

STATE OF VERMONT  
PUBLIC SERVICE BOARD

DOCKET NUMBER 8585

INVESTIGATION INTO METEOROLOGICAL TOWER  
AT 700 KIDDER HILL ROAD IN IRASBURG,  
VERMONT --

June 15, 2016  
1:30 p.m.

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112 State Street  
Montpelier, Vermont

Status Conference held before the  
Vermont Public Service Board, at the Susan M. Hudson  
Conference Room, People's United Bank Building, 112 State  
Street, Montpelier, Vermont, on June 15, 2016, beginning  
at 1:30 p.m.

P R E S E N T

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A P P E A R A N C E S

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Also present:

Dr. Robert Holland (By telephone)

1 MR. YOUNG: Good afternoon. This is a  
2 status conference in Docket Number 8585,  
3 investigation into meteorological tower at 700 Kidder  
4 Hill Road in Irasburg, Vermont. The Board has  
5 appointed me, George Young, to be Hearing Officer in  
6 this proceeding.

7 Why don't I take appearances; start  
8 with the Department.

9 MR. KISICKI: Aaron Kisicki on behalf  
10 of the Department of Public Service. And with me is  
11 the Director for Public Advocacy, Geoffrey Commons.

12 MS. WELTS: Leslie Welts on behalf of  
13 the Agency of Natural Resources.

14 MS. STONE: Alison Stone on -- go  
15 ahead.

16 MR. HOLLAND: Robert Holland on behalf  
17 of Irasburg.

18 MS. STONE: And Alison Stone on behalf  
19 of Respondent David Blittersdorf, and my colleague,  
20 Leslie Cadwell, is joining us by phone as well.

21 MR. YOUNG: Okay. Well the main thing  
22 we have here, I mean the last scheduling order I said  
23 if I got competing schedules or after we got  
24 schedules, we would have a status conference, which  
25 is why we are here. And what we have is competing

1 schedules with different approaches. And so the main  
2 thing I guess we have to decide, or I have to decide  
3 is which way we want to do this.

4 Does -- I have a couple questions.  
5 Does anybody have anything else they want to add  
6 before I start asking a couple questions? Further  
7 argument in support of schedules?

8 MR. KISICKI: No.

9 MR. YOUNG: Okay. Well I guess I would  
10 like to understand -- what I would like to understand  
11 first is I understand from Mr. Blittersdorf that your  
12 objection to the Department's schedule is you need an  
13 opportunity for discovery; is that correct?

14 MS. STONE: Yes.

15 MR. YOUNG: And I'm trying to  
16 understand that.

17 MS. STONE: Yes. So for one, my client  
18 has not waived his right to a hearing; entitled to a  
19 hearing on the penalty. And it's important for him  
20 to have the opportunity to discover what evidence the  
21 other parties might have that would support his  
22 position or that the -- that might be brought up in  
23 the context of a hearing, when he's being posed  
24 questions that he should have an opportunity to be  
25 prepared for.

1 MR. YOUNG: I fully understand the need  
2 for discovery to the extent there is a hearing. What  
3 I had understood from the -- from your position was  
4 that you wanted discovery in advance of a Rule 56  
5 summary judgment motion. And that's where I was  
6 puzzled. I mean it seems to me if you think there  
7 are issues of material fact, you simply say there are  
8 issues of material fact, you can't grant summary  
9 judgment, and let's go to a litigation schedule and  
10 discover things.

11 What I'm trying to understand is why  
12 you need discovery in order to decide whether issues  
13 -- how to respond to that. I was just sort of a  
14 little lost on that. If you can help me out.

15 MS. STONE: I guess we, you know, we  
16 want to understand what the -- we want to have the  
17 full -- all of the facts out there that might be  
18 relevant to this proceeding. We are not sure we are  
19 privy to all of them at this point. So we would like  
20 to understand the full factual context and have that  
21 be on the record prior to there being motions for  
22 summary judgment. I don't know if Leslie, do you  
23 want to weigh in on this point; Leslie Cadwell?

24 MS. CADWELL: Sure. So can folks hear  
25 me?

1 MR. YOUNG: Yes.

2 MR. COMMONS: Yes.

3 MS. CADWELL: Okay great. And forgive  
4 me, Dr. Holland, if I'm screaming in your ear,  
5 because we are on the phone together.

6 So the summary judgment if you look  
7 even at the most recent version of Rule 56, never  
8 really contemplated cutting off one party's right to  
9 discovery before motions were filed. In civil  
10 process, as you may know, the parties don't prefile  
11 testimony and take turns to do discovery. There is a  
12 discovery period for both sides to do discovery at  
13 the same time simultaneously. Here at every turn  
14 when we have asked to do discovery, we are getting  
15 cut off. And the Department seems very anxious to  
16 circumvent or cut off the Respondent's right to  
17 engage in discovery under the civil rules as Rule 56  
18 contemplates.

19 So we think it would be more efficient  
20 to do discovery. If the Department wants to file a  
21 motion, it certainly can file a motion at any time.  
22 But that should not preclude the Respondent from  
23 exercising his right to discover what information the  
24 opposing parties have that may be relevant to the  
25 facts that the Department is going to need to prove

1 as the prosecutor, air quotes here, and the other  
2 factors -- the other facts that go to the factors  
3 under 30(c) if indeed a violation has occurred.

4 MR. YOUNG: Mr. Kisicki.

5 MR. KISICKI: So if I may respond, the  
6 Department disagrees with Ms. Cadwell's reading of  
7 Rule 56. And more to the point the assertion that  
8 she makes in her filing that somehow the Department  
9 filing a Rule 56 motion would deny the Respondent his  
10 rights to discover facts, that is not the case. If  
11 you read Rule 56, it contemplates that a party can  
12 file a Rule 56 motion at any time prior to 30 days  
13 after the close of discovery. It does not dictate  
14 the discovery has to be conducted and completed  
15 before the filing of a Rule 56 motion.

16 More to the point, the Department wants  
17 to file a motion because it feels that there is no  
18 genuine dispute with respect to material facts  
19 related to whether or not the violation took place.  
20 There is no discovery that the Department can think  
21 of that the Respondent could possibly levy against  
22 the Department to determine whether or not there are  
23 material facts related to the Respondent's own  
24 conduct in and of itself.

