

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont	
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Order entered: 01/30/2020

I. INTRODUCTION

In today's order I determine that an objection, filed on January 6, 2020, by the respondent David Blittersdorf, to the admissibility of certain information filed by the Department of Public Service ("Department") has been rendered moot by subsequent events. I also deny a companion motion by Mr. Blittersdorf to strike the Department's filing from the record. Lastly, I seek input from the parties on how this matter should proceed given that neither the Department nor the Agency of Natural Resources prefiled any testimony.

II. PROCEDURAL HISTORY

On November 25, 2019, I issued a scheduling order in this proceeding. That order established December 20, 2019, as the deadline for non-respondents to prefile their written testimony.

On December 20, 2019, the Department, rather than filing testimony, filed a document titled "Department of Public Service's Recommendation Re: Civil Penalty."

On January 6, 2020, Mr. Blittersdorf filed an objection to the admissibility of the Department's December 20 filing, or in the alternative, a motion to strike that filing from the record.

On January 21, 2020, the Department and the Vermont Agency of Natural Resources each filed a response to Mr. Blittersdorf's objection and motion.

On January 30, 2020, Mr. Blittersdorf filed a reply to the Department's January 21 response.

III. DISCUSSION

1. Objection to Admissibility

Mr. Blittersdorf objects to the admission of the Department's December 20 filing into the evidentiary record because it is not proper prefiled testimony from a qualified witness but is instead a document signed by the Department's legal counsel. According to Mr. Blittersdorf, the Commission cannot rely on the Department's filing as the basis for Commission findings unless it is sponsored under oath by a qualified witness and subject to cross-examination at an evidentiary hearing. Mr. Blittersdorf explains why he believes that the Department's comments on several of the statutory criteria that are applicable to assessing a civil penalty under 30 V.S.A. § 30(c) are inadmissible.¹

The Department states that it is not seeking the admission of its December 20 filing into the evidentiary record. Rather, the Department states that the purpose of the filing is to clarify its position with respect to an appropriate civil penalty in this matter. The Department characterizes its filing as legal conclusions based on facts already admitted to by Mr. Blittersdorf and argues that expert witness testimony is therefore not needed.²

The Agency of Natural Resources concurs with the Department.³

Given that the Department is not seeking the admission of its December 20 filing into the evidentiary record, Mr. Blittersdorf's objection to its admissibility is moot.

2. Motion to Strike

Mr. Blittersdorf contends that the Department's December 20 filing should be stricken from the record because the facts and opinions in the filing "are immaterial and impertinent having been filed without leave from the Hearing Officer or consent of Respondent or other parties."⁴ According to Mr. Blittersdorf, striking the Department's filing from the record is appropriate because "the Department seeks to influence the outcome of this proceeding while simultaneously depriving Respondent of his statutory right to cross examine a witness on those opinions."⁵

¹ Blittersdorf objection at 1-10; reply at 1-2.

² Department response at 1-2.

³ Letter from Kane Smart, Esq. to Judith Whitney, Clerk of the Commission, dated January 21, 2020.

⁴ Blittersdorf objection at 11.

⁵ Blittersdorf objection at 11.

Mr. Blittersdorf further asserts that 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.” Mr. Blittersdorf asserts that the evidentiary record will not be complete until after the evidentiary hearing is over and the Department will have the opportunity to file its proposed fact findings and legal arguments after the close of evidence.⁶

The Department asserts that its recommendation on a penalty amount is neither immaterial nor unduly prejudicial to Mr. Blittersdorf. According to the Department, because a hearing officer can agree or disagree with the Department’s analysis when forming a proposal for decision, no cognizable harm to Mr. Blittersdorf can result from the Department’s December 20 filing.

I deny Mr. Blittersdorf’s motion because I find no basis to strike the Department’s filing merely because it was filed instead of prefiled testimony. Vermont Rule of Civil Procedure 12(f) provides that a court “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” I disagree with Mr. Blittersdorf’s claim that the December 20 filing is immaterial or impertinent. The Department’s ultimate recommendation on a penalty amount in the penalty phase of an investigation being conducted under 30 V.S.A. § 30 cannot be considered immaterial or impertinent.

I realize that the Department submitted what amounts to its initial brief on the date that was set for the pre-filing of testimony. However, that act does not render the filing immaterial or impertinent, it merely renders it early. By doing so, the Department has foregone its ability to supplement the factual record in this proceeding and has effectively filed its legal position on what it perceives to be the appropriate outcome in this case earlier than it was actually due.

I see no prejudice to Mr. Blittersdorf from this early filing. The Department has not presented a witness and does not seek the admission of the December 20 filing into the evidentiary record of this case. Instead, the Department intends to rely on facts already submitted by the parties, in particular Mr. Blittersdorf, during the liability phase of this proceeding. Further, Mr. Blittersdorf will have a full and fair opportunity to respond to the Department’s December 20 filing by arguing against the Department’s legal reasoning and

⁶ Blittersdorf reply at 2.

challenging any inferences the Department may have drawn based on the facts in the record of this proceeding.

3. Remaining Process

The schedule for this proceeding envisioned the non-petitioners prefiling testimony on December 20, 2019, with discovery served on that testimony on January 10, 2020, and responses to discovery due on January 31, 2020. The schedule negotiated by the parties did not include a date for the prefiling of testimony by Mr. Blittersdorf nor any other additional process before an evidentiary hearing to be held on February 27, 2020. Briefs and reply briefs were due to be filed two weeks and four weeks respectively after the availability of the evidentiary hearing transcript.⁷

However, the non-petitioners decided to forego the opportunity to supplement the factual record through prefiled testimony on December 20, 2019, with the Department instead filing its penalty recommendation through counsel. Mr. Blittersdorf did not serve any discovery requests on January 10, 2020, presumably because no prefiled testimony was filed by either the Department or the Agency of Natural Resources. As a result, the only remaining items on the schedule are the February 27, 2020, evidentiary hearing and the filing of briefs and reply briefs.

Given the lack of any prefiled testimony in this matter, it is no longer clear what purpose the scheduled evidentiary hearing would serve. Accordingly, the parties are directed to file either a confirmation that the hearing remains necessary or a withdrawal of their request for a hearing no later than February 10, 2020.⁸ This will allow the Clerk adequate time to issue the notice of hearing in compliance with the required minimum 12-day notice period.⁹ If the parties confirm the need for the evidentiary hearing, each party shall provide a description of what it intends to present at the hearing and a proposed schedule for the day. If the parties agree that the evidentiary hearing is not necessary, they should propose specific due dates for briefs and reply briefs. Absent a compelling reason to the contrary, I intend to treat the Department's December 20 filing as its initial brief. Any briefing schedule should therefore take that filing into account.

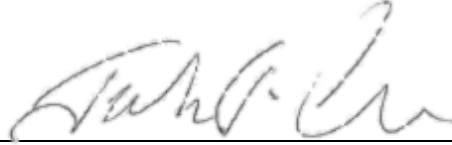
⁷ Case No. 8585, Order of 11/25/19.

⁸ Mr. Blittersdorf is entitled to an evidentiary hearing pursuant to 30 V.S.A. § 30. Therefore, the hearing will take place even if only Mr. Blittersdorf believes that it remains necessary.

⁹ See 30 V.S.A. § 10(b).

SO ORDERED.


Dated at Montpelier, Vermont this 30th day of January, 2020.



John J. Cotter, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: January 30, 2020

Attest: 

Deputy 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)

PUC Case No. 8585 - SERVICE LIST

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