

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

THE DEPARTMENT OF PUBLIC SERVICE'S POST-HEARING BRIEF RE: PROPOSED PENALTY

The Department of Public Service (the "Department"), by and through its undersigned counsel, submits the following recommendation regarding the assessment of a civil penalty against David Blittersdorf (the "Respondent"), pursuant to 30 V.S.A. § 30, in the above-captioned matter. For the reasons set forth in detail below, the Vermont Public Utility Commission (the "Commission") should assess a penalty in the amount of Two-thousand Five Hundred and 00/100 Dollars (\$2,500.00) for Respondent's violation of 30 V.S.A. § 246 resulting from construction of a meteorological ("MET") tower without first obtaining a certificate of public good ("CPG").

On September 12, 2019, the Hearing Officer granted, in part, the Department's Motion for Summary Judgment finding the Respondent violated 30 V.S.A. § 246 by constructing a MET tower without issuance of a CPG by the Commission.

On March 18, 2021, an evidentiary hearing was held. The Department agreed to submit an updated penalty recommendation incorporating the Department's exhibits by April 9, 2021.¹ Each of the 30 V.S.A. § 30(c) factors are addressed below:

Analysis of Criteria Under 30 V.S.A. § 30

- 1. The extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service, or the other interests of utility customers*

By failing to obtain a CPG under Section 246 prior to constructing a MET tower, the Respondent violated state law and in doing so: (1) deprived any adjoining landowners, nearby residents, and the Town of Irasburg of the right to actual notice prior to construction, the right to comment on the MET tower prior to construction, and the opportunity to participate in the permitting process, and (2) adversely affected the interests of utility customers. The Respondent's failure to obtain a CPG adversely affected the interests of utility customers because such a failure is unnecessarily burdensome and diminishes the credibility of the regulatory process.²

Consistent with the Commission's decision in Docket 8561, the Department concludes that the Respondent's violation caused harm but does not rise to the level of "substantial harm". Therefore, the maximum civil penalty that may

¹ The Department submitted a penalty recommendation on December 20, 2019. This brief is consistent with that recommendation.

² *Investigation Pursuant to 30 V.S.A. Ss 30 & 209 Regarding the Constr. & Operation of A Meteorological Tower in Swanton, Vermont*, No. 8561, Order on Remand Imposing Civil Penalty at 5-6 (Sept. 11, 2019) (Finding Respondent's construction of a MET tower without a CPG adversely affected the interests of utility customers by Respondent's failure to observe the regulatory oversight process); *Investigation Pursuant to 30 V.S.A. Ss 30 & 209 Regarding the Alleged Taking of Harsh Sunflower Plants by Vermont Gas Sys., Inc. in Monkton, Vermont*, No. 8791, 2017 WL 2351434, at 7 (May 25, 2017) (Commission finding VGS's failure to obtain a permit before taking harsh sunflower plants resulted in harm to the regulatory oversight process and diminishes the credibility of that process); *Investigation Pursuant to 30 V.S.A. Ss 30 & 209 & Pub. Util. Comm'n Rule 5.110(c) into Alleged Lack of Adequate Notice & Violations of Certificate of Pub. Good #nmp-7438 Concerning the Constr. of A Grp. Net-Metered Solar Elec. Generation Facility in Guilford, Vermont*, No. 8843, 2018 WL 1686082, at 14 (Mar. 27, 2018) (Commission finding Respondent's failure to notify the Commission and interested parties harmed the public and the interests of utility customers in the credibility of the regulatory review process).

be imposed by the Commission is Ten Thousand an 00/100 Dollars (\$10,000.00), pursuant to 30 V.S.A. § 30(a)(2), for Respondent's violation of Section 246.

2. *Whether the respondent knew or had reason to know the violation existed and whether the violation was intentional*

The Department also concludes that the record does not demonstrate that the Respondent intentionally or knowingly committed the violation. However, the Department concludes that the evidentiary record demonstrates the Respondent had reason to know that a violation existed. The Respondent's employment background is replete with experience and expertise in renewable energy technology operation and policy. The Respondent is a self-described "inventor of wind assessment technology," founder of NRG Systems, Inc. and AllEarth Renewables, Inc³, former member-manager of Georgia Mountain Community Wind, LLC, and the Georgia Mountain Community Wind Project⁴, and current member and former President and Treasurer of Renewable Energy Vermont's Board of Directors.⁵

Additionally, the Respondent appeared before the Commission in permitting for small net-metering projects of his own for both wind and solar projects.⁶ Respondent also appeared before the Commission in a matter involving the approval and transfer of a MET tower from Endless Energy Corporation to NRG Systems and Earth Turbines.⁷ In the Respondent's case, the Commission concluded it did not have jurisdiction over MET towers unless the installation was "directly related to the future construction of generation facilities."⁸ Therefore, the Respondent should have been aware of the potential for regulatory oversight of a MET tower in connection with a wind energy project.

