STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

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

Order entered: 08/27/2018

ORDER GRANTING THE DEPARTMENT'S MOTION TO QUASH 30(b)(6) DEPOSITION

I. INTRODUCTION

On June 29, 2018, Chelsea Solar LLC ("Chelsea") filed a notice of deposition, pursuant to Vermont Rule of Civil Procedure 30(b)(6), on the Vermont Department of Public Service ("Department") with the Vermont Public Utility Commission ("Commission"). Chelsea's notice sought information from one or more Department "officers, directors, or managing agents, or other persons who consent to testify and who possess sufficient knowledge to testify about" 37 different topics listed in the notice. On August 3, 2018, the Department filed a motion to quash Chelsea's deposition. The Department argues that Chelsea is seeking information that is: (1) beyond the scope of the Department's prefiled testimony; (2) overly broad and irrelevant; (3) a violation of the work-product doctrine and/or the attorney-client privilege; and (4) appropriate for the Department's expert witness to address.

On August 17, 2018, Chelsea filed its response opposing the motion to quash ("Chelsea's Response").

No other parties filed comments on the motion to quash.

In this Order, I grant the motion to quash.

II. LEGAL STANDARDS

Rule 26(b)(1) states:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26(c) states, in part:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any Superior Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; . . . .

Rule 30(b)(6) states:

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

III. TOPICS ON WHICH EXAMINATION IS REQUESTED

In its Rule 30(b)(6) notice of deposition, Chelsea filed the following list of topics on which examination is requested of the Department ("DPS") during the deposition:

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

2. Orderly development of the Bennington region.

3. The Act 174 planning process.

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

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.

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

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

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").

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.

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

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

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

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

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

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

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

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

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

19. Development of cell towers in the RCON.

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

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

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

23. Information provided to DPS regarding the Project.

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

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

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.

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.

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

29. DPS Comprehensive Energy Plan.

30. DPS Total Energy Study.

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

32. The legal status of the MOUs;

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

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

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

36. The effect of PFOA contamination on orderly development.

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

IV. POSITIONS OF THE PARTIES

The Department

The Department requests that their noticed 30(b)(6) deposition be quashed because the information that Chelsea seeks is: (1) beyond the scope of the Department's prefiled testimony; (2) overly broad and irrelevant; (3) a violation of the work-product doctrine and/or the attorney-client privilege; and (4) appropriate for the Department's expert witness to address. The Department argues that "[a]ny benefit deposing the Department might provide is clearly outweighed by the fact that almost all the topics identified in the Notice are beyond the scope of the Department's prefiled testimony and are therefore irrelevant and disproportionate to the needs of the case."[1]

The Department asserts that allowing the deposition "would be prejudicial to the Department."[2] The Department argues that "a 30(b)(6) is not appropriate in this case because most of the topics noted are protected under the work-product doctrine."[3] The Department maintains that if the Commission allows the deposition it would be "tantamount to deposing trial counsel and invading the [Department's] work product."[4]

The Department asserts that "Chelsea has operated under the guise that it has a due process right to engage in unlimited discovery, when in reality, discovery must be proportional to the needs of the case."[5] The Department argues that "in a petition for a Certificate of Public Good for a 2.0 MW solar generating facility, Chelsea's campaign of unrestrained and duplicitous discovery is nothing more than a strategy to exploit and exhaust all parties to this proceeding and diminish their capacity to participate in the proceeding."[6] In sum, the Department requests that the Commission grant the motion to quash because "reasonable restrictions should be imposed to prevent further mistreatment of the Commission's permitting process."[7]

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[1] Department Motion at 2.
[2] *Id*. at 3.
[3] *Id*.
[4] *Id*. (citing *Securities & Exchange Commission v. McGinnis*, No. 5:14-CV-6, 2015 WL 13505396 (D. Vt. Jan. 13, 2015) (the facts and legal theories sought in deposition were acquired and developed in the investigation its attorneys conducted and court quashed part of 30(b)(6) deposition that would violate the attorney-client privilege and the work-product doctrine)).
[5] *Id*. at 2.
[6] *Id*.
[7] *Id*.

