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 DEPARTMENT OF PUBLIC SERVICE'S MOTION TO QUASH

Chelsea Solar LLC (the "Petitioner" or "Chelsea") files this opposition to the motion for a protective order filed by the Department of Public Service ("DPS" or the "Department") seeking to prevent the institutional deposition of the Department under V.R.C.P. 30(b)(6). The Department cannot even remotely reach the very substantial Constitutional and other criteria its faces in a motion of this sort.

Instead of heeding the hearing officer's request at the last status conference to maintain civility, the Department has chosen to engage in *ad hominem* attacks on Chelsea—calling the Petitioner "duplicitous," "utiliz[ing] a scorched earth approach", impugning Chelsea's good faith,[1] and accusing Chelsea of "mistreatment of the Commission's permitting process." All those claims are simply false.[2] Moreover the Department's complaints are largely a bed of its own making. In

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[1] Here Chelsea made numerous attempts to engage the Department in discussion regarding any issues that it had with the revised, smaller Chelsea project. The Department rebuffed all attempts at substantive discussion prior to filing the pre-filed testimony of David Raphael. As Chelsea has argued previously, there is no reasonable or good faith basis for the Department to object to the revised, smaller Chelsea project after having executing a memorandum of understanding with respect to the original configuration.

[2] "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.) The Department's tactic of *argumentum ad hominem* is even more objectionable because it comes from a public entity.

this proceeding, for example, there is no justifiable basis on which the Department could take the position it did in the Memorandum of understandings in docket 8302 on the larger Chelsea Project and do a complete 180-degree turn on the smaller, less impactful Chelsea Project. As a governmental agency representing the people of the State of Vermont, the Department has a duty to turn square corners, and to comport itself with compunction and integrity. The changes to the Project cannot justify the 180-degree turn made by the Department. Furthermore, it is the Department, not individual experts that the Department might hire on a transactional basis, that is the gatekeeper to determine whether its actions are in the best interests of the people of the State of Vermont. Here, the Department has abdicated its role, leaving in its wake an *ad hoc* standard-less discriminatory review process. As this case illustrates, systemic discriminatory treatment results when the Department's position in a case is determined by the bias and methodology of a single witness.

The situation of which the Department now complains may also have been avoided if the Department had simply done the right thing when the Town confessed that the bases on which the Chelsea project was initially denied a CPG were, in the Town's attorney's words, simply not credible. Instead of seeking to rectify the manifest injustice that was done to Chelsea, the Department has constantly opposed Chelsea's efforts.

Putting aside the Department's improper tactics, the Department's motion presents important issues related to access to discovery, trial preparation, due process, and equal protection. The protective order sought by the Department is unsupportable as a matter of law and fact, and if granted would seriously and unfairly impair Chelsea's prosecution of this case. 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"). As applied to the facts here, the case law establishes that Chelsea is entitled to take the Department's deposition.

SUMMARY OF THE ARGUMENT

The Department seeks an unprecedented and unjustifiable protective order blocking Chelsea from deposing it under VCRP 30(b)(6) on issues at the very heart of this case. In seeking to quash the deposition, the Department would remove any transparent review of its actions from this process, and would hide evidence that undermines and impeaches its own witness. As a party in this case, the Department cannot and should not be allowed to avoid its obligations as a party to fully respond to discovery and allow a transparent process intended to reach a full and fair decision. There is simply no credible basis proffered by the Department for the extraordinary relief requested. On the other hand, granting such relief would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case.

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.")

Trying to stop a deposition, as the Department requests, is even more disfavored and protective orders prohibiting depositions are rarely granted. The Department's 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.")[3] 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

[3] *See also, Investment Properties Intl., Ltd. v. IOS, Ltd*., 459 F.2d 705, 708 (2d Cir. 1972) (granting writ of mandamus to vacate district court order quashing notice of depositions in antitrust action); *United States v. Mariani,* 178 F.R.D. 447, 448 (M.D. Pa 1998); *Naftchi v. New York Univ. Med. Ctr.,* 172 F.R.D. 130, 132 (S.D.N.Y. 1997); *Motsinger v. Flynt,* 119 F.R.D. 373, 378 (M.D.N.C. 1988).

the stress from deposition could be "life threatening" to the witness). Extraordinary circumstances do not exist here.

Further, in this proceeding, the Department cannot simply abdicate to its witness its responsibilities as a party and its statutory obligations. Under the legislative direction in 30 V.S.A. § 2(b), "[i]n cases requiring hearings by the Commission, the Department, through the Director for Public Advocacy, shall represent the interests of the people of the State, unless otherwise specified by law." In addition, 30 V.S.A. § 2(g) provides: "in all forums affecting policy and decision making for the New England region's electric system …the Department of Public Service shall advance positions that are consistent with the statutory policies and goals set forth in 10 V.S.A. §§ 578, 580, 581 and sections 202a, 8001, 8004, and 8005 of this title." Those sections relate to greenhouse gas emissions and renewable energy that affect the New England electric system. The goals advanced by these sections are also directly relevant to Section 248 review and the Department's role as the Public Advocate because the Commission has adopted an aesthetics standard that is significantly informed by the societal benefits of a project. *See In re Petition of Green Mountain Power Corporation*, Docket No. 7628, Order of 5/31/11 at 83 ("*Kingdom Wind*") (citing In Re: Northern Loop Project, Docket 6792, Order of 7/17/03 at 28). In *Kingdom Wind*, the Commission found that the societal benefits of the Kingdom wind project outweighed the apparent undue adverse aesthetics impacts to certain neighbors. *Id*. at 88 ("As discussed in detail in the General Good of the State section of this Order, the proposed project meets societal needs and provides important benefits to Vermont through the addition of a renewable resource, pursuant to state policy. In light of the societal need for and benefits of the proposed project, we conclude that the adverse effects around Bayley Hazen Road are not undue."). The General Good discussion in *Kingdom Wind* also made it clear that consideration of clean energy attributes of a proposed

