

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 8585

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

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Order entered: 11/06/2019

**PROCEDURAL ORDER DENYING REQUEST FOR INTERLOCUTORY REVIEW**

On September 12, 2019, the hearing officer assigned to this case issued an order granting in part a motion for summary judgment filed by the Vermont Department of Public Service (“Department”) and denying a motion for summary judgment filed by the respondent, David Blittersdorf. The order granted the Department’s motion with respect to the respondent’s liability under 30 V.S.A. § 246 for constructing a meteorological (“MET”) tower without first obtaining a certificate of public good (“CPG”). The order further stated that the case would move into a second phase to determine the appropriate civil penalty to be imposed as a result of the respondent’s failure to obtain the CPG.<sup>1</sup>

On September 24, 2019, Mr. Blittersdorf filed a “Motion for Commission Review and Reconsideration” of the hearing officer’s September 12 order.

On October 8, 2019, the Department filed an opposition to Mr. Blittersdorf’s motion.

On October 22, 2019, Mr. Blittersdorf filed a reply to the Department’s opposition.

The Commission has reviewed Mr. Blittersdorf’s September 24 motion and October 22 reply and the Department’s October 8 opposition and denies Mr. Blittersdorf’s request for interlocutory review of the hearing officer’s order.<sup>2</sup>

The Commission looks to the Rules of Appellate Procedure for guidance in deciding whether to engage in an interlocutory review of a hearing officer’s interim decision, in particular rules 5(b) and 5.1(a).<sup>3</sup>

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<sup>1</sup> Case No. 8585, Order of 9/12/19 at 1, 15.

<sup>2</sup> Mr. Blittersdorf titled his filing a “Motion for Commission Review and Reconsideration.” However, it is more appropriately viewed as a request for an interlocutory review by the Commission of the hearing officer’s interim order on summary judgment on the question of liability.

<sup>3</sup> *Investigation into New England Telephone and Telegraph Company’s tariff filing re: Open Network Architecture*, Docket No. 5713, Order of 6/4/99 at 3.

Rule 5(b) provides for an interlocutory appeal when an “order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion” and “an immediate appeal may materially advance the termination of the litigation.”<sup>4</sup>

We do not believe that our review of the hearing officer’s September 12 order would materially advance the termination of this litigation. On July 20, 2018, the parties to this proceeding agreed to a stay of this matter pending a decision from the Vermont Supreme Court in the appeal of Commission Case No. 8561, another case regarding the construction of a MET tower without a CPG. The parties requested the stay because it was thought that the Vermont Supreme Court’s decision in that appeal would provide guidance to the parties and the Commission in resolving this matter.

Approximately nine months later, on April 26, 2019, the Vermont Supreme Court issued its decision on the appeal of Case No. 8561.<sup>5</sup>

The hearing officer convened a status conference on June 25, 2019, and issued information requests to Mr. Blittersdorf on July 3, 2019, the responses to which were received on July 19, 2019. The Department filed its final comments and recommendations on August 2, 2019, and the hearing officer issued his order on summary judgment on September 12, 2019.

Following the resolution of the appeal at the Vermont Supreme Court, this matter has moved forward in an efficient manner. We have no reason to expect that the hearing officer will not manage the remainder of this proceeding in a similar manner and therefore do not believe that our review of the September 12 order will materially advance the termination of this litigation. It is more efficient for the hearing officer to proceed to hear the penalty phase of this matter and then provide a complete proposal for decision for the Commission’s consideration.

In reaching this conclusion we emphasize that the hearing officer’s order is not a final judgment. It is an interim ruling on a question of law that was necessary to advance this case to its conclusion.<sup>6</sup> After the penalty phase, the hearing officer will issue a proposal for decision that both sets forth a recommended penalty amount and incorporates the findings and conclusions of the September 12 order. Final judgment will be rendered by a majority of the Commission after

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<sup>4</sup> V.R.A.P. 5(b)(1)(A) & (B).

<sup>5</sup> *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 (April 26, 2019).

<sup>6</sup> A hearing officer “may inquire into and examine any matter within the jurisdiction of the Commission.” 30 V.S.A. § 8(a).

the parties are provided an opportunity to file comments and present oral arguments to the Commission on the hearing officer's proposal for decision consistent with the requirements of 30 V.S.A. § 8 and 3 V.S.A. § 811.<sup>7</sup>

We also find no support in V.R.A.P. 5.1(a) for interlocutory review of the hearing officer's September 12 order. Rule 5.1(a) allows for an appeal from an interlocutory order or ruling if "the order or ruling conclusively determines a disputed question, resolves an important issue completely separate from the merits of the action, and will be effectively unreviewable on appeal from a final judgment."<sup>8</sup> All three of these requirements must be met before interlocutory review will be granted. In this case, none of the required elements are met. The September 12 order is not a final Commission order addressing the issue of liability because that will occur by a majority of the Commission after the hearing officer serves his proposal for decision. The question of liability is also not separate from the merits of this case, although it is a prerequisite for reaching those merits, and the hearing officer's ruling will be subject to full Commission review after the proposal for decision is served on the parties.

For the forgoing reasons, Mr. Blittersdorf's request for interlocutory review of the hearing officer's September 12, 2019, order on summary judgment is denied. We emphasize that this is not a ruling on the merits of Mr. Blittersdorf's position with respect to liability under Section 246. We will issue our ruling on the merits of the liability question when we issue our final decision in this matter, which will occur after the hearing officer issues a proposal for decision and the parties have had an opportunity to file comments with and present oral argument to the Commission consistent with 30 V.S.A. § 8 and 3 V.S.A. § 811.

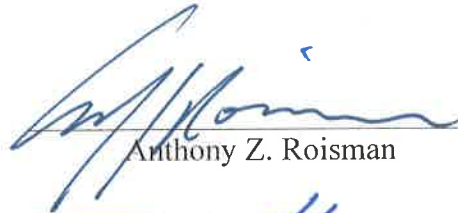
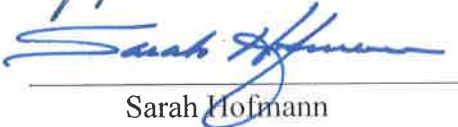
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<sup>7</sup> The hearing officer pointed this out to the parties in footnote 2 of the September 12 order.

<sup>8</sup> V.R.A.P. 5.1(a)(1)(A)-(C).

**SO ORDERED.**

Dated at Montpelier, Vermont, this 6th day of November, 2019.

	)	PUBLIC UTILITY
Anthony Z. Roisman	)	
	)	COMMISSION
	)	
Sarah Hofmann	)	OF VERMONT

OFFICE OF THE CLERK

Filed: November 6, 2019

Attest:   
Clerk of the Commission

*Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: [puc.clerk@vermont.gov](mailto:puc.clerk@vermont.gov))*

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Parties:

\*Leslie A. Cadwell, Esq. (for David Blittersdorf)  
Legal Counselors & Advocates, PLC  
P.O. Box 827  
Castleton, VT 05735  
lac@lac-lca.com

Eric B. Guzman (for Vermont Department of Public Service)  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620  
eric.guzman@vermont.gov

Dr. Robert R. Holland (for Town of Irasburg)  
Town of Irasburg  
PO Box 88  
4328 Route 14  
Irasburg, VT 05845  
kcf.rrh@gmail.com

James Porter, Esq. (for Vermont Department of Public Service)  
Vermont Department of Public Service  
Vermont Public Service Department  
112 State St  
Montpelier, VT 05620  
james.porter@vermont.gov

Kane Smart, Esq. (for Vermont Agency of Natural Resources)  
Vermont Agency of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05620  
kane.smart@vermont.gov