VERMONT

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VERMONT PUBLIC SERVICE BOARD
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July 15, 2016

Judith Whitney, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

Re: Docket No. 8585 – Kidder Hill/Irasburg MET Tower Investigation

Dear Ms. Whitney,

Enclosed for filing in the above-referenced proceeding, please find the original and three (3) copies of the Vermont Department of Public Service, the Vermont Agency of Natural Resources, and the Town of Irasburg's Motion and Memorandum in Support of Motion to Quash Notices of Deposition and for Protective Order.

Thank you for your time and attention to this matter. Please contact me with any questions or concerns.

Sincerely,

Aaron Kisicki
Special Counsel

cc: Docket 8585 Service List (w/ enclosure)

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

July 15, 2016

THE VERMONT DEPARTMENT OF PUBLIC SERVICE, THE VERMONT AGENCY OF NATURAL RESOURCES, AND THE TOWN OF IRASBURG'S MOTION TO QUASH NOTICES OF DEPOSITION AND FOR PROTECTIVE ORDER

The Vermont Department of Public Service ("Department" or "DPS"), the Vermont Agency of Natural Resources ("ANR"), by and through undersigned counsel, and the Town of Irasburg ("Irasburg") (together "Non-respondents"), by and through its undersigned designated *pro se* representative, hereby moves the Vermont Public Service Board ("Board" or "PSB") to quash notices of deposition and depositions *duces tecum* issued by David Blittersdorf on June 29, 2016 ("Notices"), and for protective order in the above-captioned proceeding. The five Notices seek deposition of named and unnamed representatives of each of the Non-respondents. Four of the Notices are styled as deposition *duces tecum* and seek production of certain documents at the associated deposition.

The Non-respondents seek to quash the Notices, as the depositions are overbroad and seek information that is irrelevant to the subject matter involved at this stage of the proceeding, is privileged, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the depositions are unduly burdensome at this stage of the proceeding, and the information sought by Mr. Blittersdorf is obtainable from some other source that is more convenient, less burdensome, and less expensive. The Non-respondents also request that the Board or Hearing Officer assigned to the proceeding issue a protective order limiting discovery to issues

that are relevant at the time a request is made, making clear that only issues related to whether a violation has taken place are relevant unless and until the Board and/or Hearing Officer determines a violation did, in fact, take place, and limiting the use of depositions only to matters that could not be reasonably explored through the use of interrogatories and requests to produce.

The bases for the relief the Non-respondents seek are presented in the accompanying memorandum in support of this motion.

Dated at Montpelier, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: _____

Geoffrey Commons
Director for Public Advocacy
Aaron Kisicki
Special Counsel

Dated at Montpelier, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

VERMONT AGENCY OF NATURAL RESOURCES

By: _____
Leslie Welts
Litigation Attorney

Dated at Irasburg, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

TOWN OF IRASBURG

By: Robert B Holland
Dr. Robert Holland
Pro Se Representative

cc: Docket 8585 Service List

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

July 15, 2016

THE VERMONT DEPARTMENT OF PUBLIC SERVICE, THE VERMONT AGENCY OF NATURAL RESOURCES, AND THE TOWN OF IRASBURG'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH NOTICES OF DEPOSITION AND FOR PROTECTIVE ORDER

The Vermont Department of Public Service ("Department" or "DPS"), the Vermont Agency of Natural Resources ("ANR"), by and through undersigned counsel, and the Town of Irasburg ("Irasburg") (together "Non-respondents"), by and through its undersigned designated *pro se* representative, hereby submit this memorandum in support of their motion to quash notices of deposition and deposition *duces tecum* issued by David Blittersdorf on June 29, 2016 ("Notices"), and for protective order filed in the above-captioned proceeding. The five Notices seek deposition of named and unnamed representatives of each of the Non-respondents. Four of the Notices are styled as deposition *duces tecum* and seek production of certain documents at the associated deposition. The Non-respondents seek to quash the Notices, as the depositions are overbroad and seek information that is irrelevant to the subject matter involved at this stage of the proceeding, is privileged, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the depositions are unduly burdensome at this stage of the proceeding, and the information sought by Mr. Blittersdorf is obtainable from some other source that is more convenient, less burdensome, and less expensive.

