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VERMONT PUBLIC  
SERVICE BOARD

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Leslie A. Cadwell  
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**By Email and U.S. Priority Express Mail**

July 27, 2016

Judith C. Whitney, Clerk  
Vermont Public Service Board  
112 State Street, 4<sup>th</sup> Floor  
Montpelier, VT 05620-2701

Re: Docket No. 8585  
Respondent's Supplemental Memorandum of Law

Dear Ms. Whitney:

Enclosed for filing in the above-referenced matter, please find an original and 3 copies of Respondent's Supplemental Memorandum of Law in Opposition to Motion to Quash and for Protective Order.

Thank you for your assistance and attention to this filing.

Very truly yours,



Leslie A. Cadwell

Enclosure(s)

Cc: Attached service list

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 8585

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

SERVICE LIST

Geoffrey Commons, Esq.  
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Vermont Department of Public Service  
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Montpelier, VT 05620-2601

Irasburg Select Board  
P.O. Box 51  
Irasburg, VT 05845

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STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 8585

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

RESPONDENT'S SUPPLEMENTAL MEMORANDUM OF LAW  
IN OPPOSITION TO MOTION TO QUASH AND FOR PROTECTIVE ORDER

On July 22, 2016, Respondent in the above-captioned matter filed a memorandum in opposition to a motion to quash and for protective order filed on July 15, 2016 by the Department of Public Service on behalf of the Department, the Town of Irasburg, and the Agency of Natural Resources.<sup>1</sup> In compliance with the Hearing Officer's scheduling order issued on July 25, 2016 and served on the parties by email, Respondent files this Supplemental Memorandum of Law.

Memorandum of Law

The Department seeks expedited review of a motion to quash and for protective order that it filed prematurely and without regard to counsel's obligation under Rule 26(h) of the Vermont Rules of Civil Procedure.<sup>2</sup> The Department's motion rests on a fiction that it created to shield it from producing witnesses for deposition, namely that

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<sup>1</sup> The Respondent and the Agency have since resolved their discovery dispute without need for Board intervention, rendering the Agency's request for relief in the motion moot.

<sup>2</sup> The Respondent agrees that expedited review is appropriate given that the Department and the Town of Irasburg have impeded Respondent's ability to discover facts relevant to the question of a potential violation of Sections 246 and 248. Respondent will be seeking an extension of time to file his response to the Department's summary judgment motion in light of opposing parties' refusal to produce witnesses for deposition before the July 29, 2016 response deadline.

this "proceeding is a bifurcated process." Department Memorandum in Support of Motion to Quash and for Protective Order at 4 ("DPS Memo."). The Department does not cite any legal authority for its position that this proceeding, and other Section 30 investigations, involve a "bifurcated process." *Id.* Indeed, there is no such controlling legal authority, and the record in this matter proves that the Department is, quite simply, weaving a tale to excuse its own non-compliance with the discovery rules.

A bifurcated proceeding is one that is divided into two stages for hearing, such as a liability and punishment. Black's Law Dictionary 1295 (9<sup>th</sup> ed. 2010); *see also* *Petition of Vt. Transco LLC, for authority to condemn easement rights in property interests of Katherine B. Arthaud*, Docket No. 7285, Order of 8/15/2007 (denying motion to bifurcate condemnation proceeding into two stages, one to address necessity and the second to address damages). The only recent example of a bifurcated proceeding commenced under Section 30 of Title 30 can be found in Docket 8734, where the Hearing Officer's scheduling order adopted a two-phase proceeding pursuant to the parties' agreement:

During the prehearing conference, the parties agreed that this investigation should proceed in two phases. The first phase would end with a determination of whether GMCW's operation of its turbines when ice was present on the blades constituted a violation of the requirements of its winter operating protocol and related Board orders. The second phase, which would only be needed if the first phase resulted in an affirmative finding, would examine what level of civil penalty would be appropriate if the Public Service Board ("Board") finds a violation.

