STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

RESPONDENT DAVID BLITTERSDORF'S COMMENTS ON THE HEARING OFFICER'S PROPOSAL FOR DECISION

This document has been electronically filed via ePUC.

> *I have been studying the wind in one way or another since I was a kid, and I've been testing wind measuring devices since I was a teenager. My land offered me a private hilltop where I could test prototypes and protect my intellectual property.*
>
> David C. Blittersdorf, December 18, 2015

I. Introduction

On May 21, 2021, the Hearing Officer issued a proposal for decision (PFD) in this proceeding, which the Public Utility Commission opened in September 2015. Misnaming this proceeding an "investigation," the Commission delegated management of the case to a Hearing Officer, who then began a nearly six-year-long process that played lip service to the Administrative Procedures Act and the Commission's rules for contested cases and evidentiary hearings, denying Respondent his fundamental due process rights. The case record over the last several years documents a clear appearance of bias in favor of a pre-determined result to find Respondent at fault rather than investigate the facts and neutrally apply the law. The most recent example is the Hearing Officer's PFD improperly taking judicial notice of facts found in other Commission proceedings. PFD at 19.

Respondent promptly responded to the Commission's order opening this "investigation" and complied with the Hearing Officer's directive to file testimony to facilitate an inquiry into the facts. That took place in 2015. Since that time, the Department of Public Service and the Commission-appointed Hearing Officer have

placed obstacles in the way of a full inquiry into the facts and shifted the responsibilities and burdens assigned to them by law to the Respondent. Respondent did not violate 30 V.S.A. § 246 and he is not required to pay a civil penalty, or any costs related to this proceeding. As detailed below, the Commission should reject the PFD, enter judgment for Respondent, and dismiss this proceeding.

II. Procedural Background

Citing its authority under 30 V.S.A. §§ 30, 209, 246, 247, and 248, the Commission opened this investigation in September 2015 following a complaint from the Town of Irasburg and Department of Public Service that Respondent had installed a meteorological tower ("met mast") on his property in Irasburg, Vermont without first obtaining a certificate of public good (CPG) from the Commission. In the summer of 2016, after Respondent complied with the Hearing Officer's order to prefile testimony and answered two rounds of written discovery from the Department and other parties, the Department moved for summary judgment that Respondent's met mast installation violated both 30 V.S.A. § 246 and 30 V.S.A. § 248. Respondent subsequently cross moved for summary judgment and argued the contrary: that his facility was not a temporary installation and thus not covered by 30 V.S.A. § 246, or an electric generating station that would trigger the Commission's jurisdiction under 30 V.S.A § 248.

It took two years for the Commission-appointed Hearing Officer to issue a decision on the cross motions for summary judgment—*two years*. The Hearing

Officer's June 2018 decision denied summary judgment to all parties because he concluded that a genuine issue existed with respect to whether Respondent's met mast satisfied the definition of a "meteorological station" as defined by 30 V.S.A. § 246. *Order Denying Motions for Summary Judgment*, Case No. 8585, Order of 6/22/2018 at 8 [hereinafter referred to as "*Summary Judgment Order I*"]. The Hearing Officer reasoned that Section 246 provides a more streamlined process for review of temporary facilities because the effects of temporary facilities are, by definition, temporary, and that if Respondent's facility were permanent, the Commission would regulate it under 30 V.S.A. § 248 instead. *Id*. at 7, 8. (As discussed later, the Hearing Officer later changed his mind about the scope of the statute.)

After the Hearing Officer's *Summary Judgment Order I*, the Department proposed a stay of the proceeding pending resolution of the appeal in the case of *In re Construction and Operation of a Meteorological Station*, 2019 VT 20. Case No. 8585, Telephone Conference Transcript 7/20/2018 (hereinafter "Tr. 7/20/2018") at 5. The Department posited that the Court's decision in the other case could bear directly on the parties' dispute over the applicability of Sections 246 and 248 to Respondent's met mast. *Id*. Respondent's consent to the delay was conditioned on the understanding that it would not affect the Respondent's rights under the procedural rules or schedule:

> If further proceedings are ordered, you know, following the continuance, what we understood as sort of the status quo is that the schedule would start with the updating of first, I think, updating of discovery responses and then the prefiling of testimony by the nonresponding parties, the

> Department, ANR, and the Town of Irasburg on both the issues, so-called liability issue and then the penalty issue, if any.

Tr. 7/20/2018 (Counsel for Respondent). The parties did not dispute Respondent's characterization of his consent nor contest that prefiled testimony was expected from the other parties if they wanted to present a case to the Commission. With that understanding, the Hearing Officer stayed the proceeding pending resolution of the appeal in the other docket. *Procedural Order re: Schedule*, Case No. 8585, Order of 7/24/2018.

On September 12, 2019, after reconsidering summary judgment under the Supreme Court's holding in *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, the Hearing Officer granted the Department's 2016 motion for summary judgment by reconstruing Section 246 to apply to facilities that are "temporarily used" even if they were not temporarily installed. *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 [hereinafter referred to as "*Summary Judgment Order II*"] at 8-9. The Hearing Officer declined to rule on the question of Section 248's applicability to Respondent's installation. *Id*. at 1, 5.

Respondent immediately sought Commission review of *Summary Judgment Order II* with a motion filed on September 24, 2019, requesting the Commission enter judgment for Respondent. *Respondent's Motion for Commission Review and Reconsideration*, Case No. 8585 (Sept. 24, 2019). The Hearing Officer's construction of Section 246 was (and is) a

controlling question of law that, if reversed, would have immediately terminated the investigation. Since the Commission's November 6, 2019 order denying Respondent's request believing deferral would result in more "efficiency," another 576 days have passed with the issue remaining unresolved. *Procedural Order Denying Request for Interlocutory Review*, Case No. 8585, Order of 11/6/2019 at 2.