Chelsea

Chelsea asserts that the Rule 30(b)(6) deposition is necessary in order that Chelsea can discover issues "at the very heart of this case"[8] including inquiring into why the Department's position against this smaller, less-impactful petition is "a complete 180-degree turn"[9] from its position supporting the larger project in Docket 8302.[10] Chelsea argues that failing to allow the 30(b)(6) deposition "would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case."[11]

Chelsea contends that the Department "cannot simply abdicate to its witness its responsibilities as a party and its statutory obligations" by relying solely on the testimony of its expert witness.[12] Chelsea argues that "the Department has impliedly waived any ability to object to its deposition by filing testimony."[13] Chelsea also argues that it is erroneous "that the scope of discovery directed to the Department is limited to the testimony of its witness, David Raphael."[14] Chelsea asserts that by relying on Mr. Raphael's testimony, the Department fails to observe its responsibility to meet the legal standards and information requirements of Section 248 review that it is required to participate in as the "statutorily appointed Public Advocate under 30 V.S.A. § 2b(b) and (g)."[15] Further, Chelsea argues that the Department has not shown "good cause" for the issuance of a protective order,[16] and the Department's claims under the work-product doctrine are unsupported.[17]

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[8] Chelsea's Response at 3.

[9] *Id.* at 2.

[10] *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 at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, denial order 2/16/16.

[11] Chelsea's Response at 3.

[12] *Id.* at 5.

[13] *Id.* at 7.

[14] *Id.*

[15] *Id.* at 8.

[16] *Id.* at 10-11 (citing *Schmitt v. Lalancette*, 2003 VT 24, ¶ 13 (quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975) ("Restrictions which may impede the development, presentation, and determination of facts should be avoided wherever possible.")).

[17] *Id.* at 14 (distinguishing *SEC v. McGinnis*, No. 5:14-CV-6, 2015 WL 13505396 (D. Vt. Jan. 13, 2015) (deposition of trial counsel invades the work-product doctrine and is inappropriate)); Chelsea argues that the Department has made no showing that the matters it seeks to depose cannot be responded to by Department staff other than trial counsel.

In Chelsea's Response, Chelsea re-addresses the 37 topics in its deposition request and makes the following clarification to its request for answers on topics 1, 5, 13, 14, and 15 :

> 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[ed]in the application of section 248(b)(1) or section 248(b)(5).[18]

Chelsea also withdraws its request for answers on topics 25, 26, 27, and 32.[19] And, Chelsea made the following clarification to its request for answers on topic 29: "Chelsea will identify what portions of the [Comprehensive Energy Plan] it wishes to address."[20]

V. Discussion and Conclusion

Chelsea has a due process right to discovery to prepare for the evidentiary hearing. The scope of that discovery, however, is guided by Rule 26(b)(1), and a judge may protect a party from discovery using the standard set in Rule 26(c). In particular, Chelsea may further inquire into the parties' prefiled testimony and engage in live questioning of the witnesses who provided that testimony prior to questioning them live at the hearing. Chelsea may not, however, depose witnesses who have not presented—and never will present—testimony or other evidence in this case.

Irrelevant and Disproportional

Chelsea seeks to depose a member of the Department staff to discover information about why the Department is relying solely on Mr. Raphael's testimony when, according to Chelsea, his prefiled testimony is contrary to the position of the Department as reflected in the memoranda of understanding between the Department and Chelsea in Docket 8032. I do not agree that how the Department developed its position is relevant or discoverable through a Rule 30(b)(6) deposition.

On June 22, 2018, the Department filed the prefiled testimony of Mr. Raphael and a report summarizing his review of the proposed Willow Road project.[21] Mr. Raphael's prefiled

[18] Chelsea's Reponse at 17, 20, 24, and 25.
[19] *Id*. at 28 and 29.
[20] *Id*. at 29.
[21] Exhibit PSD-DR-2.

testimony and report "outline his assessment of the potential impacts of the proposed [Willow Road project] with respect to aesthetics and orderly development of the region under 30 V.S.A. § 248(b)(5) and 30 V.S.A. § 248(b)(1)."[22] This is currently the only information filed for admission into evidence in this case by the Department.

On July 23, 2018, Chelsea filed a motion to exclude the Raphael testimony and report in their entirety because Chelsea asserted that the Department is obligated not to oppose the Willow Road project in this case (the "Chelsea Motion to Exclude") . Chelsea further argues that Mr. Raphael's testimony and exhibit should be excluded from evidence because they are "based on unverified facts or unreliable assumptions,"[23] and requested a *Daubert*[24] hearing to make that demonstration.

On August 13, 2018, I issued an order denying the Chelsea Motion to Exclude and overruling Chelsea's objection to Mr. Raphael's prefiled testimony and denying Chelsea's request for a *Daubert* hearing.

On August 14, 2018, Chelsea filed notice of its deposition of Mr. Raphael scheduled to occur on August 22, 2018.

