STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont	

Order entered: 08/07/2018

ORDER GRANTING TOWN'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION AND BACKGROUND

On June 27, 2018, the Town of Bennington (the "Town") filed with the Vermont Public Utility Commission ("Commission") a motion for a protective order precluding Chelsea Solar LLC ("Chelsea") from taking the deposition of every individual member of the Town's Selectboard, restricting Chelsea to written discovery, and requiring Chelsea to conform to Vermont Rule of Civil Procedure (V.R.C.P.) 30(b)(6) in seeking testimony on behalf of a municipal entity as to the matters on which the Town has offered evidence (the "Town's Motion").

On June 29, 2018, the Town supplemented the Town's Motion, requesting, in the alternative, that if depositions are permitted to proceed, Chelsea should be required to pay the Town's expenses relating thereto, including its attorneys' fees.

On July 10, 2018, Chelsea filed its response to the Town's Motion ("Chelsea's Response").

On July 18, 2018, the Town filed a supplemental brief in support of the Town's Motion (the "Town's Supplementary Brief").

Also on July 18, 2018, Chelsea filed a supplementary brief in opposition to the Town's Motion ("Chelsea's Supplementary Reply").

No other parties filed any responses.

In today's Order, I grant the Town's Motion.

II. Legal Standard

As stated in Commission Rule 2.214(a), discovery in Commission proceedings is guided by the V.R.C.P., Rules 26 through 37. These rules establish guidelines for the discovery process, and they address the methods of discovery, the general scope of discovery, depositions, written interrogatories, protective orders and limits on discovery, and sanctions for failure to be responsive to discovery requests.

Rule 26(b)(1) addresses the scope of discovery and states that:

> Parties may obtain discovery regarding any unprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs the likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26(c) establishes guidelines for when a judge may protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" and further states that the "provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to" a motion for a protective order.

Rule 30(b)(6) addresses the deposition of organizational representatives and states that:

> A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 37(a)(4) permits a judge to issue an order compelling discovery responses "if a deponent fails to answer" and may issue a sanction ordering that the party being compelled to provide discovery "pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees."

III. Positions of the Parties

The Town

The Town requests that the Commission preclude Chelsea from taking the deposition of every individual member of the Town's Selectboard, restrict Chelsea to written discovery, and require Chelsea to conform to V.R.C.P. 30(b)(6) in seeking testimony on behalf of a municipal entity as to the matters on which the Town has offered evidence. In the alternative, if depositions are permitted to proceed, the Town requests that Chelsea be required to pay the Town's expenses relating thereto, including its attorneys' fees.

The Town argues that Chelsea's request to depose each of the Selectboard members is disproportionate to the needs of the proceeding, and that the burden of the Town's providing the testimony substantially outweighs its likely benefit. "Given the extremely limited value of an individual lawmaker's testimony concerning legislative history, legislative intent, or legislative interpretation, [Chelsea's] request is disproportionate to the burden it would impose both on these individuals and on public resources."[1] The Town further asserts that:

> Where no extraordinary circumstances exist, individual decision-making authorities are generally not required to submit to an oral deposition where the authority is "willing to respond institutionally to discovery initiatives by producing the administrative record or other documents, answering interrogatories, or by designating a single representative to speak for the agency on deposition" in accordance with Rule 30(b)(6).[2]

The Town asserts that the use of Rule 30(b)(6) is appropriate because: (1) the Selectboard members are ordinary citizens and volunteers; (2) none of them have offered evidence or given testimony in this proceeding; and (3) taking the deposition of each member of the Selectboard is not an appropriate use of their time or of public resources and is contrary to public policy.[3]

The Town also observes that a Chelsea affiliate, PLH LLC, had commenced a lawsuit against the Town in Environmental Court seeking declaratory and injunctive relief, as well as monetary damages, attorneys' fees, and costs (the "Complaint"). "The allegations set forth in the

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[1] Town's Motion at 4-5.
[2] *Id.* at 5 (quoting *Community Federal Sav. And Loan Ass'n. v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (1983) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)).
[3] *Id.* at 6.

