STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

Investigation into Meteorological Tower at 700)
Kidder Hill Road in Irasburg, Vermont)

RESPONDENT'S MEMORANDUM IN OPPOSITION TO
DPS MOTION FOR PROTECTIVE ORDER

I. Introduction

On February 7, 2020, the Department of Public Service moved for a protective order pursuant to V.R.C.P. 26(c) "to bar the subject topics of discovery in the Rule 30(b)(6) Notice of Deposition served by Respondent on June 29, 2016."[1] This is the second time the Department has moved for an order of protection to prevent or limit the scope of the Rule 30(b)(6) depositions Respondent noticed on June 29, 2016. Like its July 15, 2016 motion,[2] the Department's February 2020 motion does not meet the high bar established by Rule 26(c) to protect the Department from producing a witness for deposition under Rule 30(b)(6). The Department cannot show good cause because it waived objections to the Rule 30(b)(6) deposition on penalty topics by not raising them earlier and waived any claim of work product privilege by disclosing to Respondent the Department's

[1] *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*, Case No. 8585 (Feb. 7, 2020) (hereinafter "DPS 2d Mot. Protection").
[2] *The Vermont Department of Public Service, the Vermont Agency of Natural Resources, and the Town of Irasburg's Motion to Quash Notices of Deposition and for Protective Order*, Case No. 8585 (July 15, 2016) (hereinafter "DPS 1st Mot. Protection").

legal theories and counsel's mental impressions of the prefiled evidence in a voluntary submission to the Commission on December 20, 2019. For those reasons, and on grounds that the motion is procedurally defective by not meeting the requirements of V.R.C.P. 26(h), the Commission should deny the Department's motion.

II. Background

A. Relevant Procedural History

In 2016, the Department and other parties in this proceeding sought to prevent all depositions that Respondent noticed in June 2016 pursuant to V.R.C.P. 30, along with subpoenas duces tecum, by claiming that the notices and subpoenas were overbroad, sought information that was "irrelevant to the subject matter involved at [that] stage of the proceeding, "privileged," and not reasonably calculated to lead to the discovery of admissible evidence."[3] The Department also claimed that the depositions were unduly burdensome at that stage of the case, and that the information could be obtained from another source that is "more convenient, less burdensome, and less expensive."[4] These objections were general and interposed as to all of the noticed depositions and subpoenas. Importantly, the Department argued that it was not seeking to limit Respondent's discovery of "relevant and non-privileged materials," but was asking the Commission to limit "the scope, timing, and methods used based on the issues that are

[3] DPS 1st Mot. Protection at 1.
[4] *Id*.

actually live at the time the requests are made."[5] In a subsequent motion to expedite a ruling on its motion to quash and for a protective order, the Department reiterated that it was not seeking to deny Respondent "the ability to conduct appropriate discovery related to issues relevant to the proceeding when and if those issues are relevant."[6]

The Department's first attempt to obtain protection under Rule 26(c) and to quash Respondent's deposition notices failed.[7] After the Hearing Officer denied the Department relief, the Department designated a staff member to testify on some of the topics listed in Respondent's Rule 30(b)(6) deposition notice, and swore under oath that for the remaining penalty-specific topics, the Department did not have a designee to provide testimony *at that time*.[8] The Department's Rule 30(b)(6) affidavit did not state that the Department would *never* designate a representative to address the listed penalty topics, nor did the Department object to the Rule 30(b)(6) notice on grounds that the topics as described in the notice lacked adequate specificity or that they sought information that was protected by a cognizable privilege.[9]

In fact, the Department's 2016 communications with Respondent's counsel about the Rule 30(b)(6) depositions never hinted at a substantive objection to the subjects

