

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 REPLY TO DAVID BLITTERSDORF'S RESPONSE BRIEF

In the *Department of Public Service's Post-Hearing Brief RE: Proposed Penalty* filed on April 9, 2021, the Department of Public Service (the "Department") set forth an analysis of the 30 V.S.A. § 30(c) penalty factors relevant to the Public Utility Commission's (the "Commission") decision on the appropriate penalty amount for David Blittersdorf's (the "Respondent") violation of 30 V.S.A § 246. The Department offers the following responses that will focus on issues raised by the Respondent that are erroneous or otherwise unsupported. Silence by the Department on any issue that was previously raised in its initial brief should not be construed as a concession by the Department on any such issue.

The Department will address Respondent's contentions that (i) a reasonable person would not have knowledge of the requirement for a certificate of public good ("CPG") to construct a temporary meteorological ("MET") tower, (ii) the extensive procedural history and contested issues in this matter and the like case, *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 ("Swanton Appeal") supports the notion that the Respondent could not have reasonably interpreted the regulatory requirements for construction of a MET tower, (iii) the Endless Energy case did not give the Respondent prior knowledge of the Commission's jurisdiction over a MET tower pursuant to Section 246, and (iv) the evidentiary record does not support the finding that Respondent's failure to obtain a CPG resulted in harm to the interests of utility customers.

The Department concludes the Respondent's arguments are without merit and fail to refute the Department's findings and conclusion contained in its initial brief.

I. The Respondent's Reliance Upon the Vermont Anemometer Program Grant Agreement is Misplaced and Does Not Address the Respondent's Failure to Exercise Due Diligence in Understanding the Applicable Regulatory Requirements

Respondent argues two points in support of the assertion that a reasonable person would not have knowledge of the requirement for a CPG to construct a temporary MET tower. First, the Respondent argues that the Commission's March 9, 2010 Section 246 Standards Order addresses the regulatory review of temporarily installed MET towers, not permanently installed towers. Because the Respondent intended his facility to be a permanent structure for multiple uses, the Respondent could not have anticipated or had knowledge of the Section 246 permitting requirement. Second, the Respondent argues that the Vermont Anemometer Program Grant Agreement contains no reference to a CPG requirement with the Commission, and instead, contains a Scope of Work attachment indicating that temporary MET tower permits are handled through the local government regulations.¹

The Respondent's reliance upon the Vermont Anemometer Program Grant Agreement is misplaced and ignores the explicit mandates of 30 V.S.A § 246 and the Commission's Standards Order requiring issuance of a CPG for temporary meteorological stations. The record demonstrates that the Respondent intended to construct a MET tower for

¹ Respondent's Reply to the Public Service Department's Brief ("Respondent's Brief"), Docket No. 8585 at 2-4 (April 23, 2021).

multiple purposes, one of which was the temporary use of the MET tower to determine the suitability of his property for the location of a residential wind turbine.² The Respondent's intended purpose, to construct a MET tower for use to determine suitability of a wind turbine, is explicitly contained within language of the Commission's Standards Order and directly relates to uses such as "to collect and record wind speed, wind direction, and atmospheric conditions," referenced in Section 246. Given the goals of the MET tower project, a reasonable person should have known of the potential applicable requirements contained by statute and by the Commission's order. The Respondent had a duty to understand the applicable legal requirements and act in compliance with them. The Respondent's reliance upon the Scope of Work language contained in an attachment to the Vermont Anemometer Program Grant Agreement does not demonstrate reasonable effort and due diligence in understanding the applicable regulatory requirements.

The Department maintains that the Respondent had reason to know a violation existed and recommends that the Commission weigh this factor in favor of a significant penalty.

II. The Respondent Errs in Concluding the Contested Issues in Preceding Litigation and the Current Case Demonstrate an Excusable Ignorance of the Law

The Respondent argues that the extensive procedural history and contested issues of this docket and that of the comparable case decided by the Vermont Supreme Court in *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20 demonstrates that it would be unreasonable to conclude Respondent should have known of the regulatory requirements when the Department and the Commission as a decisionmaker have engaged in substantial and ongoing process and litigation on the applicability of Section 246 and 248. The Respondent's argument must be rejected. The mere fact that the applicability of Section 246 and 248 to MET towers was previously litigated does not support the assertion that Section 246 was unreasonably vague and therefore exempts any individual or entity from conforming to its requirements. The present docket was stayed pending the outcome of the Swanton Appeal to facilitate regulatory efficiency and obviate redundant litigation and briefing given the similarity of facts and issues in both cases. Additionally, both the Department and the Commission clearly maintained the application of Section 246 in both investigations.