I. BACKGROUND

On September 23, 2015, the Vermont Public Service Board ("Board" or "PSB") issued an order opening an investigation, pursuant to 30 V.S.A. §§ 30, 209, 246, 247, and 248, "into the factual circumstances and legality of the site preparation, construction, and operation of a meteorological tower located in Irasburg, Vermont, and owned by David Blittersdorf." Docket 8585, Order Opening Investigation and Notice of Hearing, Sept. 23, 2015 at 2. Mr. Blittersdorf submitted prefiled testimony and exhibits on December 18, 2015, and responded to two rounds of discovery requests by the Non-respondents in February and March, 2016. The parties then sought to reach a negotiated resolution to the investigation, but were unable to do so.

The Board's Hearing Officer assigned to the proceeding held a status conference on June 15, 2016 to consider proposed schedules for the remainder of the proceeding. The Hearing Officer's Scheduling Order issued the next day set a deadline for Mr. Blittersdorf to file first round discovery requests on Non-respondents and for the Department to file a Motion for Partial Summary Judgment on June 29, 2016. The Scheduling Order also set a July 29 deadline for Mr. Blittersdorf to respond to the Department's motion, and an August 5 deadline for Non-respondents to file responses to the first round discovery requests.[1]

On June 29, Mr. Blittersdorf filed the Notices, which sought taking deposition of Andrew Perchlik of the Department and deposition subpoena *duces tecum* of unknown representative(s) of Irasburg on July 15, 2016, and deposition *duces tecum* of Irasburg's *pro se* representative, Dr. Holland and unnamed representative(s) of the Department and ANR on July 26, 2016. He then filed interrogatories, requests to admit, and requests to produce on the Department and ANR on

[1] The Hearing Officer later granted a two-day extension of the June 29 and August 5 deadlines to July 1 and August 7, 2016, respectively. *See* Procedural Order Granting Extensions, June 30, 2016.

July 1, 2016. The Department and Irasburg have since agreed to postpone the depositions initially scheduled for July 15 to a later date.

II. LEGAL FRAMEWORK

Vermont Rule of Civil Procedure 26, as applied to Board proceedings under PSB Rule 2.214(A), sets certain limitations on the scope of permissible discovery practice:

> (b)(1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> . . . .
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> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by a Superior Judge if it is determined that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. The Superior Judge may act upon the Superior Judge's own initiative after reasonable notice or pursuant to a motion under subdivision (c).
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> . . . .
>
> (c) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any Superior Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . .

The Vermont Rules of Civil Procedure "require that a litigant have a good faith, and reasonably supported, belief that his or her claim has merit and that the requests for discovery are not interposed to harass or to cause unnecessary delay or expense. Thus, the purpose of discovery is *not* to fish through every potential theory of recovery to determine if there is any factual support for the theory. Nor is it the purpose to change the economics of litigation so that the litigant with the deepest pocket or the most perseverance will prevail in the end." *Chrysler Corp. v. Makovec*, 157 Vt. 84, 90, 596 A.2d 1284, 1288 (1991)(internal citations omitted).

III. ARGUMENT

The Non-respondents respectfully request that the Board quash the Notices, and issue a protective order prescribing the appropriate timeframe to engage in and methodology to use in this type of discovery, and limiting the scope of discovery to only those issues relevant to the focus of the proceeding at this time. The Notices seek irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence and in a manner that can more easily and reasonably be obtained through other means. Likewise, the Notices seek information that is privileged. Issuance of a protective order is therefore warranted in this instance.

A. The Information Sought in Depositions and Subpoenas Duces Tecum is Not Relevant to the Subject Matter at Issue in the Proceeding at this Time

The Notices' depositions and accompanying subpoenas *duces tecum* seek information that is irrelevant to the proceeding at this time. The instant investigation is being held pursuant to 30 V.S.A. § 30. As is typical of most § 30 investigations, the proceeding is a bifurcated process. First, a determination must be made regarding whether a violation of a certain Title 30 provision(s) occurred. If the parties agree or the Board determines that a violation occurred, only then the

proceeding shifts focus to determine the appropriate penalty to be applied pursuant to § 30. Here, no determination related to a violation has been made. Indeed, the schedule fashioned by the Hearing Officer calls for consideration of a motion for partial summary judgment, and the Department filed such a motion on July 1, focused solely on the issue of whether the factual record in the proceeding supports a finding of violation(s). Reponses to and decision on that motion are now pending.

