

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

**DEPARTMENT OF PUBLIC SERVICE'S RESPONSE TO RESPONDENT'S
MOTION FOR RECONSIDERATION BY THE COMMISSION**

The Department of Public Service ("Department") submits its response to David Blittersdorf's ("Respondent") *Motion for Review and Reconsideration by the Commission* of the Public Utility Commission's ("Commission") September 12, 2019 *Order Granting in Part Department's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment* ("Order") and states the following:

I. MOTION FOR RECONSIDERATION

On September 24, 2019, Respondent submitted a *Motion for Review and Reconsideration by the Commission* of the Hearing Officer's September 12, 2019 decision and requested the Commission grant judgment in favor of the Respondent and to dismiss this matter with prejudice. Additionally, the Respondent has requested an opportunity to present oral argument to the Commission in connection with this motion.

The legal standard for a motion to alter or amend a judgment rests with the discretion of the trial court.¹ V.R.C.P. 59(e) gives courts "broad power to alter or amend a judgment," however it "should be used with great caution."² The purpose of Rule 59(e) is to avoid an unjust result due to mistake or inadvertence of the Commission, as opposed to that of a party.³ The rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.⁴ Finally, the motion must "present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued."⁵

The Department finds the Respondent's Motion for Reconsideration attempts to relitigate the issues already decided upon by the Hearing Officer without presentation of any additional facts that should have initially been considered. Respondent's mere disagreement with the Hearing Officer's

¹ *Alden v. Alden*, 187 Vt. 591, 592 (2010).

² *Haven v. Ward's Estate*, 118 Vt. 499, 502 (1955).

³ *Investigation to Consider Revising Maximum & Minimum Water Levels at Great Averill Pond, Little Averill Pond, & Norton Lake in the Towns of Averill, Norton, & Warrens Gore, Vermont*, No. 8429, 2017 WL 6730088, at *4 (Dec. 21, 2017)

⁴ *Id.*

⁵ *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

decision is not grounds for reconsideration.⁶ The Department finds Respondent's motion would be appropriate in the context of briefing and oral arguments before the Commission after the issuance of a proposal for decision. Without any additional, undisclosed facts or consideration of a new argument, the Department requests the Respondent's motion be denied. However, without waiving its objection to Respondent's motion, the Department submits its response.

II. INTRODUCTION

Respondent argues the Hearing Officer's Order incorrectly interpreted Section 246's application to the Respondent's meteorological tower. In support of this argument, Respondent finds the Order (1) does not adequately consider the plain language of Section 246, (2) contradicts the Legislature's intent to regulate temporary installations, and (3) violates the holding by the Vermont Supreme Court in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20. The Department maintains the Order correctly interpreted Section 246 and satisfactorily applies the analysis found in the Vermont Supreme Court's recent decision.

Section 246, 30 V.S.A. § 246, Temporary siting of meteorological stations, states:

- (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.

The Vermont Supreme Court held that Section 246 jurisdiction is triggered if the meteorological station satisfies two characteristics: (1) it is temporary, and (2) it is constructed or installed to determine the suitability of a site for a grid-connected wind project.⁷ While the Vermont Supreme Court's decision provided substantial guidance regarding the second prong of the Section 246 jurisdictional threshold test, the Court did not elaborate upon the "temporary" tower requirement.⁸ Additionally, the Legislature did not provide clarifying definitions of the term "temporary", the primary term at issue, within the statute. The question before the Commission is one of statutory interpretation.

III. STATUTORY INTERPRETATION – LEGAL STANDARD

The objective in statutory interpretation "is to construe and effectuate the legislative intent behind a statute."⁹ "In interpreting the statute, we look first to the plain meaning to derive the intent of

⁶ *In re Bowen Conditional Use Application*, 2011 WL 495658; see also *Application of Emerson Fall Hydro, Inc.*, CPG #NMP-6757, Order of 3/4/16 (Motion for reconsideration denied because no new arguments presented).

⁷ *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 at ¶ 22 (April 26, 2019).

⁸ *Id.*, n.8 (The PUC found, and the parties did not dispute, the tower in this matter was "temporary.")

