

STATE OF VERMONT
PUBLIC SERVICE BOARD

VERMONT PUBLIC
SERVICE BOARD ✓

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Docket No. 8585

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

August 24, 2016

**VERMONT DEPARTMENT OF PUBLIC SERVICE'S REPLY TO
DAVID BLITTERSDORF'S MEMORANDUM IN OPPOSITION TO
DEPARTMENT OF PUBLIC SERVICE MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND DISMISSAL WITH PREJUDICE AND RESPONDENT'S
SUPPLEMENTAL MEMORANDUM ON SUMMARY JUDGMENT**

The Vermont Department of Public Service ("Department" or "DPS"), by and through undersigned counsel, hereby submits this reply to respondent David Blittersdorf's Memorandum in Opposition to the Department's Motion For Partial Summary Judgment and Cross-Motion For Summary Judgment and Dismissal With Prejudice ("Response"), and Supplemental Memorandum on Summary Judgment ("Supplemental Response"), dated July 29 and August 10, 2016 respectively (together "Responses"). The Vermont Public Service Board's ("Board" or "PSB") Hearing Officer is currently reviewing the Department's July 1, 2016 Motion for Partial Summary Judgment ("Motion") regarding the issue of whether respondent Mr. Blittersdorf failed to obtain a certificate of public good ("CPG") prior to the construction and operation of a meteorological ("MET") station on his property, in violation of 30 V.S.A. §§ 30, 246, and/or 248.

ARGUMENT

Mr. Blittersdorf's Responses ostensibly serve three distinct purposes: to respond to the Department's Motion, to seek judgment as a matter of law on an issue adequately framed in his cross-motion for summary judgment, and to seek dismissal of this proceeding with prejudice based on a jurisdictional argument regarding the limits of the Board's authority pursuant to 30 V.S.A. §§ 246 and 248. At the outset of this reply, the Department notes that the contours of these three distinct purposes are non-existent. The Responses establish three broad arguments; two related to the jurisdictional question, and third claiming that the Department's Motion is supported by disputed, unsupported, and immaterial facts. Nowhere in the Responses does Mr. Blittersdorf make clear what specific issue(s) he is seeking judgment as a matter of law on. The two sections addressing the jurisdictional questions move interchangeably between arguing that the Department has not presented sufficient evidence to justify granting its Motion, and making pronouncements regarding the scope of the Board's jurisdiction without linking the analysis to specific requests for relief. A discussion about the Department's use of evidence in its motion has no impact on whether the Board has the jurisdiction to decide this matter under §§ 246 and/or 248, and an argument about the limits of the Board's jurisdiction does not support a motion for summary judgment *per se*.

I. The MET Station is Subject to the Board's Jurisdiction Pursuant to 30 V.S.A. § 246

The Responses argue that the Board does not have § 246 jurisdiction over the MET station in question because the Department has not presented evidence with respect to the four elements defining "temporary meteorological station" in the Board's § 246 Standards Order: 1) the tower is

temporary; 2) instrumentation to collect and record wind speed, wind direction, and atmospheric conditions is attached; 3) the installation is for the purpose of determining a particular location's suitability for the location of a 4) grid-connected wind turbine.

The four elements set forth in the § 246 Standards Order differ from the statutory definition of "temporary meteorological station." 30 V.S.A. § 246 defines "meteorological station" as "one temporary tower, which may include guy wires, and attached instrumentation to collect and record wind speed, wind direction, and atmospheric conditions." The statutory definition does not include the third and fourth elements presented above. The § 246 Standards Order does create additional focus to the statutory definition, but Mr. Blitterdorf interpretation of the definition gives rise to a problem that is present here.

The Standards Order defines the MET station only to be "constructed or installed to determine the suitability of a site for the location of a grid-connected wind turbines." This variation from the statutory definition, as Mr. Blittersdorf interprets it, creates uncertainty for the Board and/or Department to determine whether a § 246 CPG is required unless and until the intent of the installation has been made clear, either by an express statement of intent by the MET station installer or once a grid-connected facility CPG is applied for using data gathered by the station. Such intent cannot be inferred independent from the MET tower installer. In this instance, it would be difficult, if not impossible, for the Board and/or the Department to determine whether a § 246 CPG is required if, for example, a Town of Irasburg resident reported the existence of the MET station prior submission of a net-metered or § 248 CPG application for a grid connected facility.

