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November 24, 2020

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

Re: Case No. 8585 – Respondent's Plans for Hearing

Dear Ms. Whitney:

In response to the Hearing Officer's order dated October 29, 2020, I write to report that the parties do not have an agreement on process or what evidence will be presented at the hearing to which Respondent is entitled by law. There is no pending summary judgment motion on the penalty factors and relevant facts are disputed.[1] Furthermore, Respondent is not obliged to present evidence against his interests to establish the State of Vermont's case against him. Respondent does not bear the burden of proof in this case, a position stated clearly by his counsel on the record during the November 12, 2015 status conference without any party— or the Hearing Officer—disputing this legal fact.

In the five years since that November 2015 status hearing, nothing has changed; the burden of proof in this case remains with those who have alleged Respondent violated the law and should be penalized under 30 V.S.A. § 30. Indeed, Respondent emphasized his position in March of this year following the Public Service Department's submission of counsel's legal analysis on penalty factors at issue in this case:

[1] During the June 15, 2016 status conference in this matter, counsel for the Public Service Department informed the Hearing Officer and the parties that the Department would not be filing a motion for summary judgment on the penalty issues. Tr. 6/15/2016 at 8 (Attorney Kisicki).

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).

. . . .

. . . 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).

. . . .

. . . 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.[2]

Nevertheless, Respondent reiterates his intent to subpoena Public Service Department employee Andrew Perchlik to the evidentiary hearing to testify on matters relevant to Respondent's liability under 30 V.S.A. §§ 246, 248 and 30(a)(2) and the penalty factors applicable thereto. I requested but was denied consent from the Public Service Department to have Mr. Perchlik appear without the need for a subpoena. I expect to question Mr. Perchlik for approximately 45 minutes to one hour. I do not expect to subpoena any other witnesses, and I will file the documents I intend to introduce through Mr. Perchlik with a subpoena for his appearance.

Finally, Respondent will not stipulate to the admission of any documents on file with the Commission prior to the duly noticed evidentiary hearing.

This letter has been electronically filed using ePUC.

Very truly yours,

Leslie A. Cadwell

[2] Letter from Leslie A. Cadwell to Judith C. Whitney re: Respondent's Response to Procedural Order re: Schedule Proposals, March 27, 2020 at 1-3.