Between the end of 2019 and the date of these comments, the Hearing Officer continued to manage the proceeding in a manner that ran roughshod over Respondent's interests. The Hearing Officer excused the Department from prefiling testimony while blaming Respondent for the Department lacking a competent witness to testify at the evidentiary hearing held on March 18, 2021; blamed Respondent for the Hearing Officer's failure to timely issue a notice of hearing before January 15, 2021, the date the Hearing Officer himself set for Respondent to issue a witness subpoena; allowed the Department's lawyer to sponsor exhibits for admission into the record over Respondent's objection and in violation of the Commission's procedural rules and Rule 3.7 of the Vermont Rules of Professional Conduct. The PFD is not supported by admissible evidence or proper findings, and its legal conclusions are untenable. Respondent is entitled to judgment and dismissal of this proceeding.

III. Section 246 Applies Only to Temporary Installations

The Hearing Officer concludes that the Commission's Section 246 authority encompasses the "temporary use" of a non-temporary installation for the purpose of

gathering data for a grid-connected wind project. PFD at 6; *Summary Judgment Order II* at 8. This conclusion is not consistent with the statute's plain language, is contrary to the Legislature's intent to regulate temporary installations not temporary use, and violates the Vermont Supreme Court's holding in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20.

Construing a statute requires the Commission to implement the Legislature's intent as reflected in the plain meaning of the statute's words. *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 12. The Commission must presume that the Legislature included words intentionally to give effect to their plain and ordinary meaning. *In re Porter*, 2012 VT 97, ¶¶ 10, 13. Although the Commission may look beyond the text of an ambiguous statute, the Commission's interpretation of a statute must always stay within the bounds of "the authority granted by the enabling statute" and must not "conflict with the statutory definition." *In re Construction and Operation of a Meteorological Tower*, 2019 VT 20, ¶ 22 n.7. These limits on the Commission's authority are tied to the principle that powers of specialized administrative bodies like the Commission arise from statute, not the common law, thus "nothing will be presumed in favor of [the Commission's] jurisdiction." *Green Mountain Power Corp. v. Sprint Communications*, 172 Vt. 416, 419 (2001).

Section 246 gives the Commission authority to issue a CPG for "the *temporary installation*" of a "meteorological station," which the statute defines as "one *temporary tower*." 30 V.S.A § 246(a), (b) (emphasis added); *In re Construction and Operation of a*

Meteorological Station, 2019 VT 20, ¶ 22. The plain meaning of the statutory language limits the Commission's authority to temporary structures that are towers. *In re Construction and Operation of a Meteorological Station*, 2019 VT 20, ¶¶ 19, 22. The undisputed facts in this case surrounding the installation of Respondent's met mast take his facility out of the scope of Section 246 and the Commission's jurisdiction. Respondent's met mast is neither a "temporary tower" nor a "temporary installation." Respondent installed the facility on his Irasburg property without any intention to remove it so that he could use it for multiple purposes, including testing prototype wind resource assessment equipment that Respondent himself invents. *Respondent's Cross Motion for Summary Judgment Statement of Undisputed Facts*, Case No. 8585, at ¶¶ 2, 3, 7 (July 29, 2016); Prefiled Testimony of David Blittersdorf at 1 (Dec. 18, 2015); Exh. DB-1. The Town of Irasburg taxes the facility as part of Respondent's real property. Affidavit of Respondent David Blittersdorf, July 18, 2016, at ¶¶ 4-6.

The clear legislative intent to limit the Commission's jurisdiction to temporary meteorological stations is reflected in the maximum five-year term that the statute allows for such installations. 30 V.S.A. § 248(c)(2). At the end of that period, or sooner depending on the terms of the CPG, the facility must be dismantled and removed from the site, and the site must be restored to its pre-installation condition. *Id*.

Before the Hearing Officer issued *Summary Judgment Order II* extending the statute to encompass the temporary use of a non-temporary facility, the Commission interpreted and applied Section 246 consistent with legislative intent to regulate temporary

installations only. The Commission's March 2010 *Section 246 Standards and Procedures Order* defines the facility that is subject to its Section 246 jurisdiction as a "temporary tower." The Commission determined that temporary facilities result in temporary impacts, so it created a rebuttable presumption on the aesthetics criterion for temporary towers under 200-feet tall, and it conditionally waived other substantive review criteria for all other Section 246 facilities. *See Section 246 Standards and Procedures Order* at 2 ("The Board's conditional waiver of § 248 criteria is based on the limited potential for impact presented by the majority of temporary meteorological stations under those criteria."); *see also id.* at 3 ("[G]iven the temporary nature of these projects any aesthetic impacts will also be temporary.").

Later, while this proceeding was pending in 2017, the Commission revisited its 2010 Section 246 Standards and Procedures Order following legislative changes to the statute. *See Amended order establishing standards and procedures for issuance of a certificate of public good for a temporary meteorological station pursuant to 30 V.S.A. § 246*, Case No. 17-5090-INV, Order of 12/6/2017. The order resulting from that proceeding left standing the existing definition of the facility within the Commission's jurisdiction and it re-adopted the "Purpose and Applicability" section from the 2010 version of the procedures. The Purpose and Applicability section makes plain that the Commission's authority is limited to *temporary* facilities, not non-temporary, multi-purpose facilities like Respondent's:

> The purpose of these standards and procedures is to implement 30 V.S.A. § 246. These standards and procedures

> are applicable to the proposed construction or installation of a *temporary* meteorological station.

Id. at 4 (emphasis added). The Commission's 2010 and 2017 orders implementing Section 246 show that it that properly presumed the Legislature intentionally included the word "temporary" to define both the type of structure subject to the Commission's jurisdiction and the nature of the structure's installation. Tellingly, since issuing its first set of standards and procedures for temporary met masts in 2010, the Commission only has issued CPGs under those procedures for temporary, not permanent, facilities. *See, e.g., Dairy Air Wind, LLC,* Case No. 8837, Order of April 6, 2017 (granting a CPG with a three-year term for a temporary met mast associated with a proposed 2.2 MW Standard Offer wind project)[1]; *In re Application of Atlantic Wind, LLC*, Case No. 7905, Order of 12/20/2012 (approving installation of met tower that would collect data for three years); *In re Seneca Mountain Wind, LLC*, Case No. 7867, Order of 8/9/2013 (approving the installation of four temporary met towers).