project is necessary in reaching an overall conclusion regarding General Good under Section 248(b)(1):

> The Vermont General Assembly has set out certain policy goals to be achieved by renewable energy in 30 V.S.A. § 8001:
> (a) The general assembly finds that it is in the interest of the people of the state to promote the state energy policy established in section 202a of this title by:
>> (1) Balancing the benefits, lifetime costs, and rates of the state's overall energy
>> portfolio to ensure that to the greatest extent possible the economic benefits of
>> renewable energy in the state flow to the Vermont economy in general, and to the
>> rate paying citizens of the state in particular.
>> (2) Supporting development of renewable energy and related planned energy
>> industries in Vermont, in particular, while retaining and supporting existing
>> renewable energy infrastructure.
>> (3) Providing an incentive for the state's retail electricity providers to enter into
>> affordable, long-term, stably priced renewable energy contracts that mitigate
>> market price fluctuations for Vermonters.
>> (4) Developing viable markets for renewable energy and energy efficiency
>> projects.
>> (5) Protecting and promoting air and water quality by means of renewable energy
>> programs.
>> (6) Contributing to reductions in global climate change and anticipating the
>> impacts on the State's economy that might be caused by federal regulations
>> designed to attain those reductions.
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> The wind project proposed by the Petitioners will contribute to diversification of the state's energy portfolio, reduction in global climate change caused by CO2 emissions, and protection of air quality. It would also result in long-term stably priced power resources for the regulated utility.

Id. at 141.

This section 248 proceeding is a forum affecting policy and decision making. Section 248 is a

legislative policy making activity. *See In re Twenty-Four Vermont Utilities*, 159 Vt. 363, 618 A.2d 1309 (1992). The Department's position advanced through its witness is inconsistent with the Department's statutory obligation, and inconsistent with the goals the Department is entrusted to advance.

Moreover, the Department has impliedly waived any ability to object to its deposition by filing testimony. A governmental entity that voluntarily chooses to file testimony on section 248(b)(1) and (5) issues has impliedly waived any basis that it might otherwise have had to refuse discovery that relates to those issues. Implied waiver arises "when the party attempts to use [a] privilege both as a shield and a sword by partially disclosing [in this case the testimony of Raphael and] affirmatively relying on them to support its claim or defense and then shielding the underlying communications from scrutiny." *Pall Corp. v. Cuno Inc.*, 268 F.R.D. 167, 168 (E.D.N.Y. 2010) (internal citations and quotations omitted). That is exactly what the Department is attempting to do here—use its right as a party to file testimony under section 248(b)(1) and under section 248(b)(5) as a sword and then try to shield impeachment evidence through claims of proportionality or some type of purported right to hide them. Selectively shielding facts that are potentially less favorable from disclosure is a sword and shield practice that the Vermont Supreme Court finds impermissible.

The Department's motion is premised upon the simple, but erroneous, proposition that the scope of discovery directed to the Department is limited by the testimony of its witness, David Raphael. *See* DPS Motion at 2 ("almost all the topics identified in the Notice are beyond the scope of the Department's prefiled testimony and therefore irrelevant to Chelsea's claim and disproportionate to the needs of the case.") The Department cites the July 31, 2018 order in this case denying the motion to quash filed by intervenors Harris et al. But the Department misreads

the July 31, 2018, order and ignores its context. The context is that intervenor Harris, a *pro se* party, expressed concern that Petitioner would digress into irrelevant personal questions of Harris during the deposition. That is obviously not a concern with respect to the Department. Nor is there a concern with the *pro se* status of the deponent. In this case the Department is represented by no fewer than three attorneys. What the order said was that questioning that goes beyond the prefiled testimony would not be allowed if "it is not reasonably likely to result in relevant, admissible evidence." July 31, 2018 Order at 3. That statement contradicts, rather than supports the Department's assertion that questioning beyond the pre-filed testimony is irrelevant and not proportional.