Complaint are directly related to some of the issues raised in this proceeding. The Chelsea Project is mentioned 13 times in the Complaint, and the Complaint takes issue directly with various actions of the Selectboard."[4] The Town contends the Selectboard members' depositions are irrelevant to changes in the Town's position regarding the Project[5] but would have a greater relevance to the Complaint than to the Commission's determination about the Chelsea Project:

> Chelsea seeks to take these depositions in order to address what it refers to as "standard-less criteria in the Town Plan," which Chelsea asserts would violate Chelsea's constitutional rights. Chelsea wants to get to the bottom of the legislative intent behind the Town Plan by examining individual lawmakers, in their individual capacities. Thus, rather than assert that individual Selectboard members would offer testimony relevant to Petitioner's entitlement to a Certificate of Public Good for the Chelsea Solar Project, Petitioner bases its need for the deposition on examining the constitutionality of the Town's actions vis-à-vis due process, equal protection, and "generalized animus." [6]

While the Complaint has been dismissed by the Environmental Court, it remains possible that it will be re-filed in a different jurisdiction. Regardless, the Town argues that the Selectboard member's testimony has limited relevance to the Commission.

Finally, the Town asserts that the individual Selectboard members will suffer specific harm because they will lose their private time for the sake of information of limited value to the Commission in this proceeding, and the Town will have to pay for their representation in the six depositions.[7]

Chelsea

Chelsea responds that the Town "cannot even remotely reach the very substantial Constitutional and other criteria they face in a motion of this sort."[8] Chelsea argues that the Town's Motion would violate the Vermont Supreme Court's caution that "during the pretrial period 'restrictions which may impede the development, presentation, and determination of facts

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[4] *Id.*

[5] Town's Supplementary Brief at 4 (citing *Andrews v. Lathrop*, 132 Vt. 256, 260 ("the testimony of individual legislators as to the purpose the legislature had in mind is of doubtful relevance.")).

[6] Town's Supplementary Brief at 3.

[7] *Id.* at 7 (citing *Weatherly v. Gravel and Shea, P.C.*, 2013 WL 12231876 (Vt. Super. 2013) (Mello, J.) (undue burden created when limited value testimony outweighs the burden to witness)).

[8] Chelsea's Reply at 1.

should be avoided.'"[9] Chelsea contends that the Town's Motion "wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure"[10] and that "granting [the Town's Motion] would deprive Chelsea of basic due process rights and seriously harm its trial preparation."[11]

Chelsea asserts that the Town has not shown "good cause" to meet its heavy burden to show the extraordinary circumstance that the deposition of the six Selectboard members will cause harm or prejudice to the Town or to the Selectboard members themselves. Chelsea contends that the Town's Motion "trips at the starting gate as it utterly fails the specificity and evidentiary requirements that must be presented."[12]

Chelsea argues that the six Selectboard members have "voluntarily interjected themselves"[13] into this proceeding and that the "Commission is statutorily required to give 'due consideration' to the recommendations of the Town."[14] Chelsea contends that deposing the six Selectboard members is necessary because the "motivations of the Selectboard members, how they distinguish the Chelsea Project for similarly situated projects that the Town has supported," are important evidence for the Commission to consider when determining the "level of the consideration 'due' to the Town's recommendations."[15]

Chelsea also asserts that "the evidence already in the record supports its claim that the Town's opposition is not based upon any legitimate regulatory purpose, but rather [is] motivated by the vocal opposition from a few neighbors and generalized animus."[16] Chelsea then argues that the Vermont Supreme Court has "unequivocally condemned such conduct" citing to a case where the Court affirmed a finding holding a town liable in tort for due process and equal protection violations.[17]

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[9] *Id.* (citing *Schmitt v. Lalancette*, 2003 VT 24, ¶ 13, 175 Vt. 284, 289, quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d. Cir. 1975)).

[10] *Id.* at 2 (citing *Schmitt*, at ¶ 12 n. 3).

[11] *Id.*

[12] *Id*. at 14 (citing *Schmitt* at ¶¶ 15-16 (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1114 (3d Cir.1986) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.")).

[13] Chelsea's Reply at 2.