Applying Section 246 according to its plain language is consistent with the Vermont Supreme Court's decision in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20. The Court's holding in that case establishes that Section 246 jurisdiction is trigged only if two conditions are met, the first condition of which is the

[11] Ironically, Respondent was the principal of the Dairy Air Wind, LLC, the Applicant and CPG holder in Case No. 8837. As discussed later in these comments, the Hearing Officer's decision to take judicial notice of some cases involving Respondent or the companies he owns or operates but not others seems indicative of bias against Respondent.

installation must be *temporary*. *Id*. at ¶ 22. The temporary nature of a Section 246 installation is one critical factor that distinguishes the scope of 30 V.S.A. § 246 from 30 V.S.A. § 248. The Court explained that unlike Section 248 projects, Section 246 meteorological stations "*are temporary constructions*." *Id*. ¶ 19 (emphasis added). The Court also recognized that meteorological stations do not generate electricity and are not connected to the electric grid. *Id*. at ¶ 18. Thus, the temporary use of a non-temporary installation, even for the purpose of evaluating wind resources for a potential grid-connected wind project, is not regulated by Section 246 because it falls outside the statute's scope.

The Hearing Officer's *Summary Judgment Order II* construes Section 246 as if its text grants the Commission authority to regulate the "temporary installation **or use** of one or more meteorological stations." 30 V.S.A. § 246(b) (bolded text not in original). In the Hearing Officer's opinion, it would be absurd for the Legislature to require Commission review of a temporary meteorological station while allowing permanent installations to "escape review." *Summary Judgment Order II* at 9. The Hearing Officer's rationale is fatally flawed: a facility that is not subject to the Commission's jurisdiction does not "escape review" because there is no review from which to escape.

More importantly, it is not absurd for the Legislature to limit the Commission's jurisdiction to temporary meteorological station installations. As the Commission and the Department surely know from their experience with grid-connected wind projects, wind project development typically involves the use of a temporary meteorological

station to evaluate wind resources in the proposed wind project location. Indeed, that was the entire purpose of the Vermont Anemometer Loan Program:

> The mission of this program is to continue to provide wind measurement instrumentation to Vermont businesses, farms, and other potential small-wind equipment users. . . .
>
> The objective of this program is providing an anemometer equipment loan service to Vermont homeowners, farms, and businesses interested in installing small wind systems on their property (10-100 kW).

Exhibit DPS-4 at 1. Because wind project development uses temporary met masts, the Legislature included a provision in Section 246 that requires the structures to be removed and the affected site restored when the masts are longer operating or needed. 30 V.S.A. § 246(c)(2); *see also In re Dairy Air Wind, LLC*, Case No. 8837, CPG 4/6/2017 at 1 ("The CPG Holder shall remove the meteorological stationand all associated equipment within three years of the date of this certificate of public good, and the site shall be restored as provided in 30 V.S.A. § 246(c)(2)."). Section 246(c)(2) is not laudatory or discretionary, it is mandatory.

Neither the Hearing Officer's *Summary Judgment Order II* nor the PFD explain how the Commission can implement 30 V.S.A § 246(c)(2)'s mandatory removal requirement if the statute is read to regulate the temporary use of a permanent installation like Respondent's. The PFD ignores that issue and simply explains that the Commission lacks "continuing jurisdiction over the tower located on [Respondent's] property now

that it is no longer being used for the purposes described in 30 V.S.A. § 246."[2] PFD at 7. The Hearing Officer's construction of Section 246 improperly renders subsection (c)(2)'s removal and restoration requirement surplusage. *See Doyle v. City of Burlington Police Dep't*, 2019 VT 66, ¶ 6 (explaining that the construction of a statute may not render a significant part of it irrelevant or surplusage).

The Hearing Officer expressly aimed his novel construction of 30 V.S.A. § 246 to prevent an installer seeking to "escape review" from later claiming that the meteorological station "had an additional permanent purpose, such as a flying flag or pennant." *Summary Judgment Order II* at 9. Those are not the facts of this case, however, and there is no support in the statute for the Hearing Officer's theory that an expansive view of 30 V.S.A § 246 is needed to deter rogue, pennant-flying installers.

It is more likely that the Legislature enacted Section 246 to provide a streamlined process for the review scores of temporary meteorological stations that were being installed as part of the Vermont Anemometer Loan Program, which commenced just a year prior to the enactment of Section 246. Exhibit DPS-4. If the Department and Commission are someday confronted with a rogue pennant-flying installer, they can

[2] The text of Section 246 does not include a description of purposes, so the Hearing Officer's finding that it does is clearly erroneous. The Commission interpreted the statute to have a purpose when it adopted the standards and procedures for issuance of Section 246 CPGs in 2010. The Vermont Supreme Court explained these facts in its 2019 decision in *In re Construction and Operation of a Meteorological Station*. 2019 VT 20, ¶ 22 n.7.

investigate the matter using the numerous tools available to them to do so and a decision can be rendered based on the record evidence adduced in that case.

In this case, however, the record is devoid of any evidence that Respondent's installation was meant to "escape review." Rather, the undisputed facts establish that Respondent has been gathering and analyzing wind data since he was a teenager, that he installed a non-temporary met mast that he designed on his Iraburg property so he could use it for multiple purposes on a long-term basis, and that he investigated whether the Town of Irasburg required a permit for it and learned that it did not. Prefiled Testimony of David Blittersdorf at 1, 4, 5 (Dec. 18, 2015).

It is worth highlighting that the Hearing Officer's concern about a rogue installer "escaping review" is premised on the wrongheaded notion that all land uses must be subject to some form of governmental review. That premise is an affront to the common law and the longstanding principle that statutes in derogation of the common law must be narrowly construed. *In re CVPS/Verizon Act 250 Land Use Permit*, 2009 VT 71, ¶ 14. Ultimately, Section 246 is a land use statute because it regulates land development involving the installation of a temporary structure. Construing the statute narrowly and giving effect to all its language means that the temporary use of a non-temporary met mast is not regulated by Section 246 even if the temporary use is evaluating wind resources in a specific location for a grid-connected wind project.

