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March 27, 2020

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

Re: Case No. 8585 – Respondent's Response to Procedural Order re: Schedule Proposals

Dear Ms. Whitney:

Respondent in the above-referenced matter offers this letter in response to the Hearing Officer's Procedural Order re Schedule Proposals issued on March 12, 2020.

This case was opened by the Commission at the request of a municipal government (the Town of Irasburg) and an agency of the State of Vermont (the Department of Public Service) to investigate Respondent's installation of a meteorological mast on property he owns in Irasburg, Vermont where he built a home. Respondent has been clear from the outset of this case that he wants a hearing to confront the claims against him as is his right under state statute, 30 V.S.A. § 30(a) and 3 V.S.A. § 809(a), and as a matter of constitutional due process. U.S. Const. Amds. V, XIV; Vt. Const. ch. I, art. 4. The government may not deprive Respondent of his property in the form of a civil penalty without providing him with due process that, at a minimum, requires fair notice of the claims against him and an opportunity for hearing to confront the government's witnesses and to present contrary evidence. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

Respondent has faced an evolving set of claims since this proceeding was opened in 2015. First, he was accused by the Department, the Town, and the Agency of Natural Resources (hereinafter "government parties") of violating Section 246 by installing the

met mast. *DPS Motion for Partial Summary Judgment*, July 1, 2016. The Hearing Officer went beyond the government parties' position and held that both Sections 248 and 246 were in play and that a hearing was necessary to determine Respondent's legal liability under Section 246 if the met mast was a temporary installation, or Section 248 if it was a necessary precursor to Respondent's net-metered wind turbines. *Order Denying Motions for Summary Judgment*, June 22, 2018.

Now, Respondent faces a potential penalty because the Hearing Officer reconsidered his prior determination and held that Section 246 applies because Respondent used the met mast temporarily for siting two residential wind turbines on his property, and left the question of Section 248 open. *Order Granting In Part Department's Motion For Summary Judgment and Denying Respondent's Cross-Motion For Summary Judgment*, Sep. 12, 2019. That decision is preliminary and was not made after an evidentiary hearing. Respondent sought reconsideration from the Commission clarifying what legal standard applied to Respondent's conduct and was denied. *Procedural Order Denying Interlocutory Review*, Nov. 6, 2019. Thus, whether a penalty under 30 V.S.A. § 30(a)(1) or (a)(2) may be imposed remains an open issue.

Even assuming the Commission adopts the Hearing Officer's preliminary summary judgment decision on the need for a Section 246 CPG, neither the government parties nor the Commission may rest on legal arguments to support a penalty under 30 V.S.A. § 30 because legal arguments are not evidence. Respondent's right to due process did not end when the Hearing Officer entered the preliminary order on "liability"; the Commission's findings on an appropriate penalty must be grounded in evidence, not arguments or inferences drawn from evidence not admitted at a duly noticed hearing. *See Manley v. Georgia*, 279 U.S. 1, 5-6 (1929) (holding that a rational connection between what is proved and what is inferred must exist to satisfy due process); *In re Jankowski*, 2016 VT 112, ¶ 12, 203 Vt. 418 (explaining that due process makes no distinction with respect to an adjudication that a violation has occurred and what consequences flow from that violation).

The statutory scheme entrusted to the Commission's and Department's implementation cannot be construed to allow the Commission to impose a fine on an individual for violating either Sections 246 or 248 without evidence presented at a duly noticed hearing. Title 30 gives both of these government entities substantial authority to conduct investigations, engage experts, and otherwise ensure that the Commission has admissible evidence upon which it can make fact findings to support its judgments. Notwithstanding their authority and Respondent's constitutional and statutory rights,

the government parties, with the Hearing Officer's implicit consent, have shifted the entire burden of proof in this case onto Respondent. Shifting the burden on Respondent to disprove the government parties' allegations violates Respondent's fundamental right to due process. *In re Grievance of Muzzy*, 141 Vt. 463, 472 (1982).

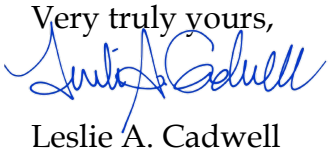
Therefore, Respondent objects to the Commission rendering a decision in this matter without duly noticing a hearing to take evidence from *the government parties* on the penalty factors that apply in this case and affording Respondent an opportunity to respond to that evidence. The government bears the burden of proof, not Respondent, and it is the government that must satisfy the preponderance-of-the-evidence standard in support of its contentions; it cannot rely solely on inferences from what its legal advisor argues are undisputed facts. *In re Smith*, 169 Vt. 162, 168 (1999); *see also Manley*, 279 U.S. at 5-6. Since the government parties have waived their rights to present evidence, this matter should be dismissed.

Respondent intends to defend himself to the extent possible given the shifted burden of proof and denial of his due process rights, including the denial of Respondent's right to a Rule 30(b)(6) deposition on penalty factors. If the Commission does not dismiss this proceeding or demand that the government parties support their claims against Respondent and in favor of a penalty with admissible evidence at a duly notice evidentiary hearing, then Respondent intends to call a representative from the Department of Public Service, Andrew Perchlik, and the Chair of the Irasburg Select Board, Dave Lahar, to testify to facts relevant to 30 V.S.A. §§ 246, 248, 30(a) and (c). Respondent also intends to call Billy Coster from the Agency of Natural Resources to authenticate agency discovery responses relevant to 30 V.S.A. § 30(a)(2) and (c) if the Agency's counsel remains unwilling to stipulate to their admission into the evidentiary record.

Finally, the evidentiary hearing should be scheduled for a reasonable time after the end of the State of Emergency arising from the COVID-19 pandemic. Preparing for and participating in a hearing under the present stay-at-home order, even remotely, is not reasonable, and it may not be reasonable for the next several months. A briefing schedule can be agreed upon at that time.

Thank you for your assistance and attention to this filing.

Very truly yours,



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Cc: ePUC