*Investigation pursuant to 30 V.S.A. §§ 30 and 209 into operations during icing conditions by the Georgia Mountain Community Wind, LLC wind electric generating facility in Georgia, Vermont, Docket No. 8734, Order of 6/14/2016 at 1.* Because bifurcated proceedings cause significant delay in the ultimate resolution of a proceeding, the Board has denied motions to bifurcate where the parties, including the Department of Public Service, have filed objections to the procedure. *See, e.g., Petition of Vt. Transco LLC, for authority to condemn easement rights in property interests of Katherine B. Arthaud, Docket No. 7285, Order of 8/15/2007 (denying motion to bifurcate and explaining that “[a] fully bifurcated schedule would significantly delay the Board’s final decision”); Amended Petition of Vt. Elec. Power Co., Inc. for authority to condemn easement rights in property interests of The Harley A. Grice Revocable Trust, Docket No. 7121, Order of 4/21/2006 (denying motion to bifurcate because “such bifurcation would provide no benefit and would only cause delay”); see also Investigation into the existing rates of Cent. Vt. Pub. Serv. Corp., Docket Nos. 6946 and 6988, Order of 1/28/2005 (denying utility motion to bifurcate rate proceeding).* Contrary to the Department’s claim, proceedings under Section 30 of Title 30 are not typically bifurcated. For example, in the case of *Lajeunesse Interiors, Inc.*, the Board considered and decided the issues of liability and penalties under Section 30 in one order. *Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the 22.5 kW net-metered solar electric generating system owned by Lajeunesse Interiors, Inc., Docket No. 8446, Order of 1/14/2016.* In the case of a request to amend a certificate of public good (“CPG”) that was combined with a Section 30 compliance investigation, the

Board addressed all of the issues in one stage, during one hearing, and it rendered a single decision on both the CPG amendment request and the Section 30 issues. *Petition of Chaput Family Farms for an amendment to its Certificate of Public Good pursuant to 30 V.S.A. Section 248*, Docket No. 7542, Order of 8/21/2012. Additional cases demonstrate that the Department's claim that Section 30 proceedings are "typically" bifurcated has no support in Board precedent. *See, e.g., Petition of GASNA 14P, LLC (formerly Triland Partners, LP) for an Amended Certificate of Public Good*, Docket No. 7632, Order of 5/21/2014 (considering liability and penalty in a single order on sanctions under 30 V.S.A. § 30); *Petition of Vt. Community Wind Farm LLC for a certificate of public good authorizing the installation and operation of a temporary wind measurement tower and associated equipment on Susie's Peak in Clarendon, Vermont*, Docket No. 7526, Order of 1/6/2010 (holding in a single order that CPG holder violated terms of CPG and issuing a civil penalty under 30 V.S.A. § 30).

In addition to the lack of legal precedent supporting the Department's novel bifurcation theory, this proceeding has never been subject to a bifurcation order, and the Department and other parties never moved to have this proceeding bifurcated into stages. In fact, the record reflects that the Department took a different position about bifurcation when the schedule for this proceeding was first considered and adopted. In the Department's November 20, 2015 scheduling proposal, which was joined by the Agency of Natural Resources and the Town of Irasburg, the Department recommended that the Respondent prefile testimony first and address all of the issues within the scope

of this proceeding, including the factors for issuing a penalty under 30 V.S.A. § 30(c). See Exhibit A. The Hearing Officer adopted the Department's proposed schedule without limiting the issues for the Respondent's prefiled testimony nor restricting discovery by the Department and other parties to certain subject matters. *See Order re: Schedule* (Dec. 9, 2015); see also *Prefiled Testimony and Exhibits of David Blittersdorf* (Dec. 18, 2015).

In further contradiction to the Department's bifurcation claim, the Department, the Agency of Natural Resources, and the Town of Irasburg all issued discovery requests to the Respondent that went beyond the single issue the Department now claims is the only issue before the Hearing Officer, namely whether Respondent violated the law. For example, the Department's discovery asked about Respondent's affiliation with both Georgia Mountain Community Wind and Renewable Energy Vermont, and sought information about interruptions in data collected from the instruments on Respondent's meteorological mast. Department of Public Service First Set of Discovery Requests Nos. 7, 11 and Department of Public Service Second Set of Discovery Requests No. 1. The Agency of Natural Resources focused its discovery on what impact the Respondent's meteorological mast had on protected natural resources, an issue relevant only to Section 30(c)(1). *See, e.g., Agency of Natural Resources First Set of Discovery Requests Nos. 2-9.* The Town of Irasburg's discovery asked about a variety of matters irrelevant to whether Respondent needed a certificate of public good for his Irasburg meteorological mast, including when he purchased property in Morgan, Vermont and when the turbines for

the Georgia Mountain Community Wind Project were ordered. Town of Irasburg First Set of Discovery Requests Nos. 16, 19.