Presumably, Chelsea fully exercised its opportunity to challenge Mr. Raphael's prefiled testimony in preparation for the evidentiary hearing at his deposition. The Department has otherwise filed no information about its review of the Willow Road petition under orderly development and aesthetics criteria. Chelsea is free to challenge the quality and credibility of the Department's review of those criteria through Mr. Raphael's testimony and through argument. The Department's "position" on the petition has not otherwise been filed for admission into evidence and will, therefore, not otherwise be considered as a separate evidentiary matter by the Commission. Based on the foregoing, I conclude that the information sought in Chelsea's Rule 30(b)(6) deposition is irrelevant and disproportional to this case and not important to resolving the issues in this case.

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[22] David Raphael, Department ("Raphael") pf. at 1.
[23] Chelsea Motion to Exclude at 2.
[24] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Burden Outweighs the Benefit

Given its irrelevance and disproportionality, I also conclude that the burden to the Department of responding to the Rule 30(b)(6) deposition far outweighs any alleged benefit. The Department contends the deposition "would be prejudicial to the Department"[25] noting that "most of the topics noted are protected under the work-product doctrine."[26] Presumably, any deposition of a Department staff member knowledgeable in the matters Chelsea seeks information about would include Department counsel. The Department has already stated its specific objections to Chelsea's requests, and Chelsea has responded to those objections. Any deposition would likely be highlighted by a reiteration of those objections and is unlikely to result in any discoverable information responsive to Chelsea's discovery request. The burden of State employees expending an inordinate and unnecessary amount of time responding to Chelsea's discovery requests outweighs the remote possibility of a deposition resulting in information useful in resolving this case.

Notably, the case law about Rule 30(b)(6) depositions on government agencies and the impact of the work-product doctrine and attorney-client privilege referred to by both the Department and Chelsea is from other jurisdictions. While these issues have arisen in Commission proceedings, a circumstance like Chelsea's seeking a Rule 30(b)(6) deposition from the Department does not appear to have arisen before the Commission previously. Generally, in this quasi-judicial forum, discovery disputes and depositions are the exception rather than the rule. Chelsea has cited no cases where the Commission has ordered a Rule 30(b)(6) deposition of a member of the Department, and the topics at issue in the proposed deposition do not justify deviating from that precedent.

Good Cause

Chelsea's request is irrelevant and disproportional and would create an undue burden, and the Department has met the high standard of good cause for a protective order under Rule 26(c).

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[25] *Id*. at 3.
[26] *Id*.

Chelsea seeks to find out why and how the Department allegedly changed its position. Chelsea also seeks information to support its contention that the Department is failing to meet it statutory responsibilities and is acting contrary to the interests of the citizens of the State. A deposition into such matters would open the door to annoyance and undue burden on the Department with no link to any relevant information that will form the basis of the findings upon which the Commission will make its public good determination in this case.

Chelsea remains free to argue about and characterize the evidence the Department may seek to have admitted based on Mr. Raphael's testimony and report. Chelsea may argue that the Department has not met its statutory responsibilities. But there is no reason why Chelsea should be permitted to annoy the Department in a deposition about matters outside the evidence the Department has put forth in its case. That evidence consists solely of the prefiled testimony of Mr. Raphael—testimony Chelsea has every right to explore fully in a deposition of Mr. Raphael. What Chelsea cannot do is explore the Department's legal position separate and apart from the evidence in this case.

> Accordingly, while a Rule 30(b)(6) deposition may be appropriate to discover facts known to a governmental agency, it may not be used to discover what the agency's counsel thinks about those facts, which facts and witnesses he or she finds persuasive and important, why he or she thinks certain facts give rise to certain inferences or support certain legal theories, or how he or she plans to use the facts at trial.[27]

I am granting the Department's motion because I conclude, pursuant to Rule 26(b)(1), that the information sought by Chelsea is not relevant and proportional to the needs of the case nor is it important in resolving the issues in the case, and because the burden outweighs the likely benefit. Therefore, pursuant to Rule 26(c), Chelsea's notice of deposition is quashed.

SO ORDERED.

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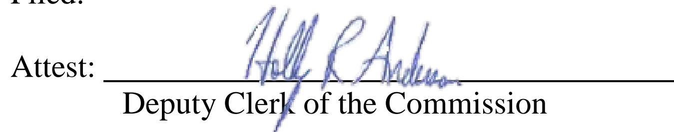
[27] *SEC v. McGinnis*, No. 5:14-CV-6, 2015 WL 1355396 at 6 (citing *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (holding that the court need not await a deposition where the notice of deposition seeks to "ascertain how the SEC intends to marshal[ ] the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.")).

Dated at Montpelier, Vermont, this 27th day of August, 2018 .

Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: August 27, 2018



Attest: ______________________________
Deputy Clerk of the Commission

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

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

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