---

[5] *The Vermont Department of Public Service, the Vermont Agency of Natural Resources, and the Town of Irasburg's Memorandum in Support of Motion to Quash Notices of Deposition and for Protective Order*, Case No. 8585 at 9-10 (July 15, 2016) (hereinafter "DPS 1st Memo Protection").
[6] *Request of the Vermont Department of Public Service for Expedited Review of Motion to Quash Notices of Deposition and for Protective Order*, Case No. 8585 at 3 (July 21, 2016).
[7] *Order re: Motion to Quash Depositions*, Case No. 8585 (Aug. 4, 2016).
[8] *Affidavit of Aaron Kisciki Pursuant to V.R.C.P. 30(b)(6)*, Case No. 8585 (Aug. 9, 2016).
[9] Those are the objections that the Department raises now, four years later. DPS 2d Mot. Protection at 5-6

listed in the deposition notices. On July 11, 2016, the Department wrote Respondent's counsel that "unnamed Department representatives will not be available for deposition *until August 5, 2016*, pursuant to the schedule established by the Hearing Officer in the proceeding."[10] On July 12, and again on July 26, 2016, the Department confirmed that it would make representatives available on or after August 5, 2016 and was "still in the process of "identifying appropriate Department rep(s)" for the Rule 30(b)(6) depositions. [11] The Department emphasized in the July 26 communication that it would "make the designation(s) in advance of the depos as required by the rule," without indicating that it had objections to the topics listed in the Rule 30(b)(6) notice. On August 9, 2016, the Department emailed an affidavit from counsel responding to the Rule 30(b)(6) notice, which as described previously, did not raise an objection to the notice or to the topics listed in it. The affidavit deferred a designation on the penalty topics for a later time.[12]

On December 20, 2019, the Department filed with the Commission a recommendation on a penalty in which the Department's counsel laid out his legal theories as well as his mental impressions of evidence that Respondent prefiled in the proceeding.[13] Under the procedural schedule the Department agreed to, the

[10] *Letter from Geoffrey Commons, Director for Public Advocacy to Leslie A. Cadwell, counsel for Respondent*, July 11, 2016 (attached as Attachment 1) (emphasis added).
[11] *Email from Aaron Kisicki, Esq., DPS Special Counsel to Leslie A. Cadwell, counsel for Respondent*, July 26, 2016 (attached as Attachment 2)
[12] *Affidavit of Aaron Kisciki Pursuant to V.R.C.P. 30(b)(6)*, Case No. 8585 at ¶ 4 (Aug. 9, 2016).
[13] *Department of Public Service's Recommendation re: Civil Penalty*, Case No. 8585 (Dec. 20, 2019).

Department had the opportunity to prefile testimony from a witness to present its case on the penalty factors under 30 V.S.A. § 30(a)(2) and (c), but chose instead to file a memorandum from counsel.

B. Standard for Rule 26(c) Protective Orders

The Department now seeks to protect disclosure of relevant information on a penalty by seeking a protective order under Rule 26(c) of the Vermont Rules of Civil Procedure. The rule allows the Commission to prevent or limit discovery "for good cause shown" for certain specified reasons: to protect a party or a person from (1) annoyance, (2) embarrassment, (3) oppression, (4) undue burden, or (5) undue expense.[14] The party seeking a protective order bears a heavy burden to establish the necessary "good cause" to warrant relief under the rule.[15] That burden includes a demonstration of a clear and specific injury to the moving party if discovery is permitted.[16]

A motion for protection under Rule 26(c) must also meet the procedural prerequisites under V.R.C.P. 26(h) before the Commission may consider the motion on it merits. Rule 26(h) requires counsel for the movant to:

> file with the court, as part of his or her motion papers, an affidavit or a certificate . . . subject to the obligations of Rule 11 certifying that he or she has conferred or has attempted to

[14] V.R.C.P. 26(c).
[15] *One Source Envtl., LLC v. M+W Zander, Inc.*, 2014 U.S. Dist. LEXIS 143814, *3 (D. Vt. 2014); *McDonnell v. First Unum Life Ins. Co.*, 2012 U.S. Dist. LEXIS 434, *2-3, 2012 WL 13933 (S.D.N.Y. 2012); *Brown v. Astoria Fed. Sav. & Loan Ass'n*, 444 F. App'x 504, 505 (2d Cir. 2011).
[16] *McDonnell v. First Unum Life Ins. Co.*, 2012 U.S. Dist. LEXIS 434, *3-4.

