

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

MEMORANDUM IN REPLY TO DPS OPPOSITION  
TO RESPONDENT'S MOTION FOR COMMISSION  
REVIEW AND RECONSIDERATION

Respondent in the above-captioned proceeding submits this reply to the memorandum filed by the Department of Public Service on October 8, 2018 in opposition to Respondent's Motion for Review and Reconsideration by the Commission.

Respondent seeks Commission review and reconsideration of an interim summary judgment order entered against Respondent by the Hearing Officer. Resolving Respondent's motion requires the Commission to apply the summary judgment standard in Rule 56 and determine whether the undisputed material facts in this case entitle any party to judgment as a matter of law.<sup>1</sup>

Fundamentally, this case boils down to one question: whether the Legislature intended to give regulatory authority to the Commission over the installation of a

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<sup>1</sup> V.R.C.P. 56. The Department argues that V.R.C.P. 59(e) relating to motions to alter/amend a judgment applies to Respondent's motion. Department Memorandum in Opposition to Respondent's Motion for Review and Reconsideration at 1. Rule 59(e) does not apply to Hearing Officer orders, however, because such orders are not judgments of the Commission. V.S.A. §§ 811, 812; 30 V.S.A. § 8. The Commission itself must decide whether summary judgment is appropriate based on the record in this case.

meteorological station that is a fixture on residential property owned by a landowner who uses the station to study wind resources on his property and to test prototype devices consistent with the landowner's lifelong interests:

Q13. What was the purpose of the met mast installation?

A13. The installation met two primary purposes: assessing the wind on my property and prototype testing. 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. My Irasburg land offered me a private hilltop where I could test prototypes and protect my intellectual property.

Q14. When you installed the met mast, how long did you plan to keep it up?

A14. I assumed I'd keep it up for at least as long as it served its purposes. I didn't have any plans to take it down.<sup>2</sup>

Respondent's sworn testimony on the purposes for which he installed the met mast is not contradicted by any sworn statements or other admissible evidence in the record.<sup>3</sup>

Respondent's testimony on his installation and use of the met mast as a fixture on his residential property is also supported by an objective review of other facts in the record.<sup>4</sup>

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<sup>2</sup> Prefiled Testimony of David Blittersdorf at 4.

<sup>3</sup> Responses of the Department of Public Service to David Blittersdorf's ("Respondent") First Set of Discovery Requests, dated July 1, 2016 at 10, 16, 20 (Aug. 8, 2016) (A.Resp:DPS.1-1-9, A.Resp:DPS.1-3-3, and A.Resp:DPS.1-3-7).

<sup>4</sup> See *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 26 (explaining that an objective fact-based review of circumstances is necessary to determine whether a temporary meteorological station is within the Commission's jurisdiction).

First, the Town of Irasburg, whose complaint to the Commission initiated this investigation, considers the met mast a fixture on Respondent's property and includes the value of the facility in its tax assessment of Respondent's property.<sup>5</sup> Second, the met mast has remained on Respondent's property since its installation in 2010 and has been used by Respondent on an ongoing basis to collect weather/wind data and to test prototype devices.<sup>6</sup> No party has presented evidence to counter either Respondent's sworn statements about the installation and use of his met mast or the objective facts that support those statements. Having failed to produce any evidence to support their allegations after two rounds of discovery on Respondent, the Department, the Town of

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<sup>5</sup> Affidavit of Respondent David Blittersdorf, July 28, 2016, at 1. Respondent testified:

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.

*Id.*

<sup>6</sup> 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.

Irasburg, and the Agency of Natural Resources have failed to create a factual issue for trial.<sup>7</sup>

The Department contends that these undisputed facts mean that Respondent violated 30 V.S.A. § 246 because (1) he “temporarily used” the met mast to evaluate wind resources on his property for net-metered wind turbines, and (2) the statute prohibits installations like Respondent’s that are not temporary.<sup>8</sup> As explained in Respondent’s previous submissions in this matter, the Legislature did not authorize the Commission to regulate Respondent’s met mast because it is not a “temporary tower” or a “temporary installation” as provided in the statute.

Both the Department and the Hearing Officer read words into Section 246 that do not appear in the statute’s text. The words “temporary use” do not appear anywhere in the statute, nor does the statute expressly prohibit the installation of non-temporary facilities. Had the Legislature intended to regulate “temporary use” or prohibit landowners from installing meteorological stations as fixtures on their property, it would have used language to express that intent.<sup>9</sup>

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<sup>7</sup> V.R.C.P. 56; see *Gore v. Green Mountain Lakes*, 140 Vt. 262, 266 (1981) (reiterating that “the opponent to a summary judgment motion may not rest on allegations in the pleadings to rebut credible documentary evidence or affidavits.”).

<sup>8</sup> Department Memorandum in Opposition to Respondent’s Motion for Review and Reconsideration at 3-6.

<sup>9</sup> See *Lemieux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 14 (1995) (explaining that in absence of an express prohibition, administrative agency’s interpretation of statute to prohibit certain actions was invalid).

The Department argues that Section 246 can be read to allow Respondent to seek an extension of a CPG issued for his met mast so that Respondent can continue to operate the facility for what the Department characterizes are “additional ‘permanent’ purposes.”<sup>10</sup> Again, the Department reads into Section 246 words—“permanent purposes”—that do not appear anywhere in the statute. Moreover, the argument is illogical because if, as the Department contends, all meteorological stations are temporary as a matter of law, then renewing a Section 246 CPG to authorize use for “permanent purposes” would exceed the Commission’s express authority over temporary installations.

The only reasonable interpretation of Section 246 is that it regulates temporary meteorological installations associated with the development of grid-connected wind projects as Respondent has argued repeatedly. Section 246 was not intended to encompass, and does not prohibit, landowner installations as fixtures on residential property like the facility at issue in this case, even if information collected from the facility is used to help develop a wind project.

Finally, the Department misapprehends Respondent’s challenge to the Hearing Officer’s finding that Respondent temporarily used the met mast to collect wind and other meteorological data.<sup>11</sup> Respondent’s dispute centers on the Hearing Officer’s

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<sup>10</sup> Department Memorandum in Opposition to Respondent’s Motion for Review and Reconsideration at 6.

<sup>11</sup> The Department argues at page 6 of its opposition: “Respondent argues the Hearing Officer’s finding that Respondent’s meteorological tower was used to collect weather data to assess the suitability of

characterization of Respondent's use of his met mast as "temporary." Respondent clarified this point on page 4 of the pending Motion for Review and Reconsideration:

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. [ ] **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.

Respondent's Motion for Review and Reconsideration at 4 (citations omitted) (bold added for emphasis). Even if the Department's recitation of the record evidence is wrong, however, Respondent's met mast is not a temporary installation that triggers the Commission's Section 246 jurisdiction so its misapprehension of the record is inconsequential.<sup>12</sup>

#### CONCLUSION

The Commission has broad authority over the matters committed to its jurisdiction. That jurisdiction is limited, however, and does not extend to a met mast that a property owner installs as a fixture on his residential property for multiple purposes, including to collect wind and weather data consistent with his lifelong


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Respondent's property for a wind project is not supported by Respondent's testimony." This is not what Respondent argued as explained above.

<sup>12</sup> "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." Respondent's Motion for Review and Reconsideration at 5.

**This document has been electronically filed via ePUC.**

interests and practices. Therefore, Respondent is entitled to summary judgment and dismissal of this proceeding.

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