

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

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

MOTION FOR COMMISSION REVIEW AND RECONSIDERATION

NOW COMES Respondent in the above-captioned matter, by and through the undersigned counsel, and moves the Public Utility Commission to review and reconsider the Hearing Officer's September 12, 2019 *Order Granting in Part Department's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment*. The Respondent offers the following Memorandum of Law in support of this motion.

MEMORANDUM OF LAW

The central issue in this case is whether the Public Utility Commission's jurisdiction under 30 V.S.A. §§ 246 and 248 extends to a property owner's permanent installation of a meteorological mast for the purpose of long-term collection of wind resource data for multiple purposes, including evaluation of that data for a grid-connected wind project and to test prototype inventions. The Hearing Officer ruled on cross motions for summary judgment, holding that the installation on Respondent's property is subject to 30 V.S.A. § 246 because the facility was "temporarily used" to assess wind on his property in connection with two net-metered wind turbines. The Hearing Officer declined to rule on whether Section 248 applies to Respondent's installation

notwithstanding that the issue was initially raised by the Commission in its order opening this investigation and later by the Department of Public Service. These two rulings are clear error and require immediate correction by the Commission. The Commission must reverse the Hearing Officer, enter judgment for Respondent on all claims, and dismiss this proceeding.

I. Background

Citing its authority under 30 V.S.A. §§ 30, 209, 246, 247, and 248, the Commission opened this investigation in September 2015 following a complaint from the Town of Irasburg and Department of Public Service that Respondent had installed a meteorological mast ("met mast") on his property in Irasburg, Vermont without first obtaining a certificate of public good (CPG) from the Commission. During the summer of 2016, the Department, joined by the Agency of Natural Resources and the Town of Irasburg, moved for summary judgment that Respondent's installation violated both Sections 246 and 248 of Title 30. Respondent subsequently cross moved for summary judgment, arguing that his installation was not subject to the Commission's jurisdiction because (1) it was not a temporary installation, and thus not covered by 30 V.S.A. § 246, and (2) it was not an electric generating station or otherwise subject to the requirements of 30 V.S.A § 248.

In June 2018, the Commission-appointed Hearing Officer denied summary judgment to all parties. In denying Respondent's summary judgment motion, the

Hearing Officer explained that Section 246 was “intended to provide a more streamlined process for review of *temporary MET towers because their effects, like the towers themselves, are also temporary.*” *Order Denying Motions for Summary Judgment*, Case No. 8585, Order of 6/22/2018 at 7 (emphasis added) [hereinafter referred to as “*Summary Judgment Order I*”]. The Hearing Officer further held that even if Section 246 does not apply to Respondent’s installation because it is not temporary, Respondent cannot escape liability because a permanent met mast installation is subject to Section 248. *Id.*

Subsequent to the Hearing Officer’s order denying summary judgment, the Department proposed that the Commission stay the proceeding pending resolution of an appeal involving a different met mast installation. The Department posited that the Court’s decision in that appeal could have a direct bearing on the dispute over the applicability of Sections 246 and 248 to Respondent’s met mast. The parties and the Hearing Officer agreed to stay the proceeding pending resolution of the appeal.

Procedural Order re: Schedule, Case No. 8585, Order of 7/24/2018.

Once the appeal was decided, the parties asked the Hearing Officer to reconsider his summary judgment decision in light of the Vermont Supreme Court’s opinion and order. On September 12, 2019, the Hearing Officer issued a new ruling on summary judgment granting the Department’s motion that Section 246 applies to Respondent’s installation because the met mast was “temporarily used” to assess the suitability of his property for a grid-connected wind project. *Order Granting in Part Department’s Motion for Summary Judgment and Denying Respondent’s Cross-Motion for Summary Judgment*,

Case No. 8585, Order of 9/12/2019 [hereinafter referred to as "*Summary Judgment Order II*"]. The Hearing Officer declined to rule on the question of Section 248's applicability to Respondent's installation. *Id.* at 1, 5. Respondent moves the Commission for review and reconsideration of those rulings.

Before setting out the legal standards and arguments in favor of reconsideration, Respondent addresses the Hearing Officer's linchpin finding that Respondent temporarily used the met mast to collect weather data to assess the suitability of his property for a wind project. *See Summary Judgment Order II* at 6, 9 (finding that the met mast "was . . . temporary in purpose"). That finding is not supported by Respondent's sworn statements in this investigation. Respondent has been clear throughout this proceeding that he installed and uses the met mast on his property on an *ongoing basis* to collect weather and other data, including wind speed and wind direction. *Prefiled Testimony of David Blittersdorf* at 4; *Respondent's Answers to Questions 9 and 10 of the Department of Public Service First Set of Information Requests*; *Respondent's Answers to Questions 1 and 2 of the Hearing Officer's Information Requests Dated July 3, 2019*. In other words, Respondent has not stopped collecting wind and other weather data that one might utilize in connection with siting a wind turbine on his property. Respondent also uses the facility for prototype testing. *Prefiled Testimony of David Blittersdorf* at 4; *Respondent's Answers to Questions 1 and 2 of the Hearing Officer's Information Requests Dated July 3, 2019*.