But the Department is also wrong in its claim that Chelsea's topics go beyond the scope of the Department's testimony. The Department voluntarily sponsored testimony on orderly development under section 248(b)(1) and aesthetics under section 248(b)(5), and in doing so is responsible as the statutorily appointed Public Advocate under 30 V.S.A. § 2(b) and (g), for assuring that the information it supplies to the Commission and the positions it advances in section 248 proceedings conform to the correct legal standards and clean energy laws and policies of the State. Mr. Raphael's report regarding aesthetics fails to reference or address any societal benefits of the Project. His assessment of orderly development also fails to meet the required legal standards set forth in the statute and as articulated by the Vermont Supreme Court in *In re Rutland Renewable Energy, LLC*, 2016 VT 50. Specifically, and contrary to Section 248(b)(1)'s focus on the region, the orderly development report submitted by the Department fails to discuss let alone assess regional impacts. *See id.* at ª 9. The Department's report also consistently refers to consistency with or conformance with the Town Plan, when the correct standard is due consideration. *Id.* at § 33. Finally, the Department has not offered any position on the General

Good considerations regarding renewable energy, climate change and other societal benefits required to be considered under section 248(b)(1). *See Kingdom Wind, supra*. All of the topics in the Notice are relevant to those two issues, and *crucially impeachment* evidence that the Department may have. The Department "is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action." *SEC* v. *Collins* & *Aikman,* 256 F.R.D. 403, 414 (S.D.N.Y. 2009). Indeed, "[l]ike any ordinary litigant, the Government must abide by the [] Rules of Civil Procedure." *Id.; see also Francis* v. *New York,* 262 F.R.D. 280, 282 (S.D.N.Y. 2009). "Although the Government sometimes enjoys privileges not available to private parties, these unique privileges do not usually generate an automatic, across-the-board immunity from 30(b)(6) depositions." *SEC v. Merkin,* 283 F.R.D. 689, 698 (S.D. Fla. 2012).

The Department seeks to quash the subpoena so only David Raphael's one-sided view of orderly development and aesthetics would be given. But the Department is the repository for orderly planning in the State of Vermont particularly when it relates to renewable energy facilities, and its knowledge relevant to section 248(b)(1) and (b)(5) goes far beyond the one-sided methodology and report of its witness.

The sole case relied on by the Department is inapposite and indeed undermines its position. In contrast to *SEC v. McGinnis*, No. 5:14-CV-6, 2015 U.S. Dist. LEXIS 193082 (D. Vt. Jan. 13, 2015), where there where only the attorneys at the SEC that had knowledge of relevant facts from the investigation in the case before the court, here there more than a dozen potential witnesses the Department could designate to respond to rule 30(b)(6) topics, who probably have had little to no connection with these proceedings. For example, according to the Department's web site, the Department of Public Service consists of the following divisions: Planning and Energy Resources, Engineering, Telecommunications and Connectivity, Finance & Economics, Public Advocacy and

Consumer Affairs and Public Information. In the planning and energy resources division there are more than a dozen potential designees that would have relevant impeachment evidence regarding renewable energy planning.[4] Orderly development of a region is a planning related topic, and specifically in the context of renewable energy planning within regions and Vermont as a whole, the Department is a repository of that information. None of the personnel with the relevant knowledge implicate the work-product or attorney-client privilege, and the Department's assertions to the contrary are frivolous. Even with respect to topics related to the Department's involvement in dockets 8302, 8454 and this case, Chelsea is entitled to seek important impeachment and direct evidence, which is not available from any other source. If a particular question at the deposition raises an issue of privilege the Department can raise the objection at that time. But a blanket prohibition is not warranted, and would violate Chelsea's right to due process and seriously impair its prosecution of this case.

I. The Department Has Not Shown "Good Cause" For The Issuance Of A Protective Order.

The Department's 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

[4] Planning and Energy Resources Division includes: Ed McNamara, Director, Kelly Launder, Assistant Director, Brian Cotterill, Energy Efficiency Program Specialist, Ed Delhagen, Clean Energy Finance & Program Manager, Keith Levenson, Energy Program Specialist, Anne Margolis, Renewable Energy Development Director, Alexis Miles, Energy Programs Specialist, Barry Murphy, Energy Efficiency Program Specialist, Andrew Perchlik, Director of Clean Energy Development Fund, Dan Potter, Energy Policy and Program Analyst, Joanna White, Utilities Economic Analyst, Maria Fischer, Utilities Economic Analyst.

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 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.'")

"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).[5]

The Department's motion trips at the starting gate as it utterly fails the specificity and evidentiary requirements that must be presented to even hope to obtain a protective order. General allegations of privilege, 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 Department's motion must be denied.

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

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[5] "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.)

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").

See also, Elliott v. AMS, Inc. (In re Am. Med. Sys.), 2016 U.S. Dist. LEXIS 109970, (S.D. W.Va. 2016) *10-11:

> protective orders "should be sparingly used and cautiously granted." *Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2006) (quoting *Medlin v. Andrew*, 113 F.R.D. 650, 653 (M.D.N.C. 1987)). Moreover, a court's customary reluctance to constrain discovery is heightened in the case of a motion seeking to prevent the taking of a deposition.