> confer with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court, and has been unable to reach such an agreement. . . . The affidavit shall set forth the date or dates of the consultation with opposing counsel, and the names of the participants.[17]

In this case, the Department moved for a protective order in response to Respondent's motion to compel a Rule 30(b)(6) designation on the penalty-related topics listed in the June 29, 2016 deposition notice. The motion lacks counsel's certification or affidavit that an attempt was made to resolve the parties' dispute, and it claims that the Department will suffer undue burden and expense by having to produce a designated representative to answer questions under oath about penalty issues. For the first time in this proceeding, the Department claims that the proposed deposition will violate the work product doctrine and will be overly broad, unreasonably cumulative, and disproportionate to the needs of the case.[18] The motion should be denied and the Department directed to designate a representative for deposition.

III. Argument

C. The Department's Motion for Protective Order is Procedurally Deficient

The Department's Motion for Protective Order contains scant information on counsel's efforts to negotiate a resolution with Respondent's counsel over the Rule 30(b)(6) deposition as required by V.R.C.P. 26(h). Significantly, it omits the 2016

[17] V.R.C.P. 26(h).
[18] DPS 2d Mot. Protection at 7.

interactions between counsel that Respondent relied upon in good faith. The motion lacks a supporting affidavit or certification from counsel that good faith efforts were made per Rule 26(h). As shown in the 2016 emails between counsel for Respondent and the Department (attached), the Department never raised objections to the Rule 30(b)(6) deposition topics as set out in the deposition notice or claimed that the deposition on penalty topics would result in undue burden and undue expense to the Department. At that time, the Department opposed the deposition's timing. Rule 26(h) prohibits parties from filing discovery motions without first working in good faith with opposing counsel and detailing those efforts in a written and sworn submission.[19] This fundamental procedural defect warrants denial of the motion.

D. The Department Waived All Objections To Respondent's Rule 30(b)(6) Depositions

i. The Department failed to timely object to the Rule 30(b)(6) depositions after losing its first motion for protective order in 2016.

The Department waived its present objections to the Rule 30(b)(6) deposition on penalty topics by failing to raise those objections in 2016 notwithstanding ample opportunity to do so. First, the Department failed to raise work product, overbreadth, lack of specificity, or undue burden when it sought to quash the Rule 30(b)(6) deposition notices in 2016.[20] Second, the Department failed to raise the objections with counsel prior to filing both the 2016 motion and the currently pending motion for

[19] V.R.C.P. 26(h).
[20] DPS 1st Mot. Protection at 1.

protection, a requirement of V.R.C.P. 26(h). Third, the Department failed to object to the Rule 30(b)(6) notice and topics included therein in its Rule 30(b)(6) affidavit after losing the 2016 *Motion to Quash and for Protection Order*. The sum total of the Department's response to the deposition notice on penalty-specific topics was the following:

Docket No. 8585
Aaron Kisicki Affidavit per V.R.C.P. 30(b)(6)
August 9, 2016
Page 2 of 2

4. The Department has no designee that is able to testify at this time on the following matters and/or topics listed in the Notice of Deposition:

   a. What factors the Department 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.

   b. What aggravating circumstances the Department 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.

   c. What mitigating circumstances the Department 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.

   d. The contents of documents and photographs related to the matters and/or topics identified above and produced in response to the Notice of Deposition's companion subpoena *duces tecum*.

Aaron Kisicki

The Department's omission of an objection on any grounds to the penalty topics is particularly significant because it came five days after the Hearing Officer reminded the Department that it remained "free to raise objections over information that is privileged," and that all "discovery must, of course, be limited to material that is

relevant to the issues in the proceeding."[21] The Department waived its objections to the Rule 30(b)(6) deposition on penalty-related topics by not timely raising them in response to Respondent's notice of deposition. Good cause does not exist to protect the Department from designating a representative and making that individual available for deposition before hearing.

ii. <u>The Department waived work product privilege on the penalty topics in the Rule 30(b)(6) deposition notice by voluntarily filing a memorandum recommending a penalty before trial that contained counsel's legal theories and mental impressions of the prefiled evidence.</u>

The Department also waived any claim that a deposition on the penalty topics will violate counsel's work product privilege if it touches on the basis for the Department's penalty recommendation.[22] The Department voluntarily disclosed to Respondent counsel's mental impressions and legal theories by setting out those impressions and theories in the written penalty memorandum filed with the Commission on December 20, 2019. The Department's disclosure was not compelled. It was voluntary and made for the purpose of clarifying the Department's position on an appropriate civil penalty in this proceeding.[23] The Department intends for the Commission to consider the facts, inferences, and legal analysis set forth in the December 20, 2019 memorandum and

