STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

RESPONDENT'S REPLY TO THE PUBLIC SERVICE DEPARTMENT'S BRIEF

NOW COMES Respondent in the above-captioned matter, by and through the undersigned counsel, and submits this reply to the Public Service Department's Post-Hearing Brief re: Proposed Penalty filed with the Public Utility Commission on April 9, 2021.

The Department proposes a $2,500 penalty for Respondent's temporary use of a non-temporary meteorological station (met mast) that Respondent installed on property he owns in Irasburg, Vermont. The Department contends that Respondent had reason to know that a certificate of public good (CPG) was required pursuant to 30 V.S.A. § 246 before Respondent installed the met mast on his property. The Department also contends that the installation harmed the interests of utility customers and the credibility of the regulatory process by depriving neighbors and the Town of Irasburg advance notice of the installation and the opportunity to participate in the Section 246 permitting process. These contentions lack legal and factual support and should be rejected by the Commission.

I. Respondent Did Not Have Reason to Know that a Section 246 CPG Was Required for His Met Mast

A. The Commission's Section 246 Standards Order would not lead a reasonable person to believe a CPG was required for Respondent's met mast because it is not a temporary facility.

In 2007, the Vermont legislature enacted 30 V.S.A. § 246, which became effective on July 1, 2008. The statute governs "whether and how to obtain a CPG for [a] temporary meteorological tower[]," In re Construction and Operation of a Meteorological Tower, 2019 VT 20, ¶ 15, and it directs the Commission to "establish by rule or order standards and procedures governing application for, and issuance or revocation of, a certificate of public good for the temporary installation of one or more meteorological stations." 30 V.S.A. § 246(b). The Commission did not establish those standards and procedures until nearly two years after the statute's effective date, on March 9, 2010.

Consistent with legislative intent, the procedures in the Commission's March 9, 2010 Section 246 Standards Order (Standards Order) address the application and review of temporarily installed met masts, not permanently installed met masts that are used for multiple purposes like Respondent's facility. The Commission's Standards Order explains that the temporary nature of these facilities provides the basis for conditionally waiving certain criteria set forth in 30 V.S.A. § 248(b) that the legislature directed the Commission to utilize when reviewing Section 246 applications. Recognizing that these are temporary facilities, the Commission's Standards Order also explains that a streamlined aesthetics review was appropriate for met masts under 200 feet tall that are

installed for three years or less. Thus, the Standards Order creates a rebuttable presumption that such facilities satisfy the aesthetics criterion under the Quechee Test. Standards Order at 3. In addition, CPGs for temporary met masts expire in five years, and when they expire, the subject facilities must be removed, and the sites restored to their preconstruction condition. Standards Order at 6. Given the state of the law as just described, it is unreasonable to infer that if Respondent had consulted an attorney or done his own due diligence on the Section 246 regulatory regime, he would have learned that a CPG was required before he installed the met mast in Irasburg. Department Brief at 2. Respondent installed the met mast on his Irasburg property because he is an inventor of the technology and he intended the facility to be a permanent structure for multiple uses. See, e.g., Exhibit DPS-1 at 4; Exhibit DPS-10 at 1-3.

The Department also relies, in part, on Respondent's experience as inventor of wind assessment technology and founder of NRG Systems to infer that Respondent had reason to know that a CPG pursuant to Section 246 was required before he installed the met mast on his property. Department Brief at 2. The weight of the evidence requires a contrary inference. The Department oversaw a federal grant that funded the Vermont Anemometer Program, a program operated by Vermont Technical College that loaned met masts made by NRG Systems to homeowners, farms, and businesses for the purpose of evaluating wind resources on their property for the installation of small wind turbines. Exhibit DPS-4 at 3-4, 13. In the grant agreement's Scope of Work, it states

that permits for temporary met masts "are typically not difficult to obtain and are handled through the local governments such as the town zoning coordinator." Exhibit DPS-4 at 3. Nowhere in the grant agreement can one find a reference to a CPG from the Commission before a met mast could be installed. Importantly, according to Exhibit DPS-1, Respondent's tenure at NRG Systems overlapped with the Vermont Anemometer Loan Program, and Respondent was aware that NRG Systems equipment was being installed in connection with the program. Exhibit DPS-1 at 5. Therefore, it is more reasonable to infer that Respondent had reason to believe that a local permit, not a CPG, was necessary before he could install the met mast. That inference is even more reasonable given the additional evidence in Exhibit DPS-1, which indicates that Respondent checked into whether he needed a local zoning permit from the Town of Irasburg before he installed the met mast. Exhibit DPS-1 at 5.

