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VERMONT PUBLIC
SERVICE BOARD

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Leslie A. Cadwell
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Hand Delivered

July 29, 2016

Judith C. Whitney, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05602-2701

Re: Docket No. 8585; Respondent's Memorandum in Opposition to Department of Public Service Motion for Partial Summary Judgment and Respondent's Cross-Motion for Summary Judgment and Dismissal with Prejudice

Dear Ms. Whitney:

Enclosed for filing in the above-referenced matter, please find an original and 3 copies of Respondent's Memorandum in Opposition to Department of Public Service Motion for Partial Summary Judgment and Respondent's Cross-Motion for Summary Judgment and Dismissal with Prejudice, along with supporting affidavits.

Thank you for your assistance and attention to this filing.

Very truly yours,

Leslie A. Cadwell

Enclosure(s)

Cc: Geoffrey Commons & Aaron Kisicki, Vermont Department of Public Service
Leslie Welts, Vermont Agency of Natural Resources
Dr. Robert R. Holland, Town of Irasburg

STATE OF VERMONT
PUBLIC SERVICE BOARD

VERMONT PUBLIC
SERVICE BOARD
2016 JUL 29 PM 4 09

Docket No. 8585

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

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO
THE DEPARTMENT OF PUBLIC SERVICE MOTION FOR PARTIAL
SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR
SUMMARY JUDGMENT AND DISMISSAL WITH PREJUDICE**

NOW COMES David Blittersdorf, Respondent in the above-captioned action, by and through his undersigned counsel and pursuant to V.R.C.P. 56(b), to oppose the motion for partial summary judgment filed by the Vermont Department of Public Service (PSD) on July 1, 2016, and to cross-move for summary judgment in Respondent's favor and dismissal of this investigation with prejudice. In support of its opposition and requests for relief, Respondent offers the following Memorandum of Law and Statement of Undisputed Material Facts.

MEMORANDUM OF LAW

I. Introduction

Docket No. 8585 involves an investigation pursuant to 30 V.S.A. §§ 30, 209, 246, 247, and 248, into the factual circumstances and legality of the site preparation and construction of a meteorological ("met") tower located on Respondent David Blittersdorf's property at 700 Kidder Hill Road in Irasburg, Vermont. The Public Service Board's investigation raises the following issues: 1) whether Mr. Blittersdorf violated 30 V.S.A. §§ 246 and/or 248 by installing the met tower without first obtaining a Certificate of Public Good (CPG), and if so, 2) whether a penalty should be imposed under 30 V.S.A. § 30(a)(1) or 30 V.S.A. § 30(a)(2) and 3) what penalty amount, if any, is appropriate. This motion focuses on the first issue, which is broken out into its two

component parts, namely (i) whether there was a violation of Section 246 and (ii) whether there was a violation of Section 248.

II. Standard for Summary Judgment

Summary judgment is available if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a). A fact is “material” when it affects the outcome of a case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, the Board may not act as the trier of fact. *Mellin v. Flood Brook Union School Dist.*, 173 Vt. 202, 211 (2001). The Board must accept as true all of the properly supported allegations presented by the non-moving party, in this case Respondent, and it is obliged to draw all reasonable inferences and doubts in Respondent's favor. *Everbank v. Marini*, 2015 VT 131, ¶ 15 (2015). The standard presupposes that the nonmoving party has had the opportunity to develop his factual case. *Zukatis by Zukatis v. Perry*, 165 Vt. 298, 300, 682 A.2d 964, 965, 1996 Vt. LEXIS 68, *2 (Vt. 1996).

III. Respondent is entitled to judgment as matter of law because the installation of the meteorological tower was not subject to the Board's jurisdiction under 30 V.S.A. § 246

As an initial matter, the Public Service Board is a “body exercising special and statutory powers . . . as to which nothing will be presumed in favor of its jurisdiction.” *Tyrbulski v. Bellows Falls Hydro Electric Corp.*, 112 Vt. 1, 7 (1941) (emphasis added). As the Vermont Supreme Court long ago explained, the Board “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.” *Id.* at 7.

Section 246 of Title 30 grants the Board jurisdiction over the temporary siting of meteorological stations, which the statute defines as “one *temporary* tower, which may include guy wires, and attached instrumentation to collect and record wind speed, wind direction, and atmospheric conditions.” 30 V.S.A. § 246(a) (emphasis added). The Board’s Section 246 Standards Order interprets the Board’s jurisdiction over meteorological tower installations under Section 246 in accordance with the plain language of the statute. The Board’s jurisdiction is limited to the proposed construction or installation of a “temporary meteorological station,” which, like the statute, the Board defines as “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.”¹ Thus, the following elements must be met for the Board to have jurisdiction over a particular meteorological tower installation:

- (1) The tower is temporary;
- (2) Instrumentation is attached to the tower to collect and record wind speed, wind direction, and atmospheric conditions;
- (3) The installation is for the purpose of determining a particular location’s suitability for a future wind turbine; and
- (4) The future wind turbine will be grid-connected (as opposed to an off-grid system).

