STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	**)** **)** **)** **)** **)**	**Case No. 17-5024-PET**

PETITIONER'S OPPOSITION TO THE MOTION FOR RECONSIDERATION OF LIBBY HARRIS, APPLE HILL HOMEOWNERS ASSOCIATION AND MARU LEON

Chelsea Solar LLC (the "Petitioner" or "Chelsea") files this opposition to the August 6, 2018, motion for reconsideration filed by Libby Harris ("Harris"), Lora Block ("Block", as a representative of the Apple Hill Homeowners Association) and Maru Leon ("Leon"), of the hearing officer's ruling denying a motion for protective order which sought to prevent the deposition of Harris, Block and Leon. Harris, Block and Leon are collectively referred to herein as the "Intervenors".

The Intervenors have not provided any basis on which the order should be reconsidered. The Petitioner has rescheduled the depositions to dates agreeable to the Intervenors and will be conducting all depositions in Bennington in order to minimize the inconvenience to the Intervenors.

In their motion, the Intervenors resort to their familiar tactic of *ad hominem* attacks on Petitioner. In this particular filing, the *ad hominem* attack recites a similar attack from the Department's recent motion to quash its rule 30(b)(6) deposition. A motion that opens with such attacks is usually designed to distract from the merits. The Intervenors' motion is no exception.[1]

[1] "The law, like boxing, prohibits hitting below the belt." *Martinez v. Department of Transportation*, 238 Cal. App. 4th 559, 566 (Cal. App. 4th 2015). "The rule [] prohibit[s] irrelevant *ad hominem* attacks. Thus a defense attorney commits misconduct in attempting to besmirch a plaintiff's character. [] Attorneys are not to mount a personal attack on the opposing party even by insinuation." *Id*. at 566-567 (internal citations omitted.) Here, the Intervenors are *pro*

Each of the Intervenors voluntarily filed testimony. There is no basis on which to preclude the deposition of a witness that files testimony, and the Intervenors cite none. As applied to the facts here, the case law establishes that Chelsea is entitled to take the oral deposition of Harris, Block and Leon. The Intervenors' motion for reconsideration should be denied. Moreover, contrary to the Intervenors' assertions, much of their discovery responses are inadequate, and Chelsea is proceeding to notify the Intervenors of those deficiencies in the hope that a motion to compel can be avoided.

If, as they claim, some or all of the Intervenors withdraw from the case, and withdraw their testimony, in order to attempt to avoid a deposition, those parties still have the avenue of submitting public comments with the Public Utility Commission (the "Commission") in order to make their positions and concerns know.

INTRODUCTION

The Vermont Supreme Court has cautioned that "during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided.'" *Schmitt v. Lalancette*, 2003 VT 24 (2003) at P13 ("*Schmitt*") quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975). *See also*, *Farnsworth v. Procter & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir. 1985) ("trial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary infringement"). The position on protective orders of the Vermont Supreme Court and all federal and state courts is the same—protective orders are disfavored and should only be granted under extraordinary circumstances. *Schmitt* at P12 fn. 3 ("[p]rotective orders might prove necessary where there is a risk that one party will abuse the discovery process, [] but these are exceptional situations.")

se parties and therefore entitled to more leeway. The Department's tactic of *argumentum ad hominem,* however, on which the Intervenors' attack is based is not, especially because it comes from a public entity.

Trying to stop a deposition, as the Intervenors request, is even more disfavored and protective orders prohibiting depositions are rarely granted. The Intervenors' motion wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure. *Schmitt,* P12, fn. 3; *Salter v. Upjohn Co*., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.") The moving party bears a heavy burden of showing "extraordinary circumstances" that would justify such an order, and the showing must be sufficient to overcome plaintiff's "legitimate and important interests in trial preparation." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998); *see also Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, 48 (D. Mass. 1998); *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986) (burden of persuasion is on the party seeking protective order; the harm alleged "must be significant, not a mere trifle"); *see also, Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (party "assumes a heavy burden because protective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances."); *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1136 (Pa. Cmwlth. 2017) ("In both Pennsylvania and in the federal courts, protective orders are rare, disfavored, and require the party seeking a protective order to shoulder a heavy burden."); *Elliott v. AMS, Inc.,* 2016 U.S. Dist. LEXIS 109970, (S.D. W.Va. 2016) *10-11 (same) (collecting cases); *Frideres v. Schiltz*, 150 F.R.D. 153, 156 (S. D. Iowa 1993) ("Protective orders prohibiting depositions are rarely granted.") Examples of "extraordinary circumstances" are rare, such as if there is "compelling evidence that a deposition will constitute a substantial threat to a witness' life." *United States v. Mariani,* 178 F.R.D. 447, 448 (M.D. Pa. 1998) (protective order preventing the deposition of 83-year-old terminally ill witness warranted); *see also, Frideres v. Schlitz*, 150

F.R.D. 153, 156 (S.D. Iowa 1993) (protective order issued where witness' physician opined that the stress from deposition could be "life threatening" to the witness). Extraordinary circumstances do not exist here.