[21] *Order re: Motion to Quash Depositions* at 3. *See also* V.R.C.P. 30(d) (establishing orderly process for objections during deposition).
[22] DPS 2d Mot. Protection at 5.
[23] *Vermont Department of Public Service Response to Respondent David Blittersdorf's Objections and Motion to Strike*, Case No. 8585 at 2 (Jan. 21, 2020).

opposed its exclusion from the record in this proceeding.[24] As explained below, the Department's voluntary and sweeping disclosure of counsel's legal theories and mental impressions to Respondent waived any work product privilege that may have attached to the recommendation and to any communications and information related thereto.

The work product privilege is not absolute and may be waived in certain circumstances.[25] One such circumstance is the voluntary disclosure of work product to an adversary in litigation.[26] Although an attorney's opinion work product is entitled to heightened protection under the work product doctrine, it too can be waived through voluntary disclosure.[27] This principle is recognized in Rule 510 of the Vermont Rules of Evidence, which provides that voluntary disclosure of privileged matter waives the privilege.[28] And when a privilege is waived through a filing made in a Vermont proceeding, the waiver will extend to all related undisclosed information or communications, provided that the waiver was intentional, the undisclosed information concerns the same subject matter, and fairness requires that the disclosed and

[24] *Id.*
[25] *United States v. Nobles*, 422 U.S. 225, 239 (1975); *Trudeau v. N.Y. State Consumer Prot. Bd*, 237 F.R.D. 325, 339 (N.D.N.Y 2006); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 184 F.R.D. 49, 54 (S.D.N.Y. 1999).
[26] *Trudeau*, 237 F.R.D. at 339; *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993).
[27] *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 278 (S.D.N.Y. 1995); *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87 (E.D.N.Y. 1981); *see Trudeau v. N.Y. State Consumer Prot. Bd*, 237 F.R.D. at 337 (describing difference between opinion and non-opinion work product).
[28] V.R.E. 510(a).

undisclosed information be considered together.[29] This is called a subject matter waiver.[30]

The most clear cut example of the subject matter waiver provided by caselaw and V.R.E. 510 is when a party makes a partial disclosure of privileged material to an adjudicating authority for the purpose of influencing the authority's decision.[31] "'Subject matter waiver is reserved for the rare case where a party either places privileged information affirmatively at issue, or attempts to use privileged information as both a sword and a shield in litigation.'"[32] This is precisely what the Department is trying to do here.

The Department made a strategic decision not to support its position with a witness but with work product in the form of a written pre-trial memorandum disclosing counsel's view of the prefiled evidence and his legal theories on an appropriate penalty under 30 V.S.A § 30(a)(2) and (c).[33] Having voluntarily revealed work product to Respondent through the pre-trial legal memorandum from counsel, the Department cannot now use the work product privilege to shield relevant and legitimate inquiry

---

[29] V.R.E. 510(b)(1); *see also In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. at 282 (explaining that courts have imposed subject matter waiver in the interests of fairness to prevent prejudice at trial).
[30] *Mitre Sports Int'l, Ltd. v. HBO, Inc.*, 304 F.R.D. 369, 371 (S.D.N.Y. 2015); *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. at 282.
[31] *See Mitre Sports Int'l, Ltd.*, 304 F.R.D. at 371 (citing analogous Federal Rule of Evidence 501).
[32] *Id*. (quoting *Freedman v. Weatherford Int'l Ltd.*, 2014 U.S. Dist. LEXIS 102248, 2014 WL 3767034 at *3 (S.D.N.Y. July 25, 2014)); *see also Granite Partners, L.P.*, 184 F.R.D. at 54 ("It is well settled that waiver may be imposed when 'the privilege-holder has attempted to use the privilege as both 'sword' and 'shield.'") (quoting *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987)).
[33] DPS 2d Mot. Protection at 5 ("Respondent's requests identified for deposition are protected under the work-product doctrine.").

into the Department's recommendation that is within the scope of the Rule 30(b)(6) topics listed in Respondent's deposition notice. In other words, to the extent that an inquiry into the topics listed in the Rule 30(b)(6) deposition notice may touch on work product, the Department waived its right to keep that work product from discovery by filing with the Commission work product containing counsel's legal theories and mental impressions in order to influence the Commission's decision on a penalty in this proceeding.

