This document was electronically filed using ePUC

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585	
Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont	

DEPARTMENT OF PUBLIC SERVICE'S OPPOSITION TO RESPONDENT DAVID BLITTERSDORF'S MOTION TO COMPEL PURSUANT TO V.R.C.P. RULE 30(b)(6) DEPOSITION OF THE DEPARTMENT AND RESPONSIVE MOTION FOR PROTECTIVE ORDER

The Department of Public Service ("Department"), pursuant to V.R.C.P. 78(b), opposes Respondent David Blittersdorf's *Motion to Compel V.R.C.P. 30(B)(6) Designation and Deposition on Penalty Issues* filed on January 28, 2020. The Department hereby moves the Vermont Public Utility Commission ("Commission"), pursuant to V.R.C.P. 26(c), to issue a protective order to bar the subject topics of discovery in the Rule 30(b)(6) Notice of Deposition ("Notice") served by Respondent on June 29, 2016.

The Commission should bar the subject topics listed in the Notice because the topics Respondent seeks discovery on are (1) in violation of the work product doctrine; (2) beyond the scope of the Notice; (3) unreasonably cumulative and duplicative; and (4) disproportional to the needs of the case. In the alternative, the Department requests the Commission issue a protective order limiting the scope of inquiry. In support of its opposition and accompanying Motion, the Department relies on the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

I. BACKGROUND

On June 29, 2016, Respondent served the Department a Notice of Deposition pursuant to V.R.C.P. Rule 30(b)(6). Specifically, the Respondent requested the following information:

> 4. What factors the PSD will recommend that the Public Service Board take into account when assessing whether to impose a penalty if the Board determines in this Docket No. 8585 that the Respondent violated the law.
>
> 5. What aggravating circumstances the PSD will recommend that the Public Service Board consider in assessing a penalty if the Board determines in this Docket No. 8585 that the Respondent violated the law.
>
> 6. What mitigating circumstances the PSD will recommend that the Public Service Board consider in assessing a penalty if the Board determines in this Docket No. 8585 that the Respondent violated the law.[1]

[1] Respondent's Exh. A at 3.

On July 15, 2016, the Department, the Agency of Natural Resources, and the Town of Irasburg filed a Motion to Quash Respondent's Notices of Deposition and requested a Protective Order. The Non-Respondents stated the depositions were overbroad and irrelevant, privileged, not reasonably calculated to lead to discovery of admissible evidence, and unduly burdensome.[2]

August 4, 2016, the Hearing Officer issued an Order denying Non-Respondents' Motion to Quash, stating "Mr. Blittersdorf's use of depositions is within the scope of permissible discovery. I note, however, that I make no ruling as to whether particular inquiries in the depositions are appropriate. . . I have insufficient information to rule on the reasonableness of any particular inquiry."[3]

On August 9, 2016, the Department provided an affidavit by the Department's then counsel designating a representative to respond to Topics 1 through 3 listed in the Notice.[4] With respect to Topics 4 through 7, the requests at issue, the Department stated it "has no designee that is able to testify at this time on the following matters/or topics listed in the Notice of Deposition."[5]

On September 12, 2019, the Hearing Officer issued an *Order Granting in Part Department's Motion for Summary Judgment and Denying Respondent's Cross Motion for Summary Judgment*, finding Respondent liable for violation of 30 V.S.A. § 246.

On December 20, 2019, the Department filed the *Department of Public Service's Recommendation re: Civil Penalty*, stating its position on a penalty amount pursuant to the criteria listed in 30 V.S.A. § 30(c).

Beginning on January 15, 2020, the Respondent's counsel and the Department engaged in discussions regarding the Department's designation of a 30(b)(6) witness for deposition on the subject topics of the Notice. The parties were unable to come to a resolution.

ARGUMENT

I. LEGAL STANDARD FOR RULE 30(B)(6) DEPOSITIONS

Generally, depositions are a form of permissible discovery pursuant to V.R.C.P. 26. Any party "has a due process right to be permitted to engage in discovery in order to prepare for [an] evidentiary hearing."[6]

---

[2] Respondent's Exh. B at 1.
[3] Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont, Docket No. 8585, *Order Re: Motion to Quash Depositions* at 2 (Aug. 4, 2016).
[4] Respondent's Exh. C at 1.
[5] *Id*. at 2.
[6] *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order at 3 (July 31, 2018).