Nevertheless, the Hearing Officer's erroneous finding is accepted as true for purposes of this Motion because even if it were true, Respondent's installation falls outside of the Commission's limited jurisdiction under 30 V.S.A. §§ 246 and 248.

II. Legal Standards

Two questions of statutory interpretation are at issue in this case. First, whether Respondent's permanent installation of a met mast for multiple purposes on his property, including to assess wind resources in connection with a grid-connected wind project, is subject to the requirements of 30 V.S.A. § 248(a)(2). The second question is whether Respondent's installation is subject to 30 V.S.A. § 246 because one of its multiple purposes included "temporary use"¹ to evaluate the suitability of his property for a grid-connected wind project.

Construing a statute requires the Commission to implement the Legislature's intent as reflected in the plain meaning of the words used in the statute. *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 12. The Commission must presume that the Legislature included words intentionally to give effect to their plain meaning. *In re Porter*, 2012 VT 97, ¶¶ 10, 13. And although the Commission may look beyond the text of an ambiguous statute, the Commission's interpretation of a statute must always stay within the bounds of "the authority granted by the enabling statute" and must not

¹ This finding is not supported by Respondent's uncontested sworn statements in this proceeding. See *supra* at 4.

“conflict with the statutory definition.” *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 22 n.7. These limits on the Commission’s authority are tied to the principle that powers of specialized administrative bodies do not arise from common law, they are statutory; thus “nothing will be presumed in favor of [the Commission’s] jurisdiction.” *Green Mountain Power Corp. v. Sprint Communications*, 172 Vt. 416, 419 (2001). Applying these analytical principles to the legal questions at issue in the instant case means that Respondent is entitled to judgment as a matter of law and dismissal of this proceeding.

III. Respondent Is Entitled to Judgment As A Matter of Law That His Installation Is Not Subject To 30 V.S.A. § 248.

The Hearing Officer denied Respondent’s cross motion for summary judgment that Respondent’s installation was not subject to the requirements of Section 248 of Title 30, holding that the “Commission need not resolve the question.” *Summary Judgment Order II* at 5. Respondent contends that the Commission must indeed resolve the question in Respondent’s favor to fully conclude this proceeding.

A. The Commission must decide whether Section 248 applies to Respondent’s installation to fully resolve this proceeding.

The Commission’s order opening this proceeding alleged that Respondent may have violated Section 248 by installing his met mast without a CPG. *Order Opening Investigation and Notice of Hearing*, Case No. 8585, Order of 9/23/2015 at 2. The Department of Public Service moved for summary judgment that Respondent’s

installation was subject to Section 248, *Motion for Partial Summary Judgment of the Vermont Department of Public Service* (July 1, 2016), and Respondent cross moved for summary judgment on that question and requested dismissal. *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* (July 29, 2016). As a result, this case cannot be fully resolved without addressing that question. To leave the question of Section 248's applicability to Respondent's installation undecided is patently unjust because it puts Respondent at risk for a future investigation, more litigation, and more significant penalties. Having given Petitioner notice under 3 V.S.A. § 809 that the Commission was investigating whether to penalize Respondent for violating Section 248, the Commission cannot now avoid deciding that question simply because the Hearing Officer found other reasons to penalize Respondent. Respondent is entitled to judgment as a matter of law that his mast is not regulated by Section 248. Dismissal of that claim, with prejudice, is required.

B. Respondent's installation is not an electric transmission or generation station and is not subject to the requirements of 30 V.S.A. § 248(a)(2).

There is no dispute in this case that Respondent's installation does not generate electricity and is not an electric transmission line. As such, the installation is not subject to Section 248. Therefore, the claim against Respondent for violating Section 248 must be dismissed with prejudice.

The Vermont Supreme Court has defined the scope of Section 248(a)(2) by explaining that it is triggered by site preparation or construction of an electric generation or transmission facility. *See In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 2003 VT 53 (“In unambiguous terms, § 248(a)(2) enumerates just two events that trigger the statute's application: (1) "site preparation for" or (2) "construction of" an electric transmission or generation facility.”). The Court reaffirmed this construction of Section 248(a)(2) earlier this year in two cases decided the same day. *See In re Investigation into SolarCity Corp.*, 2019 VT 23 (holding that Section 248(a)(2) applies to net-metered solar projects); *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 20 n.5 (“By the plain language of § 248(a)(2), it is a violation to construct an electricity-producing facility that connects to the electric grid without first obtaining a CPG.”).

