure is

[19] Department brief at 1.

evident by itself because his avoidance of a statutory process resulted in the inability of the public, municipalities, and state agencies to participate in that process.[20] However, while the Department believes that Mr. Blittersdorf's failure resulted in harm to these interests, it does not believe the harm was substantial and the maximum penalty that the Commission can impose under Section 30(a)(2) is therefore $10,000.

Mr. Blittersdorf argues that there is no factual evidence in the record of this proceeding on which the Commission can make the finding proposed by the Department because the Department did not present any such evidence.[21]

In contested cases, the Commission's findings of fact "shall be based exclusively on the evidence and on matters officially noticed."[22] However, as the trier of fact the Commission is entitled to draw reasonable inferences from the facts in the record.[23]

The Commission has consistently determined that a failure to observe the regulatory oversight process results in a harm to that process and therefore to the interests of the public and utility customers.[24] The evidence of record demonstrates that Mr. Blittersdorf failed to apply for and obtain a CPG before erecting his MET tower and in doing so did not observe the regulatory requirements applicable to his actions. The Commission's regulatory process depends in large part on the cooperation of those it regulates. When regulated persons and entities ignore their responsibilities to that process, then the process cannot function as intended. A failure in the function of the regulatory process causes harm to the integrity and credibility of that process, and therefore to the interests of the public and utility customers. Reaching this conclusion is a

[20] Department reply at 3-4.
[21] Blittersdorf response at 8-10.
[22] 3 V.S.A. § 809(g).
[23] *In re Moody's Estate*, 115 Vt. 1, 9; 49 A.2d 562, 568 (1946) ("It is unnecessary to cite authority for the well recognized principle that the weight to be given the evidence, the conflicts and inconsistencies therein, and the fair and reasonable inferences to be drawn therefrom are for the trier of facts to decide.").
[24] *See, e.g.*, *Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the construction and operation of a meteorological tower in Swanton, Vermont*, Case No. 8561, Order of 9/11/19 at 5 (failure to apply for a CPG harms the regulatory process); *Investigation pursuant to 30 V.S.A. §§ 30 and 209 and Public Utility Commission Rule 5.110(D) into the accuracy of information supplied on an application for an interconnected group net-metered photovoltaic electric power system in Ferrisburgh, Vermont, filed by Beach Properties, Inc., d/b/a Basin Harbor Club*, Case No. 8692, Order of 8/31/17 at 10 (providing false information on a CPG application harms the regulatory process); and *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Newbury GLC Solar, LLC's certificate of public good issued in Case #17-4721-NMP*, Case No. 19-0734-INV, Order of 8/1/19 at 7-8 (providing false information on a CPG application harms the regulatory process).

reasonable inference to be drawn from Mr. Blittersdorf's failures and the Commission's experience and expertise in applying the requirements of Title 30.

While I recommend that the Commission find that Mr. Blittersdorf's failure to comply with the requirements of 30 V.S.A. § 246 caused harm to the regulatory process, I also recommend that the Commission find the harm to not be substantial, thereby limiting the penalty the Commission may impose under 30 V.S.A. § 30(a)(2) to $10,000. Within that statutory maximum, I recommend that the Commission weigh the identified harms in favor of a significant penalty.

2. Whether the respondent knew or had reason to know the violation existed and whether the violation was intentional.

The Department asserts that while the evidentiary record does not support a finding that Mr. Blittersdorf's violation of Section 246 was intentional or knowing, it does support a finding that Mr. Blittersdorf had reason to know that the violation existed. According to the Department, the record demonstrates that Mr. Blittersdorf has extensive knowledge and experience in the renewable energy field in Vermont that should have led him to inquire into whether Section 246 applied to his MET tower, and had he done so he would have learned that it did.[25] The Department also contends that Mr. Blittersdorf's reliance on the language in the grant agreement used in the anemometer loan program, the history of this case and a similar MET tower case, and his experience in *Endless Energy* do not excuse his failure to conduct due diligence into the regulatory requirements of his planned MET tower.[26]

Mr. Blittersdorf contends that he had no reason to believe that a CPG was required for his MET tower. Mr. Blittersdorf first argues that he had no reason to think Section 246 applied to his tower because he considered the tower to be a permanent structure, and Section 246 and the Commission's procedures for applying for MET tower CPGs[27] apply only to temporary MET towers. Mr. Blittersdorf contends that had he done due diligence or consulted an attorney about Section 246 he therefore would not have learned of the need to obtain a CPG. Mr. Blittersdorf further argues that his experience in the renewable energy field in Vermont actually supports his

[25] Department brief at 2.
[26] Department reply at 1-3.
[27] *Order establishing standards and procedures for issuance of a certificate of public good for a temporary meteorological station pursuant to 30 V.S.A. § 246*, Order issued March 9, 2010.

position because his experience in the anemometer loan program led him to believe that only local permits were required for MET towers.[28]

Second, Mr. Blittersdorf contends that the two orders on summary judgment in this case and the Department's request to stay this proceeding until the Vermont Supreme Court decided an appeal in a similar case indicate that there was uncertainty on the part of the regulators as to what was required by Section 246. Therefore, according to Mr. Blittersdorf, it cannot be inferred that he should have known what that statute required.[29]

Third, Mr. Blittersdorf asserts that the two differing summary judgment orders, the Vermont Supreme Court's partial reversal of the Commission's order in a similar case, and the Department's uncertainty in 2018 on how Section 246 should be applied, show that the law on MET tower permitting was not clear, and that constructive knowledge of the requirements should therefore not be imputed to Mr. Blittersdorf.[30] Mr. Blittersdorf also argues that his participation in *Endless Energy* does not support an inference that he should have known that his MET tower required a CPG under Section 246.[31]

Fourth, Mr. Blittersdorf states that his experience with permitting for grid-connected generation facilities does not support an inference that he would also have developed knowledge about permitting requirements for non-generation facilities.[32]

I recommend that the Commission find that Mr. Blittersdorf should have known that erecting his MET tower without a CPG was a violation of Section 246 and that the Commission weigh this factor in support of a significant penalty.

