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VERMONT PUBLIC
SERVICE BOARD
2016 JUL 28 PM 4 02

July 28, 2016

Judith Whitney, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

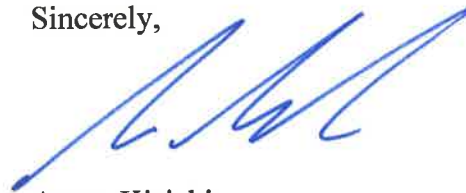
Re: Docket No. 8585 – Kidder Hill/Irasburg MET Tower Investigation

Dear Ms. Whitney,

Enclosed for filing in the above-referenced proceeding, please find the original and three (3) copies of the Reply of the Vermont Department of Public Service to Respondent's Opposition to Motion to Quash and for Protective Order.

Thank you for your time and attention to this matter. Please contact me with any questions or concerns.

Sincerely,



Aaron Kisicki
Special Counsel

cc: Docket 8585 Service List (w/ enclosure)



STATE OF VERMONT
PUBLIC SERVICE BOARD

VERMONT PUBLIC
SERVICE BOARD

2016 JUL 28 PM 4 02

Docket No. 8585

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

July 28, 2016

**REPLY OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE
TO RESPONDENT'S OPPOSITION TO
MOTION TO QUASH AND FOR PROTECTIVE ORDER**

The Vermont Department of Public Service ("Department"), by and through undersigned counsel hereby submits this reply to Respondent David Blittersdorf's opposition to the Department, the Vermont Agency of Natural Resources, and Town of Irasburg's motion to quash notices of deposition and depositions *duces tecum* and for protective order in the above-captioned proceeding. The Department submits an affidavit by undersigned counsel in support of the motion to quash pursuant to V.R.C.P. 26(h), or, alternatively, seeks to adopt certain representations made in Mr. Blittersdorf's counsel's Rule 26(h) affidavit as proof that Department counsel did confer with Mr. Blittersdorf's counsel about the discovery issues addressed in the motion to quash and for protective order in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution.

The Department, ANR, and the Town of Irasburg filed their motion to quash and for protective order ("Motion") on July 15, 2016. Mr. Blittersdorf filed his opposition to the Motion on July 21 ("Opposition"), along with a Rule 26(h) affidavit of counsel. On the same day, the Department filed a request for expedited review of the Motion or a stay of deposition pending a ruling on the motion.

Mr. Blittersdorf is correct that the Department failed to file an affidavit or certificate from undersigned counsel certifying that he conferred with Mr. Blittersdorf's counsel in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution in advance of filing the Motion, as required by V.R.C.P. 26(h). Counsel for the two parties did, however, confer in good faith prior to the filing of the Motion about the notices of deposition and deposition *duces tecum* at issue. Consultation on the discovery issues is reflected in undersigned counsel's affidavit, attached hereto as Attachment 1, and has been adequately memorialized in Mr. Blittersdorf's counsel's Rule 26(h) affidavit, attached hereto as Attachment 2.

In the event that the Hearing Officer does not accept undersigned counsel's affidavit, the Department adopts certain representations made in the Opposition Rule 26(h) affidavit, which shows that the Department did, in fact, meet the obligations of V.R.C.P. 26(h) prior to filing the Motion. Specifically, Paragraphs 6 and 7 of the Opposition affidavit recount a telephone conversation between counsel about the Department's "position about the deposition," including discussion about "respective positions on whether depositions were excluded from the . . . discovery period established by the order" and the Department's "view that depositions were not needed and burdensome."


As reflected in Mr. Blittersdorf's counsel's own filing, the Department's omission of a Rule 26(h) affidavit as part of the Motion filing was driven by oversight, as opposed to failure to meet the obligations and spirit of the rule. The affidavit shows that opposing counsel had a good-faith discussion about differing views on the rights and obligations of the parties regarding discovery, and was ultimately unable to reach agreement on whether the depositions should

Based on the forgoing, the Department respectfully submits that its failure to append a Rule 26(h) affidavit or certificate to the Motion filing was harmless error, and requests that the Hearing Officer allow it to cure the deficiency by accepting the attached affidavit as part of the record. Alternatively, Mr. Blittersdorf's counsel's affidavit has already cured the deficiency by making clear that counsel for him and the Department did confer on July 14 in advance of the Motion, satisfying the Rule 26(h) requirement. The Department requests that the Hearing Officer allow it to adopt Paragraphs 6 and 7 of the Opposition affidavit in support of this reply.