[14] *Id.* at 5.

[15] *Id.*

[16] *Id.*

[17] *Id.* (citing *In re Town Highway No. 20*, 2012 VT 17, ¶ 22).

Chelsea contends that the Town has "impliedly waived any ability to object to the depositions of the Selectboard members by filing testimony and recommendations."[18] Chelsea argues that the motivation of the Selectboard members is based on a constitutionally proscribed, manifestly illegal discriminatory animus rather than any legitimate regulatory purpose and that the development standards in the Town Plan "are not standards at all but merely optional *ad hoc* criteria that can be applied at will by the political elite of the Town."[19]

Chelsea contends that the Selectboard members' motivations in opposing the Project infect not only the recommendations themselves, but what "due consideration" the Commission should give them. Chelsea argues that recommendations that are pre-textual and motivated by local opposition are illegimate and entitled to no weight.[20] Chelsea asserts that the Town's decisions with regard to the Chelsea Project "have all been guided by one motive: to favor the property rights of the neighbors." [21]

Chelsea argues that the depositions of the six Selectboard members are proportional to the needs of the case.

> How the Selectboard differentiates its position with respect to the Chelsea Project as compared to other similarly situated projects is also relevant to what "due consideration" the Selectboard recommendations are entitled. That in turn requires a direct query into the deliberative and mental processes of the Selectboard members in reaching a decision.[22]

Finally, Chelsea's Supplementary Brief looks beyond its proportionality argument and the motivations of the Selectboard members by "excluding each member's personal motivations and the role of neighbor opposition." Instead, Chelsea asserts that the deposition of the six Selectboard members is needed to probe the credibility of the "hearsay" prefiled testimony of Mr. Monks:

> Even excluding each member's personal motivations and the role of neighbor opposition, Chelsea is entitled to probe each Selectboard member on the substantive issues, process, standards and basis for the purported recommendations and conclusions. Chelsea will uncover highly relevant and admissible evidence related

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[18] *Id.* at 8.
[19] *Id.* at 12.
[20] *Id.* 27-28 (citing *In re Town Highway No. 20*, 2012 VT 17, ¶ 22).
[21] *Id.* at 28.
[22] *Id.* 30-31 (citing *State v. Wesco*, 2006 VT 93, ¶ 12) ("some evidence" required to compel discovery of State's Attorney's unjustifiable and unconstitutional motivation in selective prosecution claim).

to all the issues addressed in Monks' prefiled testimony and the level of due consideration to which the Selectboard's recommendations should be entitled.[23]

IV. Discussion and Conclusion

Chelsea has a due process right to be permitted to engage in discovery in order to prepare for the evidentiary hearing. The scope of that discovery is guided by V.R.C.P. 26(b)(1), and a judge may protect a party from discovery using the standard set in V.R.C.P. 26(c). In particular, Chelsea may further inquire into each of the parties' prefiled testimony and to engage in live questioning of the witnesses who provided that testimony, not simply written interrogatories, prior to questioning them live at the hearing.

Chelsea seeks to depose the six members of the Bennington Selectboard. The Town seeks a protective order to prevent that from occurring. Instead, the Town has offered the Town Manager and Town Planner as appropriate representatives of the Town to be deposed pursuant to V.R.C.P. 30(b)(6).

I am granting the Town's request because I find that the Chelsea's depositions of the six Selectboard members is unnecessary, would not be proportional to the needs of the case, and the burden and expense of the proposed discovery outweighs the likely benefit.

Needs of the Case

Chelsea's deposition request is inconsistent with the needs of this case.

Chelsea misstates the record of discovery in this case when it argues that the Town Selectboard members "voluntarily injected" themselves into this case and filed testimony and recommendations. The only testimony filed by the Town in this case is the prefiled testimony of the Town Planner.[24] Chelsea, on the other hand, has filed numerous exhibits that reflect the recommendation of the Town.[25] The Town does not object to Chelsea's further deposition of

[23] Chelsea's Supplementary Reply at 4.

[24] Prefiled direct testimony of Daniel Monks dated 6/22/18.