I make this recommendation in particular because I believe that Mr. Blittersdorf's reliance on *Endless Energy* is misplaced. His experience in that case actually compels the conclusion that either he should have known or should have inquired whether a CPG was

[28] Blittersdorf response at 2-4. The anemometer loan program supported the installation of MET towers in Vermont to assess the wind resource for the potential installation of small wind turbine installations. Exh. DPS-1 at 6. The grant agreement that was used in the anemometer loan program stated that permits for the meteorological towers used in the program were handled by local authorities. Exh. DPS-4 at 3.

[29] Blittersdorf response at 4-5.

[30] Blittersdorf response at 6-7.

[31] Blittersdorf response at 6-7.

[32] Blittersdorf response at 7-8.

required before erecting a MET tower to assess the wind resource for a grid-connected turbine, regardless of whether the turbine would be a utility-scale or a net-metered residential turbine.

In *Endless Energy*, Mr. Blittersdorf's companies, NRG Systems and Earth Turbines, filed a joint petition with Endless Energy Corporation seeking to transfer a CPG previously issued to Endless Energy for a MET tower located in Manchester, Vermont. Endless Energy originally sought the CPG for the MET tower to assess the wind resource at that location for the potential installation of a grid-connected wind turbine, and thus a CPG was required. At the time the joint petition was filed, Endless Energy had completed its data collection for its potential grid-connected turbine. NRG Systems and Earth Turbines represented that they would be using the existing tower not to assess the suitability of the wind resource for a possible grid-connected turbine, but to gather information about the performance of wind measurement equipment in extreme conditions.[33] Because the MET tower would not be related to a grid-connected turbine, it was not within the Commission's jurisdiction and the petition was therefore dismissed.[34]

Mr. Blittersdorf's reliance on *Endless Energy* is misplaced because the holding of that case was that a MET tower does not need a CPG provided it is not being used to assess the wind resource for a potential future grid-connected wind turbine. By contrast, if the MET tower is being used for such a purpose, then a CPG is required whether the potential grid-connected turbine is commercial or residential in application. The summary judgment record demonstrates unambiguously that Mr. Blittersdorf installed his MET tower with that purpose in mind. As a result, the lesson of *Endless Energy* was that a CPG was required for the installation of his MET tower for the purpose of assessing the wind resource for the potential installation of grid-connected residential turbines.

Mr. Blittersdorf's argument that *Endless Energy* took place under Section 248 rather than Section 246 is unavailing. At the time of *Endless Energy*, the Commission exercised jurisdiction over MET towers under Section 248 and viewed Section 246 as a procedural statute that simplified the process for MET tower CPG applications, not as a separate source of authority

[33] These two companies also represented their intent to install a wind turbine that would not be connected to the grid but that instead would be used to test turbine performance in extreme conditions. Because the turbine would not be grid-connected, it did not require a CPG. Case No. 6154, Order of 12/11/08 at 1.

[34] Case No. 6154, Order of 12/11/08 at 2.

over temporary MET towers.[35] The Commission's holding in *Endless Energy* was issued on December 11, 2008. Mr. Blittersdorf, who was involved in that case, erected his MET tower in December of 2010. Therefore, Mr. Blittersdorf's argument that inquiry into the regulatory status of his proposed project *at that time* would not have alerted him to the need for a CPG is without merit. Had he engaged in due diligence, he most certainly would have been told that a CPG was required. In short, *Endless Energy* would have caused a reasonable person in Mr. Blittersdorf's situation to have either retained the services of an experienced attorney or contacted the Department of Public Service to inquire as to whether a CPG for his MET tower was required and whether to seek a declaratory ruling from the Commission.[36]

I also find no support in Mr. Blittersdorf's arguments that the history of this case and the Vermont Supreme Court's decision in the *Belisle* case mean that he had no reason to know that a CPG was required for his MET tower. Mr. Blittersdorf erected his MET tower in 2010. The summary judgment orders in this case were issued on June 22, 2018, and September 12, 2019. The Vermont Supreme Court decided *Belisle* on April 26, 2019. These decisions could not have in any way influenced Mr. Blittersdorf's 2010 decision to erect his MET tower without first even making inquiry into the possible need for a CPG.

Mr. Blittersdorf has significant experience in the renewable energy field in Vermont, as demonstrated by both his prefiled testimony and resume. The record demonstrates that his experiences have brought him into contact with the regulatory process under Title 30 on several occasions. I believe that Mr. Blittersdorf's reliance on the content of the anemometer grant agreement supports a finding that he did not knowingly or intentionally violate Section 246 and recommend that the Commission should so find. However, when the grant agreement is viewed in the overall context of the evidentiary record, it does not rebut a finding that Mr. Blittersdorf

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[35] *See* Case No. 6154, Order of 12/11/08 at 2 ("The [Commission] has consistently held that if met towers are directly related to the future construction of generation facilities, they fall within the Commission's jurisdiction under § 248."); and *Application of Green Mountain Clean Energy, LLC, for authority, pursuant to 30 V.S.A. §§ 246 and 248, to install a temporary meteorological station in Bolton, Vermont*, Case No. 7671, Order of 10/15/10 at 1 (finding that the procedure authorized by Section 246 was sufficient because the application effectively addressed the substantive criteria of Section 248).