The Respondent's assertion that the applicability of Section 246 was the subject of litigation and a contested issue does not support the notion that the Respondent could not have reasonably known of its applicability. The Department recommends that the Commission reject the Respondent's argument.

III. The Endless Energy Case Demonstrates the Respondent's Knowledge of the Commission's Jurisdiction Over Met Towers Associated with Future Construction of Generation Facilities

The Respondent argues that the Department erred in its reliance on the Respondent's involvement in *In re Endless Energy Corporation*, Case No. 6154 ("Endless Energy") as a factor in support of the Department's conclusion that the Respondent should have known a violation existed. The Respondent argues that the case did not involve the application or interpretation of Section 246 because the application was filed under Section 248. Therefore, the Respondent argues

² Exhibit DPS-1, Blittersdorf's Response to DPS First Set of Discovery, at 2.

that the Endless Energy decision does not support the inference that the Respondent had reason to know that Section 246 was applicable to his MET tower.³

The Department concedes that Endless Energy was applied for and decided under Section 248. However, the Department's brief was not citing to *Endless Energy* for the proposition that the Respondent had direct knowledge of the applicability of Section 246, but rather for the proposition that the Respondent had knowledge of the Commission's jurisdiction over MET towers if the installation was "directly related to the future construction of generation facilities."⁴ The Department's proposition is that the Respondent was previously involved in a case before the Commission where the primary issue was the Commission's jurisdiction over MET towers generally. Given the Commission's clear indication that it would have jurisdiction over a MET tower that is related to future construction of generation facilities, the Respondent had knowledge of the Commission's potential jurisdiction over the subject MET tower in the present matter, regardless of whether that jurisdiction fell under Section 246 or 248. This supports the assertion that the Respondent should have known a violation existed.

For these reasons, the Department recommends that the Commission reject the Respondent's argument.

IV. The Commission May Exercise its Discretion in Determining Whether the Respondent's Failure Obtain a CPG Prior to Construction of the MET Tower Resulted in Harm to the Regulatory Process

The Respondent argues the Department's conclusion that the Respondent's failure to obtain a CPG is unnecessarily burdensome and diminishes the credibility of the regulatory process is unsupported by admissible evidence and erroneous. The Respondent contends that the Commission cannot rely upon such a finding because the Department did not offer a witness to establish the Respondent's actions resulted in such a harm.

The Department maintains that the Respondent's failure to obtain a CPG prior to construction of the MET tower demonstrably avoided all regulatory oversight of the project mandated by the Legislature under Section 246 and the Commission's Standards Order and avoided the right to notice, hearing, and comments by members of the public, the Town of Irasburg, and the Department, the Agency of Natural Resources, and other interested parties. Had the Respondent engaged in the regulatory process to seek a jurisdictional ruling from the Commission or a CPG, this lengthy, resource-intensive investigation may have been avoided. The Respondent's actions denied any input from the municipality, members of the public, and statutory parties prior to construction. The Respondent's actions, the subsequent investigation, and the finding of liability demonstrate that harm to the regulatory oversight process exists where failure to obtain a CPG results in an unnecessarily burdensome process and diminishes the credibility of the regulatory process.

Such findings of harm do not require an evidentiary showing because the harm itself is evident within the Respondent's avoidance of a statutory process and the inability of the public, municipalities, and state agencies to

³ Respondent's Brief at 7.

⁴ 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).

participate as a result. Furthermore, such a finding is within the discretion of the Commission as the regulatory authority with direct knowledge of the burdensome impact that stems from an individual's failure to obtain a CPG and the subsequent harm to the credibility of the Commission's process as a result. As noted in the Department's initial brief, the Commission has consistently held failure to obtain a CPG and approval of a project within the Commission's jurisdiction results in such harm.

The Department recommends that the Commission reject the Respondent's argument and conclude such harm resulted from the Respondent's actions.

V. Conclusion

For the foregoing reasons, as well as those stated in the Department's initial brief, the Department respectfully requests that the Commission reject the Respondent's arguments and impose a penalty of \$2,500.00 against the Respondent for failure to obtain a CPG prior to erecting a MET tower on his property in Irasburg, Vermont.

DATED at Montpelier, Vermont this 7th day of May 2021.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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