If one or more of these elements are not met, the installation does not fall within the Board’s Section 246 authority, and no CPG is required for the installation.

¹ See *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*, March 9, 2010 (“Section 246 Standards Order”) at 6 (emphasis added); see also 30 V.S.A. § 246.

The undisputed facts developed to date — without any discovery produced by the other parties — establish that the Respondent's meteorological mast is a permanent structure, rather than a temporary one. The Respondent's prefiled testimony states that that when Respondent installed his met mast, he had no plans to take it down at any future date. Respondent's Statement of Undisputed Material Facts ("SOUMF") at ¶2. He also testified that one of the primary purposes for which the met mast was installed was to conduct prototype testing, which is ongoing and, by necessity, long-term. SOUMF at ¶¶4-6. Furthermore, the Town of Irasburg included the value of the met mast in its grand list and will tax it as real property in 2016. When Respondent appealed the Town's assessed value of the met tower, he indicated to the representatives of the Town of Irasburg holding the associated July 14, 2016 hearing on the matter that he considered his met tower to be permanent, and therefore was only contesting the amount of the tax and not the taxation of the met tower as real property. SOUMF at ¶¶4-5. At this July 14, 2016 hearing, representatives of the Town of Irasburg confirmed that they were taxing the met tower on the basis that it was permanent, and that if the structure was going to be taken down, i.e. if it was temporary, it would not be subject to taxation. Blittersdorf aff. at ¶ 6. Due to its permanency, purpose and long-term use for prototype testing, Mr. Blittersdorf's met mast is distinguishable from a meteorological station that is installed on a temporary basis for the purpose of determining the suitability of a site for a grid-connected wind project. Based on the permanency of the met mast, it is not subject to the Board's limited jurisdiction under the plain language and intent of Section 246.

The PSD's motion for summary judgment and accompanying statement of facts fails to point to evidence establishing *any* of the required elements under Section 246. Instead, its three-paragraph argument is based on the patently incorrect claim that "Mr. Blittersdorf admits -- repeatedly in some instances and without qualification -- that he

installed a met station, as defined by Vermont law, at his Kidder Hill property in December, 2010 without securing a CPG in advance as required by §§ 246 and/or 248, and the Board's Standards Order. SOF at 2,3,5." PSD Mot. at 3. Mr. Blittersdorf has made no such admission. The cited paragraphs (2,3,5) in the Department's statement of facts simply do not support the Department's claim. They indicate generally that Respondent installed a met tower and collected data from it (¶2), that the tower included instrumentation including wind vanes and wind speed anemometers (¶3),² and that Respondent did not obtain a CPG for the installation (¶5). The Department has failed to demonstrate that the Public Service Board had jurisdiction over the installation such that a CPG was required.

The PSD has not presented or pointed to any evidence on the record with respect to the first required element of the Board's Section 246 jurisdiction: that the installation be a temporary one. In fact, references to the clear "temporary" requirement and facts relevant to it are conspicuously absent from the PSD's July 1, 2016 motion for summary judgment ("PSD Mot.") and accompanying statement of facts ("PSD SOF"). As outlined above, the evidence in this docket clearly establishes that Respondent's met mast was permanent, rather than temporary.

With respect to the second element, the PSD's statement of facts indicates that that Mr. Blittersdorf's met mast included a tower and instrumentation to "collect and record. . . atmospheric conditions." PSD SOF at ¶ 3. This statement, which parrots 30 V.S.A. § 246(a), is not conclusively established by the testimony and exhibit cited, neither of which indicates that the tower and ancillary equipment were capable of, or

² However as explained later in this section, PSD SOF ¶3 is not supported by the record with inasmuch as it claims the record establishes instrumentation to collect and record atmospheric conditions.

were used to, collect or record data about "atmospheric conditions" specifically, as distinct from wind speed and direction.