[36] *See Agency of Nat. Res. v. Persons*, 2013 VT 46, ¶¶ 14-19 (finding that ambiguity is not an absolute defense for civil violations, particularly when there is a process for getting clarity from an agency). "Based on the totality of facts, defendants had sufficient reason to know that the excavation work was prohibited without a permit or a conditional use determination. *At the very least, defendants should have sought the advice of ANR before commencing work*." *Id.* at ¶ 19 (emphasis added).

should have known that he needed to obtain a CPG before erecting a MET tower for the purpose of assessing the suitability of the wind resource at his property to support the installation of two grid-connected wind turbines.

I recommend that the Commission find that Mr. Blittersdorf should have known that his failure to obtain a CPG for his MET tower was a violation of Section 246 and that this factor weigh in favor of a significant penalty.

3. The economic benefit, if any, that could have been anticipated from an intentional or knowing violation.

While there is presumably an economic benefit from not having to go through the expense and time of a permitting process, the evidence in the record does not support a finding that Mr. Blittersdorf's violation was knowing or intentional. Therefore, I recommend that the Commission not weigh this factor either for or against Mr. Blittersdorf in arriving at a penalty amount.

4. The length of time that the violation existed.

Mr. Blittersdorf installed his MET tower on December 29, 2010. There is no direct evidence in the record specifying the exact date on which Mr. Blittersdorf ceased using the MET tower to assess the wind resource for his future net-metered turbines. However, the evidence does demonstrate that Mr. Blittersdorf erected two net-metered wind turbines in 2012 after receiving a CPG for their installation on January 5, 2012. Based on the reasoning in *Belisle* that the wind resource assessment ends before the installation of the subject turbines, Mr. Blittersdorf's assessment activity for his two turbines ceased in the later part of 2011. Therefore, the violation existed for approximately one year.

I recommend that the Commission weigh the length of the violation in favor of a significant penalty.

5. The deterrent effect of the penalty.

The Commission has previously found that a penalty in the amount of $2,500 was sufficient to deter violations of Section 246. Therefore, the Commission should find that the $2,500 penalty I recommend today is also sufficient to deter similar future violations.[37]

6. The economic resources of the respondent.

There is no evidence in the record regarding Mr. Blittersdorf's economic resources. Therefore, I recommend that the Commission not weigh this factor either for or against Mr. Blittersdorf in arriving at a penalty amount.

7. The respondent's record of compliance.

The Department states that it is not aware of any previous violations by Mr. Blittersdorf and therefore recommends that this factor should weigh neither for nor against Mr. Blittersdorf in assessing a penalty amount.[38]

Mr. Blittersdorf did not address this factor.

The record does not demonstrate any previous personal non-compliance by Mr. Blittersdorf in matters within the Commission's jurisdiction. However, a review of Commission precedent reveals three cases where business entities under his control or supervision were found to have violated their regulatory responsibilities. Additionally, there is one case where Mr. Blittersdorf was personally investigated for alleged violations of a CPG, but that case was resolved through a stipulation among the parties without any admission of wrongdoing or finding to that effect.

In *Basin Harbor*, an employee of Mr. Blittersdorf's company, AllEarth Renewables, signed an application for a net-metered solar facility to be located in Ferrisburgh, Vermont. By order dated August 31, 2017, the Commission found that the application that AllEarth Renewables helped prepare contained two misstatements of fact, and as a result imposed a penalty on the CPG holder in the amount of $10,000.[39] At the time the application containing

[37] *See* Case No. 8561, Order of 9/11/19.
[38] Department brief at 4.
[39] *Basin Harbor*, Case No. 8692, Order of 8/31/17.

false statements was prepared, Mr. Blittersdorf was the president and CEO of AllEarth Renewables.

In *GMCW 1* and *GMCW 2*, the Commission imposed $17,500 in fines against Georgia Mountain Community Wind for operating its project in violation of its winter operating protocol on three separate occasions.[40] At the time the three violations occurred, Mr. Blittersdorf was the managing partner and majority owner of Georgia Mountain Community Wind.

Lastly, Mr. Blittersdorf came under investigation in response to allegations that he constructed one of the two net-metered wind turbines he installed on his property in violation of his CPG by placing that turbine in a location that was not authorized by the CPG. While the case was ultimately settled before a final finding was reached on whether or not Mr. Blittersdorf did in fact violate the CPG, he opted to pay a significant penalty in the amount of $10,000 and to surrender the CPG and remove the two net-metered turbines from his property.[41]

While Mr. Blittersdorf was not found personally liable in *Basin Harbor*, *GMCW 1*, or *GMCW 2*, he did hold positions of significant responsibility in those entities at the time the violations noted above occurred. Therefore, I recommend that the Commission attribute some degree of responsibility for those violations to Mr. Blittersdorf when weighing the amount of civil penalty to impose.

Additionally, while the investigation against Mr. Blittersdorf in *NM Turbines*, Case No. 8774, was ultimately resolved through a stipulation that did not include any admission of wrongdoing by Mr. Blittersdorf, when taken in context with the other three cases discussed immediately above, it does call into question the seriousness of Mr. Blittersdorf's commitment to the regulatory process.