25 Now if there is discovery they want to

1       levy against the Department with respect to the  
2       penalty phase, that is something different. And the  
3       Department doesn't intend to file a Motion for  
4       Summary Judgment that speaks to the penalty phase of  
5       this proceeding. So to the extent -- we are not  
6       anxious to circumvent the Respondent's right to  
7       discovery.

8               We are at a position in this proceeding  
9       where based on the evidentiary record before us and  
10      before the Hearing Officer, we feel that there are no  
11      genuine issues of material fact related to whether or  
12      not a violation occurred. And that's where we intend  
13      to stop our summary judgment motion; nothing beyond  
14      that. Certainly the Respondent would be able to  
15      engage in discovery if it's appropriate. Depending  
16      on what the Hearing Officer's ruling is on the  
17      summary judgment motion.

18             MR. YOUNG: So just to clarify, at this  
19      point you're not planning to move for summary  
20      judgment on any of the Rule 30(c) criteria. It is  
21      simply on the question of -- I'm taking it that your  
22      plan is in -- a motion that the material fact is that  
23      certain facts occurred that constitute a violation.

24             MR. KISICKI: Correct.

25             MR. YOUNG: Period.



1 MR. KISICKI: Correct.

2 MR. YOUNG: And are you still planning  
3 to file that by I believe June 29? Is the date that  
4 you wrote down?

5 MR. KISICKI: That's a good question.  
6 The Board issued a memorandum related to a temporary  
7 rulemaking that will be taking place within the next  
8 45 days. They issued that memo last night. It  
9 requires that the Department file comment proposals  
10 on I think July 27th. That may --

11 MR. YOUNG: June or July 27?

12 MR. KISICKI: June.

13 MR. YOUNG: You just said July, which  
14 is what left me puzzled.

15 MR. KISICKI: I'm sorry. June 27.

16 MR. YOUNG: I thought July would have  
17 been too generous on our part.

18 MR. KISICKI: No. So I mean the  
19 Department will try to issue that motion, but given  
20 the latest memo from the Board, we may seek an  
21 extension.

22 MR. YOUNG: So let me just ask Mr.  
23 Blittersdorf's representatives, and I'll start with  
24 Ms. Stone and you can switch to Ms. Cadwell. If the  
25 summary judgment motion is limited to liability, do

1       you still need discovery? I will say when I read the  
2       filings that was what I anticipated, because I don't  
3       know how you can get summary judgment on the  
4       balancing criteria, period. I mean maybe somebody  
5       can find a way -- innovative way to do it. But I'm  
6       not sure how you could ever apply to get summary  
7       judgment on most of those criteria. If it's limited  
8       to just the issue of did this happen, is there still  
9       a reason for discovery?

10               MS. STONE: I might call on Leslie  
11       Cadwell on this one.

12               MS. CADWELL: Sure. So thanks, Alison.  
13       So I think Mr. Kisicki actually gave our point for  
14       us. There is no reason for the Department to wait.  
15       I don't know why he needed to get to schedule their  
16       Motion for Summary Judgment if it seems so obvious  
17       that one should be filed. And in the meantime, the  
18       Respondent should be allowed to proceed with  
19       discovery. We don't need to schedule the filings of  
20       motions. It was our understanding that the schedule  
21       on the proceedings would be a litigation schedule if  
22       we couldn't reach an agreement. And a Motion for  
23       Summary Judgment or a schedule that provides just for  
24       a Motion for Summary Judgment is not in fact a  
25       litigation schedule.

1                   So particularly in light of Mr.  
2                   Kisicki's work commitments, we should not have to put  
3                   a deadline in for a motion. Mr. Kisicki -- the  
4                   Department can file a Motion for Summary Judgment.  
5                   It should be allowed to do that at any time. And in  
6                   the meantime we should move forward with litigation  
7                   schedule to keep this process moving and get to the  
8                   end, and that includes an opportunity for discovery  
9                   from the -- by the Respondent.

10                  If the parties wish to prefile  
11                  testimony, the opposing parties wish to prefile  
12                  testimony, they have already had their opportunity  
13                  for discovery in order to do that. If they don't  
14                  want to, that's certainly their choice. But we would  
15                  like to move forward with discovery and move the case  
16                  along.

17                  MR. YOUNG: Is there any reason that  
18                  the Department could not -- that we could not offer  
19                  -- actually run the two in parallel which is do the  
20                  summary judgment on the liability issue, and still  
21                  move ahead with testimony and other actions including  
22                  discovery on the other part of the case?

23                  MR. KISICKI: I would prefer that not  
24                  be the case. Because until -- unless and until the  
25                  Hearing Officer rules on the Department's motion, it

1 can't adequately anticipate what the scope of its  
2 testimony should be.

3 MR. YOUNG: Basically this is the  
4 question of do you need to put on testimony in the  
5 liability issue, or can you just focus on the 30(c)  
6 criteria? I mean is that what I'm hearing?

7 MR. KISICKI: All I can tell you right  
8 now is if the Hearing Officer grants a motion for  
9 partial summary judgment on the liability issue, then  
10 we would not need to, I shouldn't say we wouldn't, I  
11 can't anticipate us having to file testimony on that  
12 issue. But if it denies that motion, we very well  
13 may need to file testimony on those issues.

14 MR. YOUNG: Right. Okay.

15 MS. STONE: What if we started doing  
16 discovery, but prior to your deadline for testimony,  
17 maybe have a second round of discovery that's after  
18 the Department's testimony deadline or the non-  
19 Respondent party's testimony deadline?

20 MR. YOUNG: Okay. Having heard  
21 anything -- Ms. Welts, did you want to jump in?

22 MS. WELTS: I just wanted to comment on  
23 the discussion so far. So I've seen plenty of  
24 litigation schedules that contemplate a deadline for  
25 dispositive motion practice. And it typically

1 provides some form of a way for the tribunal to make  
2 decisions as to legal issues without getting to  
3 facts. If there are purely no disputed material  
4 facts, then there is really no reason to deny as a  
5 Motion for Summary Judgment. If there are, then  
6 there will be an opportunity for Mr. Blittersdorf to  
7 assert that there is a dispute as to a material fact,  
8 and perhaps that motion would be denied.