In *In re SolarCity*, the Court rejected the appellant's argument that net-metered solar projects are not governed by Section 248 and emphasized that the statute applies to any site preparation or construction of a grid-connected electric generation project:

[W]e clarify here that § 248 does apply. Section 248 prohibits any construction or site preparation for a grid-connected electricity-generating project without first obtaining a CPG. 30 V.S.A. § 248(a)(2). Here petitioner failed to comply with the statutory and regulatory requirements for obtaining a CPG prior to constructing solar-electricity systems. Therefore, petitioner violated § 248 when it constructed the solar-electricity systems. *For a more extensive discussion, see Meteorological Tower*, 2019 VT 20, ¶ 20 n.5.

In re Investigation of SolarCity Corp., 2019 VT 23, ¶ 24 n.9 (emphasis added). The “extensive discussion” of Section 248 in *In re Construction and Operation of a Meteorological Tower* that the Court referenced in the above-quoted text focused on the activities that trigger Section 248 jurisdiction, which, again, are limited to site preparation or construction of “an electricity-producing facility that connects to the electric grid.” *In re Construction and Operation of a Meteorological Tower*, 2019 VT ¶ 20 n.5. The Court explained that these triggers do not extend to a meteorological tower because the facility’s role ends before site preparation or construction of a wind project begins:

A meteorological tower’s role – gathering data – concludes before site preparation for such a facility begins, which would trigger the CPG requirement under § 248. *Therefore, even if [a] tower violates § 246, it does not inherently violate § 248’s CPG requirements for grid-connected projects.*

Id. (emphasis added).

The Hearing Officer failed to apply to the undisputed facts in the instant case the holdings from the Vermont Supreme Court interpreting the limited scope of Section 248(a)(2). Respondent’s met mast is not a facility within the scope of the statute; in fact, it does not even require electricity from the grid to operate. Respondent did not violate Section 248 by installing and continuing to use a met mast on his Irasburg property. Judgment for Respondent on this claim is required by law.

IV. Section 246 Applies to Temporary Installations, Not to Temporary Use of Permanent Installations

The Hearing Officer holds that the Commission's Section 246 authority encompasses the "temporary use" of a non-temporary installation for the purpose of gathering data for a grid-connected wind project. This holding is not consistent with the statute's language, is contrary to Legislature's intent to regulate temporary installations, and violates the holding of the Vermont Supreme Court in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20.

Section 246 defines a "meteorological station" as "one *temporary* tower," and empowers the Commission to establish standards and procedures for the issuance of a certificate of public good (CPG) for "the *temporary* installation" of such towers. 30 V.S.A. §§ 246(a), (b) (emphasis added). The Legislature's intent to limit the scope of Section 246 to temporary installations is further reflected in subsection 246(c)(2), which restricts the time a temporary installation may remain in place and requires removal of the installation completely, and the site restored, upon expiration of the facility's certificate of public good. 30 V.S.A. § 246(c)(2).

Like the statute, the Commission's original order implementing Section 246 uses the term "temporary" to describe the physical facility as well as the nature of its installation. *Sec 246 Standards Order*, Order of 3/9/2010 at 6. In 2017, the Commission amended the Section 246 standards and procedures without modifying the definition or scope of the jurisdictional facility; in other words, the Commission did not expand the

scope of its authority to include non-temporary meteorological stations as the Hearing Officer has done in the instant case. *Amended 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, Case No. 17-5090-INV, Order of 12/6/2017.* The Commission's 2010 and 2017 orders implementing Section 246 show that it that properly presumed the Legislature acted advisedly by including the word "temporary" to define both the structure and nature of its installation. It is clear from the plain meaning and the requirements of Section 246 that the Legislature intended to grant the Commission jurisdiction over temporary met mast installations only.

This interpretation of Section 246 is consistent with the Vermont Supreme Court's recent decision in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20. The Court's unambiguous holding in that case establishes that Section 246 jurisdiction is triggered if two conditions are met: (1) the installation is temporary, and (2) the installation will be used to determine a site's suitability for a grid-connected wind project. ¶ 22. The temporary nature of a Section 246 installation was at the heart of what distinguishes Section 246 from Section 248. The Court explained that unlike Section 248 projects, Section 246 meteorological stations "are *temporary constructions.*" *Id.* ¶ 19 (emphasis added). The Court also recognized that meteorological stations do not generate electricity or connect to the grid. A temporary *use* of a permanent installation is not regulated by Section 246 because it falls outside the scope of the statute.