In summary, I believe Mr. Blittersdorf's record of compliance weighs against him in the determination of a civil penalty amount under Section 30.

8. <u>Any other aggravating or mitigating circumstance.</u>

The record does not contain evidence of any additional aggravating or mitigating circumstances to be applied in this case. Therefore, I recommend that the Commission not

[40] *GMCW 1*, Case No. 8734, Order of 11/29/17 (imposing $7,500 penalty for two separate violations) and *GMCW 2*, Case No. 17-2517-INV, Order of 2/1/18 (imposing $10,000 penalty for single violation).

[41] Case No. 8774, Order of 4/11/18 (accepting settlement proposal of parties).

weigh this factor either for or against Mr. Blittersdorf when assessing a civil penalty amount under Section 30.

D. The Recommended Penalty Amount

Based on the above factors, I recommend that the Commission impose a civil penalty under 30 V.S.A. § 30(a)(2) in the amount of $2,500.

I make this recommendation because it is supported by the analysis above and by the Commission's recent decision in the remand portion of *Belisle*. After being instructed by the Vermont Supreme Court that liability for the failure to obtain a CPG for a temporary MET tower arose solely under Section 246, and not both Sections 246 and 248, the Commission reassessed its earlier penalty analysis from its decision in Case No. 8561.[42] In the remand portion of the case, the Commission adjusted its penalty assessment from the original amount of $10,000 imposed under 30 V.S.A. § 30(a)(1) to the lower amount of $2,500 imposed under 30 V.S.A. 30(a)(2).[43]

After reviewing the record of this case under the factors of Section 30(c) and in light of the Commission's decision in *Belisle*, I am persuaded that it is appropriate for the Commission to impose the same $2,500 civil penalty on Mr. Blittersdorf that it imposed in *Belisle*.

V. CONCLUSION

For the reasons discussed above, I recommend that the Commission find that Mr. Blittersdorf violated the requirements of 30 V.S.A. § 246 when he failed to obtain a certificate of public good before erecting his MET tower on his property in Irasburg, Vermont. I further recommend that the Commission impose a civil penalty on Mr. Blittersdorf for this violation in the amount of $2,500.00.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

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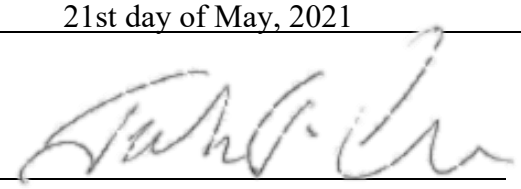
[42] *Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the construction and operation of a meteorological tower in Swanton, Vermont*, Case No. 8561, Order of 2/22/18 (imposing a $10,000 penalty on Travis Belisle for violating 30 V.S.A. §§ 246 and 248 by erecting a temporary MET tower without first obtaining a CPG).

[43] Case No. 8561, Order of 9/11/19.

Dated at Montpelier, Vermont this 21st day of May, 2021.



John J. Cotter, Esq.
Hearing Officer

VI. COMMISSION DISCUSSION

For the reasons discussed below, the Commission declines to adopt the hearing officer's proposal for decision. Specifically, we disagree with the hearing officer's legal conclusion that Mr. Blittersdorf violated 30 V.S.A. § 246 when he constructed his meteorological tower ("MET tower") without first obtaining a certificate of public good ("CPG"). We do, however, adopt all other aspects of the hearings officer's proposal for decision, including his proposed findings of fact. We note that our decision, while ultimately grounded in the language of Section 246, was a difficult one. We are concerned that the development of responsibly sited wind generation facilities in Vermont may actually become more complex in light of the applicable statutory provisions, as interpreted by the Vermont Supreme Court's decision in *Belisle*.[44]

We begin our discussion with some procedural background because it will be helpful to understanding our decision.

This investigation proceeded in two phases. The first phase examined whether Mr. Blittersdorf was liable under either 30 V.S.A. § 248 or 30 V.S.A. § 246 for installing a MET tower on his property in Irasburg without first obtaining a CPG from the Commission. Assuming the hearing officer determined that Mr. Blittersdorf was liable for his failure to obtain a CPG, the second phase would determine the recommended penalty amount to be imposed for that failure.

On September 12, 2019, the hearing officer issued an order granting in part a motion for summary judgment filed by the Vermont Department of Public Service (the "liability order"). The liability order found that Mr. Blittersdorf violated the provisions of 30 V.S.A. § 246 by constructing a temporary MET tower to assess the suitability of his property for the installation of one or more grid-connected wind turbines without first obtaining a CPG. In that order, the hearing officer also denied a cross-motion for summary judgment filed by Mr. Blittersdorf.

Having determined that Mr. Blittersdorf violated the requirements of Section 246, the hearing officer proceeded with the second phase of the investigation.

On May 21, 2021, the hearing officer issued the proposal for decision that is the subject of this order. In the proposal for decision, the hearing officer incorporated his proposed findings

[44] *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 (April 26, 2019) ("*Belisle*").

from the September 12, 2019, liability order and recommended that the Commission adopt them and find that Mr. Blittersdorf violated 30 V.S.A. § 246 when he constructed his MET tower without a CPG. The hearing officer further recommended that the Commission adopt additional, newly proposed findings and impose a civil penalty on Mr. Blittersdorf in the amount of $2,500 for violating Section 246.

On June 4, 2021, the Department filed comments supporting the Commission's adoption of the proposal for decision.