As for the third and fourth elements, namely, (3) that the met mast was installed in order to determine the suitability of a site for the location of a wind turbine, and (4) that said wind turbine would be "grid-connected," the PSD's motion claims that the record establishes that "Mr. Blittersdorf also admits that data recorded by the MET station was used to evaluate the wind resource available for construction of a net-metered facility consisting of two wind turbines, and for construction of a potential commercial wind facility on the property," *see* PSD Mot. at 3 (citing PSD SOF ¶¶6,7,8) (emphasis added). Of the paragraphs relied on for this assertion, PSD SOF ¶¶ 6-7 indicate only that Respondent received a CPG for net-metered turbines and that the turbines were installed. PSD SOF ¶ 8 indicates that four years after the met tower's installation, data from it was reviewed in order to assess the viability of a commercial wind project; this statement is not established by the record.³ It is also worth noting that ¶4, which was not cited in connection with this argument, simply states that "[t]he MET station was installed to measure and/or assess the wind resource at Mr. Blittersdorf's Kidder Hill property." It does not establish that the tower was constructed or installed *in order to determine the suitability of a site for the location of a grid-connected*

³ Mr. Blittersdorf's prefiled testimony states at page 10: "I asked a consultant to review the meteorological data gathered from the LIDAR unit and the met mast, and in February 2014, I received a wind assessment report based on the data. It was the combination of this information, the change in market conditions, and the advancement in low-wind-speed wind turbine technology that led me in 2013/2014 to consider a non-residential installation on my Irasburg property." One might infer from this, as the PSD has apparently done, that the consultant was likely retained to assess the wind data for a non-residential wind turbine facility. But the record does not conclusively establish this fact. Mr. Blittersdorf's testimony never states that Mr. Blittersdorf's consultant was retained to assess the wind resource available for a commercial project. And on the contrary, it would be reasonable to infer from the statements on page 10 of Mr. Blittersdorf's prefiled testimony that he did not seriously consider a non-residential wind facility until after the consultant was retained and began to review data from the LIDAR unit and met tower. The record is not clear on this point, and the Board is obliged to draw all reasonable inferences and doubts in Respondent's favor. *Everbank v. Marini*, 2015 VT 131, ¶ 15 (2015).

wind turbine. Finally, in light of the PSD's chosen terminology, it is worth noting that there is no statutory support for the notion that *using* weather data gathered from a meteorological station—for a residential or non-residential installation--requires a certificate of public good under Section 246. Using data collected from wind measurement instrumentation is not the same as *installing* a temporary tower for the purpose of determining the suitability of a particular location for a grid-connected wind turbine; the PSD had the burden of pointing to evidence on the record that established the latter, and it failed to meet this burden.

In sum, the PSD has failed to present undisputed material facts establishing that Respondent's installation required a CPG under 30 V.S.A. § 246, and cannot as a matter of law prevail on its motion for partial summary judgment with respect to the alleged violation of this statutory provision. On the contrary, Respondent has shown that there is no genuine dispute as to material facts establishing that Respondent's installation is permanent rather than temporary, and therefore not subject to the Board's Section 246 authority. Respondent's motion for summary judgment should therefore be granted as a matter of law.

IV. Respondent is entitled to judgment as matter of law because the met tower is not subject to the Board's jurisdiction under 30 V.S.A. § 248

While acknowledging that the Board cited § 248 as one of the statutory provisions pursuant to which it opened its Docket 8585 investigation, Respondent maintains that Section 248 does not provide a statutory basis for Public Service Board authority over Respondent's installation. The PSD's motion does not explain how Section 248, which prohibits site preparation for or construction of a transmission or electric generating facility, applies to a facility that is neither an electric transmission facility nor an electric generating station. 30 V.S.A. § 248; *see In re Proposed Sale of*

Vermont Yankee Nuclear Power Station, 2003 VT 53, ¶9 (holding that Section 248's plain language applies only to the site preparation and construction of an electric generating station or transmission facility). Indeed, the PSD's motion does not address the issue at all.

As explained previously, nothing is presumed in favor of the Board's jurisdiction, whether under Section 248 or otherwise, *Tyrbulski*, 112 Vt. at 7. Section 248 cannot be interpreted to give the Board jurisdiction over land-use activities that are not site preparation or construction of a facility covered by the statute's express terms. *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 2003 VT 53, ¶ 9. For example, in a case involving a proposed wood pellet manufacturing plant that was integral to a proposed biomass-fueled electric generating station, the Board held that Section 248 could not extend to include the manufacturing plant. *See Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 & 7679, Order of 4/1/2011 at 13-14 (citing *Tyrbulski* and holding that a wood pellet manufacturing facility that would be fully integrated into a biomass electric generating plant was not subject to Board jurisdiction under Section 248). Although the manufacturing plant's product would be used to fuel the electric generating facility and both would be located on the same property, the Board held that the manufacturing plant could not be considered part of the electric generation plant and was, therefore, not subject to Section 248. *Id.* The Board analogized the wood pellet manufacturing plant to anaerobic digesters on farms where the output, methane gas, would be used to fuel the farm's electric generating station located on the same property. *Id.* Although the facilities were related, they were not necessarily part of the electric generators over which the Board has jurisdiction under Section 248. *See also Petition of North Springfield Sustainable Energy Project, LLC*, Docket No. 7833, Order of 2/11/2014 (holding that component of biomass project that would provide a thermal heat loop was not part of electric generating station and therefore not subject to Section

248 jurisdiction). Likewise, the met mast on Respondent's property is not a necessary part of his residential wind turbines that were installed two years after the permanent met mast was erected.