B. Confusion about met mast permitting by those charged with implementing Section 246 requires an inference that Respondent did not have reason to know his met mast required a Section 246 CPG.

The Hearing Officer's rulings on summary judgment in 2018 and 2019 and the Department's suggestion for a continuance in 2018 pending the outcome of the appeal in the case In re Construction and Operation of a Meteorological Tower, 2019 VT 20 (hereinafter referred to as "Swanton Appeal") lend further support to a finding that Respondent had no reason to know that his met mast required a Section 246 CPG. In 2018, the Hearing Officer first decided that Respondent could be liable under Section

246 or Section 248 for installing his met mast depending on the facts. *Order Denying Motions for Summary Judgment*, Case No. 8585, Order of 6/22/2018 at 7-8. In July 2018, the Department asked the Commission to stay the proceeding pending the Supreme Court's decision in the Swanton Appeal. Case No. 8585, Transcript 7/20/2018 at 5. Counsel for the Department argued that the case on appeal and Respondent's case had issues with "substantial overlap" and a ruling from the Court in the Swanton Appeal could prove useful in Respondent's case, and could, in fact, be dispositive. Id.

Following the Court's partial reversal of the Commission's order in the Swanton Appeal, the Hearing Officer reconsidered his summary judgment decision and reached a different conclusion from the one he reached in 2018. This time, the Hearing Officer concluded that Respondent's temporary *use* of his met mast in connection with two net-metered wind turbines gave the Commission jurisdiction under Section 246 and thus Respondent should have secured the requisite CPG before installing the met mast. *Order Granting in Part Department's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment*, Case No. 8585, Order of 9/12/2019 at 9. With a record like the one in this case, there is no reasonable basis to find that Respondent should have known that his met mast was regulated by Section 246. If regulators are confused about what the law is, as is the case here, then it is hardly fair to say that Respondent should have known that a CPG was required for his met mast.

C. <u>The record in this case is the best evidence that the law on met mast permitting was unclear even to lawyers and the Commission and Respondent had no reason to know that a Section 246 CPG was required for his met mast.</u>

The Hearing Officer's conflicting legal conclusions, the Supreme Court's reversal of the Public Utility Commission's order in the Swanton Appeal, and the Department's 2018 uncertainty on how Section 246 should be interpreted and applied, show that the law on permitting for a met mast like Respondent's was not so clear as to impute constructive knowledge of the requirements to Respondent. In other words, if the Public Utility Commission, a Public Utility Commission Hearing Officer, counsel for the Department of Public Service, and the Vermont Supreme Court have differing interpretations of Section 246, it is patently unreasonable to infer from the record evidence that Respondent had reason to know that a Section 246 CPG was required for his met mast installation. Furthermore, given the inconsistent positions about what permits are necessary for a met mast, it is also unreasonable to find that Respondent should have consulted with an attorney, the Department, or the Commission before installing his met mast.

The Department also points to evidence of Respondent's involvement in the Endless Energy case wherein the Commission dismissed Respondent's application made pursuant to 30 V.S.A. § 248(j) to transfer ownership of a met mast that had been used to do a wind resource assessment for a future wind turbine. Department Brief at 2. See <u>In re Endless Energy Corporation</u>, Case No. 6154, Order of 12/11/2008. The

Department argues that Respondent's involvement in that case should have made him "aware of the potential for regulatory oversight of a MET tower in connection with a wind energy project." Id. The Endless Energy case did not involve the application or interpretation of Section 246; it was filed and decided under a different statute—30 V.S.A. § 248—that the Vermont Supreme Court determined in In re Construction and Operation of a Meteorological Tower does not apply to temporary meteorological stations. 2019 VT 20 ¶ 15. It is significant that the Commission's order in the Endless Energy case did not identify Section 246 as the governing statute for met tower CPGs considering that that section went into effect on July 1, 2008 and the Endless Energy petition was filed a few months later in October 2008. Therefore, the Commission's decision in the Endless Energy does not support the inference that Respondent had reason to know that a Section 246 CPG was required for his met mast; the Commission itself did not identify the statute in that case as having any application to the installation of meteorological stations. Consequently, Respondent should not be charged with superior knowledge of the law.