Also on June 4, 2021, Mr. Blittersdorf filed comments on the proposal for decision. Mr. Blittersdorf opposed its adoption on several grounds, including an argument that Section 246 jurisdiction — and thus the Commission's authority — never attached to his MET tower because the tower was planned as a permanent structure and Section 246 only applies to temporary structures. Because we agree with Mr. Blittersdorf's argument regarding the language of Section 246, we do not address any of the other arguments that he presented in his June 4 comments.

According to Mr. Blittersdorf, the plain language of Section 246 limits the Commission's authority to temporary MET towers. Further, Mr. Blittersdorf argues that the undisputed evidence in this case demonstrates that the tower he planned to erect was a permanent tower to be used for multiple purposes, including testing prototypes of wind resource assessment equipment that Mr. Blittersdorf invents.[45]

Section 246 states in relevant part:

> § 246. Temporary siting of meteorological stations
>
> (a) As used in this section, a "meteorological station" consists of one temporary tower, which may include guy wires, and attached instrumentation to collect and record wind speed, wind direction, and atmospheric conditions.
>
> (b) The Public Utility Commission shall establish by rule or order standards and procedures governing application for, and issuance or revocation of, a certificate of public good for the temporary installation of one or more meteorological stations under the provisions of section 248 of this title.

Subsection (a) defines a "meteorological station" as a "temporary tower" with certain attachments. Subsection (b) directs the Commission to establish standards governing the application for CPGs for the "temporary installation" of meteorological stations.

[45] Blittersdorf comments at 6-7.

Further, in *Belisle*, the Vermont Supreme Court found that two conditions must exist before a MET tower falls under the requirements of Section 246: First, the MET tower must be temporary, and second, it must be constructed or installed to determine the suitability of a site for a grid-connected wind project.[46]

The hearing officer found that the MET tower was temporary for the purpose of Section 246 because, based on the Vermont Supreme Court's decision in *Belisle*, the '"meteorological tower's role — gathering data — concludes'" before the installation of a grid-connected wind turbine.[47] In other words, the hearing officer concluded that the MET tower was temporarily installed for the purpose of assessing the wind resource at Mr. Blittersdorf's property to assist in his decision to install grid-connected turbines, even though the tower had other longer-term uses.

It is clear to us that the second requirement of *Belisle* is met in this case. Mr. Blittersdorf installed his MET tower in part for the purpose of assessing the suitability of his property for the installation of two grid-connected wind turbines. What is less clear to us is whether the first requirement — that the tower be temporary — is met.

The text of Section 246 uses the word "temporary" three times, once to modify the word "tower" and twice to modify the word "installation." While we understand the hearing officer's reliance on *Belisle* in reaching his recommendation that we find Mr. Blittersdorf to have violated Section 246, we find that the language of Section 246 limits our jurisdiction to towers that are physically temporary. While both the evidence in this case and the Court's reasoning in *Belisle* support the hearing officer's recommendation that the tower was used temporarily for the purpose of assessing the wind resource for the possible installation of grid-connected turbines, the evidence in this case also shows that Mr. Blittersdorf intended the tower to be permanent for other uses not regulated by the Commission. Therefore, we conclude that Mr. Blittersdorf did not violate Section 246 when he installed his MET tower without a CPG.

This case, in conjunction with *Belisle*, causes us concerns. In *Belisle*, the Vermont Supreme Court decided that Section 248 had no application to the installation of temporary MET towers because the towers themselves did not interconnect with the electric grid. The implications of that decision are two-fold.

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[46] *Belisle*, 2019 VT 20, ¶ 22.
[47] Liability order at 8 (citing and quoting *Belisle*, 2019 VT 20, ¶ 20 n.5).

First, at one end of the spectrum, a permanent tower such as Mr. Blittersdorf's may not ever be reviewed for potential environmental, aesthetic, or other impacts, even if it is used for the regulated purpose of assessing the wind resource for a grid-connected wind project. This is because (1) Section 246 would not apply, (2) not all towns in Vermont have municipal zoning, and (3) Act 250 would only apply if a MET tower were to be constructed above 2,500 feet in elevation or if statutory acreage or another threshold were met.[48]

Second, at the other end of the spectrum, certain MET towers will actually become more difficult to permit than they otherwise would have been. Because *Belisle* determined that MET towers are unrelated to Section 248, MET towers no longer enjoy an exemption from local zoning or Act 250.[49] The result is that permanent towers, if they are located in a town with zoning, will have to obtain a town zoning permit. And, if they are located above 2,500 feet or meet minimum acreage requirements, they will have to obtain an Act 250 permit. Temporary towers will need to obtain a permit from the Commission under Section 246 but may also face the same permitting requirements discussed above because it is only Section 248 that exempts them from local zoning or Act 250.

Given that the purpose of Section 246 was to provide a simpler process for permitting temporary MET towers, we question whether the consequences of *Belisle*, taken in conjunction with a plain-language assessment of Section 246, produce a result consistent with the legislative intent behind Section 246. That said, we are bound by the statutory language of Section 246.

For the reasons discussed above, we find that jurisdiction under 30 V.S.A. § 246 did not apply to Mr. Blittersdorf's installation of a permanent MET tower on his property in Irasburg, Vermont. Additionally, solely because we find that Mr. Blittersdorf was not required to apply for a CPG for his tower, we also find that he is not liable to pay the court reporter fees incurred in this proceeding.

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[48] *See* 10 V.S.A. § 6001(3)(A)(i)-(vi).

