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January 30, 2020

Judith C. Whitney, Clerk
Vermont Public Utility Commission
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Re: Case No. 8585
Respondent's Reply re: Objections and Motion to Strike

Dear Ms. Whitney:

On behalf of Respondent in the above-referenced matter, I write in reply to the opposition to Respondent's Objections and Motion to Strike filed by the Department of Public Service (DPS) and joined by the Agency of Natural Resources (ANR).

Respondent objected to the admission of the DPS penalty recommendation filed on December 20, 2019 into the evidentiary record. Respondent also moved to strike the filing because it was not contemplated by the procedural schedule agreed to by the parties and is an attempt by DPS to circumvent its obligation to support its opinions on a penalty with evidence. DPS and ANR contend that they do not need to support a penalty recommendation with evidence offered and admitted at the scheduled evidentiary hearing because, they claim, the remaining issues are legal. DPS and ANR are wrong. There is no legal authority cited by DPS or ANR to support their contention that a penalty determination under 30 V.S.A. § 30 is a question of law.

The penalty allowed by 30 V.S.A. § 30(a)(2) and the factors the Commission may consider under Section 30(c) require the Commission to make factual findings. The findings under Section 30(a)(2) must address whether the violation substantially harmed or "might have substantially harmed" (1) the public health, (2) public safety, (3)

the public welfare, (4) the interests of utility customers, (5) the environment, (6) the reliability of utility service, or (7) the financial stability of the company. 30 V.S.A. § 30(a)(2), (c). A determination on the extent to which a violation harmed those enumerated interests is not a legal question, but is a matter of opinion. The Department's opinion about the extent of harm caused by Respondent's violation must be presented by a qualified expert witness. V.R.E. 702.

Similarly, the statutory factors set out in Section 30(c) also require factual findings that must be supported by admissible evidence. As Respondent's Objections and Motion to Strike explained, how the Commission should apply facts to the penalty factors is a matter of opinion that requires expert testimony. That the application of the penalty factors under Section 30(c)(1) is a matter of opinion is supported by the DPS's own supplemental discovery responses. See A.Resp:DPS.1-1-4 (Supplemental), December 6, 2019 (attached).

Finally, there is no pending motion for summary judgment on the penalty issues, and there is no procedure in the Administrative Procedures Act (APA), the Commission's procedural rules, or the many schedules that have issued in this proceeding that call for pre-evidentiary hearing legal briefing. While it is helpful for DPS to have stated a position on a penalty for the record in this case after so many years, the evidentiary record will not be complete until after the evidentiary hearing scheduled in February is over and the evidence closed. As the APA and Commission's rules allow, DPS and ANR will have the opportunity to file proposed fact findings and legal argument in briefs to be filed after the close of evidence. Until then, the Commission may not rely on or consider the DPS penalty recommendation because it is not evidence and the time for legal briefing has not yet arrived.

Thank you for your assistance and attention to this filing.

Very truly yours,



Leslie A. Cadwell

Enclosure(s)

Cc: ePUC