9 I mean I see that as something that can  
10 just happen on its own, separate from the whole  
11 discovery piece. Many times summary judgment motions  
12 are considered and ruled on before any discovery  
13 commences in any capacity. So it can be part of a  
14 litigation schedule.

15 That being said, I don't necessarily  
16 see the two schedules as competing. They both agree  
17 that a litigation schedule is needed. And one just  
18 fills in a deadline for a dispositive motion to be  
19 ruled on before moving into a -- deadlines for  
20 testimony and then discovery on that testimony. So  
21 it really -- it comes down to if there is only  
22 partial Motion for Summary Judgment, then it's an  
23 issue of whether there is any dispute as to any  
24 material fact regarding liability here. And we can  
25 really narrow the scope of this discussion, I think,

1 to that aspect.

2 And hopefully I haven't created more  
3 confusion.

4 MS. CADWELL: Well there is actually a  
5 material dispute, as you know, in -- through our  
6 discussions in settlement, and that is whether the  
7 met mast meets the definition of a temporary  
8 installation.

9 MR. KISICKI: That's a legal --

10 MR. COMMONS: That sounds like a legal  
11 issue.

12 MS. STONE: I think she was just  
13 responding because Leslie Welts had framed the issue  
14 --

15 MR. YOUNG: I'll actually frame it  
16 differently. This may or may not be a legal issue.  
17 If you think there are material facts that would  
18 weigh on the resolution of that issue, then the  
19 response would be there are material facts, and it  
20 has to go to hearing, and therefore a summary  
21 judgment is inappropriate. I mean I'm not saying --  
22 that's not a ruling. It is -- if you think there are  
23 facts that weigh on whether that is, then the  
24 response is.

25 So I'm ready to go with this. I think

1 it would be efficient to actually just deal with the  
2 summary judgment motions first, and then deal with  
3 the rest of the litigation schedule. So I'm going to  
4 adopt basically the Department's proposal. 29th.  
5 How much time does Mr. Blittersdorf need for response  
6 to the motion? Two weeks?

7 MS. CADWELL: 30 days.

8 MR. YOUNG: You want 30 days?

9 MR. KISICKI: Under the rule.

10 MS. CADWELL: Yes.

11 MR. YOUNG: The civil rules give you a  
12 long time.

13 MR. COMMONS: I thought Rule 56 had --

14 MS. WELTS: 30 days.

15 MR. YOUNG: Typically in Board practice  
16 we don't do the civil rules in terms of time periods.  
17 But if you need 30 days, and you have the right to a  
18 reply, I believe, under the civil rules also. Do you  
19 need two weeks for that?

20 MR. KISICKI: I think that might even  
21 be what's prescribed in the rule.

22 MS. WELTS: It's 15 days, but that  
23 doesn't preclude you from filing before 15 days has  
24 expired.

25 MR. YOUNG: I will say the rules

1       prescribe a lot of things that the Board does not  
2       follow in routine practice. There are a lot of  
3       30-day time periods in the civil rules, and  
4       occasionally we will follow them, but it is not the  
5       norm here. How much time do you need for a reply  
6       realistically?

7               MR. KISICKI: Two weeks should be  
8       sufficient.

9               MS. WELTS: It's in 78. Rule 78.  
10       Memos in opposition have 15 days. That's what I'm  
11       saying.

12              MR. YOUNG: It's buried under the rule  
13       on motions practice.

14              MR. KISICKI: Motion day.

15              MR. YOUNG: Motion day. Precisely.  
16       The place where everybody thinks to look.

17              MR. KISICKI: Two weeks would be  
18       sufficient.

19              MR. YOUNG: Okay. 30 days reply. So  
20       you've got 29th. So 30 days from the 29th will be  
21       the 29th of July. 14 days thereafter I can't do real  
22       quickly off the top of my head, but I would guess  
23       it's the 12th of July -- of August.

24              MS. CADWELL: May I ask a clarifying  
25       question?



1 MR. YOUNG: You may.

2 MS. CADWELL: Are we prohibited by your  
3 order from doing any discovery until the ruling on  
4 the Motion for Summary Judgment is done? And part of  
5 the reason I ask this is because, you know, the  
6 longer things take, sometimes documents disappear and  
7 memories fade, and I would just like, you know, a  
8 clear order stating either that we are allowed to  
9 have discovery or we are prohibited until the Hearing  
10 Officer issues a ruling only on one portion of the  
11 matter.

12 MR. YOUNG: Well let me ask this  
13 question. If I gave you the opportunity for a round  
14 of discovery now, would you then after the Department  
15 filed its testimony or the Department, ANR and  
16 Irasburg filed its testimony, be okay with only one  
17 round of discovery?

18 MS. CADWELL: Since the other parties  
19 already have two rounds of discovery I think it would  
20 be unfair to deny us equal opportunity to discover  
21 facts. So yes, I would object to just one period of  
22 discovery. That's just simply not fair.

23 MS. STONE: Wait. Just to clarify were  
24 you saying one round of discovery prior to their --  
25 it's two rounds but just with the motion deadline in

1 the middle.

2 MR. YOUNG: You've got a litigation  
3 schedule which is -- Department proposed litigation  
4 schedule. Says Department, ANR, Irasburg file. You  
5 get two rounds of discovery. What I was saying is if  
6 you want one now before they file testimony, would  
7 you be okay with one after, or are you asking for  
8 three rounds of discovery instead of two?

9 MS. STONE: I think we would be okay  
10 with two. One now and one after. Leslie, do you  
11 disagree with that?

12 MS. CADWELL: No. Absolutely not.

13 MS. STONE: That would be fine with us.

14 MR. YOUNG: Mr. Kisicki.

15 MR. KISICKI: From the Department's  
16 perspective we would ask that the Hearing Officer  
17 order no discovery take place until after it rules on  
18 the motion for partial summary judgment insofar that  
19 once a ruling is made it may or may not -- it may  
20 impact the Department's responses to discovery once  
21 that ruling has been made.