The reason for rarely prohibiting a deposition is *"fundamental." Elliott v. AMS, Inc.,* 2016 U.S. Dist. LEXIS 109970 (S.D. W.Va. 2016) at *10-11:

> Usually, the subject matter of a deposition is not well-defined in advance; thus, the need for prospective relief is more difficult to establish than in other methods of discovery. In addition, "a motion can be made if any need for protection emerges during the course of the examination;" therefore, a ruling prior to commencement of the deposition is not necessary to achieve a fair resolution. 8 Wright & Miller, Federal Practice and Procedure, § 2037 (3d Ed.). As a result, the burden to show good cause for an order prohibiting the taking of a deposition is especially heavy. *Medlin,* 113 F.R.D. at 653; *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong showing of good cause *and* extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.")
>
> (emphasis added.)

"[P]rotective orders are rare, disfavored, and require the party seeking a protective order to shoulder a heavy burden, which includes a particularized, fact-intensive showing of the necessity of the order." *See*, *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1136 (Pa. Cmwlth. 2017)

(collecting cases) and citing *e.g., Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544, 545 (7th Cir. 2002); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994).

The Department has simply not established "good cause." Nor has it proven with the requisite level of specificity exactly how a deposition of witnesses the Department chooses to designate would cause any intrusion into privilege, annoyance, embarrassment, oppression, or *undue* burden or expense under VRCP 26(c) sufficient to justify a protective order.

II. The Department's Claims Under The Work Product Doctrine Are Unsupported.

The Department asserts that "a 30(b)(6) deposition is not appropriate in this case because most of the topics identified in the Notice are protected under the work product doctrine." The Department's general conclusory allegation is insufficient, and untrue.

A. The *McGinnis* Case Does Not Support The Department.

The case on which the Department relies is inapposite and indeed undermines its position. Citing *SEC v. McGinnis*, No. 5:14-CV-6, 2015 U.S. Dist. LEXIS 193082 (D. Vt. Jan. 13, 2015), the Department broadly argues that

> Were the Commission to permit such a line of questioning, it would be "tantamount to deposing trial counsel and invading the [Department's] work product." *Id.* at *1. Therefore, even if the topics presented in the Notice are within the scope of the Department's prefiled testimony, they should be quashed because they are a violation of the work product doctrine pursuant to V.R.C.P. 26(b)(6).

But the Department's argument ignores crucial and dispositive differences in the facts. In *McGinnis,* the Court's decision to quash the deposition turned on facts not present here. There the decision turned on the fact that the Rule 30(b)(6) deposition witness would be the SEC's investigator, who had no independent knowledge of the facts or any issues apart from the SEC's

investigation:

> However, where a party seeks to depose a Rule 30(b)(6) witness with no independent knowledge of the facts, "unjustified disclosure of the opinions and mental process of counsel may occur" if the deposed person is required to select and compile certain facts and asked to reveal their source because "[h]ow a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to which an adversary is entitled."

In sharp contrast, here the Department has numerous witnesses that the Department could appoint regarding the specific topics who would not be in the same position as the SEC's investigator in *McGinnis*. *See, e.g*., fn. 4 *supra*. For example, the Department's Ed McNamara, Director of Planning and Energy Resources Division has been responsible for many of the Department's responses to written discovery. Neither McNamara nor any of the other potential designees noted in footnote 4 *supra* implicate the work-product or attorney-client privilege.

Nor is this case like *McGinnis* in other important ways. *First*, here the Department has been involved in a number of section 248 proceedings in the Town of Bennington where projects were sited in visual gateways and/or the rural conservation district, involving the issue of orderly development and aesthetics. Unlike SEC investigations, such as those in *McGinnis*, which are narrowly focused on the facts of each case, here issues such as whether there is a clear community standard or a clear application of the town's orderly development plans, as Raphael has asserted, involve the outcome of similarly situated projects in Bennington. *Second*, in those proceedings the Department was required to evaluate the impact of the Town Plans and the Bennington Regional plans, just as it here involving the issue of orderly development and aesthetics. The knowledge from those proceedings is all independent of this case further distinguishing *McGinnis*. *Third*, the Department evaluated and took a position with respect to the original configuration of the Chelsea project, which was that the project did not unduly interfere with orderly development

of the region or aesthetics, but has done a 180-degree turn on the smaller project. To draw the equivalent comparison based on *McGinnis*, it would be as if the SEC previously held that there was no violation of law and then, in a hallmark of a banana republic, changed course when a new political administration was installed. We would be quite surprised if Chief Judge Reiss would quash a deposition related to such a 180-degree turn-around. Indeed, as discussed herein, the Department's 180-degree turn is the reason that neither the work-product privilege or the attorney-client privilege applies. *Fourth*, the topics in the Notice include many topics related to orderly development and aesthetics such as energy planning, all of which are undeniably relevant, and inquiry into which is proportional to the needs of the case.

B. Other Cases Reject Similar Broad Work Product Claims.

Other courts that have considered this issue have refused to provide the agencies with a blanket protective order prohibiting its Rule 30(b)(6) deposition. *SEC.* v. *Goldstone,* 2014 WL 4349507, at *39 (D.N.M. Aug. 23, 2014) (holding that the SEC must participate in depositions before it can assert work-product privilege); *SEC* v. *Kovzan,* 2013 WL 653611, at *1-4 (D. Kan. Feb. 21, 2013) (denying the SEC's motion to quash a 30(b)(6) deposition by finding that the more appropriate method for raising work product objections is at the deposition itself); *Merkin,* 283 F.R.D. at 698 (rejecting the SEC's motion to quash a 30(b)(6) deposition notice while noting that litigants cannot "prohibit a 30(b)(6) deposition by arguing in advance that each and every question would trigger the disclosure of attorney-client and work product information ... "); *SEC* v. *Kramer,* 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (rejecting the SEC's arguments that it need not sit for a 30(b)(6) deposition by noting "a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege.").