Prior to Section 246's enactment, the Board exercised Section 248 authority over meteorological stations erected for the sole purpose of evaluating the economic viability of a wind electric generating stations. *See, e.g., Petition of EMDC LLC, Docket 7037, Order of 7/29/2005.*⁴ In that case, the Board concluded that it had jurisdiction over the wind measurement towers because the project proponent argued that they were "necessary precursors to a potential wind generation facility in planning."⁵ While some meteorological station installations may be necessary to evaluate the economic viability of a wind electric generating station, not all such installations are. As Respondent stated in this case, he installed the met mast for prototype testing and to assess wind resources on his property; he did not state that the met mast was a required element of his residential wind turbine installation. SOUMF at ¶¶10, 12. In fact, many meteorological station installations have been undertaken in Vermont without a certificate of public good although the data collected from them may be used to determine whether a wind turbine would work in a particular location. SOUMF at ¶ 14. The PSD is aware of these

⁴ In 2008, the Board dismissed a petition for a CPG for a meteorological mast because the mast was not part of a wind electric generation project. *Petition of Endless Energy Corporation, Docket No. 6154, Order of 12/11/2008.*

⁵ *See Docket 7037, Order re Jurisdiction, Order of 7/29/2005 at 8-9, 12.* This line of reasoning has never been tested at the Vermont Supreme Court, and, when taken to its logical conclusion, leads to perverse results. If pre-generation wind testing via a met tower is considered part of an electric generating facility such that a CPG is required to undertake the testing, then by logical extension other testing, such as geotechnical testing, testing of plant material to ascertain species, bathymetry and sediment dispersion testing, that must be done to assess the suitability of a location for an electric generation or transmission project also require a CPG. One would be hard-pressed to find an advocate for extending the CPG requirement so far.

installations because it provided funding and managed grants that allowed those installations to occur. ⁶ SOUMF at ¶ 14.

Accordingly, even if, prior to the enactment of Section 246, the Board had authority over pre-construction testing for projects subject to Section 248, the standard established under the Board's Section 248 precedent is not satisfied in this case. The undisputed evidence demonstrates that Respondent's met mast was not, at the time it was installed or anytime thereafter, a necessary part of Respondent's net-metered wind turbines or any other grid-connected wind project. SOUMF at ¶¶8-12. Furthermore, the undisputed fact is that Respondent never contemplated that his property would ever host anything other than residential wind turbines in light of the property's elevation, which is lower than the elevation of land that was hosting wind projects in 2010, when he installed his met mast. SOUMF at ¶¶8, 11. Moreover, the data collected from the instruments on Respondent's met mast were neither necessary nor sufficient for Respondent to assess whether the wind resource on his property was adequate for a potential non-residential wind electric generating project. SOUMF at ¶11.

V. The PSD's Motion for Summary Judgment and Statement of Facts contain assertions and "facts" that are disputed and/or unsupported by the record, but which are ultimately immaterial

A number of facts set forth in the PSD's statement of facts are disputed and/or unsupported by the record, as set forth in the enclosed annotated version of the Department's Statement of Facts and addressed elsewhere in this Memorandum in Opposition to the Department of Public Services' Motion for Partial Summary Judgment and Cross Motion for summary judgment.

⁶ See 30 V.S.A. § 8015(a)(3) (authorizing grants from the Clean Energy Development Fund for an anemometer loan program).

Nonetheless, other than the definitional question of whether the met mast is a temporary installation, Respondent does not consider any of the disputed facts set out in the Department's statement of facts to be "material", and thus there is no genuine issue of material fact that would preclude judgment in Respondent's favor.

Summary judgment in Respondent's favor is appropriate nonetheless, in light of the facts set out in Respondent's Statement of Undisputed Material Facts.

VI. Conclusion

Based on the foregoing, Respondent respectfully requests that the Board or the Hearing Officer assigned to the proceeding find that no issues of material fact exist, and grant Respondent's cross motion for summary judgment.

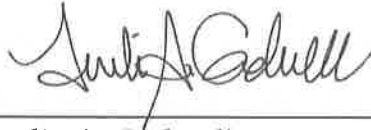
RESPONDENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Mr. Blittersdorf installed a meteorological station on his property at 700 Kidder Hill Road in November and December of 2010. On November 19, 2010, he used a Bobcat to transport components of a 60-meter tall, 10/8-inch diameter mast to the field on the high point of his property. On December 29, 2010, the tower was raised and installation completed. Blittersdorf pf. at 2.
2. When Mr. Blittersdorf installed the meteorological station at 700 Kidder Hill Road, he had no plans to take it down. Blittersdorf pf. at 4.
3. One of the primary purposes for which the meteorological station was installed was to test prototypes in a private location. This prototype testing is ongoing, and as long-term data is needed, Respondent considers it important to conduct long-term testing. Blittersdorf pf. at 4-5; Blittersdorf affidavit (Blittersdorf aff.) at ¶¶2-3.