22 And since all parties are on notice  
23 that this motion is going to be made, they have a  
24 good understanding of what the scope of that motion  
25 is going to be, we think it would be appropriate just

1 to wait until it is ruled upon.

2 MR. YOUNG: We have been having lots of  
3 back and forth. Mr. Holland, I haven't heard you  
4 chime in on anything. Is there anything you wanted  
5 to add to any of this?

6 R. HOLLAND: I have nothing to add at  
7 this point.

8 MR. YOUNG: Okay.

9 MS. WELTS: Maybe I could just as far  
10 as discovery on the Department, ANR and Irasburg,  
11 right now it's unclear whether ANR would be filing  
12 any testimony. And so to the extent that ANR does or  
13 does not file testimony, that might dictate the  
14 amount of discovery that is done around that. It may  
15 be less efficient to do it before a ruling is made.

16 MR. YOUNG: Okay. You know what, I  
17 will split the baby here and let Mr. Blittersdorf  
18 have one round before and one round after testimony.  
19 I will make the observation, and I'm doing this  
20 primarily to be able to move the schedule along  
21 faster after the summary judgment, I will make the  
22 observation that since the Department won't know the  
23 ruling on its summary judgment motion, I suspect that  
24 first round of discovery is going to be pretty much  
25 useless. And if I grant that, I'm not going to be

1 particularly willing to grant an additional round  
2 later when after the testimony -- I mean you'll get  
3 the one round after the testimony is filed.

4 But you know, I don't want to be  
5 changing to allow a second round when you basically  
6 have to start from scratch after the testimony is  
7 filed. So first round discovery on non respondents  
8 by June 29. With responses -- I'll adopt the -- Mr.  
9 Blittersdorf's proposal of August 5 which is what is  
10 in front of me. And then, you know, we will --

11 MR. KISICKI: Wait. I'm sorry. Can  
12 you repeat that?

13 MR. YOUNG: Yes. It's basically the  
14 second and third dates from the proposed schedule  
15 filed by Mr. Blittersdorf which is first round of  
16 discovery is due on non respondents by June 29.  
17 Responses due August 5.

18 MR. KISICKI: Do you mean July 29?

19 MR. YOUNG: This is June. I'm adopting  
20 what is written in front of me here.

21 MR. KISICKI: Oh.

22 MR. YOUNG: And is proposed by Ms.  
23 Cadwell. I was being unoriginal.

24 MR. KISICKI: It makes sense now.  
25 Sorry.

1 MR. YOUNG: I'll be honest, it's not  
2 clear to me what you're going to get out of that  
3 particular discovery based upon my experience working  
4 at the Department and how cases evolve. But we will  
5 go with that.

6 Anything further? And then we will set  
7 the rest of the schedule after a summary judgment  
8 ruling.

9 MR. KISICKI: Just to be clear, so with  
10 respect to the summary judgment motion, the dates  
11 are --

12 MR. YOUNG: You do the 29th.

13 MR. KISICKI: -- 29th, responses July  
14 29. Our response August 12th. Discovery response --  
15 discovery requests go out June 29. Our responses are  
16 due August 5?

17 MR. YOUNG: By our I mean all non  
18 respondents.

19 MR. KISICKI: All non respondents.

20 MR. YOUNG: Which may or may not  
21 include Irasburg or ANR to the extent --

22 MS. CADWELL: Thank you very much.

23 MR. YOUNG: Anything further?

24 (No response.)

25 MR. YOUNG: We are adjourned.

(Whereupon, the proceeding was  
adjourned at 2 p.m.)

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C E R T I F I C A T E

I, Kim U. Sears, do hereby certify that I recorded by stenographic means the Status Conference re: Docket Number 8585 at the Susan M. Hudson Hearing Room, People's United Bank Building, 112 State Street, Montpelier, Vermont, on June 15, 2016, beginning at 1:30 p.m.

I further certify that the foregoing testimony was taken by me stenographically and thereafter reduced to typewriting and the foregoing 22 pages are a transcript of the stenograph notes taken by me of the evidence and the proceedings to the best of my ability.

I further certify that I am not related to any of the parties thereto or their counsel, and I am in no way interested in the outcome of said cause.

Dated at Williston, Vermont, this 17th day of June, 2016.

A rectangular box containing a handwritten signature in cursive script that reads "Kim U. Sears". The signature is written in dark ink on a light-colored, slightly textured background.