SEC v. *Goldstone* is instructive. There, the Court rejected the very same arguments made by the Department. In *Goldstone*-as in the instant case-the SEC argued that its 30(b)(6) deposition should be prohibited because it would require the deposition of its counsel, necessarily result in an invasion of Plaintiff s work product privilege. The *Goldstone* court refused to issue a protective order based on the SEC's claim, holding that privilege concerns were not an appropriate basis on which to issue a protective order prohibiting Plaintiff s deposition. *Id.* at 39. The court noted that the proper course of action was for the Plaintiff to exercise its right, at the deposition, to object to any deposition question that intruded on its work product privilege. *Id.* The *Goldstone* court did not bar the defendants from questioning Plaintiff on any of defendants' 30(b)(6) deposition topics.

III. A Topic-By-Topic Review Of The Department's Claims.

Set forth below is the topic by topic rebuttal to the Department's claims. The rebuttal below does not repeat arguments under every topic, however, arguments under one topic apply to all other topics where the argument would be relevant.

1. **DPS involvement in Public Utility Commission ("PUC") Docket Nos. 8302, 8454 and 17-5024**.

Department's position: "Quash. Regarding Docket Nos. 8302 and 8454, beyond the scope of Department's prefiled testimony, overly broad and irrelevant, and violation of work product doctrine. Regarding Case No. 15-5024 *[sic],* overly broad and violation of work product doctrine."

Chelsea's response: Each of these Dockets involves the development of a solar generating facility in the Rural Conservation Zone in Bennington and the application by DPS of the Town Plan provisions relating thereto. DPS has done a 180-degree turnaround in this Docket as compared to Dockets 8454 and 8302 and the Petitioner has the right to understand the basis for such reversal, which can provide important impeachment evidence against the Department's current position. David Raphael cannot answer questions relating to this topic as he already has stated in the Department's written discovery responses.

Furthermore, it is the Department, not individual experts that the Department might hire on a transactional basis, that is the gatekeeper to determine whether its actions are in the best interests of the people of the State of Vermont. Whether there has been a fundamental change in policy within the Department or whether discrimination is the explanation for the Department's U-turn, David Raphael does not have the answer. The work product doctrine does not apply to

DPS policies, nor the factual basis for its decisions and claims.

Moreover, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

As Chelsea has explained to the Department, Chelsea will limit its questions to issues related to section 248(b)(1), section 248(b)(5) and other factors affecting the general good of the State weigh in the application of section 248(b)(1) or section 248(b)(5).

2. Orderly development of the Bennington region.

Department's position: "Quash. Appropriate for expert witness David Raphael to address."

Chelsea's response: Under the legislative direction in 30 V.S.A. § 2(b), "[i]n cases requiring hearings by the Commission, the Department, through the Director for Public Advocacy, shall represent the interests of the people of the State, unless otherwise specified by law." Here, DPS has voluntarily sponsored testimony on a central issue—orderly development of the Bennington region. Chelsea is not restricted to questioning the Department's sponsored witness. Mr. Raphael was not appointed by the legislature to represent the interests of the people of the State of Vermont in this proceeding. Aside from its mandated role as Public Advocate, the Department is also uniquely qualified to address orderly development considerations, given that pursuant to Act 174 the Department has the responsibility of certifying regional enhanced energy plans, which in turn form the basis for municipal enhanced energy plans within a region. Not only does the Department actively review these plans, it guides both regional commissions and municipalities through the process of developing enhanced energy plans. Further, Mr. Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under section 248(b)(1), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

3. The Act 174 planning process.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, violation of work product doctrine."

Chelsea's response: The planning aspect related to Act 174 are relevant because they also involve orderly development of the region, and in particular how renewable energy such as the project and similarly situated projects fit in to orderly development. The work product doctrine does not apply to the DPS's renewable energy planning policies or how it implements the goals of

the State of Vermont.

Moreover, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

4. Aesthetics of the Chelsea Solar project (the "Project").

Department's position: "Quash. Violation of work product doctrine and attorney-client privilege. Appropriate for expert witness David Raphael to address."