There is no information that may be gleaned through deposition or production of the subpoenaed documents relevant to the only subject matter at issue in the proceeding at this time: whether a violation of Title 30 has occurred. The Non-respondents possess no information related to Mr. Blittersdorf's conduct that Mr. Blittersdorf does not already have. Likewise, there is no conceivable claim or defense related to the question of a whether a violation occurred that would necessitate deposition of Non-respondent representatives. For instance, the Notices seek to discover information related to the scope of authority between Irasburg and Dr. Holland, and copies of certain Irasburg Selectboard minutes. Such information is not relevant to the determination of a violation.

Mr. Blittersdorf's attempt to conduct irrelevant discovery through depositions at this time is wasteful and unduly burdensome for all parties. There is no justification for subjecting a number of Non-respondent representatives to unfocused and potentially lengthy depositions when it is not clear that such lines of inquiry will ever be relevant to the proceeding. For example, ANR has concluded that it may be required to make up to ten representatives available for deposition pursuant to the Notices. The significant time, expense, and burden on ANR to prepare for and conduct those depositions would be wasted in the strongest sense of the term if the Board ultimately concludes that a violation did not occur. It may be appropriate to explore such lines of

inquiry later in the proceeding, but they should be allowed to be explored only when it is known that it is appropriate.

Lastly, the Hearing Officer explicitly warned that discovery that Mr. Blittersdorf requested to execute prematurely, would be "pretty much useless" at this stage of the proceeding. Docket 8585, Status Conference, June 15, 2016, tr. at 19. The scope of subject matter and related topics of discovery relevant to the proceeding is narrow at this time. Mr. Blittersdorf's attempt to gather information to explore issues that are not relevant now, and may never be relevant to the proceeding is unduly burdensome, expensive, and contrary to the limits placed on discovery by V.C.R.P. 26(b)(1).

B. The Depositions and Subpoenas Duces Tecum Seek Information that is Privileged

The Notices explicitly seek information that is privileged and therefore barred from discovery under V.R.C.P. 26(b). The subpoenas *duces tecum* seek, among other things, the production of all communications between the Non-respondents in connection with this investigation. Those communications are protected from discovery for two reasons. First, V.R.C.P. 26(b)(3) makes clear that "a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's . . . agent) only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Here, the communications sought were necessarily made in anticipation of litigation in the proceeding. Likewise, Mr. Blittersdorf has made no showing that he has substantial need for the

communications in the preparation of his case, which, again, is limited at this time to whether a violation of Title 30 occurred.

Second, even if Mr. Blittersdorf had made such a showing, the communications sought are privileged as attorney-work-product and are therefore undiscoverable. V.R.C.P. 26(b)(1) excludes privileged material from the permissible scope of discovery, and distills that principle further in 26(b)(3). These communications also contain mental impressions, conclusions, opinions, and/or legal theories that are "absolutely protected from discovery irrespective of any assertion of need, so long as these are part of the trial preparation product." *Killington, Ltd. v. Lash*, 153 Vt. 628, 647, 572 A.2d 1368, 1380 (1990). *Killington* also established that "where an agency appears as a party in a contested administrative proceeding, the attorney's work-product doctrine should be applied as if the action were in a court." *Id.* at 647, 1379. The communications between Non-respondents were necessarily drafted to discuss, at a minimum, impressions of the litigation. The privileged nature of the communications should alone justify the issuance of a protective order against disclosure.

Finally, Mr. Blittersdorf has not demonstrated that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means, as required by V.R.C.P. 26(b)(3). The use of the depositions and subpoenas *duces tecum* are also unreasonably cumulative and duplicative of other discovery methods employed by him. The record reveals that Mr. Blittersdorf is, in fact, able to obtain the information sought in the Notices through more reasonable, and substantially duplicative means. He propounded interrogatories, requests to admit, and requests to produce on the Department and ANR two days after serving notices of depositions on Non-respondents, which attempt to secure much of same information sought through the depositions and subpoenas *duces tecum*. *See* Respondent's Discovery Requests to DPS and ANR, July 1,

2016. Mr. Blittersdorf has not and cannot demonstrate that the discovery methods used in the Notices, in lieu of the largely duplicative interrogatories, requests to admit, and requests to produce filed almost contemporaneously with the Notices, are necessary to obtain the information he seeks.