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<p style="text-align: center;"><b>0</b></p> <p>05402-0329 1:23 05620-2601 2:4 05620-3901 2:11 05735 2:6</p> <p style="text-align: center;"><b>1</b></p> <p>1 2:10 112 [4] - 1:8, 1:12, 2:3, 23:6 12th [2] - 16:23, 21:14 14 16:21 15 [6] - 1:7, 1:12, 15:22, 15:23, 16:10, 23:7 17th 23:17 1:30 [3] - 1:7, 1:13, 23:7</p> <p style="text-align: center;"><b>2</b></p> <p>2 [2] - 2:10, 22:2 2016 [4] - 1:7, 1:12, 23:7, 23:18 22 23:11 27 [2] - 9:11, 9:15 27th 9:10 29 [6] - 9:3, 20:8, 20:16, 20:18, 21:14, 21:15 29th [6] - 15:4, 16:20, 16:20, 16:21, 21:12, 21:13</p> <p style="text-align: center;"><b>3</b></p> <p>30 [7] - 7:12, 15:7, 15:8, 15:14, 15:17, 16:19, 16:20 30(c [3] - 7:3, 8:20, 12:5 30-day 16:3 329 1:23</p> <p style="text-align: center;"><b>4</b></p> <p>45 9:8</p> <p style="text-align: center;"><b>5</b></p> <p>5 [3] - 20:9, 20:17, 21:16 56 [9] - 5:4, 6:7, 6:17, 7:7, 7:9, 7:11, 7:12, 7:15, 15:13</p> <p style="text-align: center;"><b>7</b></p> <p>700 [2] - 1:4, 3:3 751 2:6</p>	<p>78 [2] - 16:9, 16:9</p> <p style="text-align: center;"><b>8</b></p> <p>802 1:24 827 2:6 8585 [3] - 1:2, 3:2, 23:5 863-6067 1:24</p> <p style="text-align: center;"><b>A</b></p> <p>Aaron [2] - 2:2, 3:9 ability 23:13 able [2] - 8:14, 19:20 Absolutely 18:12 actions 11:21 add [3] - 4:5, 19:5, 19:6 additional 20:1 adequately 12:1 adjourned [2] - 21:25, 22:2 adopt [2] - 15:4, 20:8 adopting 20:19 advance 5:4 Advocacy 3:11 ADVOCATE 2:5 afternoon 3:1 against [2] - 7:21, 8:1 Agency [2] - 2:10, 3:13 agree 13:16 agreement 10:22 ahead [2] - 3:15, 11:21 Alison [4] - 2:7, 3:14, 3:18, 10:12 allow 20:5 allowed [3] - 10:18, 11:5, 17:8 already [2] - 11:12, 17:19 amount 19:14 ANR [6] - 17:15, 18:4, 19:10, 19:11, 19:12, 21:21 anticipate [2] - 12:1, 12:11 anticipated 10:2 anxious [2] - 6:15, 8:6 appearances 3:7 Appearing [3] - 2:3, 2:5, 2:9 apply 10:6 appointed 3:5 approaches 4:1 appropriate [2] - 8:15, 18:25 argument 4:7 asking [2] - 4:6, 18:7</p>	<p>aspect 14:1 assert 13:7 assertion 7:7 August [5] - 16:23, 20:9, 20:17, 21:14, 21:16</p> <p style="text-align: center;"><b>B</b></p> <p>baby 19:17 balancing 10:4 Bank [2] - 1:12, 23:6 basically [4] - 12:3, 15:4, 20:5, 20:13 beginning [2] - 1:12, 23:7 behalf [4] - 3:9, 3:12, 3:16, 3:18 best 23:13 beyond 8:13 Blittersdorf [7] - 2:5, 3:19, 4:11, 13:6, 15:5, 19:17, 20:15 Blittersdorf's [2] - 9:23, 20:9 Board [7] - 1:1, 1:11, 3:4, 9:6, 9:20, 15:15, 16:1 Box [2] - 1:23, 2:6 brought 4:22 Building [2] - 1:12, 23:6 buried 16:12 BURLINGTON 1:23</p> <p style="text-align: center;"><b>C</b></p> <p>Cadwell [18] - 2:5, 2:7, 3:20, 5:23, 5:24, 6:3, 9:24, 10:11, 10:12, 14:4, 15:7, 15:10, 16:24, 17:2, 17:18, 18:12, 20:23, 21:22 Cadwell's 7:6 can't [4] - 5:8, 12:1, 12:11, 16:21 capacity 13:13 CAPITOL 1:22 case [4] - 7:10, 11:15, 11:22, 11:24 cases 21:4 Castleton 2:6 cause 23:16 certain 8:23 certainly [3] - 6:21, 8:14, 11:14 certify [3] - 23:3, 23:9, 23:14 changing 20:5</p>	<p>chime 19:4 choice 11:14 circumvent [2] - 6:16, 8:6 civil [6] - 6:9, 6:17, 15:11, 15:16, 15:18, 16:3 clarify [2] - 8:18, 17:23 clarifying 16:24 clear [3] - 17:8, 21:2, 21:9 client 4:17 close 7:13 colleague 3:19 comes 13:21 commences 13:13 comment [2] - 9:9, 12:22 commitments 11:2 Commons [5] - 2:2, 3:11, 6:2, 14:10, 15:13 competing [3] - 3:23, 3:25, 13:16 completed 7:14 conduct 7:24 conducted 7:14 conference [5] - 1:11, 1:12, 3:2, 3:24, 23:4 confusion 14:3 considered 13:12 constitute 8:23 contemplate 12:24 contemplated 6:8 contemplates [2] - 6:18, 7:11 context [2] - 4:23, 5:20 correct [3] - 4:13, 8:24, 9:1 couldn't 10:22 counsel [2] - 1:17, 23:15 COUNSELOR 2:5 couple [2] - 4:4, 4:6 COURT 1:22 created 14:2 criteria [4] - 8:20, 10:4, 10:7, 12:6 cut [2] - 6:15, 6:16 cutting 6:8</p> <p style="text-align: center;"><b>D</b></p> <p>date 9:3 Dated 23:17 dates [2] - 20:14, 21:10 David [2] - 2:5, 3:19 Davis 2:10</p>	<p>deadline [7] - 11:3, 12:16, 12:18, 12:19, 12:24, 13:18, 17:25 deadlines 13:19 deal [2] - 15:1, 15:2 decide [3] - 4:2, 