Dated at Montpelier, Vermont this Twenty-eighth day of July, 2016.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: 

Geoffrey Commons
Director for Public Advocacy
Aaron Kisicki
Special Counsel

cc: Docket 8585 Service List

ATTACHMENT 1

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

July 28, 2016

RULE 26(h) AFFIDAVIT OF AARON KISICKI

1. My name is Aaron J. Kisicki. I am over 18 years of age, and am employed by the Vermont Department of Public Service ("Department") as Special Counsel in the above-referenced proceeding.
2. On June 16, 2016, the Hearing Officer assigned to this proceeding issued a Scheduling Order that included a June 29, 2016 due date for the Department to file a motion for summary judgment and respondent David Blittersdorf to file first round discovery requests on non-respondent parties; a July 29, 2016 deadline for parties to file responses to the Department's motion for summary judgment; and an August 5, 2016 deadline for non-respondents to file responses to Mr. Blittersdorf's first round discovery responses.
3. On June 29, 2016, Mr. Blittersdorf issued Notices of Deposition of Department Fund Manager, Andrew Perchlik, scheduled for July 15, 2016, and deposition of unnamed Department representative(s) and subpoena *duces tecum* seeking production of certain documents, scheduled for July 27, 2016.
4. On June 30, 2016, the Hearing Officer issued a Procedural Order granting a two-day extension of time of the June 29 and August 5, 2016 deadlines contained in the Scheduling Order, to July 1 and August 7, 2016, respectively.
5. On July 11, 2016, Department counsel, Geoffrey Commons and I, notified Mr. Blittersdorf's counsel, Leslie Cadwell and Alison Milbury Stone, via letter that the Notices of Deposition sought discovery in advance of the deadlines established in the Hearing Officer's Scheduling Order and that no Department representative would be made available for deposition until August 5, 2016.
6. On or about July 12, 2016, I received a telephone call from Ms. Cadwell to discuss the Department's July 11, 2016 letter, and the Notices of Deposition more broadly. Ms. Cadwell and I discussed our differing views about the rights and obligations each of the parties had regarding the appropriate methods and timing of discovery in the proceeding under the Vermont Rules of Civil Procedure and Vermont Public Service Board rules and/or orders.

7. During the telephone call, I informed Ms. Cadwell that the noticed depositions were unnecessary and unduly burdensome at the current stage of the proceeding, and that the Department may seek to quash the depositions.
8. After urging from Ms. Cadwell during the call, I orally agreed to reschedule the deposition of Mr. Perchlik to August 5, 2016, and reschedule the other deposition to an unspecified time on or later than August 5, 2016. I made no agreement to limit in any way the Department's ability or right to seek to quash the noticed depositions.
9. On July 15, 2016, the Department, the Vermont Agency of Natural Resources, and the Town of Irasburg filed a Motion to Quash Notices of Deposition and for Protective Order.
10. On July 18, 2016, Mr. Blittersdorf filed a Notice of Deposition for Andrew Perchlik, scheduled for August 5, 2016




Aaron Kisicki

STATE OF VERMONT
COUNTY OF WASHINGTON, ss:

Aaron J. Kisicki has sworn that the matters stated herein are true to the best of his information, knowledge and belief.

SUBSCRIBED AND SWORN before me this 28th day of July, 2016.



Angela Valentinetti
Notary Public
My commission expires: 2/10/2019

ATTACHMENT 2

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8585

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

AFFIDAVIT OF COUNSEL PURSUANT TO V.R.C.P. 26(h)

I, Leslie A. Cadwell, counsel for Respondent David Blittersdorf in the above-captioned action, being duly sworn, over 18 years of age, and competent to testify on these matters say:

1. The facts and information about which I testify in this affidavit are based on my personal knowledge and first-hand experience.
2. On June 16, 2016, the Hearing Officer in the above-referenced matter granted the Respondent's request for a 30-day discovery period without limitation as to methods or subject matters relevant to the pending litigation before the Board.
3. On June 29, 2016, in accordance with V.R.C.P. 30(a), (b)(1) and (b)(6) and the Hearing Officer's June 16, 2016 scheduling order, I served notices of deposition on behalf of Respondent to the Department of Public Service, Agency of Natural Resources, and Town of Irasburg. The notices seek depositions of certain individuals, Andy Perchlik and Ron Holland, who I reasonably believe possess information relevant to one or more issues encompassed in this proceeding, as well as individuals unknown to me, but known to the opposing parties, who are authorized to speak on the parties' behalf about information that I also reasonably believe to be relevant to one or more issues in this proceeding.
4. The notices of deposition were served on the parties at least ten days before their scheduled dates as required by V.R.C.P. 30(b)(1).

Depositions Noticed to Department of Public Service

5. On July 11, 2016, I received by email a letter from Geoffrey Commons and Aaron Kisicki, counsel for the Department of Public Service ("DPS Attorneys") and filed with the Public Service Board, acknowledging that discovery under Rule 26(d) of the Vermont Rules of Civil Procedure includes depositions, but stating their position that the Hearing Officer's scheduling order did not require the Department to respond to any discovery requests until August 5. The letter concluded: "Mr. Perchlik and/or unnamed Department representatives will not be available for deposition until August 5, 2016, pursuant to the schedule established by the Hearing Officer in this proceeding." A copy of the letter is attached as Exhibit A.
6. On July 12, 2016, I spoke to DPS Attorney Kisicki by telephone about the contents of the July 11, 2016 letter. The purpose of my call was to better understand the DPS Attorneys' position about the deposition of Andy Perchlik noticed for July 15, 2016 and the V.R.C.P. 30(b)(6) depositions noticed for July 27, 2016. The call lasted approximately 22 minutes.
7. During the telephone call, DPS Attorney Kisicki and I debated the meaning of the June 16, 2016 scheduling order and discussed our respective positions on whether depositions were excluded from the 30-day discovery period established by the order. DPS Attorney Kisicki expressed his view that depositions were not needed and burdensome and reiterated that the Department would not make Mr. Perchlik or any 30(b)(6) witnesses available before August 5. DPS Attorney Kisicki also represented that Mr. Perchlik had a conflict on July 15, 2016. I asked DPS Attorney Kisicki to clarify if his letter meant that Mr. Perchlik would be made available on August 5. After some further