E. The Department's claim of undue burden and expense is not credible considering its statutory role in Public Utility Commission proceedings

The Department claims that Respondent's Rule 30(b)(6) deposition on penalty topics is unduly burdensome. The Commission should reject that claim because the Department was created by the legislature to be a mandatory party in Commission proceedings and has been given resources to engage expert witnesses, advisors, and to procure other litigation services as necessary to fulfill its statutory duties.[34] Making a representative available for deposition on topics within the scope of a Commission proceeding in which the Department is a party cannot, absent extraordinary circumstances, impose an undue burden on the Department. The Department's bare assertion that Respondent's Rule 30(b)(6) deposition on penalty topics will cause an undue burden and associated expense is not enough to overcome Respondent's right to

[34] 30 V.S.A. §§ 2, 20.

the deposition, which was vested in 2016 when the Hearing Officer refused to quash the notice and declined to issue a protective order.

The Department raises a companion claim that other less burdensome methods of discovery exist and therefore an order of protection should issue to prevent a Rule 30(b)(6) deposition on the penalty issues.[35] The Department already raised that claim in 2016 and it was denied.[36] There is no more merit in 2020 to that claim than there was four years ago. Moreover, the Department's newly raised contention that the work product privilege protects it from discovery on the penalty-related topics makes the claim even more meritless.

Moreover, as Respondent's counsel explained in her affidavit supporting Respondent's *Motion to Compel*, a deposition on the limited topics listed in the Rule 30 (b)(6) notice provides the opportunity to ask follow-up and clarifying questions that written discovery does not offer.[37] The alternative means of discovery are also not equivalent to a Rule 30(b)(6) deposition which may be used at trial for any purpose.[38] The Vermont Rules of Civil Procedure give Respondent the right to take a Rule 30(b(6) deposition and to introduce at trial relevant evidence that may be adduced through that deposition. It is the Department's actions that have imposed an undue burden in this case, a burden being borne primarily by Respondent for having to repeatedly fight for

[35] DPS 2d Mot. Protection at 6.
[36] *Order re: Motion to Quash Depositions* at 3.
[37] *Affidavit of Counsel* at ¶ 9, Case No. 8585 (Jan. 28, 2020) (attached as Attachment 3).
[38] V.R.C.P. 32(a)(2).

his right to take a Rule 30(b)(6) deposition on issues that no party contests are within the scope of this proceeding.

IV. Conclusion

Since 2016, the Department has spent considerable effort to avoid answering questions about an appropriate penalty in this proceeding. Its resistance to discovery and the litigation tactics it has employed in support of that resistance are eerily similar to those described in *State v. Howe Cleaners, Inc.*, 2010 VT 70, a case in which the Vermont Agency of Natural Resources was sanctioned by the Superior Court. In that case, the Agency objected to a Rule 30(b)(6) deposition and moved for a protective order and to quash the deposition notice. The court denied the motion.[39] Later, when the opposing party tried to reschedule the deposition, the State filed a second motion for a protective order, just like the Department did here.[40] The court found that the Agency's behavior in the case was egregious because "it ignored a specific court order" (in this case the *Order re: Motion to Quash*) and denied discovery that the court had already ruled that party was entitled to for "a considerable period of time, thereby causing significant delay in the progress of the case and unnecessary expense to the other litigants."[41]

[39] *Id*. at ¶ 5.
[40] *Id*. at ¶ 6.
[41] I*d*. at ¶ 24.

Respondent has also waited "a considerable period of time" —almost four years— to discover information from the Department about penalty matters. The time has come for the Department to stop evading its obligation as a party and make a witness available to testify under oath to the penalty topics listed in the June 2016 Rule 30(b)(6) notice that the Hearing Officer refused to quash in 2016. Respondent respectfully requests that the Commission DENY the Department's Motion for Protective Order and COMPEL the Department to designate a witness for deposition in accordance V.R.C.P. 30(b)(6).

By: _____

Leslie A. Cadwell
Legal Counselors & Advocates, PLC
PO Box 827
Castleton, VT 05735
(802) 342-3144
lac@lac-lca.com
Counsel for Respondent