4:2, 5:12 decisions 13:2 definition 14:7 denied 13:8 denies 12:12 deny [3] - 7:9, 13:4, 17:20 Department [25] - 2:3, 3:8, 3:10, 6:15, 6:20, 6:25, 7:6, 7:8, 7:16, 7:20, 7:22, 8:1, 8:3, 9:9, 9:19, 10:14, 11:4, 11:18, 17:14, 17:15, 18:3, 18:4, 19:10, 19:22, 21:4 Department's [6] - 4:12, 11:25, 12:18, 15:4, 18:15, 18:20 Depending 8:15 Deputy 1:16 determine 7:22 dictate [2] - 7:13, 19:13 differently 14:16 Director 3:11 disagree 18:11 disagrees 7:6 disappear 17:6 discover [5] - 4:20, 5:10, 6:23, 7:10, 17:20 discovery [48] - 4:13, 5:2, 5:4, 5:12, 6:9, 6:11, 6:12, 6:12, 6:14, 6:17, 6:20, 7:13, 7:14, 7:20, 7:25, 8:7, 8:15, 10:1, 10:9, 10:19, 11:8, 11:13, 11:15, 11:22, 12:16, 12:17, 13:11, 13:12, 13:20, 17:3, 17:9, 17:14, 17:17, 17:19, 17:22, 17:24, 18:5, 18:8, 18:17, 18:20, 19:10, 19:14, 19:24, 20:7, 20:16, 21:3, 21:14, 21:15 discussion [2] - 12:23, 13:25 discussions 14:6 dispositive [2] -</p>	<p>12:25, 13:18 dispute [4] - 7:18, 13:7, 13:23, 14:5 disputed 13:3 Docket [3] - 1:2, 3:2, 23:5 documents 17:6 Dr [2] - 2:12, 6:4 Drive 2:10 due [3] - 20:16, 20:17, 21:16</p> <p style="text-align: center;"><b>E</b></p> <p>ear 6:4 efficient [3] - 6:19, 15:1, 19:15 either 17:8 EMAIL 1:24 Enforcement 2:9 engage [2] - 6:17, 8:15 entitled 4:18 equal 17:20 ESQUIRE [5] - 2:2, 2:2, 2:7, 2:7, 2:9 everybody 16:16 evidence [2] - 4:20, 23:13 evidentiary 8:9 evolve 21:4 exercising 6:23 experience 21:3 expired 15:24 extension 9:21 extent [4] - 5:2, 8:5, 19:12, 21:21</p> <p style="text-align: center;"><b>F</b></p> <p>factors [2] - 7:2, 7:2 facts [13] - 5:17, 6:25, 7:2, 7:10, 7:18, 7:23, 8:23, 13:3, 13:4, 14:17, 14:19, 14:23, 17:21 factual 5:20 fade 17:7 fair 17:22 faster 19:21 feel 8:10 feels 7:17 file [13] - 6:20, 6:21, 7:12, 7:17, 8:3, 9:3, 9:9, 11:4, 12:11, 12:13, 18:4, 18:6, 19:13 filed [7] - 6:9, 10:17, 17:15, 17:16, 20:3, 20:7, 20:15 filing [5] - 7:8, 7:9, 7:15, 15:23, 19:11</p>
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<p>filings [2] - 10:2, 10:19 fills 13:18 fine 18:13 focus 12:5 folks 5:24 follow [2] - 16:2, 16:4 foregoing [2] - 23:9, 23:11 forgive 6:3 forth 19:3 forward [2] - 11:6, 11:15 frame 14:15 framed 14:13 Frisbie 2:6 front [2] - 20:10, 20:20 full [2] - 5:17, 5:20 fully 5:1</p> <hr/> <p><b>G</b></p> <p>gave [2] - 10:13, 17:13 General 1:16 generous 9:17 genuine [2] - 7:18, 8:11 Geoffrey [2] - 2:2, 3:11 George [2] - 1:16, 3:5 given 9:19 grant [3] - 5:8, 19:25, 20:1 grants 12:8 guess [4] - 4:2, 4:9, 5:15, 16:22</p> <hr/> <p><b>H</b></p> <p>happen [2] - 10:8, 13:10 haven't [2] - 14:2, 19:3 having [3] - 12:11, 12:20, 19:2 he's 4:23 hear 5:24 heard [2] - 12:20, 19:3 hearing [15] - 1:16, 3:5, 4:18, 4:19, 4:23, 5:2, 8:10, 8:16, 11:25, 12:6, 12:8, 14:20, 17:9, 18:16, 23:5 held 1:11 hereby 23:3 Hill [3] - 1:4, 2:6, 3:4 Holland [6] - 2:12, 3:16, 3:16, 6:4, 19:3, 19:6 honest 21:1 hopefully 14:2</p>	<p>Hudson [2] - 1:11, 23:5</p> <hr/> <p><b>I</b></p> <p>impact 18:20 inappropriate 14:21 include 21:21 includes 11:8 including 11:21 indeed 7:3 info@capitolcour 1:24 information 6:23 innovative 10:5 insofar 18:18 installation 14:8 instead 18:8 intend [2] - 8:3, 8:12 interested 23:16 investigation [2] - 1:4, 3:3 Irasburg [7] - 1:4, 3:4, 3:17, 17:16, 18:4, 19:10, 21:21 issue [11] - 9:19, 10:8, 11:20, 12:5, 12:9, 12:12, 13:23, 14:11, 14:13, 14:16, 14:18 issued [2] - 9:6, 9:8 issues [7] - 5:7, 5:8, 5:12, 8:11, 12:13, 13:2, 17:10 itself 7:24</p> <hr/> <p><b>J</b></p> <p>joining 3:20 judgment [28] - 5:5, 5:9, 5:22, 6:6, 8:4, 8:13, 8:17, 8:20, 9:25, 10:3, 10:7, 10:16, 10:23, 10:24, 11:4, 11:20, 12:9, 13:5, 13:11, 13:22, 14:21, 15:2, 17:4, 18:18, 19:21, 19:23, 21:7, 21:10 July [8] - 9:10, 9:11, 9:13, 9:16, 16:21, 16:23, 20:18, 21:13 jump 12:21 June [12] - 1:7, 1:12, 9:3, 9:11, 9:12, 9:15, 20:8, 20:16, 20:19, 21:15, 23:7, 23:18</p>	<hr/> <p><b>K</b></p> <p>Kidder [2] - 1:4, 3:3 Kim 23:3 Kisicki [31] - 2:2, 3:9, 3:9, 4:8, 7:4, 7:5, 8:24, 9:1, 9:5, 9:12, 9:15, 9:18, 10:13, 11:3, 11:23, 12:7, 14:9, 15:9, 15:20, 16:7, 16:14, 16:17, 18:14, 18:15, 20:11, 