The fact that this is not a bifurcated proceeding is further evidenced by the Department's representation in an April 6, 2016 filing with the Board requesting an extension of the procedural schedule. The Department's request for an extension was to enable the parties to continue settlement negotiations that were aimed at resolving the case altogether, not just a single issue. Respondent's counsel understood from multiple settlement conversations with the Department's counsel that a resolution of the entire case was under discussion. And that understanding is consistent what the Department represented to the Board: "The parties have engaged in discussions that may lead to a stipulation or other negotiated outcome in the proceeding." Exhibit B (emphasis added). If the Department and other opposing parties wanted a bifurcated proceeding, it was incumbent on them to make that position known to the Respondent and the Hearing Officer back in November 2015 when the first procedural schedules were proposed and to refrain from serving Respondent with discovery that was irrelevant during the first stage of the proceeding. Moreover, it bears mentioning that when Respondent's counsel indicated at the June 15, 2016 status conference that a round of discovery prior to disposition of the summary judgement motion and Non-Respondents' prefiled testimony would be agreeable, it was with the understanding that, consistent with Hearing Officer Young's suggestion, the idea was to "run the two [processes] in parallel[,] which is to do the summary judgment [motion] on the liability issue, and still



move ahead with testimony and other actions including discovery on the other part of the case...." Docket 8585, Status Conference, June 15, 2015, tr. at 11. Inasmuch as there is no support for the Department's position that this is a bifurcated proceeding, the motion to quash and for protective order should be denied.

The motion to quash and for protective order should also be denied on grounds that, in addition to the right to conduction discovery in the form of depositions upon oral examination under V.R.C.P. 26(a), the Respondent has the statutory right under 30 V.S.A. § 31 to conduct the noticed depositions. Section 31 provides, in relevant part, that "any party in any investigation or hearing conducted by virtue of this title may cause the deposition of witnesses, wherever residing, to be taken in such manner and used for such purposes as the supreme court may by rule provide for taking depositions in civil actions in the superior courts." No party disputes that the Respondent served notices of deposition in accordance with the rule governing depositions, V.R.C.P. 30. Incredibly, rather than comply with valid deposition notices which the Respondent has the statutory right to issue, officials from the Department and the Town of Irasburg have chosen to use their government resources to try to limit the Respondent's right to discovery. Such conduct is especially egregious considering that those same officials have already been afforded the opportunity to serve discovery on Respondent without limitation as to subject matter or method. In accordance with Section 31 of Title 30, the Hearing Officer should allow Respondent to proceed with the noticed depositions because Respondent is entitled by law to conduct them.

The Board should be aware that Respondent anticipates having to issue subpoenas for the testimony of government witnesses with relevant and admissible evidence on issues material to the allegations against Respondent. This is due to the Department's steadfast position expressed to Respondent's counsel throughout this proceeding that the Department does not intend to prefile testimony because it believes that only legal briefs are necessary to resolve this investigation. For that reason, Respondent's counsel has insisted on an opportunity for discovery irrespective of the date for prefiled testimony. Discovery is the only way for Respondent to learn the identity of potential witnesses and what relevant evidence they possess if the Department decides not to offer a witness to assist the Board's determination of the issues in this case.

Finally, the motion to quash and for protective order should be summarily denied because it was premature and filed in violation of the Department and Irasburg's agreement to reschedule the depositions at a later time. The motion was premature because the discovery dispute is not ripe for resolution. Neither the Department nor the Town of Irasburg gave the Respondent notice of their objection to producing certain documents at the noticed depositions on the basis of privilege or attempt to resolve their objections with Respondent's counsel before filing their motion with the Board. The Department's only communication to Respondent's counsel on the issue of privilege was the following general statement in a letter dated July 11: "Likewise, no documents listed in the notice of deposition - to the extent that any of the requested documents are not

privileged, are relevant to the subject matter of the proceeding, and appear reasonably calculated to lead to the discovery of admissible evidence - will be made available until August 5, 2016." See Exhibit A to the Respondent's Opposition to Motion to Quash and for Protective Order filed July 22, 2016. The Department did not identify any specific request that it believed was objectionable under the discovery rules or explain the basis for its objections – either in communication with Respondent's counsel, or in its motion (despite the express obligation under V.R.C.P. 26(h) to include with its motion a "specific verbatim listing of each of the items of discovery sought or opposed, and immediately following each specification shall set forth the reason why the item should be allowed or disallowed.") The same is true for the Town of Irasburg, whose "pro se" representative never contacted Respondent's counsel before signing on to the Department's motion.

Moreover, as explained in Respondent's July 22, 2016 opposition memorandum, the Town and the Department had agreed to reschedule the noticed depositions to a more convenient time, and in Irasburg's case, a more convenient location. The premature motion to quash and for protective order represents a broken promise and even raises the possibility that the Department and the Town made their agreements in bad faith. Granting the Department and the Town's motion will only serve to encourage further bad faith conduct and will tarnish the fairness and integrity of this process. The Board should issue an order denying the motion to quash and for protective order and direct the parties to follow the discovery rules.