However, the Vermont Rules of Civil Procedure for discovery, made applicable by the Commission in Commission Rule 2.214, contain several restrictions on Rule 30(b)(6) depositions. Included within these restrictions is that the notice of deposition must set forth the matters for examination "with reasonable particularity."[7]

In Vermont, a 30(b)(6) notice must "designate, *with painstaking specificity*, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[8]

The Commission may place limits on Rule 30(b)(6) depositions if "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by paragraph (b)(1) of this rule."[9]

The information sought in discovery must be "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' relevant 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."[10]

The Commission's authority to limit Rule 30(b)(6) depositions is further established under V.R.C.P. 26(c), which provides that the Commission may issue a protective order "for good cause shown" and "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." More specifically and in relevant part to the Respondent's 30(b)(6) notice, the restrictions that may be placed include that (i) discovery not be conducted, (ii) the discovery may be conducted only on specified terms and conditions, (iii) the discovery be conducted in a manner other than that chosen by the party seeking it, or (iv) certain matters not be inquired into or the scope of discovery be limited.[11]

---

[7] V.R.C.P. 30(b)(6).
[8] *Kelly v. Provident Life & Accident Ins. Co.*, No. 1:09-CV-00070-JGM, 2010 WL 5300807, at *2 (D. Vt. Dec. 20, 2010) (emphasis added).
[9] V.R.C.P. 26(b)(2)(B)(i)-(iii).
[10] V.R.C.P. 26(b)(1) (emphasis added).
[11] *See* V.R.C.P. 26(c).

Protective orders under Rule 26(c) "allow courts to limit the broad discovery rights established under Rule 26(a) and (b) if such rights are being abused."[12] As such, the Commission has "broad discretion" in deciding whether to issue a protective order.[13]

II. RESPONDENT'S POSITION

The crux of Respondent's *Motion to Compel* is the *Department's Recommendation Re: Civil Penalty* is "replete with opinion and factual inferences that Respondent is entitled to examine through discovery."[14]

Respondent then goes on to state, (i) "Respondent may discover through deposition admissible evidence that relates to the *basis for the Department's choice* to use December 17, 2019 as an end point for violation," (ii) "Respondent may discover admissible evidence. . . for *the inferences that the Department draws* from Respondent's professional experience, or why no consideration was given to Respondent's testimony that he was aware of the Anemometer Loan Program and its apparently erroneous advice on permitting," (iii) and "evidence bearing on the credibility of the Department's recommendation may be adduced through deposition on the topics identified in the June 29, 2016 deposition notice."[15]

Respondent's asserts its interest in taking a 30(b)(6) deposition is "to better understand the Department's recommendation on a penalty. . ."[16]

III. HEARING OFFICER'S DENIAL OF DEPARTMENT'S MOTION TO QUASH DOES NOT PRECLUDE THE DEPARTMENT FROM OBJECTING TO RESPONDENT'S INQUIRIES

While the Hearing Officer previously denied the Department's Motion to Quash in the August 4, 2016 *Order Re: Motion to Quash Depositions,* the Order specifically made "no ruling as to whether particular inquiries in the depositions are appropriate."[17] Rather, the Order only addresses Respondent's use of depositions, generally, as within the scope of permissible discovery. The Hearing Officer further stated the Department "remain[s] free to raise objections over information that is privileged. Also, discovery must, of course, be limited to material that is relevant to the issues in the proceeding."[18]

---

[12] *Schmitt v. Lalancette*, 2003 VT 24, ¶ 10 (*citing* A. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 447 (1991)).
[13] *Id*. at ¶ 9.
[14] Respondent's Motion to Compel at 5 (Jan. 28, 2020).
[15] *Id*. at 5-6.
[16] *Id*. (emphasis added).
[17] *Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont*, Docket No. 8585, Order Re: Motion to Quash Depositions at 3 (Aug. 4, 2016).
[18] *Id*.

Consequently, the Department may object to the Respondent's discovery inquiries if such inquiries fall within the discovery limitations of V.R.C.P. 26 or 30.

IV. ANALYSIS OF RESPONDENT'S 30(B)(6) DISCOVERY REQUEST

Work-Product Doctrine. First, a V.R.C.P. 30(b)(6) deposition is not appropriate in this case because Respondent's requests identified for deposition are protected under the work-product doctrine. The U.S. District Court for the State of Vermont stated:

> [While] a 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.[19]

In essence, Respondent is requesting the Commission permit a line of questioning that would be "tantamount to deposing trial counsel and invading the [Department's] work product."[20] Respondent has clearly indicated Respondent's intent to depose a Department witness as to the "basis" of the Department's recommendation and the "inferences" made by the Department regarding its 30 V.S.A. § 30(c) penalty analysis.

Respondent's 30(b)(6) deposition request does not seek facts the Department uniquely possesses, because there are none. Rather, Respondent's inquiries impermissibly seek discovery of mental impressions, conclusions, and legal inferences that are subject to the work product doctrine. For this reason, the Respondent's Motion should be denied.