Respondent reminds the Commission that his reading of Section 246 is the only one consistent with the Commission's holding in 2017 that a temporarily installed

LIDAR cube used to evaluate wind resources for a grid-connected wind project is not subject to Section 246 because a LIDAR cube is not a tower and does not meet the definition of the statute. *In re Dairy Air Wind, LLC*, Case No. 8837, Order of 4/6/2017 at 18. Similarly, though Respondent's facility is a "tower," it is not a temporary facility and thus is not within the Commission's authority to regulate under 30 V.S.A. § 246. The Hearing Officer clearly erred by expanding the scope of the Commission's Section 246 jurisdiction to Respondent's facility. Therefore, the Commission must reject the PFD, enter judgment for Respondent, and dismiss this proceeding.

IV. This Proceeding Violates Respondent's Due Process Rights

The Hearing Officer has presided over this proceeding in a manner that has denied Respondent of his fundamental right to due process before he can be ordered pay a financial penalty under 30 V.S.A. § 30. Vermont law provides an array of tools for the Commission and the Department of Public Service to employ when investigating an alleged violation of a statute committed to their jurisdiction. Instead of using those tools to investigate the facts and apply the law, the Hearing Officer placed the burden on Respondent to prove that he did nothing wrong by installing and using a met mast on his Irasburg property since 2010. Respondent was repeatedly subject to rulings in this proceeding that frustrate the central purpose of an investigation, which is to ascertain all relevant facts so the Commission can apply the law in an informed, fair, and neutral manner.

The United States Constitution grants Respondent the right to due process before the government may deprive him of property in the form of a civil penalty. U.S. Const. amends. V, XIV; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "'[T]he process due in a given administrative proceeding depends on the interest at stake.'" *In re Green Mt. Power Corp.*, 2012 VT 89, ¶ 77, 192 Vt. 429, 60 A.3d 654 (citing *In re Smith*, 169 Vt. 162, 171, 730 A.2d 605, 613 (1999)). The interest at stake in this case concerns the potential deprivation of a property right in the form of a civil penalty of up to $100,000. 30 V.S.A. § 30(a)(2), (b). State statutes and the Commission's own rules provide clear procedures that, if utilized and applied fairly, protect against the risk of an erroneous deprivation of Respondent's property in the form of a financial penalty.

For example, state statute gives Respondent the opportunity for hearing. 30 V.S.A. § 30; see also 3 V.S.A. § 809(c). The Commission's procedural rules provide for discovery and the pre-filing of witness testimony and exhibits by all the parties to the proceeding. Pub. Util. Comm'n R. 2.213, 2.214. Both the Commission and the Department are empowered by statute to hire additional experts and legal counsel, if needed, to assist them in a Commission investigation, and to issue subpoenas to secure witness testimony. 30 V.S.A. §§ 18, 20. The statutory subpoena power goes beyond that provided an ordinary party in a Commission proceeding under Rule 45 of the Vermont Rules of Civil Procedure. For the Department, the vast powers granted to it by law allow it to fulfill its unique role as representative of the interests of the people of the State in cases before the Commission. 30 V.S.A. § 2(b).

As described below, throughout the almost six-years this case has been pending, the statutory public advocate and the Commission-appointed Hearing Officer have taken steps to shortcut the applicable legal procedures that protect against the erroneous deprivation of property in violation of Respondent's fundamental right to due process.

A. Deferring The Final Decision On The Hearing Officer's Proposed Summary Judgment Order Regarding "Liability" Under Section 246 Violates Respondent's Right to A Just, Speedy, And Inexpensive Determination of The Issue

The first rule of the Vermont Rules of Civil Procedure declares that the civil rules must be "construed, administered, and employed" in every case "to secure the just, speedy, and inexpensive determination" of the action. V.R.C.P. 1. The Commission adopted this provision of the Vermont Rules of Civil Procedure through Commission Rule 2.103 and mirrored it by declaring that the Commission's procedural rules must also "be liberally construed to secure the just and timely determination of all issues presented to the Commission." Pub. Util. Comm'n R. 2.106 (emphasis added). The words "just, speedy, and inexpensive" and "just and timely" in no way describe this extraordinary proceeding opened to determine whether Respondent's 2010 met mast installation violated the law.

The issue of Respondent's so-called "liability" under 30 V.S.A. §§ 30 and 246 was the subject of two preliminary and non-binding summary judgment orders by the Hearing Officer, the first of which took two years to issue without any explanation for

the excessive delay. In 2019, Respondent sought Commission review of the Hearing Officer's *Summary Judgment Order II* so that the "liability" question could be reviewed and finally ruled upon, thereby obviating the need for further proceedings if Respondent's position prevailed. The Commission rejected the request, treating it as a request for interlocutory review under Rules 5 and 5.1 of the Vermont Rules of Appellate Procedure, rules that do not apply to Commission proceedings, instead of a request to enter *summary judgment* on the liability issue pursuant to V.R.C.P. 56, a rule that the Commission has adopted. The Commission speculated that a final decision on liability would not materially advance this proceeding:

> We . . . do not believe that our review of the September 12 order will materially advance the termination of this litigation. It is more efficient for the hearing officer to proceed to hear the penalty phase of this matter and then provide a complete proposal for decision for the Commission's consideration.

Procedural Order Denying Request for Interlocutory Review, Case No. 8585, Order of 11/6/2019 at 2. That conclusion was erroneous. At issue in Respondent's request for review under Rule 56 was a controlling question of law that, if reversed, would have immediately resulted in the conclusion of these proceedings. *In re Pyramid Co.*, 141 Vt. 294, 302-303 (1982). Moreover, it was unreasonable for the Commission to conclude that review of the Hearing Officer's preliminary "liability" question would be less efficient because the procedural history of this case as documented in the ePUC Case Log proves otherwise.

It is now nearly six years since the Commission opened this investigation and inching up on five years since the Department filed its summary judgment motion on the "liability" issue. This case is months away from being over even if Respondent ultimately prevails. The substantial delay and deferral of a final ruling on the question of Respondent's liability under 30 V.S.A. §§ 30 and 246 violates the letter and spirit of Rules 1 and 56 of the Vermont Rules of Civil Procedure, Public Utility Commission Rule 2.106, and Respondent's right to due process.