20:18, 20:21, 20:24, 21:9, 21:13, 21:19 Kisicki's 11:2</p> <hr/> <p><b>L</b></p> <p>later 20:2 latest 9:20 legal [5] - 2:5, 13:2, 14:9, 14:10, 14:16 Leslie [10] - 2:5, 2:7, 2:9, 3:12, 3:20, 5:22, 5:23, 10:10, 14:13, 18:10 less 19:15 let's 5:9 levy [2] - 7:21, 8:1 liability [5] - 9:25, 11:20, 12:5, 12:9, 13:24 limited [2] - 9:25, 10:7 litigation [11] - 2:9, 5:9, 10:21, 10:25, 11:6, 12:24, 13:14, 13:17, 15:3, 18:2, 18:3 longer 17:6 lost 5:14 lots 19:2</p> <hr/> <p><b>M</b></p> <p>main [2] - 3:21, 4:1 makes [2] - 7:8, 20:24 mast 14:7 material [12] - 5:7, 5:8, 7:18, 7:23, 8:11, 8:22, 13:3, 13:7, 13:24, 14:5, 14:17, 14:19 matter 17:11 maybe [3] - 10:4, 12:17, 19:9 means 23:4 meantime [2] -</p>	<p>10:17, 11:6 meets 14:7 memo [2] - 9:8, 9:20 memorandum 9:6 memories 17:7 Memos 16:10 met 14:7 meteorological [2] - 1:4, 3:3 middle 18:1 MILBURY 2:7 Montpelier [5] - 1:9, 1:12, 2:4, 2:11, 23:7 motion [36] - 5:5, 6:21, 6:21, 7:9, 7:12, 7:15, 7:17, 8:3, 8:13, 8:17, 8:22, 9:19, 9:25, 10:16, 10:22, 10:24, 11:3, 11:4, 11:25, 12:8, 12:12, 12:25, 13:5, 13:8, 13:18, 13:22, 15:6, 16:14, 16:15, 17:4, 17:25, 18:18, 18:23, 18:24, 19:23, 21:10 motions [6] - 5:21, 6:9, 10:20, 13:11, 15:2, 16:13 move [6] - 8:19, 11:6, 11:15, 11:15, 11:21, 19:20 moving [2] - 11:7, 13:19</p> <hr/> <p><b>N</b></p> <p>narrow 13:25 National 2:10 Natural [2] - 2:10, 3:13 necessarily 13:15 needed [2] - 10:15, 13:17 non [5] - 12:18, 20:7, 20:16, 21:17, 21:19 norm 16:5 notes 23:12 nothing [2] - 8:13, 19:6 notice 18:22</p> <hr/> <p><b>O</b></p> <p>object 17:21 objection 4:12 observation [2] - 19:19, 19:22 obvious 10:16 occasionally 16:4 occurred [3] - 7:3,</p>	<p>8:12, 8:23 offer 11:18 Officer [7] - 1:16, 3:5, 8:10, 11:25, 12:8, 17:10, 18:16 Officer's 8:16 opportunity [8] - 4:13, 4:20, 4:24, 11:8, 11:12, 13:6, 17:13, 17:20 opposing [2] - 6:24, 11:11 opposition 16:10 order [6] - 3:22, 5:12, 11:13, 17:3, 17:8, 18:17 outcome 23:16</p> <hr/> <p><b>P</b></p> <p>p.m [4] - 1:7, 1:13, 22:2, 23:8 P.O [2] - 1:23, 2:6 pages 23:11 parallel 11:19 partial [3] - 12:9, 13:22, 18:18 particular 21:3 particularly [2] - 11:1, 20:1 parties [8] - 4:21, 6:10, 6:24, 11:10, 11:11, 17:18, 18:22, 23:15 party 7:11 party's [2] - 6:8, 12:19 penalty [3] - 4:19, 8:2, 8:4 People's [2] - 1:12, 23:6 perhaps 13:8 period [4] - 6:12, 8:25, 10:4, 17:21 periods [2] - 15:16, 16:3 perspective 18:16 phase [2] - 8:2, 8:4 piece 13:11 plan 8:22 planning [2] - 8:19, 9:2 PLC 2:5 plenty 12:23 point [7] - 5:19, 5:23, 7:7, 7:16, 8:19, 10:13, 19:7 portion 17:10 posed 4:23 position [3] - 4:22, 5:3, 8:8 possibly 7:21 practice [4] - 12:25, 15:15, 16:2, 16:13</p>	<p>Precisely 16:15 preclude [2] - 6:22, 15:23 prefer 11:23 prefile [3] - 6:10, 11:10, 11:11 prepared 4:25 prescribe 16:1 prescribed 15:21 present 2:12 primarily 19:20 prior [4] - 5:21, 7:12, 12:16, 17:24 privy 5:19 proceed 10:18 proceeding [5] - 3:6, 5:18, 8:5, 8:8, 22:1 proceedings [2] - 10:21, 23:13 process [2] - 6:10, 11:7 prohibited [2] - 17:2, 17:9 proposal [2] - 15:4, 20:9 proposals 9:9 proposed [3] - 18:3, 20:14, 20:22 prosecutor 7:1 prove 6:25 provides [2] - 10:23, 13:1 Public [5] - 1:1, 1:11, 2:3, 3:10, 3:11 purely 13:3 puzzled [2] - 5:6, 9:14</p> <hr/> <p><b>Q</b></p> <p>quickly 16:22 quotes 7:1</p> <hr/> <p><b>R</b></p> <p>re 23:4 reach 10:22 reading 7:6 ready 14:25 real 16:21 realistically 16:6 really [4] - 6:8, 13:4, 13:21, 13:25 reason [5] - 10:9, 10:14, 11:17, 13:4, 17:5 recent 6:7 record [2] - 5:21, 8:9 recorded 23:4 reduced 23:11 regarding 13:24 related [5] - 7:19,</p>