⁹ *State v. Charett*, 2018 VT 48, ¶ 6 (April 27, 2018).

the Legislature.”¹⁰ If the statute’s language is ambiguous, the Court “consider[s] the statute’s subject matter, effects and consequences, as well as the reason for and spirit of the law.”¹¹ Legislative intent “is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences.”¹²

Finally, the Court “construes statutes to avoid unreasonable consequences that are at odds with the Legislature’s apparent intent.”¹³ “If the literal meaning of the words is inconsistent with legislative intent, the intent must prevail. Such inconsistency occurs if applying the precise wording of a statute produces results which are manifestly unjust, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent.”¹⁴

In sum, the legislative intent of a statute should first be ascertained in the plain meaning of its language, unless the plain meaning leads to an irrational result. If this is the case, the statute may then be interpreted in a non-literal manner to implement the intention of the Legislature.

The crux of the issue is whether Section 246 applies to applicant-designated permanent meteorological towers that are temporarily used for collection and recording of wind speed, wind direction, and atmospheric conditions. Respondent relies upon Section 246’s plain language in his analysis and concludes “temporary” should be narrowly construed to exclude all meteorological towers that have an alternative “permanent” use, despite being utilized to determine suitability of a site for a grid-connect wind project on a temporary basis.

IV. STATUTORY INTERPRETATION - PLAIN MEANING

First, Respondent’s interpretation undermines the Legislative intent of Section 246. Based on the language of Section 246 itself, the Legislature was clearly concerned with the impact of meteorological stations on “aesthetics, historic sites, air and water purity, the natural environment, and the public health and safety,” but aimed to waive the requirements of Section 248 that were “not applicable to meteorological stations, including criteria that are generally applicable to public service companies as defined in [Title 30].”¹⁵

¹⁰ *Cornelius v. The Chronicle, Inc.*, 2019 VT 4, ¶ 18 (January 25, 2019).

¹¹ *Id.*

¹² *Lubinsky v. Fair Haven Zoning Bd.*, 148 Vt 47, 50 (February 28, 1986).

¹³ *State v. Hurley*, 2015 VT 46, ¶ 13 (March 6, 2015).

¹⁴ *Id.* (citing *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129, ¶ 7 (October 10, 2008)).

¹⁵ 30 V.S.A. § 246(c)(3).

The Department agrees with Respondent insofar that the Legislature intended to create a streamlined process for meteorological tower applications. However, Section 246 is intended to direct review of meteorological stations under applicable Section 248 criteria appropriate to such construction and not to the exclusion of meteorological towers with a self-designated, permanent purpose.

A. *“Temporary Use”*

The Hearing Officer concluded Respondent's meteorological station was utilized to gather data for the purpose of assisting in his decision to install net-metered wind turbines. The Vermont Supreme Court found that “[a] meteorological tower's role – gathering data – concludes” before the installation of a grid-connected wind turbine.¹⁶ The Hearing Officer concluded the Respondent's temporary use of the tower prior to the commencement of construction of the wind turbines to measure wind resources subjected the meteorological tower to Section 246 jurisdiction.

The Department supports the Hearing Officer's findings on the basis of statutory interpretation because “temporary tower” as used in Section 246(a) is ambiguous with respect to whether “temporary” is used to describe the physical tower structure, the temporary use of the tower, or the applicant's designation or intention for the tower as a temporary or permanent structure.

Considering the Vermont Supreme Court's finding that meteorological stations have a specified period of time for their use, the appropriate interpretation of “temporary” is the temporary use prior to construction of a wind turbine. As such, Respondent's meteorological tower is subject to Commission jurisdiction under Section 246.

B. *All Meteorological Stations are Temporary*

As an alternative evaluation of the statute, the Department posits that reading Section 246 in its entirety reveals the Legislature intended all meteorological stations utilized “to collect and record wind speed, wind direction, and atmospheric conditions” to be subject to Commission jurisdiction and temporary as a matter of law. Section 246 is titled “§ 246. Temporary siting of meteorological stations.” A plain reading of the title suggests all meteorological stations are to be temporarily sited. If the Legislature intended to designate between temporary or permanent stations, the statute would be more appropriately titled “Siting of temporary meteorological stations.” Additionally, Section 246(b) reads:

(b) The Public Utility Commission shall establish by rule or order standards and procedures governing application for, and issuance or revocation of, a certificate

¹⁶ *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 20, n.5.

of public good for the *temporary installation* of one or more meteorological stations under the provisions of Section 248 of this title. (emphasis added).

Once more, the Legislature has specified the Commission shall make decisions regarding the issuance of CPGs for the temporary installation of meteorological stations. The Legislature then went further under Section 246(c)(2) to designate a maximum of five years for the issuance of a CPG but provided applicants the option to request renewal of a CPG for an extension of time if necessary and at the discretion of the Commission. Upon a plain reading of the statute in its entirety, the Legislature clearly intended all meteorological stations utilized to collect and record wind speed, wind direction, and atmospheric conditions to ultimately be removed as they are temporary installations.