Chelsea's response: Chelsea is not restricted to questioning the Department's sponsored witness. Under the legislative direction in 30 V.S.A. § 2(b), "[i]n cases requiring hearings by the Commission, the Department, through the Director for Public Advocacy, shall represent the interests of the people of the State, unless otherwise specified by law." Here, DPS has voluntarily sponsored testimony on a central issue—aesthetics. Chelsea is not restricted to questioning the Department's sponsored witness. Mr. Raphael was not appointed by the legislature to represent the interests of the people of the State of Vermont in this proceeding. Aside from its mandated role as Public Advocate, the Department is also uniquely qualified to address aesthestic considerations, given that pursuant to Act 174 the Department has the responsibility of certifying regional enhanced energy plans, which in turn form the basis for municipal enhanced energy plans within a region. Not only does the Department actively review these plans, it guides both regional commissions and municipalities through the process of developing enhanced energy plans. Furthermore, the failure of DPS to submit a report that addresses societal benefits requires that DPS be subject to this type of discovery. Mr. Raphael's report regarding aesthetics fails to reference or address any societal benefits of the Project. Yet as Kingdom Wind illustrates, the societal benefits and impacts of greenhouse gases are part of not only the aesthetics analysis but the overall determination under section 248. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under section 248(b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

5. The negotiations of the two memorandums of understanding between DPS and Chelsea in Docket No. 8302 (the "MOUs"), including, without limitation all negotiations regarding landscape mitigation measures.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, and violation of work product doctrine and attorney-client privilege."

Chelsea's response: Docket 8302 involved the development of the larger Chelsea array. DPS has done a 180-degree turnaround in this case and the Petitioner has the right to explore the basis for such reversal, which can provide important impeachment evidence against the Department's current position. David Raphael cannot answer questions relating to this topic as he already has stated in the Department's written discovery responses.

Furthermore, it is the Department, not individual experts that the Department might hire on a transactional basis, that is the gatekeeper to determine whether its actions are in the best interests of the people of the State of Vermont. Whether there has been a fundamental change in policy within the Department or whether discrimination is the explanation for the Department's U-turn, David Raphael does not have the answer. The work product doctrine does not apply to DPS policies, nor the factual basis for its decisions and claims.

Moreover, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

As Chelsea has explained to the Department, Chelsea will limit its questions to issues related to section 248(b)(1), section 248(b)(5) and other factors affecting the general good of the State weigh in the application of section 248(b)(1) or section 248(b)(5).. If there are specific attorney-client privilege objections, they can be made during the deposition.

6. All topics covered in the prefiled testimony of David Raphael in Docket No. 17-5024.

Department's position: "Quash. Overly broad. Appropriate for expert witness David Raphael to address."

Chelsea's response: DPS has voluntarily sponsored testimony on a central issue—aesthetics of the Chelsea project. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

7. **Staffing at DPS with respect to PUC Docket Nos. 8302, 8454 and 17-5024**.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: DPS has done a 180-degree turnaround in this Docket with respect to the position it took Dockets 8454 and 8302. There have been several different DPS employees that have worked on these Dockets and little consistency among them. Chelsea's questions relate to facts, including who has been involved in the proceedings, not mental processes.

8. **The 2010 Bennington Town Plan (the "Town Plan") provisions concerning development in the Rural Conservation ("RCON") zone including without limitation how those relate to the Chelsea solar project (the "Project")**.

Department's position: "Quash. Appropriate for expert witness David Raphael to address."

Chelsea's response: DPS has voluntarily sponsored testimony on central issues—aesthetics of the Chelsea project and its impact on orderly development of the region. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

9. **The Town of Bennington's (the "Town") land Use and Development Regulations concerning the RCON zone including without limitation how those relate to the Project**.

Department's position: "Quash. Appropriate for expert witness David Raphael to address."

Chelsea's response: DPS has voluntarily sponsored testimony on central issues—aesthetics of the Chelsea project and its impact on orderly development of the region. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar

projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

10. The October 23, 2006 Amendment to the Bennington Land Use and Development regulations including without limitation how those relate to the Chelsea project.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony."

Chelsea's response: DPS has voluntarily sponsored testimony on central issues—aesthetics of the Chelsea project and its impact on orderly development of the region. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded. Moreover, the conformance of the Project with such development restrictions is not only within the scope of the DPS sponsored testimony, it goes to the heart of such testimony.

11. The April 11, 2016 Town Plan Amendment regarding solar siting including without limitation how those relate to the Chelsea solar project (the "Project").

Department's position: "Quash. Overly broad and appropriate for expert witness David Raphael to address."

Chelsea's response: DPS has voluntarily sponsored testimony on central issues—aesthetics of the Chelsea project and its impact on orderly development of the region. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded. Moreover, the conformance of the Project with such development restrictions is not only within the scope of the DPS sponsored testimony, it goes to the heart of such testimony. If the Project conforms to the amended more restrictive version, it certainly complies with the less restrictive version.

12. **The Town's solar screening ordinance including without limitation how those relate to the Project**.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and overly broad."

Chelsea's response: DPS has voluntarily sponsored testimony on central issues—aesthetics of the Chelsea project and its impact on orderly development of the region. Chelsea is not restricted to questioning the Department's sponsored witness, and the manner in which its witness' presents the section 248 topics. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, David Raphael cannot answer questions regarding the Department's evaluation of the prior larger Chelsea project. Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last expert witness in these proceedings. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded. Moreover, the conformance of the Project with such development

restrictions is not only within the scope of the DPS sponsored testimony, it goes to the heart of such testimony. If the Project conforms to the screening ordinance, that is a key impeachment factor against the Department's current witness.

13. The Town Plan's provisions concerning renewable energy including without limitation how those relate to the Project.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and overly broad."