B. The Hearing Officer Improperly Shifted the Burden of Proof To Respondent And Excused The Department From Having To Present Its Case Through A Qualified Witness Who Would Be Subject To Cross Examination

The PFD in this case is based on documents that were filed with the Commission without any witness testimony, proper authentication, or opportunity for cross examination. The Department of Public Service was excused from prefiling testimony and exhibits to prove its contentions in this case. This extraordinary exception to the Commission's procedural rules, like other preliminary rulings over nearly six years, shifted the burden of proof to Respondent and violated his right to due process.

It is well-established that before the government may deprive Respondent of his property, it must provide him with an opportunity for a hearing. *In re Miller*, 2009 VT 112, ¶ 9; *Hegarty v. Addison County Humane Soc'y*, 2004 VT 33, ¶ 18. This fundamental due process right is embodied in state law for contested case proceedings before administrative bodies like the Commission. 3 V.S.A. § 809(a). Administrative agency

decisions in contested cases must be based on findings of fact derived from evidence that is properly admitted at the hearing. 3 V.S.A. § 809(g). In its published guidance on evidentiary hearings, the Commission describes the evidentiary hearing process and the need for Commission findings to be grounded in evidence, and it cautions that parties should thus be familiar with how to get evidence admitted into the record:

> It is at the evidentiary hearing that evidence, in the form of testimony and exhibits, is admitted into the evidentiary record and witnesses are cross-examined about their prefiled testimony. The Commission can only base its decisions on information in the evidentiary record. It is therefore important that parties to evidentiary hearings understand how to get information into the evidentiary record so that the Commission can rely on it in making its decision in the case.

VT Public Utility Commission, *A Guide to Evidentiary Hearings* at 1 (2018) (available at https://puc.vermont.gov/document/guide-evidentiary-hearings). The *Guide* does not reveal any remarkable information about evidentiary hearings that a licensed Vermont attorney practicing before an adjudicatory body like the Commission would not already know. But the *Guide* does provide the parties and the public with Commission's view on the purpose of hearings and how it will manage them consistent with state statute and the Commission's procedural rules. 3 V.S.A. § 801(b)(14). Like any member of the public, Respondent was entitled to rely on the *Guide* and the duly adopted statutes and rules applicable to contested case hearings when he requested a hearing.

Under the Commission's rules, and according to the Commission's *Guide*, a party wishing to present evidence must do so through a qualified witness in written

testimony that is filed with the Commission in advance of the hearing. Pub. Util. Comm'n R. 2.213; *A Guide to Evidentiary Hearings* at 2. The *Guide* explains:

> In contrast to a court, the sworn evidence in a Commission case is prefiled in writing well before the evidentiary hearing takes place, and then sworn to and admitted into evidence at the hearing. The evidentiary hearing is mainly taken up by parties asking questions (cross-examining) about the prefiled testimony.

A Guide to Evidentiary Hearings at 2. Notable in this *Guide* excerpt is the significant role that cross examination plays in evidentiary hearings: hearing time is "mainly taken up" by the parties' cross examination. In this case, the Hearing Officer excused the Department from its obligation to present a case through prefiled testimony and exhibits from a qualified witness, thereby eliminating altogether Respondent's opportunity to cross examine the Department on its contentions.

The Hearing Officer waived the pre-filing rule for the Department and allowed the Department's lawyer to testify, without taking an oath, so that he could identify and move documents into evidence, all over Respondent's objection.[3] Tr. 3/18/2021 at passim. Allowing the Department's counsel to testify was a violation of the Commission's rules and Rule 3.7 of the Vermont Rules of Professional Conduct, which prohibits a lawyer from acting as both advocate and witness in the same contested case proceeding. Vt. Prof. Cond. Rule 3.7. As a matter of due process, Respondent was entitled to an evidentiary hearing that conformed to law by requiring the government,

[3] Respondent did not object to the admission of Exhibit DPS-4.

in this case the Department, to present its case against him through written prefiled testimony of a competent witness who would be made available at the evidentiary hearing to Respondent for cross examination. Following the lawful procedures to prevent the erroneous deprivation of Respondent's property serves the interests of justice and ensures that the Commission makes its decision on an accurate and complete factual record.

The position shared by the Hearing Officer and Department that the Department was not required to present its case using the Commission's established legal practices and procedures is untenable. Due process demands that the Hearing Officer and Department explain why they acted together to deviate from the Commission's rules and typical practice in this case when the "function involved and fiscal and [the] administrative burdens" of enforcing the Commission's rules and lawful contested case procedures are necessary, as a matter of law, to protect against an erroneous deprivation of Respondent's property interests. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Holton v. Dep't of Emp't & Training*, 2005 VT 42, ¶ 26 (demonstrating deficiency in terms of procedural fairness of administrative procedures, as set forth in *Mathews v. Eldridge*, "is an element of … burden in showing a procedural due process violation"). Similarly, as the statutory advocate for the public interest in Commission proceedings, 30 V.S.A. § 2(b), the Department has a duty to demonstrate that a valid justification exists for it to refuse to file testimony from a competent witness to prove its

allegations against Respondent. Indeed, the credibility of the regulatory oversight process demands it.

In sum, Commission fact findings based on documents sponsored by the Department's lawyer instead of prefiled testimony from a competent witness who could be cross examined at the evidentiary hearing violates Respondent's right to due process before he is ordered to pay a penalty under 30 V.S.A. § 30.

i. Respondent Was Not Required to Attend The Evidentiary Hearing Or Testify Without Having Been Subpoenaed By The Commission Or Another Party To Appear

Respondent himself did not attend the evidentiary hearing but was represented by the undersigned counsel. Respondent was not subpoenaed to be present, although the Commission and the Department both have statutory subpoena power in addition to power under the civil rules to subpoena a witness to testify at a hearing. 30 V.S.A. § 18; V.R.C.P. 45. There is no law that required Respondent's attendance at the evidentiary hearing without a subpoena to appear to give testimony and the Hearing Officer cited none at the hearing when the Department found itself without a witness to present its case.