4. The Town of Irasburg taxed the met tower as real property in 2016. Blittersdorf aff. at ¶ 4.
5. When Mr. Blittersdorf appealed the Town's assessed value of the met tower, he indicated to the representatives of the Town of Irasburg holding the associated July 14, 2016 hearing on the matter that he considered his met tower to be permanent, and therefore was only contesting the amount of the tax and not the taxation of the met tower as real property. Blittersdorf aff. at ¶ 5.
6. At the July 14, 2016 hearing, the representatives of the Town of Irasburg confirmed Mr. Blittersdorf's understanding that they were taxing the met tower on the basis that it was permanent, and that if the structure was going to be taken down, they would not tax it. Blittersdorf aff. at ¶ 6.
7. At the time he installed the met tower on his property, Mr. Blittersdorf was not considering a non-residential wind project. He was only considering prototype testing and a residential turbine installation to power his log cabin. Blittersdorf pf. at 4-5; 8-9.
8. It never occurred to Mr. Blittersdorf when he installed the met tower that there would be enough wind on his property for anything more than a small residential installation, particularly in light of the elevation of his land, which was lower than the elevation of land hosting existing projects, such as the Sheffield wind project. Blittersdorf pf. at 9-10.
9. Mr. Blittersdorf first considered a non-residential scale project on his land at 700 Kidder Hill Road around late 2013/early 2014, based on meteorological data gathered from a LIDAR unit and the met tower, a wind assessment report based on said data, a change in market conditions, and the

- advancement in low-wind-speed wind turbine technology. Blittersdorf pf. at 10.
10. The data collected from the met tower, though helpful in terms of making the financial decision to install residential turbines, was not a necessary precursor to the installation of residential wind turbines on my property. Blittersdorf aff. at ¶8.
 11. The data collected from the tower alone was not necessary or sufficient for Respondent to assess whether the wind resource on his property was adequate for a potential non-residential wind electric generating project. Blittersdorf aff. at ¶9.
 12. Mr. Blittersdorf does not consider the met tower to be part of his residential wind turbine installation. Blittersdorf aff. at ¶7.
 13. Mr. Blittersdorf knew about the Anemometer Loan Program at the time he installed the met tower on his property, because equipment from NRG Systems, which he founded, was being used in that program. Blittersdorf pf. at 6.
 14. Many meteorological station installations have been undertaken in Vermont without a certificate of public good although the data collected from them may be used to determine whether a wind turbine would work in a particular location. The PSD is aware of these installations because it provided funding and managed grants that allowed those installations to occur. Blittersdorf pf. at 5-7.

Dated at Montpelier, Vermont this 29th day of July, 2016.



Leslie A. Cadwell
Alison Milbury Stone
Legal Counselors & Advocates, PLC
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Castleton, VT 05735
lac@lac-lca.com
Respondents Attorneys

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

AFFIDAVIT OF RESPONDENT DAVID BLITTERSDORF

I, David Blittersdorf, Respondent in the above-captioned action, being duly sworn, over 18 years of age, and competent to testify on these matters say:

1. The facts and information about which I testify in this affidavit are based on my personal knowledge and first-hand experience.
2. One of the primary purposes for which the met tower was installed was to conduct prototype testing in a private location.
3. Prototype testing on the met tower on my Kidder Hill property is ongoing. I need long-term data, so it is important to keep running the prototype testing long term.
4. In 2016, the Town of Irasburg taxed the met tower on my Kidder Hill property as real property.
5. When I appealed the Town's assessed value of my met tower, I indicated to the representatives of the Town of Irasburg holding the associated July 14, 2016 hearing on the matter that I considered my met tower to be permanent, and therefore was only contesting the amount of the tax and not the taxation of the met tower as real property.
6. At that hearing, the representatives of the Town of Irasburg holding the hearing confirmed my understanding that they were taxing the met tower on the basis

that it was permanent, and that if the structure was going to be taken down, they would not tax it.

7. I do not consider the met tower to be part of my residential wind turbine installation.
8. The data collected from the met tower, though helpful in terms of making the financial decision to install residential turbines, was not a necessary precursor to the installation of residential wind turbines on my property.
9. The data collected from the met tower was not necessary or sufficient for me to assess whether the wind resource on my property was adequate for a potential non-residential wind electric generating project.