The Hearing Officer interprets Section 246 as if the text of the statute included the words "or use" when granting the Commission authority to regulate the "temporary installation of one or more meteorological stations." 30 V.S.A. § 246(b). In the Hearing Officer's opinion, it would be absurd for the Legislature to require Commission review of a temporary meteorological station while allowing permanent installations to "escape review." *Summary Judgment Order II* at 9. The fatal flaw in the Hearing Officer's reasoning is that a facility that is not subject to the Commission's jurisdiction according to the plain language of the statute does not "escape review" because there is no mandatory Commission review from which to escape.

It is not absurd for the Legislature to limit the Commission's jurisdiction to temporary meteorological station installations as the Hearing Officer opines. As the Commission surely knows from its experience, wind project development typically involves temporary meteorological stations, not permanent ones, and the Commission's Section 246 authority must be exercised to ensure that temporary facilities are removed and the affected sites restored when the facilities are no longer operating or needed. *See, e.g., Application of Dairy Air Wind, LLC for a certificate of public good, pursuant to 30 V.S.A. § 246, for a meteorological station to be located east of School Road in Holland, Vermont, Case No. 8837, CPG 4/6/2017* at 1 ("The CPG Holder shall remove the meteorological station and all associated equipment within three years of the date of this certificate of public good, and the site shall be restored as provided in 30 V.S.A. § 246(c)(2)."). This construction of the statute gives full effect to the language in subsection 246(c)(2). In

contrast, the Hearing Officer's decision does not explain how the Commission can implement subsection 246(c)(2)'s mandatory removal requirement if the temporary use of a permanent installation is within the statute's scope. That construction of the statute in this case renders subsection 246(c)(2) surplusage and is the only absurd result to be avoided in this case. *See Doyle v. City of Burlington Police Dep't*, 2019 VT 66, ¶ 6 (explaining that the construction of a statute may not render a significant part of it irrelevant or surplusage).

The Hearing Officer expressly aims his construction of Section 246 to prevent a situation where an installer seeking to "escape review" could "later state" that the meteorological station "had an additional permanent purpose, such as a flying flag or pennant." *Summary Judgment Order II* at 9. Those are not the facts of this case, however, and there is no support in the record developed to date that Section 246 was promulgated to solve the Hearing Officer's hypothetical about a rogue, pennant-flying installer. More likely is that the Legislature wanted a streamlined process to review the temporary meteorological stations that were part of the Vermont Anemometer Loan Program, which commenced just a year prior to the enactment of Section 246.² In any event, when and if confronted with an allegation that a meteorological station installation is a sham with facts similar to the Hearing Officer's hypothetical,³ the

² See Exhibit DB-3.

³ Or whether a town that has added wind measuring equipment to the flagpole outside of its municipal building is required to take the flagpole down after five years.

Commission can exercise its authority to investigate the allegation and render a decision on the evidence that is adduced in that case. This is not that case here, where the undisputed facts establish the temporary *use* component was just one facet of a permanent *installation*.

In this case, there is no genuine dispute that Respondent's met mast was installed to be a permanent part of his residential property, is being taxed by the Town of Irasburg as such, and has been used, and continues to be used, for multiple purposes since its original installation, including to evaluate wind resources on his property consistent with his lifelong interests.⁴ Under those facts, Respondent's installation falls outside the narrow scope of the Commission's Section 246 jurisdiction.

Finally, it is worth highlighting that the Hearing Officer's concern about a rogue installer "escaping review" is premised on the wrongheaded notion that all land uses must be subject to some form of governmental review. That premise is an affront to the common law and the longstanding principle that statutes in derogation of the common law must be narrowly construed. *In re CVPS/Verizon Act 250 Land Use Permit*, 2009 VT 71, ¶ 14. Ultimately, Section 246 is a land use statute because it regulates land development of a temporary nature for a particular purpose. Construing the statute narrowly and in a manner that gives effect to all of its language, including subsection

⁴ See *Prefiled Testimony of David Blittersdorf* at 4 ("I have been studying the wind in one way or another since I was a kid, and I've been testing wind measuring devices since I was a teenager.").

246(c)(2), means that the temporary use of a permanent met mast is not within the scope of Section 246 even if it that temporary use included assessing a site's suitability for a grid-connected wind project.

CONCLUSION

For the foregoing reasons, Respondent moves the Commission to reconsider the Hearing Officer's September 12, 2019 decision, grant judgment on all issues for Respondent, and dismiss this proceeding with prejudice. Respondent requests the opportunity to present oral argument to the Commission in connection with this motion.

By:



Leslie A. Cadwell

Legal Counselors & Advocates, PLC

PO Box 827

Castleton, VT 05735

802-342-3114

lac@lac-lca.com

Respondent's Attorney

Dated: September 24, 2019