Nevertheless, the Hearing Officer blamed Respondent's absence for the lack of a witness for the Department at the hearing. Case No. 8585, Evidentiary Hearing Transcript 3/18/ 2021 (hereinafter "Tr. 3/18/2021") at 19. The Hearing Officer went so far as to assert that the Department's "inability" to have a witness present at the hearing

to authenticate documents was Respondent's fault and not the obvious consequence of the Department's decision not to prefile any witness testimony, a decision the Hearing Officer condoned, repeatedly. Tr. 3/18/2021 at 19. Thus, with the Hearing Officer's approval, the Department shifted the burden of proof to Respondent while simultaneously denying him the opportunity to cross examine a witness on the Department's case. In no way did the Hearing Officer honor Respondent's due process rights when he faulted Respondent for not attending the evidentiary hearing and punished him by allowing the Department's lawyer to act as an authenticating witness for documents the Department moved to admit into the record over Respondent's objection.

ii. The Hearing Officer Failed to Follow His Own Procedural Order and Inappropriately Faulted Respondent For It

Just as the Hearing Officer blamed Respondent for the Department's failure to produce a witness at the evidentiary hearing, he faulted Respondent for not reminding him or the Clerk of the Commission to issue a notice of hearing in sufficient time for Respondent to issue a subpoena for a witness to testify at the evidentiary hearing. In a procedural order dated December 14, 2020, the Hearing Officer set January 15, 2021, as the deadline for Respondent to issue a subpoena to secure the appearance of Department employee at the evidentiary hearing so the employee could give testimony

on some of the contested issues in this case.[4] *Order re Evidentiary Hearing and Witnesses*, Case No. 8585, Order of 12/14/2020 at 2. The Order provided a date for the hearing, but not the time or place, other than a statement that the hearing would be conducted via videoconferencing. *Id.* The order deferred details of the hearing to the Clerk of the Commission, providing that "[a] separate notice of hearing will be issued by the Clerk of the Commission confirming the date and time of the hearing." *Id*. A notice of hearing containing the time, date, and place (i.e., videoconferencing details) is required by V.R.C.P. 45 for a valid subpoena directing a witness to appear for an evidentiary hearing. V.R.C.P. 45. The notice of hearing in this case was not issued until February 17, 2021.

The Hearing Officer's January 15, 2021, deadline for a subpoena passed before the notice of hearing promised in the December 14, 2020, procedural order issued. When the Hearing Officer's oversight was called to his attention, he blamed Respondent's counsel for not reminding him or the Clerk to issue the notice, taking no responsibility for his own inaction and shifting the burden onto Respondent to manage the proceeding:

> Second, counsel for Mr. Blittersdorf is well aware that the majority of hearings scheduled by the Commission start at 9:30 A.M. In fact, the Clerk emailed the parties in this proceeding on December 9, 2020, asking the parties for their availability for an evidentiary hearing. Four potential dates were proposed, including March 18, 2021, all with a start

[44] The employee, Andrew Perchlik, is a Vermont State Senator whose schedule made him unavailable during the legislative session.

> time of 9:30 A.M. In an email to the Clerk dated December 11, 2020, Mr. Blittersdorf agreed to an evidentiary hearing to be held on March 18, 2021, starting at 9:30 A.M. Further, to the extent there was any doubt as to the time of the hearing, confirmation of the time was easily obtainable by contacting the Clerk of the Commission.

Order re Subpoena Deadline, Case No. 8585, Order of 2/17/2021 at 3. There is no provision in the Administrative Procedures Act that allows the Commission to substitute the statutory notice of hearing with an informal scheduling email exchange between the Clerk and the parties' counsel. 3 V.S.A. § 809(b). Furthermore, the Hearing Officer has no basis to speculate that Respondent's counsel was "well aware that the majority of hearings scheduled by the Commission start at 9:30 A.M." *Order re Subpoena Deadline*, Case No. 8585, Order of 2/17/2021.

The responsibility to manage this case is the Commission's and it delegated that responsibility to the Hearing Officer. The "just, speedy, and inexpensive" determination of this action demanded that the Hearing Officer follow through with his own orders, not shift his responsibilities onto the Respondent or other parties. Although he attempted to cure his mistake by resetting the deadline for a subpoena, the fact that the Hearing Officer faulted Respondent for not reminding him to timely do the work that public funds pay him to do compounds the due process violations that are endemic in this case.

C. The Commission May Not Judicially Notice Findings of Fact in Prior Cases

The Hearing Officer erroneously relies on judicially noticed fact findings in prior cases to support his recommendation for a $2,500 civil penalty. See PFD Findings 11 through 17. The judicially noticed facts from prior proceedings are used to support the Hearing Officer's ultimate findings under 30 V.S.A. § 30(c), including that Respondent's "record of compliance" weighs against him in the determination of a civil penalty amount under Section 30." PFD at 19. This is clearly wrong and a violation of Respondent's rights to due process.

Like a court in our Judicial Branch, the Commission is authorized to take official notice of "judicially cognizable facts." 3 V.S.A. § 810; V.R.E. 201. A "judicially cognizable fact" is one that is "not subject to reasonable dispute" because it is either generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *In re Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.SA. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent nuclear fuel*, PUC Case No. 7862, Order of 3/29/2013, 2013 Vt. PUC LEXIS 107, *12 (hereinafter "*Entergy Nuclea*r"). "Judicial notice affords the weight of record evidence to a fact that is known to lie beyond dispute, thus obviating the need for formal proof through the evidentiary process." *Id.* Therefore, fact findings made in prior cases are not "judicially cognizable facts" for

which the Commission may take judicial notice. *Entergy Nuclear*, Case No. 7862, Order of 3/29/2013, 2013 Vt. PUC LEXIS 107, *12; *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70-72 (2d Cir. 1998); *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 97 Civ. 5499 (LAP)(JCF), 2000 U.S. Dist. LEXIS 2604 *46-*47 (S.D.N.Y. Sep. 6, 2001). Judicial notice is limited because facts found in prior Commission adjudications are not typically common knowledge and they do not "meet the test of indisputability" that V.R.E. 201(b) requires. The Commission explained the limitation on judicial notice in a 2013 decision involving the state's former nuclear power plant operator, Entergy Nuclear Vermont Yankee, LLC:

> Judicial notice is not intended as a means of by-passing cross-examination or other testing of documents and declarations for their admissibility as substantive proof pursuant to the rules of evidence.