Conclusion

The Board should deny the motion to quash and for protective order because it lacks legal and factual support and violates Respondent's right to conduct depositions under 30 V.S.A. § 31. An order denying the requested relief will discourage bad faith conduct and will encourage parties to fulfill their obligations to resolve discovery disputes in good faith and without need for Board intervention.

Dated at Castleton, Vermont this 27<sup>th</sup> day of July, 2016.



Leslie A. Cadwell, Esq.  
Legal Counselors & Advocates, PLC  
PO Box 827  
Castleton, VT 05735  
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EXHIBIT A

State of Vermont  
Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601  
<http://publicservice.Vermont.gov>

[phone] 802-828-2811  
[fax] 802-828-2342  
[tdd] 800-734-8390

VERMONT PUBLIC  
SERVICE BOARD

2016 JUL 28 AM 9 41

November 20, 2015

Mrs. Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street - Drawer 20  
Montpelier, VT 05620-2701

Re: Docket No. 8585 – Irasburg MET Tower Investigation

Dear Mrs. Hudson:

Please find the original and three (3) copies of the Proposed Schedule of the Department of Public Service (“Department”) for filing in the above-referenced proceeding.

The parties to the proceeding have tried but failed to reach agreement on a proposed schedule. The Department’s proposed schedule includes the testimony submission deadline and discovery response timeframes requested by the respondent. The schedule does not set deadlines for submission of testimony from the Department, Agency of Natural Resources, and/or the Town of Irasburg at this time. The Department feels that a stipulation between the parties as to issues of fact is very possible, given the filings made in this proceeding thus far and the scope of the Hearing Officer’s investigation outlined in the Public Service Board’s (“Board”) September 23, 2015 Order Opening Investigation. A litigation schedule would be submitted to the Board if a stipulation cannot be reached by the date contemplated in the proposed schedule.

The Department advocates this approach – as opposed to setting deadlines past a stipulation date now – because the issues of fact to be litigated, if any, will be much clearer to the parties after submission of the respondent’s testimony and subsequent exchange of information. The parties would then be in a better position than they are today to craft a litigation schedule that is tailored to the needs of the proceeding going forward.



The Department is authorized to represent that the Agency of Natural Resources and the Town of Irasburg support the Department's proposed schedule.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Commons', is written over a horizontal line.

Geoffrey Commons  
Director of Public Advocacy  
Aaron Kisicki  
Special Counsel

cc: Docket 8585 Service List (w/ enclosure)

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

VERMONT PUBLIC  
SERVICE BOARD

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Docket No. 8585

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

)  
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November 20, 2015

**PROPOSED SCHEDULE OF THE DEPARTMENT OF PUBLIC SERVICE**

Nov. 12, 2015	Status conference
Dec. 18	Blittersdorf testimony (including testimony addressing all 30 V.S.A. § 30(c) criteria)
Jan. 6, 2016	First round discovery requests on Blittersdorf
Feb. 5	Blittersdorf first round discovery responses
Feb. 24	Second round discovery requests on Blittersdorf
Mar. 25	Blittersdorf second round discovery responses
Apr. 6	Stipulation deadline with proposed hearing and briefing schedule or litigation schedule

Dated at Montpelier, Vermont this 20th day of November, 2015

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE



Geoff Commons  
Director for Public Advocacy  
Aaron Kisicki  
Special Counsel

cc: Docket 8585 Service List

EXHIBIT B

STATE OF VERMONT  
PUBLIC SERVICE BOARD

VERMONT PUBLIC  
SERVICE BOARD

2016 JUL 28 AM 9 42

Docket No. 8585

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

April 6, 2016

MOTION OF THE DEPARTMENT OF PUBLIC SERVICE TO AMEND SCHEDULE

The Department of Public Service ("Department" or "DPS"), by and through undersigned counsel, submits the following motion to amend the schedule in the above-captioned proceeding. The Hearing Officer's Order re Schedule, dated December 8, 2016, established an April 6, 2016 deadline for the parties to file a stipulation or proposed schedule for the remainder of the proceeding.

The parties have engaged in discussions that may lead to a stipulation or other negotiated outcome in the proceeding. The Department requests that the Hearing Officer amend the schedule in the proceeding to allow for additional negotiation between the parties. Specifically, the Department requests that the Hearing Officer grant a three-week extension of time, until **Wednesday, April 27, 2016**, for parties to file a stipulation or proposed schedule for the remainder of the proceeding.

The Department has discussed this proposed amendment to the schedule with the other parties, and it is authorized to represent that Mr. Blittersdorf and Dr. Holland do not object to this request.



Dated at Montpelier, Vermont this Sixth day of April, 2016

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

A handwritten signature in black ink, appearing to read 'A. Kisicki', written over a horizontal line.

Aaron Kisicki  
Special Counsel

cc: Docket 8585 Service List