[25] These include: exh. 8302-CS-MK-3 (2010 Town Plan Excerpts); exh. CS-BW-81 (2007 Bennington Regional Plan); prefiled direct testimony of Brad Wilson dated 11/21/17; exh. CS-BW-12 (Transcript of 8.14.17 Bennington Selectboard Meeting); exh. CS-BW-17 (Email from Don Campbell to Libby Harris); exh. CS-BW-18 (Bennington Solar Screening Ordinance); exh. CS-BW-20 (Bennington Letter to PUC re Paper Mills Solar Project); exh. CS-BW-21 (Photo of Paper Mill Solar Project); exh. CS-BW-22 (Photo of ER Bennington Solar Project); exh. CS-BW-

Mr. Monks or the deposition of Stuart Hurd, the Town Manager. The Town's offer is consistent with the needs of the case.

In support of its argument that Chelsea should be permitted to depose the six Selectboard members, Chelsea cites no Commission cases but cites to appellate reviews of civil and criminal cases. These cases approved denials of requests for protective orders from the deposition of municipal, state, and federal authorities where there were claims of unconstitutional discrimination, tort liability, and unjustifiable selective prosecutions. These claims sought judgments including monetary damages. In these cases, the depositions of the officials were necessary because the fact finders needed to determine whether each official's motivation was appropriate in order to substantiate the various claims. This case is different. The Commission has no jurisdiction to address Chelsea's allegations of the Selectboard's illegal conduct or to sanction the Selectboard.

There is also no need for the depositions because there is other evidence, including the depositions of Mr. Monks and Mr. Hurd, upon which the Commission could give "due consideration" to "municipal legislative bodies and the land conservation measures contained in the plan of any affected municipality" as required by Section 248(b)(1) of Title 30.

Proportionality

The Town's offer that Chelsea depose the Town Planner and the Town Manager is "proportional to the needs of the case."[26] The deposition of the six Bennington Selectboard members is not. While Chelsea argues that Mr. Monks' testimony is hearsay, there has been no showing that Mr. Monks was not a percipient witness to the events and policy decision-making reflected in his testimony.

Quashing the depositions of the Selectboard members is also proportional because Chelsea itself asserts that there is already sufficient evidence in the record for the Commission to

23 (Bennington Town Plan); exh. CS-BW-24 (Bennington Scenic Inventory); exh. CS-BW-25 (Deposition of Daniel Monks); exh. CS-BW-26 (RCON Design Standards); exh. CS-BW-27 (Bennington Land Use Regulations).

[26] V.R.C.P. 26(b).

determine that "the Town's opposition is not based upon any legitimate regulatory purpose" [27] and assess the "level of the consideration 'due' to the Town's recommendations."[28]

Chelsea argues that the depositions are appropriate because the Commission needs to make a determination as to the "level" of due consideration to give the Town's orderly development recommendation but cites no authority to support this argument. The meaning and effect of due consideration has, however, been the subject of considerable litigation and legislative discussion. None of this scrutiny has provided particularized guidance as to the "level" of due consideration the Commission should exercise under § 248(b)(1), with the possible exception of Justice Robinson's concurring opinion in the Vermont Supreme Court's decision in *Rutland Renewable Energy*, where she stated:

> [N]othing in the plain language of the statute [§ 248(b)(1)], our prior decisions construing the statute, or the recent legislative debate highlighted by the Town supports the contention that the [Commission] must defer to the Town to *any* degree.[29]
>
> Although the statute calls for "due consideration," of municipal recommendations, it does not purport to describe what consideration is "due" or to identify whether the [Commission] is the ultimate arbiter of the *level* of consideration due in a particular instance. Instead, its admonition that the Commission must afford the Town's standards "due consideration" is reminiscent of the phrase, "with all due respect," which invariably precedes and qualifies a statement evincing little or no respect.[30]

This guidance, albeit in a plurality opinion, reflects the state of the law, and does not justify Chelsea's desire to exhaustively discover evidence supporting a Commission determination as to the "level" of due consideration in order to meet this lack-of-deference[31] standard.

Burden Outweighs Benefit

In sum, "the burden or expense of the proposed discovery outweighs the likely benefit."