Entergy Nuclear, Case No. 7862, Order of 3/29/2013, 2013 Vt. PUC LEXIS 107, *14. Therefore, while the Commission may take judicial notice of the fact of a prior adjudication, it may not judicially notice the findings of fact made in a prior proceeding to avoid using admissible record evidence in this case. The Hearing Officer's proposed fact findings based on judicial notice are clearly erroneous and may not be used to support the Commission's final order in this case.

If the Commission decides it is appropriate to look at prior cases involving Respondent or the companies he founded, owns, or operates, and to take judicial notice of them, then it must as a matter of fairness and due process to further scour its records

beyond what the Hearing Officer has already done to take judicial notice of all CPGs issued to Respondent and entities affiliated with him to ascertain an accurate and complete record of Respondent's regulatory compliance. Those CPGs include the 2017 CPG issued in Case No. 8837 to Dairy Air Wind, LLC pursuant to 30 V.S.A. § 246 while this proceeding was pending, as well as the scores of net-metering CPGs since the program was adopted in 1999 that were issued to Respondent or to companies with which he is affiliated. To do otherwise is a violation of Respondent's due process rights because it proves that the Hearing Officer, and in turn the Commission, are not unbiased arbiter of facts but advocates for a particular pre-determined result prejudicial to Respondent and his property interests.[5]

Finally, the Commission must carefully review the wisdom of taking judicial notice of fact findings in the cases the Hearing Officer cites for judicial notice even if it concludes judicial notice of fact findings in other cases is appropriate. The findings made in those other cases were either not the result of a contested evidentiary hearing or were the result of a settlement. None of the cases included witness testimony with cross examination to test the veracity of their statements. In the *Basin Harbor* case, for example, the fact findings are themselves based on judicial notice of another Commission proceeding. *See* Case No. 8692, Order of 8/31/2017 at 1. The April 11, 2018, order in Case No. 8774 contains no fact findings arising from an evidentiary record. The

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order simply recounts the procedural history of the case and approves a settlement between the parties that called for dismissal with no findings of liability or admission by Respondent that he violated the law. Case No. 8774, Order of 4/11/2018 at 5. Taking judicial notice of "findings" from other Commission cases is impermissible, but it is egregious when the findings in those other cases were not the result of a full and fair contested hearing with admissible evidence.

D. The Commission's Purported Billbacks for Court Reporting Services Are *Ultra Vires*

The PFD purports to order Respondent to pay for court reporting services through a billback pursuant to 30 V.S.A. § 21. The proposal is in error for two reasons. First, the evidentiary record contains no proof of the billbacks. The billbacks and underlying invoices may be part of the Commission's case file, but they were not introduced into evidence by the Hearing Officer or any other party. Therefore, any finding regarding billback is without evidentiary support and is clearly erroneous.

Second, and more importantly, the statute limits the Commission's authority to issue billbacks to "the applicant or the company or companies involved." 30 V.S.A. § 21(a). Respondent is a natural person who is neither an applicant in this case nor a company. By its own terms, the billback statute does not apply in this case and any order purporting to apply it to Respondent here is *ultra vires* and violates Respondent's due process rights. The Commission cannot deprive Respondent of a property interest without express statutory authorization and only after an opportunity for hearing. No

such statute exists and no opportunity for hearing has been provided to Respondent on the billback issue. Respondent notes that, although 30 V.S.A. § 21(a)(1) allows the "applicant or company" to challenge a billback and request the Commission to reallocate it, it does not contemplate such a challenge from an individual natural person who is a respondent in a Commission action, not an applicant. The language of the statute makes manifest that the Commission has no authority to billback court reporter fees to Respondent in this proceeding.

V. There Is No Evidence to Support the Hearing Officer's Finding That Respondent Would Have Learned Section 246 Applied To His Installation Had He Done Additional Due Diligence Before Installing It

The Hearing Officer finds that Respondent has "extensive knowledge and experience in the renewable energy field in Vermont that should have led him to inquire into whether Section 246 applied to his MET tower, and had he done so he would have learned that it did." PFD at 13. There is no evidence to support this finding. The finding is pure opinion and speculation that runs directly counter to the only evidence that was admitted without Respondent's objection, Exhibit DPS-4, the case record here, and Commission precedent.

The only reasonable inference to be drawn from Exhibit DPS-4, the Vermont Anemometer Loan Program Grant Agreement, is the applicability of Section 246 to Respondent's installation was a matter of uncertainty in 2010. The Grant Agreement was approved, and federal funds were disbursed, for the installation of met towers

under the mistaken belief that only local approval was required: "The towers are only temporary structures, so permits are typically not difficult to obtain and are handled through the local governments such as the town zoning coordinator." Exhibit DPS-4 at 3. Temporary met towers were erected pursuant to the terms of the Grant Agreement in the towns of Holland, Coventry, Sutton, Groton, St. Albans, North Ferrisburgh, Monkton, Cabot, Cabot Plans, Huntington, Milton, Williamstown, Charlotte, Randolph, Randolph Center, Shoreham, Colchester, Waltham, Wolcott, Washington, South Hero, Wilmington, Shelburne, Marlboro, and Westford. Exhibit DPS-1 at 6. The most recent installation under the program was at the Collins Perley Sports Arena Complex in St. Albans in 2011, and at least 10 of the 27 installations done under the program did not get CPGs from the Commission. *Id.* at 7.