Reasonable Particularity. Second, Respondent has failed to issue a notice stating the topics for inquiry with reasonable particularity, as required by V.R.C.P. 30(b)(6), and Respondent is now seeking discovery beyond the scope of the Notice. Respondent's Notice contains three topics at issue for deposition: (i) the factors the Department will recommend the Commission consider when assessing a penalty on Respondent, (ii) the aggravating circumstances the Department will recommend the Commission consider when assessing a penalty on Respondent, and (iii) the mitigating circumstances the Department will recommend the Commission consider when assessing a penalty on Respondent.[21]

---

[19] *Sec. & Exch. Comm'n v. McGinnis*, No. 5:14-CV-6, 2015 WL 13505396 at *2 (D. Vt. Jan. 13, 2015).
[20] *Id.*
[21] Respondent's Exh. A at 3.

As the Department understands Respondent's Notice, Respondent Noticed topics identifying the factors the Department reviews when making a penalty recommendation to the Commission. These factors are enumerated within 30 V.S.A. § 30(c). This is further confirmed in the August 4, 2016 Order where the Hearing Officer permitted discovery "to allow Mr. Blittersdorf to gather information on the various factors that the [Commission] must assess in setting a penalty under 30 V.S.A. § 30. . ."[22]

The Department offered to present a witness to Respondent for general inquiry as to the factors the Department considers when assessing a penalty under 30 V.S.A. § 30, however Respondent declined the Department's offer.[23] Instead, Respondent now seeks a 30(b)(6) deposition of a Department representative as to the Department's basis for its penalty recommendation and inferences from the facts submitted, a request that was not originally expressed within the Respondent's Notice.

Thus, the Respondent's Notice fails to provide topics for inquiry with reasonable particularity and the necessary specificity to be permitted topics of a 30(b)(6) deposition. For this reason, the Respondent's Motion should be denied.

Unreasonably Cumulative. Third, Respondent's requests are unreasonably cumulative and duplicative and may be obtained from a less burdensome, convenient source. Responses to Respondent's noticed discovery topics are not only readily accessible within 30 V.S.A. § 30(c), the Department submitted its *Recommendation Re: Civil Penalty* which clearly addresses the topics.

As such, Respondent may readily obtain all factors the Department recommends the Commission consider from less burdensome sources – the statute and the Department's filing. For this reason, the Respondent's Motion should be denied.

Disproportional. Fourth, Respondent's 30(b)(6) deposition request is not proportional to the needs of the case, pursuant to V.R.C.P. 26(b)(1). Upon consideration of the factors listed in V.R.C.P. 26(b)(1), Respondent is placing an unreasonable burden on the Department in producing a fact witness to testify – not to potentially admissible facts under control of the Department – to legal inferences of the Department and the Department's use of the facts submitted to reach its penalty recommendation.

Furthermore, the Department has not prefiled testimony to supplement the factual record in this matter and is relying upon the information submitted by Respondent for its legal conclusion. As a result, the Department has no fact witness to present for a 30(b)(6) deposition. Respondent is

[22] Order Re: Motion to Quash Depositions at 2-3.
[23] Respondent's Exh. D at 3.

impermissibly requesting Department provide a fact witness to speak to the legal conclusions and inferences within its penalty recommendation.

Respondent is free to respond to the Department's recommendation in a reply brief to address Respondent's position on the use of the facts submitted in this matter and their application to the 30 V.S.A. § 30(c) penalty factors. However, discovery on the Department's position will not resolve any tangible issues and only generates undue prejudice to the Department. As such, Respondent's request is disproportional to the needs of the case, and Respondent's motion should be denied.

CONCLUSION AND REQUEST FOR RELIEF

In view of the forgoing legal standards, the Department respectfully requests the Commission exercise its broad discretion and issue a protective order to either (1) bar discovery on Respondent's 30(b)(6) deposition Topics 4 through 6 or (2) limit the scope of the Respondent's 30(b)(6) deposition Topics 4 through 6 to general inquiries of the penalty factors the Department recommends the Commission consider in penalty cases. Respondent's questioning is a violation of the work product doctrine, overly broad, unreasonably cumulative, and disproportional to the needs of the case. Good cause exists to grant the Department's motion and preclude undue burden and expense.

DATED at Montpelier, Vermont this 7th day of February 2020.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: /s/ Eric B. Guzman

Eric B. Guzman, Special Counsel
112 State Street
Montpelier, Vermont 05620
(802) 828-3785
eric.guzman@vermont.gov

cc: ePUC Service List