[49] *See* 24 V.S.A. § 4413(b) (exempting projects subject to Section 248 jurisdiction from municipal zoning bylaws) and 10 V.S.A. § 6001(D)(ii) (exempting projects subject to Section 248 and 248a jurisdiction from Act 250 review).

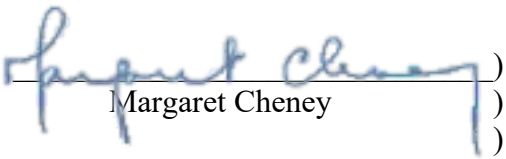
VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Utility Commission ("Commission") that:

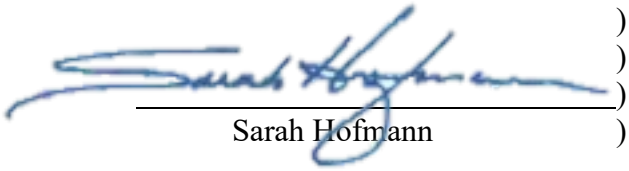
1. Except as modified above, the findings, conclusions, and recommendations of the hearing officer are adopted. All other findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.

2. This case is dismissed.

Dated at Montpelier, Vermont, this 22nd day of July, 2021.



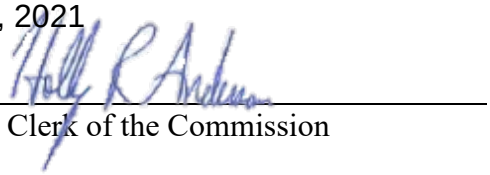
Margaret Cheney) PUBLIC UTILITY
)
) COMMISSION
)
) OF VERMONT



Sarah Hofmann)

OFFICE OF THE CLERK

Filed: July 22, 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)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

Dissent of Chair Anthony Roisman

I respectfully disagree and dissent. I believe the hearing officer correctly interpreted and applied the requirements of § 246 as adopted by the Legislature and as interpreted by the Vermont Supreme Court in *Belisle*. Therefore, I would adopt the proposal for decision.

I. LIABILITY FOR VIOLATING 30 V.S.A. § 246

The majority concludes there is no liability in this matter because it believes the plain language of 30 V.S.A. § 246 limits the Commission's jurisdiction to MET towers that are physically temporary and Mr. Blittersdorf intended his tower to be a permanent structure. The majority also concludes this result is supported by the Vermont Supreme Court's decision in *Belisle*. I respectfully disagree because the plain language of the statute, the holding and reasoning of the *Belisle* decision, and common sense lead to the opposite conclusion. If the mere incantation of the intent to use a meteorological tower for a second purpose, even though it was constructed for the purpose of testing the site for the possible siting of a grid-connected wind turbine project, is sufficient to avoid the review and permitting requirements of § 246, then that section is essentially null and void. I am unwilling to ascribe to the Legislature the intent to enact an easily evaded law and prefer to read the statute to accomplish the legislative goal of requiring Commission review and approval of a meteorological tower intended to assess a site for a possible wind turbine project even if it may also have one or more other purposes.

The Statute

I believe the majority misreads the language of § 246 by looking only at whether a tower is physically temporary without any consideration of its intended use. Under the majority's reading, one need only ask if a tower is a permanent structure, and if the answer is yes, the analysis is over regardless of whether a tower will be used temporarily for a regulated purpose to which § 246 is addressed.

A proper reading of § 246 requires consideration of the purpose of the installation in determining whether § 246 applies and of § 246 in its entirety:

> § 246. *Temporary siting of meteorological stations*
>
> (a) As used in this section, *a "meteorological station" consists of one temporary tower, which may include guy wires, and attached instrumentation to collect and record wind speed, wind direction, and atmospheric conditions*.

(b) The Public Utility Commission shall establish by rule or order standards and procedures governing application for, and issuance or revocation of, a certificate of public good for the temporary installation of one or more meteorological stations under the provisions of § 248 of this title. A meteorological station shall be deemed to promote the public good of the State if it is in compliance with the criteria of this section and the Commission's rules or orders. An applicant for a certificate of public good for a meteorological station shall be exempt from the requirements of subsection 202(f) of this title.

(c) In developing rules or orders, the Commission:

(1) Shall develop a simple application form and shall require that the applicant first file the application with the Commission and that, within two business days of notification from the Commission that the application is complete, the applicant serve copies of the complete application on the Department of Public Service, the Agency of Natural Resources, the Agency of Transportation, and the municipality in which the meteorological station is proposed to be located.

(2) Shall require that if no objections are filed within 30 days of the date of service of the complete application under subdivision (1) of this subsection, and the Commission determines that the applicant has met all of the requirements of § 248 of this title, the certificate of public good shall be issued for a period that the Commission finds reasonable, but in no event for more than five years. Upon request of an applicant, the Commission may renew a certificate of public good. Upon expiration of the certificate, the meteorological station and all associated structures and material shall be removed, and the site shall be restored substantially to its preconstruction condition.

(3) May waive the requirements of § 248 of this title that are not applicable to meteorological stations, including criteria that are generally applicable to public service companies as defined in this title. *The Commission shall not waive review regarding whether construction will have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, and the public health and safety.*

(4) Shall seek to simplify the application and review process, as appropriate, in conformance with this section.

(d) A proposal for decision shall be issued within five months of when the Commission receives a completed application for a certificate of public good for the temporary installation of one or more meteorological stations under the provisions of § 248 of this title.