Respondent purchased his property with the intended purpose of powering a cabin "completely with one or more small wind turbines."⁹ Respondent installed the MET tower on his property with the purpose of measuring the available wind resources for a residential wind turbine to power his cabin.¹⁰

Given the scope of experience and expertise the Respondent has in the renewable energy development field and the Respondent's familiarity with the Commission's jurisdiction in previous cases, the Department concludes the Respondent had reason to know a CPG was required for the construction of a MET tower. The Respondent should have learned of this fact given a reasonable investigation into regulatory requirements contained in statute. At a minimum, the Respondent should have engaged in the appropriate due diligence, on his own or through the consultation of an attorney,

³ Exhibit DPS-1 at 2; Exhibit DPS-2 at 1-2.

⁴ Exhibit DPS-5 at 2.

⁵ Exhibit DPS-2 at 2; Exhibit DPS-9 at 2.

⁶ Exhibit DPS-1 at 6.

⁷ *Id.* at 8.

⁸ *Petition of Endless Energy Corp. for an Amended Certificate of Pub. Good, Pursuant to 30 V.S.A. Section 248(j), for Installation of Three Temp. Wind Measurement Towers on Little Equinox Mountain in Manchester, Vermont*, No. 6154, 2008 WL 5273737, at 1 (Dec. 11, 2008).

⁹ Exhibit DPS-1 at 3.

¹⁰ *Id.* at 5; Exhibit DPS-7 at 1.

as to any relevant regulatory requirements applicable to installing a MET tower for the purpose of constructing a generation facility.¹¹ The Department concludes this factor weighs in favor of a significant penalty.

3. *The economic benefit, if any, that could have been anticipated from an intentional or knowing violation*

The record in this case contains no direct evidence of any economic benefit that the Respondent could have anticipated from an intentional or knowing failure to petition for a CPG approving the MET tower before it was constructed. The Respondent did fail to engage in the regulatory oversight process to obtain a CPG and thus avoided the cost of that regulatory review. However, there is no showing of the Respondent's intentional or knowing failure to obtain a CPG prior to construction. The Department concludes that this factor weighs neither for nor against a significant penalty.

4. *The length of time the violation existed*

In an *Order Clarifying Summary Judgment Ruling*, the Hearing Officer concluded that "the Commission's jurisdiction under Section 246 attached at the time Mr. Blittersdorf began using the tower to assess the wind resource at his property for the possible installation of one or more grid-connected turbines."¹² The Hearing Officer also concluded that the MET tower's "wind-resource-assessment purpose terminated with the installation of the turbines."¹³ The Respondent began construction of the MET tower on November 19, 2010 and installation was completed on December 29, 2010.¹⁴ In 2012, the Respondent installed two net-metered wind turbines.¹⁵ As of July 3, 2019, the MET tower was still erected for the purpose of collecting and sending weather and other data.¹⁶

As stated by the Respondent, the purpose of the MET tower installation was "to assess whether there was sufficient wind to install a residential wind turbine to power the log cabin via net metering."¹⁷ The Department concludes that the Commission's jurisdiction attached beginning on November 19, 2010 upon commencement of construction and ended upon construction of the two net-metered wind turbines in 2012. The Department concludes this factor weighs in favor of a significant penalty.

5. *The deterrent effect of the penalty*

The deterrent effect of a monetary penalty against the Respondent will be greatest if the amount of the penalty is significant in relation to the maximum penalty permitted by Section 30(c)(2). The Department concludes that the recommended \$2,500.00 civil penalty is sufficient to address the Respondent's violation and deters both the Respondent and others from erecting MET towers used for the purpose of constructing wind-powered electric generation facilities

¹¹ See Exhibit DPS-6 at 7 (Respondent admitting he did not consult with the Commission or the Department regarding the need to obtain a CPG for the MET tower after purchase of the Kidder Hill property but prior to the final installation of the MET tower).

¹² Case No. 8585, Order at 4 (Feb. 23, 2021) (*citing* Case No. 8585, Order at 8 (Sept. 12, 2019)).

¹³ *Id.* at 4.

¹⁴ Exhibit DPS-1 at 3; Exhibit DPS-6 at 5; Exhibit DPS-3 at 2-5.

¹⁵ *Id.* at 10; See also CPG #NM-1771 (Jan. 5, 2012).

¹⁶ Exhibit DPS-10 at 1-2.

¹⁷ Exhibit DPS-6 at 2.

without state regulatory oversight. The Department concludes a penalty of this magnitude is necessary to ensure the credibility of the Commission's regulatory process and notice other similarly situated individuals are responsible for compliance with state law and the Commission's rules.

6. The economic resources of the Respondent

While the Commission may consider the economic resources of the Respondent in determining a civil penalty under Section 30(c), the Department concludes that the remaining factors provide appropriate guidance in this matter. The Department concludes this factor neither weighs in favor of nor against a significant penalty.

7. The Respondent's record of compliance

The Department is not aware of any previous violations committed by the Respondent. The Department concludes this factor neither weighs in favor of nor against a significant penalty.

8. Any other aggravating or mitigating circumstances

The Department is not aware of any aggravating or mitigating circumstances that should impact the Commission's imposition of a penalty.

Conclusion

The Commission's discretion to impose a civil penalty is broad. The civil penalty assessed need only be broadly tailored to address the nature of the violation considering the enumerated statutory criteria. The Department respectfully recommends that the Commission impose a penalty of \$2,500.00 against Respondent for failure to obtain a CPG prior to erecting a MET tower on his property.

DATED at Montpelier, Vermont this 9th day of April 2021.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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cc: ePUC Service List