

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

**DEPARTMENT OF PUBLIC SERVICE'S OPPOSITION TO
RESPONDENT'S MOTION FOR RECONSIDERATION**

The Department of Public Service ("Department"), under V.R.C.P. 78(b), hereby opposes Respondent's *Motion for Reconsideration of Order Denying Motion to Compel Re Rule 30(B)(6) Deposition* ("Motion") filed on March 13, 2020, and provides the following argument in support of its opposition:

The Commission follows the Vermont Rules of Appellate Procedure for guidance in deciding whether to engage in an interlocutory review of a hearing officer's interim decision. Under V.R.A.P. 5.1(a), an appeal from an interlocutory order or ruling is appropriate 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."¹

As the Commission has determined, it is consistent with V.S.A., Title 3 and Title 30 for the hearing officer to issue interlocutory rulings of law during the course of a proceeding, including rulings on discovery disputes, scheduling matters, evidentiary objections, or on the scope of the proceeding.² A party may seek interlocutory review of these rulings by the Commission or raise objections before the Board in their comments on the hearing officer's proposal for decision.³

In this matter, Respondent seeks Commission reconsideration of the Hearing Officer's *Order Denying Motion to Compel* issued on February 28, 2020. The Hearing Officer's order on the discovery dispute conclusively determined a disputed question, resolved an issue separate from the merits of the matter, and would be unreviewable on appeal from a final order by the Commission. Reconsideration of the Order is appropriately before the Commission under V.R.A.P. 5.1(a).

The Respondent first argues the Hearing Officer's Order incorrectly concluded the V.R.C.P. 30(b)(6) deposition would be disproportional to the needs of the case.⁴ Specifically, Respondent states

¹ V.R.A.P. 5.1(a)(1)(A)-(C).

² *In Re Vermont Elec. Power Producers, Inc.*, No. 6270, 2001 WL 306856, at *3 (Feb. 1, 2001)

³ *Id.*

⁴ "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." V.R.C.P. 26(b)(1).

there is no evidence to support the conclusion that the time, effort, and resources expended by the Department would be disproportional to the penalty issue. However, the Respondent's argument fails to properly consider the Hearing Officer's thorough analysis outlining the V.R.C.P. 26(b)(1) factors the Commission must consider when weighing the discovery request against the needs of the case.

As required by V.R.C.P. 26(b)(1), the Hearing Officer determined the proportionality of the Respondent's discovery request by considering the "importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."⁵

First, when considering the "importance of the issues at stake in the action" and the "amount in controversy," the Hearing Officer found the recommended penalty amount is not the primary issue in this matter. Instead, Respondent's liability for failure to obtain a Certificate of Public Good is the primary issue at stake in this action, and as such, the appropriate penalty amount is entirely dependent upon the primary issue. The Hearing Officer acknowledged the importance of the Department's recommended penalty, but correctly stated the Commission is required to view the importance of the issue in the overall context of the case and the impact to the parties involved. The Hearing Officer appropriately considered the importance of the penalty issue and the amount in controversy.

Second, the Hearing Officer considered the "parties' relative access to the relevant information." The Hearing Officer concluded Respondent has access to all the information described in the subject notice of deposition "because the Department set forth the factors that it recommends the Commission consider when assessing a penalty."⁶ The Hearing Officer also concluded the topics Respondent argues in his Motion to Compel are arguments by the Department based on facts already in the record. The Hearing Officer's analysis addresses Respondent's access to the relevant information.

Third, the Hearing Officer concluded the information sought by Respondent is not significant to resolving the issue of what penalty the Hearing Officer should recommend. The facts Respondent seeks in deposing the Department would not assist the Hearing Officer in reaching a conclusion and may be resolved based on the facts already presented in this proceeding. Finally, the Hearing Officer concluded

⁵ "While I do not doubt the importance of the recommended penalty amount to Mr. Blittersdorf, I am required to view it in the context of the overall case and the impact to all parties involved." *Order Denying Motion to Compel* at 4 (Feb. 28, 2020); See also V.R.C.P. 26(b)(1).

⁶ *Id.* at 5.

the burden imposed on the Department to produce a fact witness to speak to the Department's legal conclusion based on Respondent's admissions would outweigh any benefit achieved by the Respondent. The Hearing Officer correctly applied the Rule 26(b)(1) criteria for measuring the discovery request against the needs of the case.

Next, Respondent's concern regarding the maximum penalty Respondent may be subject to for his violation cannot reasonably be perceived as proper justification to depose the Department on its penalty recommendation. The maximum penalty the Commission may impose is a legal question for determination by the Commission. As such, Respondent may address this issue through briefing to the Hearing Officer and submitting comments on an issued proposal for decision. Respondent's filings may present an analysis of the applicable facts to the penalty factors listed in 30 V.S.A. § 30 for the Commission to consider when assessing an appropriate penalty amount.

Respondent also argues the Hearing Officer incorrectly interpreted the August 4, 2016 Order denying the Department's motion to quash. The Department supports the Hearing Officer's conclusion that the Hearing Officer's order only confirmed Respondent's right to use depositions as a means of conducting discovery. Based on the language of the order, the Department retained the right to object to discovery topics under appropriate discovery limitations.

Finally, Respondent argues the Hearing Officer erred in concluding the Department did not waive work-product privilege with its penalty recommendation. The cases Respondent cites to in support of his conclusion do not support the proposition that submission of a legal analysis based on facts in the record is a waiver of work-product privilege. No valid interpretation of the work-product doctrine would permit inquiry into counsel's interpretation of the law and weighing of facts to reach a legal conclusion. The Hearing Officer's practical application of the Respondent's argument correctly demonstrates the extraordinary result of waiving work-product privilege whenever an attorney submits a filing containing a legal analysis based on facts in the record.

For the aforementioned reasons, the Department respectfully requests Respondent's *Motion for Reconsideration* be denied.

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DATED at Montpelier, Vermont this 27th day of March 2020.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: /s/ Eric B. Guzman

Eric B. Guzman, Special Counsel

112 State Street

Montpelier, Vermont 05620

(802) 828-3785

eric.guzman@vermont.gov

cc: ePUC Service List