Under his interpretation of the Standards Order definition, Mr. Blittersdorf could effectively dictate, as he has tried to do here, Board jurisdiction based solely on his subjective view of his intentions for the MET station. Such an interpretation, if accepted by the Hearing Officer

and/or Board, would lead to potentially abusive results. It would allow for Board jurisdiction to be determined exclusively by an entity subject to the Board's § 203 authority. The Department submits that such a scheme enabled by Mr. Blittersdorf's interpretation is contrary to the intent of § 246 – to allow for a more streamlined CPG review process for MET station applications in lieu of using the § 248 process – and undermines the regulatory certainty § 246 seeks to afford to all. Nonetheless, the evidentiary record makes clear that all four elements Mr. Blittersdorf seeks to establish have been satisfied, providing the Board with ample jurisdiction over the MET station and entitling the Department to the judgment it seeks in its Motion for Partial Summary Judgment.

A. The MET station is temporary for purposes of § 246 jurisdiction.

Mr. Blittersdorf argues that the MET station is not subject to the Board's § 246 jurisdiction because he intends for the tower to be permanent. To the contrary, the MET station is temporary for purposes of this investigation by operation of statute. 30 V.S.A. § 246(c)(2) allows for issuance of a MET station CPG for up to five years, but also renewal of such CPG upon request of the applicant. Any MET station is intended to be temporary under the statutory scheme, regardless of the intent of the applicant. A MET station may in effect exist as a permanent tower under the terms of § 246, provided that the applicant seeks and obtains a CPG renewal when required. The statute does not allow, as Mr. Blittersdorf suggests, an applicant to circumvent § 246 CPG requirements merely by stating that he or she does not intend to take down the structure by a date certain.

The tax relationship between Mr. Blittersdorf's Irasburg property and the Town of Irasburg recited in the Respondent's Statement of Undisputed Facts has no impact on a determination of whether the MET station is temporary or permanent under § 246 or an underlying violation of Title

30. The tax status provides evidence only that that town has to some extent agreed with Mr. Blittersdorf's representations about his intentions for the tower. As discussed below, the Board has firmly concluded that it has jurisdiction to review the siting MET stations, not any other local or regional entities. Likewise, Mr. Blittersdorf has not shown in his Responses that the town has the authority to make determinations as to the permanence of the MET station that would have any bearing on the Board's determination of its jurisdiction under the statute.

Using an entity's subjective representations about intent regarding a MET station installation, as opposed to the clearly defined temporary determination included in § 246, to determine permanent or temporary status would lead to abusive results and undermine regulatory certainty. As described above, allowing a MET station installer's intent to define the Board's jurisdictional limits would allow an otherwise regulated entity to unilaterally avoid § 246 oversight merely by stating that he or she intends to keep the station in place permanently.

B. The MET station includes instrumentation to collect wind speed, wind direction, and atmospheric conditions.

Mr. Blittersdorf argues that the evidentiary record does not establish that the instrumentation installed on the MET station was used to collect and record atmospheric conditions. The record clearly shows that the MET station collected and recorded atmospheric conditions. Mr. Blittersdorf's prefiled testimony states that the MET station included instrumentation to collect and record wind speed and wind direction. *DPS Statement of Undisputed Material Facts* ("DPS SOF"), July 1, 2016, at ¶ 3. The Merriam-Webster dictionary defines "atmosphere" as "a) the gaseous envelope of a celestial body (as a planet); b) the whole mass of air surrounding the earth." <http://www.merriam-webster.com/dictionary/atmosphere>. It

stands to reason that rate and direction of the movement of the atmosphere qualify as conditions of the same. Those measurements are not separate and apart from “atmospheric conditions.” Likewise, the Response does not provide a definition of “atmospheric conditions” or any standard that would support a claim that wind speed and direction are not atmospheric conditions contemplated by the § 246 definition of “meteorological station.”

C. The MET station was installed in order to determine the suitability of a site for the location of a grid-connected wind turbine.

Mr. Blitterdorf concedes in his prefiled testimony that wind data was used to make determinations about the suitability of his Irasburg property for the location of multiple grid-connected wind turbines. He states in his prefiled testimony that the “installation met two primary purposes” assessing the wind on my property and prototype testing” and “I installed and used the mast to measure wind for residential turbines and to test prototypes.” Blittersdorf pf. at 4-5; *See* DPS SOF ¶ 4. He also states that “I asked a consultant to review the metrological data gathered from the LIDAR unit and the met mast, and in February 2014, I received a wind assessment report based on the data.” Blittersdorf pf at 10; *See* DPS SOF ¶ 8.