Applying this rationale to Respondent's project, regardless of Respondent's intent to designate his meteorological tower as a temporary or permanent installation, Respondent is required to obtain a CPG because the tower is utilized to collect and record wind data. Upon reaching the date of expiration of the CPG, Respondent would request the Commission grant him a renewed CPG under Section 246(c)(2) if Respondent needs additional time to conduct wind measurement and data collection.

V. STATUTORY INTERPRETATION - ABSURD OR ILLOGICAL RESULT

As the Hearing Officer noted in the Order, Respondent's interpretation would lead to an irrational result contrary to the intent of the Legislature. Applying the plain language interpretation as Respondent suggests, construction of any meteorological tower would fall outside of Commission jurisdiction under Section 246 if an applicant claims the tower will be used for any alternative, permanent purpose.

Respondent further argues that this circumvention of jurisdiction is not supported by the facts of this case and should be addressed in a separate investigation. The Department disagrees and finds this would avoid addressing the policy implications of adopting the Respondent's interpretation and would result in Commission precedent that runs the risk of hollowing Section 246.

Rather, the Department supports the Hearing Officer's Order, and argues the analysis must go further than relying upon a plain meaning interpretation of "temporary" alone. Applying Section 246 jurisdiction to meteorological towers that are temporarily used, regardless of other permanent uses, for the collection and recording of wind speed, direction, and atmospheric conditions is in accordance with the legislative intent and avoids the irrational result of excluding meteorological towers with multiple "permanent" purposes.

Respondent argues the Hearing Officer's Order and the Department's position results in a construction of the statute that renders Section 246(c)(2) as surplusage.¹⁷ However, Respondent fails to note the subsection also states "upon request of an applicant, the Commission may renew a certificate of public good."¹⁸ The applicant is not without recourse and could request an extension of an issued CPG for operation of the temporary meteorological station for Respondent's additional "permanent" purposes.

Furthermore, Section 248(c)(2) conforms with the Legislative intent to require removal of all meteorological stations and associated structures utilized to collect and record wind and atmospheric data. Thus, under the Hearing Officer's Order and the Department's position, the statute sufficiently implements the Legislative intent and resolves any irrational results.

As such, the Department supports the Hearing Officer's Order and finds that Respondent installed a meteorological station on his property for the temporary purpose of assessing the property's wind resource as contemplated under Section 246. Therefore, as the Hearing Officer concluded, Respondent's meteorological tower is subject to Section 246.

VI. RESPONDENT'S METEOROLOGICAL TOWER WAS UTILIZED TO COLLECT WEATHER DATA TO ASSESS SUITABILITY OF RESPONDENT'S PROPERTY FOR A NET-METERED WIND TURBINE

Respondent argues the Hearing Officer's finding that Respondent's meteorological tower was used to collect weather data to assess the suitability of Respondent's property for a wind project is not supported by Respondent's testimony.¹⁹

The Department finds this assertion to be patently false. As noted in the Hearing Officer's Order, Respondent's then-counsel authorized a letter stating Respondent installed his meteorological tower to "assess whether there was sufficient wind to install a residential wind turbine to power the log cabin via net metering."²⁰ Respondent further reinforced this purpose in his responses to the Department's discovery request.²¹

¹⁷ See Respondent's Motion for Review and Reconsideration by the Commission, pg. 13, Docket No. 8585 (September 24, 2019).

¹⁸ 30 V.S.A. § 246(c)(2).

¹⁹ See Respondent's Motion for Review and Reconsideration by the Commission, at 4.

²⁰ See Respondent's Response to Commissioner Recchia's Request for Information, Docket No. 8585 (September 10, 2015); See also Order Granting in Part Department's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment, pg. 11, Docket No. 8585 (September 12, 2019).

²¹ "It would have been more accurate to say that the purpose of the installation was to assess conditions for ' . . . one or more residential wind turbine(s) to power the log cabin. . . ." Respondent Discovery Response, A.DPS:Resp. 1-1.

Therefore, the Department supports the Hearing Officer's legal analysis in applying the second prong of the test established in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20.

VII. CONCLUSION

For the foregoing reasons, the Department requests the Commission deny Respondent's Motion for Review and Reconsideration, or in the alternative, affirm 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*.

DATED at Montpelier, Vermont this 8th day of October 2019.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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