[Signature Page Follows]



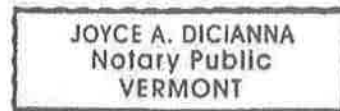
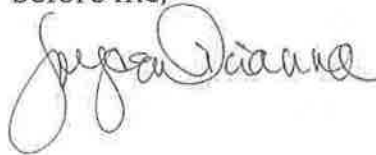
David Blittersdorf

STATE OF VERMONT

COUNTY OF Chittenden, SS.

On this 28th day of July, 2016, personally appeared David Blittersdorf, known to me or satisfactorily proven to be the person who is the signatory to the foregoing, and he swore to the truth of the foregoing statements.

Before me,

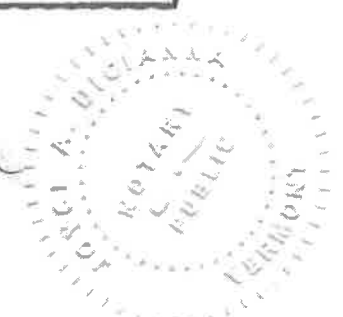


Notary Public

Printed Name: Joyce Dicianna

Notary commission issued in:

My commission expires: 2/10/19



STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

AFFIDAVIT OF COUNSEL PURSUANT TO V.R.C.P. 56(d)

I, Leslie A. Cadwell, counsel for Respondent David Blittersdorf in the above-captioned action, being duly sworn, over 18 years of age, and competent to testify on these matters say:

1. The facts and information about which I testify in this affidavit are based on my personal knowledge and first-hand experience.
2. On June 16, 2016, the Hearing Officer in the above-referenced matter granted the Respondent's request for a 30-day discovery period commencing June 29, 2016, without limitation as to methods or subject matters relevant to the pending litigation before the Board.
3. On June 29, 2016, in accordance with V.R.C.P. 30(a), (b)(1) and (b)(6) and the Hearing Officer's June 16, 2016 scheduling order, I served notices of deposition on behalf of Respondent to the Department of Public Service, Agency of Natural Resources, and Town of Irasburg. The notices seek depositions of certain individuals, Andrew Perchlik and Ron Holland, who I reasonably believe possess information relevant to one or more issues encompassed in this proceeding, as well as individuals unknown to me, but known to the opposing parties, who are authorized to speak on the parties' behalf about information that I also reasonably believe to be relevant to one or more issues in this proceeding, including the issue of whether the meteorological tower on Respondent's

property at 700 Kidder Hill Road required a Certificate of Public Good (CPG) from the Board pursuant to 30 V.S.A. § 246 and/or § 248 for its installation.

4. The notices of deposition were served on the parties at least ten days before their scheduled dates as required by V.R.C.P. 30(b)(1). The Department's 30(b)(6) deposition(s) were scheduled for July 27, 2016, and the Town of Irasburg's for July 15, 2016. The deposition of Andrew Perchlik was scheduled for July 15, 2016, and the deposition of Ron Holland was scheduled for July 26, 2016.
5. The Department subsequently filed a partial summary judgment motion dated July 1, 2016, seeking summary judgment with respect to the issue of whether Respondent committed a violation of Sections 246 and/or 248 by installing and operating a meteorological station on his property at 700 Kidder Hill Road without first obtaining a CPG.
6. On July 11, 2016, the Department sent a letter on which the Clerk of the Board was copied indicating that no Department witnesses would be made available for deposition, and no documents listed in the notices of deposition would be made available for review, before August 5, 2015, which the Department understood to be the end of the discovery period.
7. On July 12, the Department agreed to reschedule the deposition of Andrew Perchlik to August 5, 2016.
8. On July 15, 2016, the Department, along with the Town of Irasburg, filed a motion to quash Respondent's notices of deposition and for protective order.¹

¹ The Agency of Natural Resources also joined the motion, but has since reached an Agreement with the Respondent and therefore its participation in the motion is moot.

9. On July 21, the Department a filed motion for expedited review of its motion to quash, and alternatively request an order staying Andrew Perchlik's deposition until after the Hearing officer has ruled on the motion to quash.
10. Respondent's counsel filed an initial response to the motion to quash dated July 21, 2016, and a supplemental memorandum responding to the motion and the request for expedited review on July 28, 2016.
11. The Department has to-date not only refused to present witnesses for deposition, but has also declined to identify witnesses to Respondent or schedule alternative dates for the duly noticed V.R.C.P. 30(b)(6) depositions.
12. The Town of Irasburg was willing to reschedule the deposition of Ron Holland for August 5, and to reschedule the Town's 30(b)(6) depositions subject to a ruling on the motion to quash.
13. However, although all of the depositions were originally set for dates prior to the Respondent's July 29, 2016 deadline to respond to the Department's summary judgment motion, none of the rescheduled depositions will take place until after this deadline.
14. The refusal of the Department to present witnesses for duly noticed depositions during the scheduled discovery period, and the unwillingness or inability of the Department or the Town of Irasburg to reschedule depositions to dates prior to the Respondent's deadline for responding to the Department's summary judgment motion, have effectively denied Respondent his opportunity to-date to discover what information these governmental parties possess that is relevant to the issue of liability in this matter.