Chelsea's response: The renewable energy goals set forth in the Town Plan go to the heart of this case. They are only outside the scope of the DPS testimony in the sense that they were intentionally ignored by David Raphael in his results-oriented report. Moreover, how these provisions related to other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

As Chelsea has explained to the Department Chelsea will limit its questions to issues related to section 248(b)(1), section 248(b)(5) and other factors affecting the general good of the State weigh in the application of section 248(b)(1) or section 248(b)(5).

14. The Town's efforts regarding renewable energy including without limitation how those relate to the Project.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and overly broad."

Chelsea's response: The Town's efforts regarding renewable energy go the heart of this case. They are only outside the scope of the DPS testimony in the sense that they were intentionally ignored by David Raphael in his results-oriented report.

Moreover, how these provisions related to other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

As Chelsea has explained to the Department Chelsea will limit its questions to issues related to section 248(b)(1), section 248(b)(5) and other factors affecting the general good of the State weigh in the application of section 248(b)(1) or section 248(b)(5).

15. The Bennington County Regional Plan (May 17, 2007) and how it relates to the Project.

Department's position: "Quash. Overly broad and appropriate for expert witness David Raphael to address."

Chelsea's response: The renewable energy goals set forth in the Regional Plan go to the heart of this case. Chelsea is not restricted to questioning the Department's sponsored witness. David Raphael cannot, and indeed has stated he will not in the Department's discovery responses, answer questions relating to other similarly situated solar projects in Bennington and the region. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under section 248(b)(1), and may provide crucial impeachment evidence against the Department's sponsored witness. David Raphael also cannot answer questions relating other factors affecting the general good of the State that individually and cumulatively outweigh the application of the Town's scenic and other goals in its Town Plan, or that weigh in the application of section 248(b)(1) or section 248(b)(5).

Moreover, how these provisions related to other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

As Chelsea has explained to the Department Chelsea will limit its questions to issues related to section 248(b)(1), section 248(b)(5) and other factors affecting the general good of the State weigh in the application of section 248(b)(1) or section 248(b)(5).

16. **Development of the in the Paper Mill Solar Project in the RCON (Docket No. 16-0049-NMP)**.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the Paper Mill Solar Project in the RCON directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The Paper Mill Solar Project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated solar project. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

17. **Development of the Kobelia Solar Project in the RCON (Docket No. NMP-6523)**.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the Kobelia Solar Project in the RCON directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The Kobelia Solar Project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated solar project. Other similarly situated projects, and how they have been treated

by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

18. Development of the Bennington substation project in the RCON (Docket No. 8020).

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the Bennington substation project in the RCON directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The Bennington substation project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated utility project. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness. .

19. Development of cell towers in the RCON.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the cell towers in the RCON directly contradict the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The development of the cell towers in the RCON are only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated development projects. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

20. Development of the ER Bennington I Solar Project (Docket No. 16-0044-NMP).

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the ER Bennington I Solar Project in the RCON directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The ER Bennington I Solar Project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated solar project. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

21. Development of the Maple Leaf Solar Project (Docket No. 16-0002-NMP).

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the Maple Leaf Solar Project in the RCON directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The Maple Leaf Solar Project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated solar project. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

22. Development of the Bennington Sheriff GLC Solar Project (Docker NM-6646).

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: The position taken by DPS with respect to the Bennington Sheriff GLC Solar Project directly contradicts the position taken by DPS with respect to the Chelsea Project. There is no justification for the disparate treatment. The Bennington Sheriff GLC Solar Project is only outside the scope of the DPS sponsored testimony because Raphael intentionally ignored the existence of the similarly situated solar project. Other similarly situated projects, and how they have been treated by the Department, are directly relevant to the analysis of the Chelsea project under sections 248(b)(1) and (b)(5), and may provide crucial impeachment evidence against the Department's sponsored witness.

23. Information provided to DPS regarding the Project.

Department's position: "Quash. Overly broad. Chelsea must identify with specificity what "information provided to DPS" entails."

Chelsea's response: Petitioner seeks to question DPS about all information provided to DPS. For a public agency this is the type of information in document form is something DPS has a legal obligation to provide under the Vermont public records law. Chelsea merely seeks to question DPS about the information which Chelsea and the public is entitled to have. Petitioner cannot identify what was provided to DPS, that is DPS' responsibility.

24. DPS communications with Annette Smith, the Apple Hill Homeowners Association, Roberta Caslin, David Griffin, Maru Leon, Lora Block, Caroline McEver, Libby Harris and Rick Carroll regarding the Chelsea Project.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and violation of work product doctrine."

Chelsea's response: DPS's objection based upon the work product doctrine is simply frivolous. DPS communications with third-parties are entitled to no privilege. All of the aforementioned people have opposed the Project and the opposition has been incorporated into the Department's sponsored testimony through its expert's methodology. DPS's objection is utterly baseless.

25. The transition of Jeanne Elias off of Chelsea Solar LLC.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant."

Chelsea's response: Chelsea withdraws this as a separate topic as it is subsumed in topic #7.

26. DPS involvement in the appeal to the Vermont Supreme Court of the PUC denial of a certificate of public good in Docket No. 8302.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, violation of work product doctrine."