(e) *Notwithstanding any contrary provisions of this section, the holder of a certificate of public good for a constructed meteorological station may apply under section 248a of this title or 10 V.S.A. chapter 151 to convert the station to a wireless telecommunications facility, provided the application is filed at least 90 days before*

> *the expiration of the certificate for the station. Any such application shall constitute a new application to be reviewed under the facts and circumstances as they exist at the time of the review.*

30 V.S.A. § 246 (emphasis added)

The title of the section is "Temporary siting of meteorological stations." Pursuant to its authority in 30 V.S.A. § 246(b), the Commission has defined "Temporary meteorological station" to mean "a temporary tower, which may include guy wires, and attached instrumentation to collect and record wind speed, wind direction, and atmospheric conditions, constructed or installed in order to determine the suitability of a site for the location of a grid-connected wind turbine."[50] Thus, the proper inquiry is not whether the structure will be temporary but whether it was temporarily installed for a regulated purpose. In this case Mr. Blittersdorf did site a "meteorological station" and did intend to, and did temporarily use, the station to "collect and record wind speed, wind direction, and atmospheric conditions" to test the site for a possible grid-connected wind turbine project. When the temporary use ended, Mr. Blittersdorf apparently continued to use the same structure for other purposes. Such continued use did not alter the fact that the wind turbine testing purpose, to which the tower had been put, was temporary.

In addition, contrary to the reasoning of the majority, a tower does not lose its temporary status because it has a second use. Otherwise, Section 246(e) would have no effect if "temporary" applies to the structure, rather than its purpose. That section allows conversion of a temporary MET tower to another permanent use after its temporary use is completed. But under the majority's view, the only way a tower could be temporary is if it had only one purpose – i.e., to measure wind conditions for a possible wind turbine project. In short, if a MET tower were subject to § 246, it would not be eligible to be converted to another use because the existence of the other use would make the MET tower permanent and not temporary, thus meaning no MET tower that was subject to § 246 could use the opportunity created by § 246(e), making § 246(e) meaningless and mere surplusage, a result that conflicts with well-established principles of statutory construction.[51]

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[50] Ord. Establishing Standards & Procs. for Issuance of A Certificate of Pub. Good for A Temp. Meteorological Station Pursuant to 30 V.S.A. S 246., 2010 WL 2150254, at *4 (Mar. 9, 2010).

[51] *Vermont Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83, ¶ 26, 250 A.3d 567, 577–78 (Vt. 2020), reargument denied (Nov. 2, 2020), *cert. denied sub nom. VT Nat. Tel. Co. v. VT Dep't of Taxes*, No. 20-1159, 2021 WL 1951815 (May 17, 2021) ("It is a basic presumption of statutory interpretation "that language is inserted in a statute

The *Belisle* Decision

This understanding of § 246 is also supported by the Supreme Court's decision in *Belisle*. In that case, as here, the owner of the tower did not have a single purpose for use of the tower. In fact, the applicant in the *Belisle* case asserted that he had many potential uses for the tower and even denied that gathering data for a potential wind turbine project was one of them. *Belisle*, 2019 VT 20, at ¶ 30. Nonetheless the Court concluded:

> While project proponents' outward statements regarding their subjective intent behind establishing a temporary tower may be a factor in demonstrating whether a tower was constructed to assess a site's suitability for a potential grid-connected wind facility, such statements must be assessed objectively in the context of the entire project. To hold otherwise would enable a party to escape both an impartial assessment of the setting of the case under the "reasonably related" standard and summary judgment by simply denying any intent after the fact. *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) (holding in context of discrimination suit, "[t]he summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion")

Belisle, 2019 VT 20, ¶ 31, 210 Vt. 27, 46, 210 A.3d 1230, 1242–43 (2019).

Thus, the Court recognized that the Commission's use of the "reasonably related" standard in deciding whether a proposed MET tower was subject to § 246 jurisdiction must be evaluated on an objective basis looking at the actual intended use and not merely assertions of subjective intent, noting the potential abuse of the statute if such subjective intent were controlling. The Court's reasoning applies equally to the attempt to subvert § 246 by claiming the tower had an additional purpose other than testing the feasibility of a wind turbine project.

If an applicant who claims to have multiple possible uses for a MET tower, only one of which might be testing the site for a wind turbine project, is subject to § 246 jurisdiction, then an applicant who concedes that wind turbine testing is a purpose of the proposed tower is subject to § 246 jurisdiction. The focus of the Court decision was not on the term "temporary" (the parties did not dispute the fact that the tower was temporary (*Belisle*, 2019 VT 20, at ¶ 22, n.8)) but on the purpose of the proposed use of the tower to test for a wind turbine project. *See e.g. id.* at ¶¶ 28-33. The Court concluded "only those temporary towers that are "reasonably related" to a

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advisedly." *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 104, 624 A.2d 857, 860 (1993). We accordingly "construe statutes to avoid rendering one part mere surplusage." *In re Jenness*, 2008 VT 117, ¶ 24, 185 Vt. 16, 968 A.2d 316").

future wind generation project fall within PUC jurisdiction." *Belisle*, 2019 VT 20, 210 Vt. 27, 43, n. 9, 210 A.3d 1230, 1240 (2019).

I am therefore unconvinced by Mr. Blittersdorf's contention that the MET tower's purpose is irrelevant to determining its temporary status.[52] The Vermont Supreme Court places emphasis on the use of a MET tower in determining whether § 246 applies, explaining that a MET tower's role under § 246 ends when the wind assessment use is complete, and noting that the requirement for a CPG for a MET tower turns on its intended purposes — whether it is used to determine the suitability of a site for a grid-connected turbine. The time-limited role described by the Supreme Court means that the use of the tower is relevant to determining whether a MET tower is temporary for purposes of § 246.