15. Accordingly, Respondent has been unable to discover and present facts essential to justify his opposition to the Department's partial summary judgment motion.

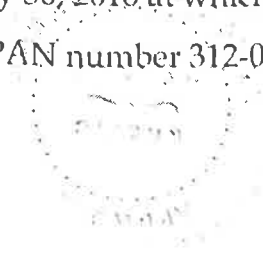
Depositions Noticed to Department of Public Service

16. Respondent seeks inter alia information from the Department that will establish that Respondent's meteorological tower is not subject to 30 V.S.A. § 246 and/or 248.
17. I reasonably believe that Andrew Perchlik or another person authorized to speak on behalf of the Department is likely to have information that will help Respondent's counsel to establish that the Public Service Board did not have jurisdiction over the installation of Respondent's tower under Section 248 because the tower is not a necessary component of an electric generating facility, just as the Respondent's log cabin and access road are not necessary components of an electric generating facility, although they are used in connection with two residential wind turbines.
18. The notice for the Department's VRCP 30(b)(6) deposition included several items in the List of Topics (see Items #1-3) and the List of Documents (see Items #5-7) with respect to the Anemometer Loan Program (ALP). I expect that these items will lead to the discovery of relevant evidence that will establish that the Respondent's installation, like others installed with funding administered by the Department in connection with the ALP, was not subject to the Board's Section 246 or 248 authority.
19. Because Respondent's counsel has been unable to depose a witness for the Department who is knowledgeable on these topics or to review any responsive documents, Respondent has been unable to discover and present any facts in the

Department's possession that justify Respondent's opposition to the Department's partial summary judgment motion.

Depositions Noticed to the Town of Irasburg

20. In order to establish that the meteorological tower is a permanent structure and therefore not subject to the Board's jurisdiction under 30 V.S.A. § 246, Respondent seeks facts from the Town of Irasburg that establish that the met tower is considered permanent and taxable real property.
21. Item #1 on the List of Topics included with the VRCP 30(b)(6) deposition served on the Town of Irasburg dealt with the inclusion on the Irasburg 2016 Grand List, effective April 1, 2016, of the meteorological tower installed at 750 Kidder Hill Road in the valuation of real estate having the SPAN number 312-099-10626, including the basis for the property value attributed to the meteorological tower installation.
22. Item #1 on the List of Documents included with the VRCP 30(b)(6) deposition served on the Town of Irasburg seeks "All public records, including e-mails and text messages, that contain communications between one or members of the Irasburg Select Board and one or more of Irasburg Listers concerning the met tower installed at 750 Kidder Hill Road with the SPAN number 312-099-10626." Moreover, Item #2 on the List of Topics seeks to identify one or more witness(es) who is (are) knowledgeable about the content of these documents.
23. Item #2 on the List of Documents included with the VRCP 30(b)(6) deposition served on the Town of Irasburg seeks Minutes of Irasburg Select Board meetings from January 1, 2012 through July 30, 2016 at which the met tower installed at 750 Kidder Hill Road with the SPAN number 312-099-10626 was discussed.



24. Because Respondent has been unable to depose a witness for the Town of Irasburg who is knowledgeable on these topics or to review any responsive documents, Respondent has been unable to discover and present any facts in the Town of Irasburg's possession that justify Respondent's opposition to the Department's partial summary judgment motion.

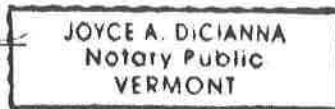

Leslie A. Cadwell, Esq.

STATE OF VERMONT
COUNTY OF Chittenden, ss.

On this 28th day of July, 2016, personally appeared Leslie A. Cadwell, and she swore to the truth of the foregoing statements.


Before me,


Notary Public



Printed Name:

Notary commission issued in: 2/10/19

My commission expires: 



STATE OF VERMONT
PUBLIC SERVICE BOARD

VERMONT PUBLIC
SERVICE BOARD

2016 JUL 29 PM 4 09

Docket No. 8585

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

July 1, 2016

STATEMENT OF UNDISPUTED MATERIAL FACTS OF THE VERMONT
DEPARTMENT OF PUBLIC SERVICE

RESPONDENT'S MARK UP SHOWING DISPUTED/UNSUPPORTED FACTS

The Vermont Department of Public Service, by and through undersigned counsel, hereby submits the following statement of undisputed facts in support of its Motion for Partial Summary Judgment pursuant to Vermont Rule of Civil Procedure 56 in the above-captioned proceeding.