While the framing of this element of the § 246 Procedures Order definition of “temporary meteorological station” allows for the regulatory problems inherent in determining intent discussed above, the record here shows that the MET station was installed to determine site suitability. Data from the MET station was analyzed to determine the suitability of two net-metered facilities at the site that were issued CPGs in January 2012, and as part of a third-party’s assessment of the suitability of a commercial-sized facility at the site. The data set that was used in making those determinations existed only because the MET station had been installed and recorded relevant atmospheric conditions data. Section 246 does not require that the MET station’s sole or primary

purpose be to determine site suitability – it is devoid of any “primary” requirement or the like. In this instance the test of these two elements is clear: did Mr. Blittersdorf use data gathered by the MET station in determining the site’s suitability for one or more grid-connected wind turbine(s)? Here, he relied on MET station data in advance of permitting and constructing two net-metered wind facilities, and has explored a potential third facility on the site.

II. The MET Station is Subject to the Board’s Jurisdiction Pursuant to 30 V.S.A. § 246

While ample reason exists to conclude that the Board properly has jurisdiction over the MET station pursuant to 30 V.S.A. § 246, it may also assert jurisdiction over the MET station pursuant to 30 V.S.A. § 248 if it concludes § 246 jurisdiction is lacking. The Board has examined this jurisdictional question a number of times prior to the promulgation of § 246, and has concluded that it has jurisdiction over MET stations.

In Dockets 6884 and 7037, the Board reviewed § 248 and Act 250, along with a Vermont Attorney General’s Office advisory opinion, and a pair of Environmental Board declaratory rulings in determining whether it has jurisdiction over wind measurement towers. It concluded that a § 248 CPG is required when proposed construction is reasonably related to an electric generation or transmission facility, and that wind measurement towers are a necessary precursor to such facilities and are therefore directly related to wind generation facilities. *See* Docket 6884, *Final Order*, Apr. 21, 2004 at 17-20; Docket 7037, *Order re Jurisdiction*, July 29, 2005 at 7-10.

The Department notes that the Board’s jurisdictional analysis in this pair of proceedings does not, as Mr. Blittersdorf suggests, lead to perverse results. *See* Response at 9, fn 5. Geotechnical testing, environmental testing and the like do not constitute the kind of construction

that a MET station installation does and that the Board's "reasonably related" test contemplates. As a result, the Board has not extended its jurisdiction to include the types of activities Mr. Blittersdorf posits may trigger § 248 oversight, nor does it appear that it would given its stated "reasonably related" analysis.

Section 246 was made available to regulated entities to utilize to permit MET stations in lieu of using a more in-depth § 248 process. Board § 248 jurisdiction over MET stations has not, however, contracted or disappeared in any way since the introduction of § 246. If the Hearing Officer and/or Board determines that § 246 jurisdiction is not available, authority to continue this proceeding continues to exist pursuant to § 248.

III. Mr. Blittersdorf's Cross-Motion for Summary Judgment Rests on Unsupported and Immaterial Facts.

As discussed above, the precise basis for Mr. Blittersdorf's cross-motion for summary judgment, as separate and distinct from the jurisdictional analysis that appears to underpin his motion to dismiss, is unclear and fails to identify each claim or defense on which summary judgment is sought in violation of V.R.C.P. 56 (a). To the extent that he does draw on an evidentiary record to support the cross-motion, the supporting facts are largely immaterial as to whether a violation of 30 V.S.A. §§ 246 and 248 occurred or whether the Board has jurisdiction over the MET station. A genuine dispute as to a number of the remaining material facts are present. Responses to the cross-motion's statement of undisputed facts are provided in the separate but accompanying filing.

CONCLUSION

Based on the foregoing, the Vermont Department of Public Service respectfully requests that the Public Service Board or the Hearing Officer assigned to the proceeding find that no genuine issues of material fact related to Mr. Blittersdorf's admitted conduct giving rise to a violation of 30 V.S.A. §§ 246 and/or 248, pursuant to 30 V.S.A. § 30, exists, and grant the motion for partial summary judgment. The Department also requests that the Board or Hearing Officer find that the Board has the requisite jurisdiction to continue this proceeding pursuant 30 V.S.A. §§ 246 and 248. Finally, the Department requests that the Board or Hearing Officer reject Mr. Blittersdorf's cross-motion for summary judgment and motion to dismiss with prejudice.

Dated at Montpelier, Vermont this twenty-fourth day of August, 2016.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE



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cc: Docket 8585 Service List