As the hearing officer correctly held, the Intervenors have not met their heavy burden to show that the depositions will cause harm or prejudice to the Intervenors. The Intervenors simply have not "shown any special circumstances requiring that the [PUC] order a form of examination different from that requested by [Chelsea]." *Gallagher v. Pelletier*, 1997 U.S. Dist. LEXIS 19738, *4 (E.D. Pa. 1997) citing *Interlego v. Leslie-Henry Co.,* 32 F.R.D. 9, 10 (M.D. Pa. 1963) ("In the absence of special circumstances, the court should ordinarily allow the examining party to choose his own mode of examination.")

ARGUMENT

I. The Intervenors Have Not Shown "Good Cause" For The Issuance Of A Protective Order.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." V.R.C.P. 26(b)(1). This relatively broad rule may be constricted when a party from whom discovery is sought shows "good cause" for protection "from annoyance, embarrassment, oppression, or undue burden or expense." V.R.C.P. 26(c).

The Vermont Supreme Court has stated that "[p]rotective orders might prove necessary where there is a risk that one party will abuse the discovery process, [] *but these are exceptional situations*." *Schmitt* at P12 fn. 3. (emphasis added.) Like all other courts, the Vermont Supreme Court considers protective orders "extraordinary measures," that only should be issued if the movant has shown "good cause" and shows that the protective order is necessary to prevent an abuse of the discovery process. *Id.*

"Good cause" requires the party resisting discovery to meet a heavy burden. *Minter v.*

Wells Fargo Bank, N.A., 258 F.R.D. 118, 125 (D. Md. 2009) ("the standard for issuance of a protective order is high. A motion seeking to prevent the taking of a deposition is regarded unfavorably by the courts, and it is difficult to persuade a court to do so."); *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) ("By requesting the Court to prohibit plaintiff from deposing a witness, defendant [] assumes a heavy burden because protective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances.") (internal citations omitted); *see also SEC v. SBM Investment Certificates, Inc*., 2007 U.S. Dist. LEXIS 12685, 2007 WL 609888 (D. Md. 2007) (recognizing courts' general disfavor completely prohibiting depositions). Similarly, the Vermont Supreme Court has cautioned that "during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided wherever possible.'" *Schmitt,* at P13 quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975).[2]

The Intervenors' motion wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure. *Schmitt,* P12, fn. 3; *Salter v. Upjohn Co*., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error."). The moving party bears a heavy burden of showing "extraordinary circumstances" that would justify such an order, and the showing must be sufficient to overcome plaintiff's "legitimate and important interests in trial preparation." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998); *see also Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986) (burden of

[2] To obtain a protective order, the party resisting discovery or seeking limitations must show "good cause" for its issuance *by demonstrating harm or prejudice that will result from the discovery*. Fed. R. Civ. P. 26(c)(1); *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp*., 307 F.3d 1206, 1210-1211 (9th Cir. 2002). Generally, a party seeking a protective order must meet a "heavy burden" to show why discovery should be denied. *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975)." *Cedano v. Thrifty Payless, Inc*., 2011 U.S. Dist. LEXIS 123950 (D. Ore. 2011), *8 (emphasis added.)

persuasion is on the party seeking protective order; the harm alleged "must be significant, not a mere trifle"); *Schmitt* at P13 ("during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided.'")

In *Schmitt*, for example, the Vermont Supreme Court reversed the issuance of a protective order, rejecting generalized allegations of "embarrassment to defendants, the potential significant and unjustified negative impact on defendants' business, and the potential for extending discovery 'into expensive and unnecessary areas far in excess of that justified by the possible value of this lawsuit,'" as sufficient to issue a protective order. *See, Schmitt* at P15 ("None of these reasons, in the context of this lawsuit, are sufficient to support an order denying otherwise relevant discovery to Schmitt under Rule 26(c).") The Vermont Supreme Court then proceeded to adopt the federal rules approach to the heavy burden required to meet "good cause" for a protective order:

> Although we have not had occasion to discuss the meaning of "good cause," this is well-traveled ground under the federal rules. A party seeking a protective order to prevent injury to a business must present allegations of injury with some specificity. *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." *Id*. at 1121; *see also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (refusing to make protective order where proponent's only argument in its favor was the conclusory statement that disclosure of certain information would "injure the bank in the industry and local community").