C. The Depositions and Subpoenas Duces Tecum are Unduly Burdensome and Expensive, and the Information Sought can be Obtained by Other, More Appropriate Means

As discussed above, the information sought in the Notices is not relevant to the proceeding. Deposition of Non-respondent representatives would be unduly burdensome and expensive at this time, particularly when taking into account the current needs of the proceeding relative to the importance of the issues Mr. Blittersdorf seeks to explore. Given the limited scope of the issues present in the proceeding at this time, the depositions would serve only to harass and unduly burden the Non-respondents.

Alternatively, the information Mr. Blittersdorf seeks would be more appropriately sought through means other than deposition of potentially a dozen or more Non-respondent representatives when and if the investigation moves into a penalty phase. Issuance of interrogatories and requests to produce are a more efficient, focused, and cost-effective method for conducting discovery in this instance, where there appears to be only a small number of relevant issues to explore in a penalty phase.

The timing of the noticed depositions also places a unique and acute undue burden on the Non-respondents. The Hearing Officer established a schedule that explicitly placed an obligation on Non-respondents to respond to Mr. Blittersdorf's first round discovery requests by August 5 (later extended to August 7). The noticed depositions, including those with companion subpoenas *duces tecum*, have been scheduled in advance of the August 7 Non-respondent response deadline.

The Hearing Officer established the sequencing and timing of discovery in this phase of the proceeding in his Scheduling Order, as is allowed pursuant to V.R.C.P. 26(d). The depositions and subpoenas *duces tecum* seek to force Non-respondents to respond to Mr. Blittersdorf's discovery – both in the form of oral deposition and production of documents – in advance of the deadline set in the Hearing Officers schedule. Notwithstanding the fact that the relevant information sought could have been, and largely was, incorporated into interrogatories and requests to produce as part of Mr. Blittersdorf's first round discovery requests, the depositions and subpoenas create an undue burden by subjecting the Non-respondents to respond under an expedited timeline not contemplated by the schedule.

D. Issuance of a Protective Order is Warranted

The Non-respondents seek a protective order from the Board limiting discovery to subject matters that are at issue at the appropriate stage of the proceeding, and that the method of discovery be limited to those that are not unduly burdensome and expensive for all parties, particularly when discovery can be had by more efficient and less burdensome means. Here, a protective order delaying discovery that seeks to address issues beyond the question of whether Mr. Blittersdorf violated Title 30 until after the Board renders a decision on the pending motion for partial judgment is appropriate. Likewise, a protective order prohibiting the use of depositions in lieu of interrogatories and requests to produce, would guard against undue burden and expense on all parties.

The Non-respondents in no way seek to limit Mr. Blittersdorf ability to seek discovery of relevant and non-privileged materials. Rather, they seek to establish an orderly discovery process that places fair limits on the scope, timing, and methods used based on the issues that are actually

live at the time requests are made. These limits guard against wasteful expenditure of time and resources while ensuring that a full exploration of relevant issues is allowed in advance of a potential hearing and/or briefing.

CONCLUSION

Based on the foregoing, the Vermont Department of Public Service, the Agency of Natural Resources, and the Town of Irasburg respectfully requests that the Public Service Board or the Hearing Officer assigned to the proceeding quash Mr. Blittersdorf's June 29, 2016 notices of deposition and deposition *duces tecum*. The Non-respondents also request that the Board or Hearing Officer issue a protective order limiting discovery to issues that are relevant at the time a request is made, making clear that only issues related to whether a violation has taken place are relevant unless and until the Board and/or Hearing Officer determines a violation did, in fact, take place, and limiting the use of depositions only to matters that could not be reasonably explored through the use of interrogatories and requests to produce.

Dated at Montpelier, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: _____

Geoffrey Commons
Director for Public Advocacy
Aaron Kisicki
Special Counsel

Dated at Montpelier, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

VERMONT AGENCY OF NATURAL RESOURCES

By: _____
Leslie Welts
Litigation Attorney

Dated at Irasburg, Vermont this Fifteenth day of July, 2016.

Respectfully submitted,

TOWN OF IRASBURG

By: Robert R Holland

Dr. Robert Holland
Pro Se Representative

cc: Docket 8585 Service List