1. On November 19, 2010, Mr. Blittersdorf began preparation for installation of a meteorological ("MET") station on his property at 700 Kidder Hill Road, Irasburg, Vermont. David Blittersdorf ("Blittersdorf") prefiled testimony, Dec. 18, 2015 ("pf.") at 2. Respondent does not dispute that he prepared to install a meteorological mast on which Respondent installed a lightning rod, multiple levels of wind 1 direction vanes, wind speed anemometers and a heated anemometer, a data 2 logger (approximately 1.5 square feet) and a 250 watt, approximately 3' x 5' solar 3 panel located near the bottom of the mast. Respondent disputes that the installation was a "meteorological station" as defined by 30 V.S.A. § 246(a).
2. On December 29, 2010, Mr. Blittersdorf completed installation of the MET station and began recording data gathered by the MET station instrumentation. Blittersdorf pf. at 2; Bittersdorf Discovery Response ("Discovery") A.DPS:Resp.1-5. Respondent does not dispute that he installed a meteorological mast on which Respondent installed a lightning rod, multiple levels of wind 1 direction vanes, wind speed anemometers and a heated anemometer, a data 2 logger (approximately 1.5 square feet) and a 250 watt, approximately 3' x 5' solar 3 panel located near the bottom of the mast. Respondent disputes that the installation was a "meteorological station" as defined by 30 V.S.A. § 246(a).
3. The installed MET station included a 60-meter tower and instrumentation to collect and record wind speed, wind direction, and atmospheric conditions, including wind vanes, wind speed anemometers, a heated anemometer, and data logger. Blittersdorf pf. at 2, 4; Exh. DB-2, Photo 3. Respondent does not dispute that he installed a meteorological

mast on which Respondent installed a lightning rod, multiple levels of wind 1 direction vanes, wind speed anemometers and a heated anemometer, a data 2 logger (approximately 1.5 square feet) and a 250 watt, approximately 3' x 5' solar 3 panel located near the bottom of the mast. Respondent disputes that the installation was a "meteorological station" as defined by 30 V.S.A. § 246(a). Respondent disputes that he installed instrumentation to collect and record "atmospheric conditions."

4. The MET station was installed to measure and/or assess the wind resource at Mr. Blittersdorf's Kidder Hill property. Blittersdorf pf. at 4; Letter from Leslie Cadwell, Esq., on behalf of Mr. Blittersdorf, to Susan Hudson, PSB Clerk, re: *Meteorological Tower on David Blittersdorf's Property*, Sept. 10, 2015; Discovery A.DPS:Resp.1-1. Respondent does not dispute that he installed a meteorological mast on which Respondent installed a lightning rod, multiple levels of wind 1 direction vanes, wind speed anemometers and a heated anemometer, a data 2 logger (approximately 1.5 square feet) and a 250 watt, approximately 3' x 5' solar 3 panel located near the bottom of the mast. Respondent disputes that the installation was a "meteorological station" as defined by 30 V.S.A. § 246(a).
5. Mr. Blittersdorf did not obtain a certificate of public good ("CPG") from the Vermont Public Service Board, pursuant to 30 V.S.A. §§ 246 and/or 248, in advance of installing the MET station. Blittersdorf pf. at 4-5.

6. On January 1, 2012, Mr. Blittersdorf was issued a CPG to install net-metered facility consisting of two wind turbines interconnected with the Vermont Electric Cooperative, Inc. electrical distribution system at his Kidder Hill property. Blittersdorf pf. at 9; CPG #NM- 1771, Final Order, Jan. 5, 2012.
7. Two net-metered wind turbines were installed at Mr. Blittersdorf s Kidder Hill property in 2012. Blittersdorf pf. at 9.
8. In February 2014, data gathered and recorded by the MET station was reviewed by a consultant retained by Mr. Blittersdorf to assess the wind resource available at Mr. Blittersdorf s Kidder Hill property for a commercial, non-residential wind turbine facility. Blittersdorf pf. at 10. Respondent disputes this characterization of his testimony. Respondent testified at page 10 of his prefiled testimony that he “asked a consultant to review the meteorological data gathered from the LIDAR unit and the met mast, and in February 2014, [he] received a wind assessment report based on the data.” He further testified that the data, combined with a change in market conditions and the advancement of low-wind-speed turbine technology led him to consider a non-residential wind turbine installation on his property.

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

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE



Aaron Kisicki
Special Counsel

cc: Docket 8585 Service List

VERMONT

PSD6

Department of Public Service

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