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[27] Chelsea's Reply at 5, *see also* Chelsea's Reply at 31.

[28] *Id.* at 16.

[29] *In re Petition of Rutland Renewable Energy, LLC*, 216 VT 50, ¶ 31 (emphasis added).

[30] *Id.* at ¶ 33 (emphasis added).

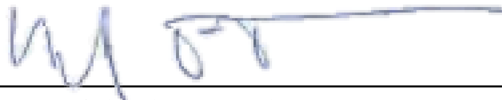
[31] *Id.* ¶ 35 ("the Legislature has not included in § 248 any language suggesting that the [Commission] must afford any deference to the Town's recommendations, explain its departure for those recommendations, or ensure that the Project conforms to the Town's recommendations.")

The Town Selectboard members are voluntary, part-time public servants who make municipal decisions after listening to townspeople and receiving the advice of town employees, including the Town Planner and the Town Manager, both of whom have been made available for deposition. The Selectboard members have active private lives dominated by public involvement and employment commitments that would be unnecessarily interrupted by their proposed depositions. Further, the Town would have to fund their attorneys' representation of the Selectboard members during these multi-day depositions. The burden and expense exceed the likely benefit of the depositions. The depositions of the six Selectboard members is not proportional to the needs of this case and their cost outweighs their benefit. The Town's Motion is granted.

The Town's alternative request that the Commission order Chelsea to "pay attorneys fees to that they can hire legal counsel to represent them"[32] at the depositions of the six Selectboard members is moot and is also unsupported by Rules 26(c) and 37(a).

SO ORDERED.

Dated at Montpelier, Vermont, this 7th day of August, 2018.



Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: August 7, 2018

Attest:
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

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[32] Intervenors' Motions at 3.

PUC Case No. 17-5024-PET - SERVICE LIST

Parties:

Anson Tebbetts, Secretary
Vermont Agency of Agriculture, Food and Markets
AGR.Notice@vermont.gov
(for Vermont Agency of Agriculture, Food and Markets)

Sarah L. J. Aceves
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
sarah.aceves@vermont.gov
(for Vermont Department of Public Service)

Merrill E Bent
Woolmington, Campbell, Bernal & Bent, P.C.
PO Box 2748
Manchester Center, VT 05255
merrill@greenmtlaw.com
(for Town of Bennington)

Lora Block
AppleHill Homeowners Association
34 McIntosh La
Bennington, VT 05201
lblock@sover.net
(for Apple Hill Homeowners Assoc)

Jake Clark, Esq.
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620-2601
jake.clark@vermont.gov
(for Vermont Department of Public Service)

Donald J. Einhorn, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
donald.einhorn@vermont.gov
(for Vermont Agency of Natural Resources)

Libby Harris, *pro se*
531 APPLE HILL ROAD
Bennington, VT 05201
libbyharris@comcast.net

Kimberly K. Hayden, Esq. (for Chelsea Solar LLC)
Paul Frank + Collins PC
One Church Street 05402
P.O. Box 1307
Burlington, VT 05401
khayden@pfclaw.com

Maru Leon (for Mt. Anthony Country Club)
Mt. Anthony Country Club
180 Country Club Rd
Bennington, VT 05201
maru@mtanthonycc.com

Michael Melone, Esq. (for Chelsea Solar LLC)
Allco Renewable Energy Limited
1740 Broadway
15th Floor
New York, NY 10019
mjmelone@allcous.com

Thomas Melone, Esq. (for Chelsea Solar LLC)
Allco Renewable Energy Limited
1740 Broadway
15th Floor
New York, NJ 10019
thomas.melone@gmail.com

James Porter, Esq. (for Vermont Department of Public Service)
Vermont Department of Public Service
112 State St
Montpelier, VT 05620
james.porter@vermont.gov

Alison Milbury Stone, Esq. (for Vermont Agency of Agriculture, Food and Markets)
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
alison.stone@vermont.gov

Robert E. Woolmington, Esq. (for Town of Bennington)
Woolmington, Campbell, Bernal & Bent, P.C.
P.O. Box 2748
4900 Main Street
Manchester Center, VT 05255
rob@greenmtlaw.com