The Intervenors' motion utterly fails the specificity and evidentiary requirements that must be presented to even hope to obtain a protective order. General allegations of annoyance, embarrassment, oppression, or undue burden or expense are simply insufficient. *See, Schmitt* at P16 ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test," quoting *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986).) On that basis alone, the Intervenors' motion must be denied.

The Intervenors' have simply not established "good cause," nor any cause for that matter.

Nor have they proven with the requisite level of specificity exactly how a deposition would cause any annoyance, embarrassment, oppression, or *undue* burden or expense under VRCP 26(c) sufficient to justify a protective order.

The Intervenors' motion does exactly what the Vermont Supreme Court and other courts reject—relying on "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning." The motion does not provide any evidentiary basis to support its claim that depositions would be an undue burden or cause prejudice. The Petitioner has accommodated the Intervenors in terms of scheduling and location, making all the depositions in Bennington. As the Vermont Supreme Court and other courts made clear, the movant seeking to prevent a deposition must come with proof, and proof in detail, as to exactly how there is good cause and how the deposition *is* prejudicial and how it *will cause* annoyance, embarrassment, oppression, or undue burden or expense. Even when such a showing is made, courts will not prohibit the deposition but will constrain the protective order in a targeted manner to address the specific ways in which the depositions would cause annoyance, embarrassment, oppression, or undue burden or expense. In short, the Intervenors have not shown that the short depositions that Chelsea has proposed would cause annoyance, embarrassment, oppression, or undue burden or expense.

II. The Depositions Are Proportional to The Needs Of The Case.

As parties to this case, the Intervenors have placed their respective interests in issue and cannot and should not be allowed to avoid their respective obligations as a party to fully respond to discovery and allow a transparent process intended to reach a full and fair decision. On the other hand, granting such relief would deprive Chelsea basic due process rights and harm its trial preparation and prosecution of its case. Here each of the Intervenors have both first-hand knowledge and direct involvement of the issues *that they have raised in their respective testimony*.

Harris in her testimony raises issues regarding aesthetics, air pollution, wind concerns, noise concerns, wildlife impacts, streams, private property concerns, neighborhood deed restrictions, maintenance agreement and the Petitioner's good faith in these proceedings. Although the vast majority of her testimony lies outside the scope of these proceedings, section 248(b)(5) requires that the Project not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), impacts to primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts. As such, several of the allegations set forth in the Harris testimony go to the heart of the issues in these proceedings.

Block in her testimony raises issues regarding wind concerns, noise concerns, air pollution, water pollution, aesthetics, wildlife impacts, purported Town Plan violations and neighborhood deed restrictions. Although some of the topics raised in her testimony is outside the scope of these proceedings, several of the allegations set forth in the Block testimony, such as section 248(b)(1) and (5), go to the heart of the issues in these proceedings.

Leon in her testimony raises issues regarding aesthetics and purported Town Plan violations. Although the vast majority of her testimony relates to her private property interests, several of the allegations set forth in the Leon testimony go to the heart of the issues in these proceedings.

Written interrogatories are not a substitute for live testimony of witnesses with first-hand knowledge. As distinct from written interrogatories, "[t]he underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993); *see also Applied Telematics, Inc. v. Sprint Corp.*, 1995 WL

79237 at *1 (E.D. Pa. Feb. 22, 1995). Direct questioning of Harris, Block and Leon is both appropriate and proportional, and necessary for trial preparation. *See, Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) ("Depositions are also more reliable, as they are taken under oath, and the deponents' responses are relatively spontaneous.") Moreover, contrary to the Intervenors' assertions, much of their discovery responses are inadequate, and Chelsea is proceeding to notify the Intervenors of those deficiencies in the hope that a motion to compel can be avoided. Oral depositions are the only method in which Chelsea can adequately make the inquiries necessary to then present a comprehensive case in order to refute the unsubstantiated allegations set forth in the Intervenors' prefiled testimony.

III. There Is No Basis On Which To Condition The Depositions On The Payment Of Attorney's Fees.

The Intervenors' motion suggests that if they are required to sit for a deposition that Chelsea should pay for their legal fees. As the hearing officer correctly held there is no basis on which to require Chelsea pay for legal fees for the Intervenors. The Intervenors' request should be rejected out-of-hand, just as the Vermont Supreme Court rejected in *Schmitt* the complaint about costs imposed by rightful discovery. *See Schmitt*, at *18 ("there was no unnecessary expense to Lalancette [even if it would] be expensive."). *See also, Gallagher v. Pelletier*, 1997 U.S. Dist. LEXIS 19738, *3-4 (E.D. Pa. 1997) (denying costs of depositions because "Defendants have made no showing of unreasonable hardship or circumstances that would overcome the general obligation of parties to bear their own expenses.") *Id*. at *4. ("'This Court has generally been reluctant to impose charges of this kind upon the party taking the depositions and will usually rule that the parties should bear their own expenses, unless the circumstances are such as to indicate strongly that discretion should be exercised to the opposite effect.' *Continental Casualty Company v. Houdry Process Corp*., 18 F.R.D. 75, 76 (E.D. Pa. 1955)." *Alfred Bell & Co. v. Catalda Fine Arts,*