Moreover, it an undisputed fact that it took a 2019 decision from the Vermont Supreme Court in *In re Construction and Operation of a Meteorological Station* to correct the Department and Commission's long-standing and mistaken belief that Section 248 regulated CPGs for meteorological towers. Further, the Department sought to delay this proceeding, which the Hearing Officer approved, for the sole purpose of waiting for that 2019 Supreme Court decision which the Department contended would clarify the applicability of Section 246 to the facts of this case. If Vermont regulators require an order from the Vermont Supreme Court to clarify their understanding of a statute committed to their sole jurisdiction, then it is unfair and unreasonable to find as fact that Respondent would have learned that a Section 246 CPG was required for his

facility if he had done additional due diligence, including by seeking guidance from regulators, before he installed it.

A review of the Commission's precedent on met tower permitting after Section 246 went into effect on July 1, 2008, further proves that any guidance from regulators about what law applied to met towers would have been confusing, at best. In an order dated August 5, 2009, the Commission approved the temporary installation of a met tower under 30 V.S.A. §§ 219a and 248 as if it were a net-metering facility. *In re Sunrise Village Homeowners Association*, Case No. CPG #NM-677, Order of 8/5/2009. Although the application in that case was filed almost a year after Section 246 became effective, the Commission's order does not cite or even mention 30 V.S.A. § 246.

The Commission issued a similar decision in the case of *In re Foundation for a Sustainable Future*, Case No. CPG #NM-499, Order of 9/17/2008, which involved two met towers, one of which was already constructed and was actually an operating wind turbine that was installed without Commission approval. *Id*. at 1, 2. The Commission approved the facilities as net-metering systems under 30 V.S.A. §§ 219a and 248, while also acknowledging the enactment of Section 246. *Id.* at 5. In its acknowledgement, however, the Commission stated its erroneous belief that the legislature "specifically recognized that meteorological tower construction falls under § 248." *Id*. at 5. As we know, the Supreme Court disagreed and corrected the Commission's misunderstanding on that point in *In re Construction and Operation of a Meteorological Station*, 2019 VT 20.

Based on the Commission's inconsistent and incorrect view of the law applicable to met towers before 2019, the only properly admitted evidence in this proceeding (Exhibit DPS-4), and the procedural history in this case, there is no credible basis to find that Respondent should have known to secure a CPG pursuant to 30 V.S.A. § 246 before he installed the met mast.

Respondent observes that the Commission and the public would have benefitted from hearing a witness from the Department of Public Service explain the conflict between how met towers enrolled in the Vermont Anemometer Loan Program were permitted versus its position in this case that Respondent's facility needed a CPG. A Department witness could explain what advice, if any, it would have given Respondent if he had inquired about the permit process for met towers considering the Commission's conflicting precedent on the issue discussed above. The Commission and the parties might have learned how the Department vets such inquiries, whether the Department had ever received any similar inquiries and if so, how they disposed of those inquiries. Unfortunately, the Hearing Officer was unwilling to allow a full investigation into relevant facts by excusing the Department from presenting its case through a witness who would be subject to cross examination. The Commission should reject the Hearing Officer's finding that Respondent should have known a Section 246 CPG was required for his met mast because it is based solely on inference and speculation, not evidence.

VI. Harm To The Regulatory Oversight Process Or Its Credibility Is Not A Penalty Factor Within The Ambit of 30 V.S.A. § 30(c)(1)

The PFD finds that Respondent's met mast installation harmed the regulatory oversight process by diminishing its credibility. PFD at 11. The Hearing Officer makes this finding without any evidence to support it or a basis in the text of Section 30(c)(1).

When determining an appropriate financial penalty under 30 V.S.A § 30, the Commission may consider:

> 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[.]

30 V.S.A § 30(c)(1). Subsection 30(c)(1) enumerates a specific list of interests whose harm or potential harm may be considered when calculating a penalty for violating Section 246, among other statutes. The enumerated list does not include the "credibility of the regulatory process." *See* PFD at 11. The reason for the omission is obvious. Section 30 itself vindicates the public's interest in a robust regulatory process by authorizing the Commission to impose financial penalties for violating the statutes and rules it is empowered to supervise and to enforce. Harm to the "credibility of the regulatory process" is a construct of regulators that is not a factor that may be considered under the plain text of subsection (c)(1) of 30 V.S.A. § 30.

The PFD cites numerous cases where the Commission has made this identical finding about harm to the "credibility of the regulatory process." See PFD at 12 n.24. The recitation of cases with an identical finding proves Respondent's point: it is a

regulatory construct derived from a concept that is embedded in the penalty statute itself. Harm to the "credibility of the regulatory process" is not an independent factor to consider under 30 V.S.A. § 30(c)(1).

Whether Respondent's alleged violation of law caused harm to any of the interests enumerated in 30 V.S.A. § 30(c)(1) is a question of fact that requires proof and evidence, not speculation and citation to Commission case law. The PFD's findings on harm to the "credibility of the regulatory process" is without support and must be rejected.

Respondent must make one final point about the PFD's discussion at page 12 regarding the importance of following one's responsibilities in the regulatory process. The Hearing Officer writes:

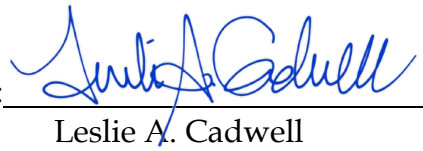
> The Commission's regulatory process depends in large part on the cooperation of those it regulates. When regulated persons and entities ignore their responsibilities to that process, then the process cannot function as intended.

PFD at 12. Respondent does not disagree with these principles but disagrees that his met mast installation had a deleterious effect on the credibility of the regulatory process. The credibility of the regulatory process has been diminished by the rulings and positions taken in this case by the Commission-appointed Hearing Officer and the Vermont Department of Public Service. A credible regulatory process requires that regulators set the example by fulfilling their statutory roles, using the tools that the legislature made available to them to do so, and enforcing the rules of procedure uniformly to all parties without favor.

VII. CONCLUSION

For the reasons explained in these comments and Respondent's Cross Motion for Summary Judgment, the Commission must enter judgment for Respondent and dismiss this proceeding because Respondent did not violate 30 V.S.A. § 246 when he installed the met mast that remains on his Irasburg property today, collecting wind resource data that Respondent has been collecting and analyzing since childhood.

Dated at Castleton, Vermont this 4th day of June, 2021.

By: 

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