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<p>7:23, 8:11, 9:6, 23:14 relevant [2] - 5:18, 6:24 repeat 20:12 reply [3] - 15:18, 16:5, 16:19 <b>REPORTERS</b> 1:22 representatives 9:23 requests 21:15 requires 9:9 resolution 14:18 Resources [2] - 2:10, 3:13 respect [3] - 7:18, 8:1, 21:10 respond [2] - 5:13, 7:5 Respondent [8] - 3:19, 6:22, 7:9, 7:21, 8:14, 10:18, 11:9, 12:19 Respondent's [3] - 6:16, 7:23, 8:6 respondents [4] - 20:7, 20:16, 21:18, 21:19 responding 14:13 response [6] - 14:19, 14:24, 15:5, 21:14, 21:14, 21:24 responses [5] - 18:20, 20:8, 20:17, 21:13, 21:15 rest [2] - 15:3, 21:7 rights 7:10 Road [3] - 1:4, 2:6, 3:4 Robert [2] - 2:12, 3:16 Room [2] - 1:12, 23:5 round [12] - 12:17, 17:13, 17:17, 17:24, 19:18, 19:18, 19:24, 20:1, 20:3, 20:5, 20:7, 20:15 rounds [4] - 17:19, 17:25, 18:5, 18:8 routine 16:2 rule [14] - 5:4, 6:7, 6:17, 7:7, 7:9, 7:11, 7:12, 7:15, 8:20, 15:9, 15:13, 15:21, 16:9, 16:12 ruled [3] - 13:12, 13:19, 19:1 rulemaking 9:7 rules [8] - 6:17, 11:25, 15:11, 15:16, 15:18,</p>	<p>15:25, 16:3, 18:17 ruling [9] - 8:16, 14:22, 17:3, 17:10, 18:19, 18:21, 19:15, 19:23, 21:8 run 11:19</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p>saying [4] - 14:21, 16:11, 17:24, 18:5 Says 18:4 schedule [17] - 4:12, 5:9, 10:15, 10:19, 10:20, 10:21, 10:23, 10:25, 11:7, 13:14, 13:17, 15:3, 18:3, 18:4, 19:20, 20:14, 21:7 schedules [6] - 3:23, 3:24, 4:1, 4:7, 12:24, 13:16 scheduling 3:22 scope [3] - 12:1, 13:25, 18:24 scratch 20:6 screaming 6:4 Sears 23:3 Section 2:9 seek 9:20 seems [3] - 5:6, 6:15, 10:16 sense 20:24 separate 13:10 Service [4] - 1:1, 1:11, 2:3, 3:10 settlement 14:6 shouldn't 12:10 sides 6:12 simply [3] - 5:7, 8:21, 17:22 simultaneously 6:13 somebody 10:4 somehow 7:8 sorry [3] - 9:15, 20:11, 20:25 sort 5:13 sounds 14:10 speaks 8:4 split 19:17 start [4] - 3:7, 4:6, 9:23, 20:6 started 12:15 State [5] - 1:1, 1:8, 1:12, 2:3, 23:6 stating 17:8 status [4] - 1:11, 3:2, 3:24, 23:4 stenograph 23:12 stenographic 23:4</p>	<p>stenographically 23:10 Stone [15] - 2:7, 3:14, 3:14, 3:18, 3:18, 4:14, 4:17, 5:15, 9:24, 10:10, 12:15, 14:12, 17:23, 18:9, 18:13 stop 8:13 Street [4] - 1:8, 1:12, 2:3, 23:6 sufficient [2] - 16:8, 16:18 summary [28] - 5:5, 5:8, 5:22, 6:6, 8:4, 8:13, 8:17, 8:19, 9:25, 10:3, 10:6, 10:16, 10:23, 10:24, 11:4, 11:20, 12:9, 13:5, 13:11, 13:22, 14:20, 15:2, 17:4, 18:18, 19:21, 19:23, 21:7, 21:10 support [2] - 4:7, 4:21 Susan [2] - 1:11, 23:5 suspect 19:23 switch 9:24</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p>taken [2] - 23:10, 23:12 taking [2] - 8:21, 9:7 telephone [2] - 2:7, 2:12 temporary [2] - 9:6, 14:7 terms 15:16 testimony [23] - 6:11, 11:11, 11:12, 11:21, 12:2, 12:4, 12:11, 12:13, 12:16, 12:18, 12:19, 13:20, 13:20, 17:15, 17:16, 18:6, 19:12, 19:13, 19:18, 20:2, 20:3, 20:6, 23:10 Thank 21:22 thanks 10:12 thereafter [2] - 16:21, 23:10 therefore 14:20 thereto 23:15 thing [2] - 3:21, 4:2 thinks 16:16 third 20:14 top 16:22 tower [2] - 1:4, 3:3</p>	<p>transcript 23:12 tribunal 13:1 turn 6:13 turns 6:11 typewriting 23:11 typically [2] - 12:25, 15:15</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p>unclear 19:11 understand [8] - 4:10, 4:10, 4:11, 4:16, 5:1, 5:11, 5:16, 5:20 understanding [2] - 10:20, 18:24 understood 5:3 unfair 17:20 United [2] - 1:12, 23:6 unless 11:24 unoriginal 20:23 upon [2] - 19:1, 21:3 useless 19:25</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p>Vermont [10] - 1:1, 1:5, 1:9, 1:11, 1:12, 1:23, 2:10, 3:4, 23:7, 23:17 version 6:7 violation [4] - 7:3, 7:19, 8:12, 8:23 VT [4] - 2:3, 2:4, 2:6, 2:11</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p>wait [4] - 10:14, 17:23, 19:1, 20:11 waived 4:18 wanted [3] - 5:4, 12:22, 19:4 wants [2] - 6:20, 7:16 weeks [4] - 15:6, 15:19, 16:7, 16:17 weigh [3] - 5:23, 14:18, 14:23 Welts [10] - 2:9, 3:12, 3:12, 12:21, 12:22, 14:13, 15:14, 15:22, 16:9, 19:9 what's 15:21 Whereupon 22:1 whether [8] - 5:12, 7:19, 7:22, 8:11, 13:23, 14:6, 14:23, 19:11 whole 13:10 willing 20:1</p>	<p>Williston 23:17 wish [2] - 11:10, 11:11 within 9:7 won't 19:22 wouldn't 12:10 written 20:20 wrote 9:4</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p>you'll 20:2 Young [44] - 1:16, 3:1, 3:5, 3:21, 4:9, 4:15, 5:1, 6:1, 7:4, 8:18, 8:25, 9:2, 9:11, 9:13, 9:16, 9:22, 11:17, 12:3, 12:14, 12:20, 14:15, 15:8, 15:11, 15:15, 15:25, 16:12, 16:15, 16:19, 17:1, 17:12, 18:2, 18:14, 19:2, 19:8, 19:16, 20:13, 20:19, 20:22, 21:1, 21:12, 21:17, 21:20, 21:23, 21:25</p>
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