Chelsea's response: Chelsea withdraws this topic.

27. DPS involvement in Docket No. 8188 (Petition of Rutland Renewable Energy for the Cold River Project), including DPS involvement at both the Commission and in the Vermont Supreme Court Appeal.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, violation of work product doctrine."

Chelsea's response: Chelsea withdraws this topic.

28. Cumulative impacts of the Project and the Apple Hill solar project (Docket No. 8454).

Department's position: "Quash regarding the Apple Hill solar project. Appropriate for expert witness David Raphael to address. Regarding Case No. 17-5024, overly broad. Chelsea must identify with specificity what 'cumulative impacts' entails."

Chelsea's response: DPS's objection is meritless. DPS's own witness talks about cumulative impacts but yet DPS implies that it does not know what that entails. DPS has raised the issue of cumulative impacts through its sponsored witness.

29. DPS Comprehensive Energy Plan.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant. Chelsea must identify with specificity what portions of the

Comprehensive Energy Plan it wishes to address."

Chelsea's response: Chelsea will identify what portions of the CEP it wishes to address.

30. DPS Total Energy Study.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant. Chelsea must identify with specificity what portions of the Total Energy Study it wishes to address."

Chelsea's response: The Total Energy Study is only 24 pages. Surely the Department's renewable energy experts are well-versed in a study that addresses Vermont's renewable energy challenges in such a compact way.

31. DPS' role in the Vermont Solar Pathways Report.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, and violation of work product doctrine."

Chelsea's response: The Vermont Solar Pathways Report is a planning report that by definition affects orderly development of regions, including Bennington. The positions DPS may have taken in the preparation of that report may provide valuable impeachment evidence contradicting its expert's opinions and methodology. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded, especially as to information provided to third parties.

32. The legal status of the MOUs.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, and calls for a legal conclusion."

Chelsea's response: In light of the hearing officer's ruling of August 13, 2018, Chelsea removes this topic.

33. The May 17, 2018 vested rights order in Docket No. 17-5024.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and overly broad."

Chelsea's response: The vested rights of the Petitioner are not outside the scope of DPS testimony, as they are directly discussed therein, albeit in a manner which is contrary to law. Specifically, Raphael concedes that even though Chelsea is entitled to vested rights and the use of the 2010 Town Plan, Raphael sees that as a mere "technicality" that he can do an end-run around by characterizing the subsequent Town Plan changes as evidence of what was there all along.

34. The aesthetics report and other documents of Jean Vissering in Docket 8302.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and violation of work product doctrine. The Department already responded to a similar inquiry in its Response to Chelsea's First Set of Information Requests to Admit, sent to Chelsea via electronic mail on July 31, 2018."

Chelsea's response: The Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last witness in these proceedings. This topic is likely to produce valuable impeachment evidence against the Department's position and its witness. With respect to the Department's interrogatory responses on this topic, the DPS responses were manifestly insufficient as they provided no information and were deficient for the reasons set forth in the letter from Petitioner to DPS dated August 15, 2018.

35. The aesthetics report and other documents of Jean Vissering in Docket 8454.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony, overly broad and irrelevant, and violation of work product doctrine. The Department already responded to a similar inquiry in its Response to Chelsea's First Set of Information Requests to Admit, sent to Chelsea via electronic mail on July 31, 2018."

Chelsea's response:

The Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last witness in the proceedings involving the adjacent solar project. This topic is likely to produce valuable impeachment evidence against the Department's position and its witness. With respect to the Department's interrogatory responses on this topic, the DPS responses were manifestly insufficient as they provided no information and were deficient for the reasons set forth in the letter from Petitioner to DPS dated August 15, 2018.

36. The effect of PFOA contamination on orderly development.

Department's position: "Quash. Beyond the scope of Department's prefiled testimony and overly broad and irrelevant.

Chelsea's response: PFOA contamination is only outside the scope of the DPS testimony because Raphael intentionally ignored the role the local contamination plays in an orderly development analysis.

37. The DPS decision to file testimony in Docket No. 17-5024.

Department's position: "Quash. Overly broad and violation of work product doctrine."

Chelsea's response: DPS has done a 180-degree turnaround in this Docket with respect to the position it took Dockets 8454 and 8302. The Raphael testimony directly contradicts the position taken Jean Vissering, the Department's last witness. As a governmental agency representing the people of the State of Vermont, the Department has a duty to turn square corners,

and to comport itself with compunction and integrity. The changes to the Project cannot justify the 180-degree turn made by the Department. Furthermore, it is the Department, not individual experts that the Department might hire on a transactional basis, that is the gatekeeper to determine whether its actions are in the best interests of the people of the State of Vermont. Here, the Department has abdicated its role, leaving in its wake an *ad hoc* standard-less discriminatory review process. As this case illustrates, systemic discriminatory treatment results when the Department's position in a case is determined by the bias and methodology of a single witness. Furthermore, the Department fails to explain with specificity exactly how the work product doctrine would purportedly be invaded.

IV. Conclusion.

For the reasons stated above, the Department's motion should be denied.

Dated: August 17, 2018

Respectfully submitted,

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