Common Sense

Additionally, as the hearing officer explained, Mr. Blittersdorf's arguments lead to illogical results. Mr. Blittersdorf argues that § 246 provides for expedited review because it covers only temporary towers and their attendant temporary effects. Yet, under his interpretation, a permanent tower, with its attendant permanent effects, receives no Commission review at all, even when used for an otherwise regulated purpose.

If all an applicant must do to avoid § 246 review is declare, while erecting the MET tower, that it is intended to remain operational for any purpose in addition to testing for wind turbine suitability, then the substantive factors required to be considered under § 246 will not be considered.[53] Exemption from § 246 also eliminates any opportunity for members of the public or local or regional governments to participate in a Commission process to express concerns or to be aware a project is proposed for their neighborhood unless local zoning laws apply, or the project is at an altitude where Act 250 applies.

However, whether the project is physically temporary – the touchstone of the majority opinion – or physically permanent, its construction still has the potential to cause all these impacts. It is irrational to assume that when the Legislature crafted § 246 it thought a temporary wind-turbine-testing MET tower's impact should be evaluated by the Commission but the

[52] Blittersdorf comments at 10-14.

[53] 30 V.S.A. § 246 (c)(3)("The Commission shall not waive review regarding whether construction will have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, and the public health and safety.")

identical tower, if it would remain at the site for other purposes, might never be evaluated. In fact, the majority view would produce the perverse effect that the Commission would evaluate the potential for substantial, temporary impacts of a temporary structure but that there would be no Commission consideration of the identical impacts that would be permanent if the proposed MET tower included an additional purpose that required it to remain permanently.

I prefer to see § 246 as a substantively relevant statute that expresses a legislative intent to require a review of any MET tower that has as a purpose, even if not its only purpose, testing for siting a grid-connected wind turbine project. Admittedly, MET towers unrelated to testing a site for a grid-connected wind turbine project are not subject to Commission review, but it is for the Legislature to decide whether such facilities require review by another agency. The Commission's nexus to the MET tower in this and similar cases is that one of its purposes is to test a site for a possible power generation facility. I believe we have a duty to apply § 246 in a way that ensures that MET towers intended to pave the way for potential future grid-connected wind turbine projects are fully evaluated under the relevant § 248 criteria, as required by the Legislature, and embodied in § 246, even if the tower might have another intended use.

I am also not persuaded by Mr. Blittersdorf's argument that the hearing officer's proposal for decision renders meaningless § 246(c)(2)'s five-year limit for MET tower CPGs and the requirement that they be removed once the CPG expires.[54] He argues that the § 246(c)(2) requirement that "[u]pon expiration of the certificate, the meteorological station and all associated structures and material shall be removed, and the site shall be restored substantially to its preconstruction condition" means that only structurally temporary towers are subject to § 246. The premise of his argument is that the statute does not apply to a dual-purpose, permanent tower, like the one involved here, because the statute would not require tearing down, and then re-erecting the tower, when its temporary purpose was concluded. The flaw in that argument is that if the only tower to which the statute applies is one that is always intended to be a temporary structure that would be torn down after five years, then, as noted above, there would be no reason for § 246(e) because application of the unqualified obligations of § 246(c)(2) would require the MET tower to be torn down when its temporary purpose had been met. But § 246(e) is premised

[54] Blittersdorf comments at 11-12.

on the idea that it is the purpose of the tower that is temporary, not the tower itself, and that the structurally permanent tower can be converted from wind testing to a telecommunications tower, but only after meeting the requirements of § 248a.

In my view, the statute required Mr. Blittersdorf to do two things: (1) apply for and receive a CPG, and (2) either remove the tower when the CPG expired or apply for an extension under § 246(c)(2) or a conversion under § 246(e). If Mr. Blittersdorf intended to continue to use the MET tower for yet another purpose, it would be subject to any applicable local, regional, and state permitting requirements. On this point, I differ somewhat with the hearing officer in the proper interpretation of § 246. However, I agree on the practical result of the proposal for decision. There is no basis on which the Commission could or should direct its removal.

For the reasons described above, I conclude that Mr. Blittersdorf's MET tower was temporary for the purposes of § 246 and that his failure to obtain a CPG before its installation was a violation of that statute.

II. LIABILITY FOR COURT REPORTER COSTS

Because I believe Mr. Blittersdorf violated the requirements of § 246, I conclude that he is also liable for the court reporter costs incurred by the Commission in this investigation.

Mr. Blittersdorf contends the Commission is without authority to bill him for the court reporter costs in this case because "the statute limits the Commission's authority to issue billbacks to 'the applicant or the company or companies involved.' Respondent is a natural person who is neither an applicant in this case nor a company."[55]

Mr. Blittersdorf's interpretation of the statute again leads to illogical outcomes. The only reason Mr. Blittersdorf was not an "applicant" with respect to his MET tower is because he failed to meet his obligation to apply for a CPG for that tower. It is illogical to allow someone to benefit from non-compliance with their regulatory obligations when someone who complied with those same obligations would not realize that benefit.

For all these reasons, I respectfully dissent and would approve the hearing officer's thoughtful and correct decision.

[55] Blittersdorf comments at 29.

Dated at Montpelier, Vermont this 22nd day of July, 2021.

Anthony Z. Roisman

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