Inc., 5 FRD 327 (D.N.Y. 1946) (Denying request by plaintiff that defendants be required to pay all expenses necessarily entailed in connection with taking of depositions of plaintiff's officials and employees and others residing in England.); *SEC v. Aqua-Sonic Products Corp*., 93 FRD 326 (S.D.N.Y. 1981) (where Securities and Exchange Commission in action alleging violations of securities laws took depositions of investors who, albeit located across country, had been sought out originally by defendants, defendants have not demonstrated good cause, annoyance, oppression, or undue burden and expenses cannot be awarded under Rule 26(c)).

The Intervenors have not met the "good cause" standard for the extraordinary measure of a protective order under VRCP 26(c). As a result, there is no legal basis on which the taking of the depositions could be conditioned on the payment of attorney's fees. Nor is it even arguable that the Intervenors paying their own attorney to attend a deposition Bennington (if they choose to hire attorney) is an "undue" expense under VRCP 26(c). Depositions are a normal part of discovery. *See, Schmitt* at P18 (rejecting party's claim for a protective order because the discovery sought was "discovery to which he is otherwise entitled… [and no] facts [] supported the notion that Schmitt's request was so abusive or burdensome that a protective order was appropriate.")

IV. The Intervenors' Work-Product Privilege Claim.

The Intervenors assert that somehow the work product doctrine should shield them from deposition. The party asserting work-product protection "bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003). The Intervenors, however, provide no basis for their assertion and as such it must be rejected.

The work product doctrine is intended to safeguard the fruits of the attorney's trial preparation from the discovery attempts of an opponent. *In re Subpoenas Duces Tecum*, 738 F.2d

1367, 1371 (D.C. Cir. 1984). The work product privilege, formally codified in Vermont Rule of Civil Procedure 26(b)(4), provides in relevant part as follows:

> (4) Trial Preparation: Materials. -- Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party.

Even if the Intervenors could make a valid claim to protection of some material, which they do not specify what material, the work product privilege is not absolute. The Rule only extends to documents and tangible things. "[O]nly where the document is primarily concerned with legal assistance" is it work product. *Loctite Corp. v. Fel-Pro, Inc*., 667 F.2d 577, 582 (7th Cir. 1981). Even if it is attorney work-product, Rule 26(b)(4) allows the party seeking the document or other tangible thing to obtain it on a showing of substantial need and that he is unable, without undue hardship, to obtain the substantial equivalent of the material by other means. Substantial need has been shown to be present where the material *is relevant and not otherwise available to the requesting party*. *Jarvis, Inc. v. American Tel. & Telegraph Co*., 84 F.R.D. 286, 293 (D. Colo. 1979). No showing beyond the substantial need/undue hardship standard is required to discover opinion work product as opposed to factual work product. *See Donovan v. Fitzsimmons,* 90 F.R.D. 583, 588 (N.D. Ill. 1981). In order to establish work product protection for a document, the discovery opponent must show that "the primary motivating purpose behind

the creation of a document or investigative report must be to aid in possible future litigation." *Id*. at 1119 (quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D. D.C. 1982)). Moreover, the documents must have been prepared because of the prospect of litigation. *Dawson v. New York Life Ins. Co*., 901 F. Supp. 1362, 1368 (N.D. Ill. 1995) (citation omitted).

Work product protection does not shield from discovery *the facts concerning the creation of work product or the facts contained within the protected materials*. *See Jones v. Secord*, CIV.A. 11-91101-PBS, 2011 U.S. Dist. LEXIS 63486, 2011 WL 2456097, *2 (D. Mass. June 15, 2011) (quoting *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)); *see also In re Grand Jury Subpoena*, 220 F.R.D. 130, 141 (D. Mass. 2004).

Here the Intervenors have simply failed to show how the work product privilege might apply in their situation.

V. Conclusion.

For the reasons stated above, the Intervenors' motion for reconsideration should be denied.

Dated: August 10, 2018

Respectfully submitted,

/s/ Thomas Melone
Thomas Melone
Bar No. 5456
Allco Renewable Energy Limited
1740 Broadway, 15th floor
New York, NY 10019
Phone: (212) 681-1120
Email: Thomas.Melone@AllcoUS.com

Attorney for Chelsea Solar LLC