D. There is no evidence to show that Respondent's experience permitting electric generating facilities means he had reason to know a Section 246 CPG was required for the met mast, which is not an electric generating station and requires no regulated utility services.

Similarly, the Department points to Respondent's experience permitting grid-connected electric generation facilities for its argument that Respondent had reason to know that a Section 246 CPG was required for his met mast. Department Brief at 2. This

is a remarkable proposition from the agency that is charged by the legislature to "supervise and direct the execution of all laws relating to public service corporations and firms and individuals engaged in such business." 30 V.S.A. § 2(a). A met mast is not a grid-connected electric generating facility. It is not regulated under 30 V.S.A. § 248 like all in-state grid-connected electric generating facilities are, including net-metered wind turbines. The Department presented no testimony to explain why someone like Respondent with experience permitting grid-connected facilities should know that facilities that do not generate electricity and do not require any utility service are subject to the Commission's jurisdiction under 30 V.S.A. § 246. Without such evidence, it is unreasonable to infer that Respondent had reason to know that a Section 246 CPG was required for his met mast simply because Respondent had previously permitted electric generating facilities under a different statute.

II. Respondent's Met Mast Installation Did Not Harm Public Health, Safety or Welfare, The Environment, Reliability Of Utility Service Or The Interests Of Utility Customers

Respondent's met mast installation did not harm the public's health, safety or welfare; it did not cause any environment harm; it did not affect the reliability of utility service; and it had no impact whatsoever on the interests of utility customers. 30 V.S.A. § 30(c)(1). It is undisputed that the met mast was installed on private residential property and did not require a connection to the electric grid or any other regulated utility service that could impact ratepayers. The Department contends otherwise,

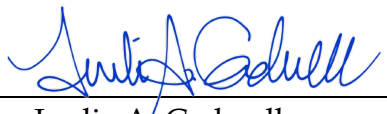
claiming that Respondent's failure to obtain a CPG "is unnecessarily burdensome and diminishes the credibility of the regulatory process." Department Brief at 1. The record lacks evidence to explain and support these claims because the Department chose not to sponsor a witness who could testify as to what it means for a failure to obtain a CPG to be "unnecessarily burdensome" and why it might diminish "the credibility of the regulatory process." While these factual assertions about harm to the regulatory process have become a regulatory mantra at the Commission lately, like all fact findings made by an administrative tribunal, they must be supported by admissible evidence or they are clearly erroneous and an order relying on them will be reversed on appeal. 3 V.S.A. § 809(g); In re Twenty-Four Vt. Utils., 159 Vt. 339, 346-47 (1992). The Department's advancement of these assertions without testimony from a witness also prevented Respondent from cross-examining a party on its evidence and denied him the right under 3 V.S.A. § 809(c) "to respond and present evidence and argument on all issues involved." In re Twenty-Four Vt. Utils., 159 Vt. at 347 n.3.

Likewise, the record lacks evidence explaining how denying adjoining landowners and the Town of Irasburg the right to notice and comments prior to construction or the opportunity to participate in the permitting process amounts to harm to the public's health, safety or welfare or the interests of utility customers. Simply asserting that is the case does not make it so. How notice to a town or neighbors prior to installation of a met mast is protective of utility customers or the public's health, safety or welfare is unexplained by the record evidence. The record even lacks evidence quantifying and

qualifying the asserted risk that met masts like Respondent's present to the interests of utility customers and the public's health, safety, or welfare. Therefore, the Commission should reject the Department's arguments and unsupported factual assertions and find that Respondent's met mast installation did not harm or have the potential to harm the public health, safety or welfare, the environment, the reliability of utility service, or the other interests of utility customers.

CONCLUSION

The record evidence does not support the Department's proposed findings that it claims supports a penalty of $2,500 for Respondent's met mast installation in Irasburg. The Commission should find that Respondent had no reason to know a Section 246 CPG was required and that the installation caused no harm to the public safety, health, and welfare, the environment, or the reliability of utility service or interests of their customers. There being no basis for a penalty in this case, none should be ordered, and the case dismissed with prejudice.

By: 

Leslie A. Cadwell
Legal Counselors & Advocates, PLC
PO Box 827
Castleton, VT 05735
(802) 342-3114
lac@lac-lca.com
Respondent's Attorney

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