discussion, DPS Attorney Kisicki offered to make Mr. Perchlik available on August 5 at 9:30 A.M.

8. After checking my schedule, I emailed DPS Attorney Kisicki shortly before 1:00 P.M. on July 12, 2016 and confirmed the deposition of Andy Perchlik for August 5 starting at 10:30 A.M. due to a prior commitment at 9:30 A.M. A copy of my email is attached as Exhibit B.
9. On July 14, 2016 at approximately 4:19 P.M., I notified the other parties and the Clerk of the Board by email that Mr. Perchlik's deposition had been rescheduled for August 5, 2016 per my agreement with the Department. I also indicated that I would send revised notices of deposition when I returned from Maine following a family emergency. A copy of my email is attached as Exhibit C.
10. At 4:31 P.M. on July 15, 2016, DPS Attorney Aaron Kisicki sent an email with a Motion to Quash and Motion for Protective Order jointly signed by the Department of Public Service, Agency of Natural Resources, and Ron Holland for the Town of Irasburg. In addition to me and my co-counsel, the email was sent to the Clerk of the Board, counsel for the Agency of Natural Resources, and Ron Holland. I did not open and read the email until Saturday, July 16, 2016.


Depositions Noticed to the Town of Irasburg

11. On July 6, 2016, I received an email from Sara Davies-Coe, outside counsel for the Town of Irasburg, regarding the notices of deposition served on the Town relative to the above-captioned proceeding. Attorney Davies-Coe represented that the Town of Irasburg had contacted her about the notices of deposition and requested to reschedule them both as to time and location to accommodate the Town Clerk's vacation and avoid the need for town officials to travel to Montpelier. Attorney Davies-Coe explained that the Irasburg Select Board was

scheduled to meet with her the following week, and after the meeting they would "try to come up with some days that work for all of the Town officials and then try to schedule the depositions with you." I responded to Attorney Davies-Coe by email the following day, July 7, 2016. A copy of our email exchange is attached as Exhibit D. We subsequently scheduled a call for Tuesday, July 12, 2016 at 1:00 P.M. to discuss the matter further.

12. At approximately 1:00 P.M. on July 12, 2016, my co-counsel, Alison Milbury Stone, and I spoke to Attorney Davies-Coe by telephone. We discussed the timing for lodging the grand list relative to the real property tax assessment for Respondent's meteorological mast and the request for documents that accompanied the notice of deposition, and we agreed to reschedule the V.R.C.P. 30(b)(6) deposition noticed for July 15, 2016 to a later time to be determined.
13. On July 13, 2016, Attorney Davies-Coe and I exchanged emails in which I confirmed that the deposition for July 15, 2016 would be rescheduled for a later time to be determined and that the rescheduled deposition would take place at her office in Barton, Vermont. A copy of our email exchange is attached as Exhibit E.
14. On July 16, 2016, I forwarded the July 15, 2016 email and joint Motion to Quash and for Protective Order from DPS Attorney Kisicki to Attorney Davies-Coe expressing my surprise that the Town of Irasburg had joined the motion after our July 12 agreement to reschedule the depositions noticed to the Town of Irasburg and its representative in the above-captioned proceeding. Attorney Davies-Coe responded to my email on July 18, 2016. A copy of our email exchange is attached as Exhibit F.

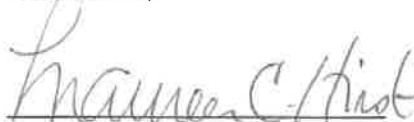
15. Since our email exchange on July 18, 2016, I have not received any further communication from the Town of Irasburg, either through Attorney Davies-Coe or Ron Holland about rescheduling the noticed depositions.
16. At no time prior to executing the joint Motion to Quash and Motion for Protective Order did the Town of Irasburg's designated representative, Ron Holland, contact me or my co-counsel about the notice of deposition issued to him or the notice of deposition issued under V.R.C.P. 30(b)(6) to the Town of Irasburg.


Leslie A. Cadwell, Esq.

STATE OF MAINE
COUNTY OF York, ss.

On this 21st day of July, 2016, personally appeared Leslie A. Cadwell, and she swore to the truth of the foregoing statements.

Before me,



Notary Public

Printed Name: MAUREEN C HIRST

Notary commission issued in:

My commission expires:


Maureen C. Hirst, Notary Public
State of Maine
My Commission Expires 11/4/2016