STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

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

Order entered: 02/28/2020

ORDER DENYING MOTION TO COMPEL

I. INTRODUCTION

In today's order I deny a motion filed on January 28, 2020, by the respondent, David Blittersdorf, seeking to compel the Department of Public Service ("Department") to engage in discovery by producing a witness for deposition pursuant to Rule 30(b)(6) of the Vermont Rules of Civil Procedure and also seeking costs of the motion. Today's ruling renders moot the Department's motion for a protective order filed on February 7, 2020.

II. PROCEDURAL HISTORY

On June 29, 2016, Mr. Blittersdorf served a notice of deposition on the Department pursuant to V.R.C.P. 30(b)(6), asking the Department to identify a witness for deposition on several topics, three of which related to the amount of a potential penalty in this matter.[1]

On July 15, 2016, the Department filed a motion to quash Mr. Blittersdorf's notice of deposition and requested the issuance of a protective order.

On August 4, 2016, the hearing officer issued an order denying the Department's motion to quash.[2]

On August 9, 2016, the Department provided an affidavit of counsel designating a representative to testify to certain topics in the notice of deposition, but with respect to the topics related to a penalty amount, the Department stated that it did not have a representative able to testify to those topics "at this time."

[1] At the time Mr. Blittersdorf served his notice of deposition on the Department, he also served notices of deposition on the Agency of Natural Resources and the Town of Irasburg. The Agency and the Town joined the Department in filing a motion to quash the depositions. The deposition notices to the Agency and Town are not part of the pending dispute between the Department and Mr. Blittersdorf. Therefore, they are not discussed in this order.

[2] George Young, Esq. served as hearing officer in this proceeding through May 30, 2018.

On September 12, 2019, I issued an order granting in part a Department motion for summary judgment on the question of liability and denying Mr. Blittersdorf's cross-motion for summary judgment.

On November 25, 2019, I issued a scheduling order in this proceeding. That order established December 20, 2019, as the deadline for the non-respondents to prefile written testimony recommending the amount of civil penalty to be applied in this matter.

On December 20, 2019, the Department filed a brief titled "Department of Public Service's Recommendation Re: Civil Penalty."

On January 28, 2019, Mr. Blittersdorf filed his motion to compel. The motion to compel applies to the three topics related to a penalty amount that were originally contained in Mr. Blittersdorf's June 29, 2016, notice of deposition.

On February 7, 2020, the Department filed an opposition to Mr. Blittersdorf's motion as well as a motion for a protective order pursuant to V.R.C.P. 26(c).

On February 21, 2020, Mr. Blittersdorf filed an opposition to the Department's motion for a protective order.

III. POSITIONS OF THE PARTIES

Mr. Blittersdorf contends that the Department must designate a witness for deposition on the amount of a potential penalty in this case. Mr. Blittersdorf argues that his right to take the deposition of a Department witness on the penalty question was confirmed by the hearing officer's August 4, 2016, order denying the Department's motion to quash Mr. Blittersdorf's June 29, 2016 deposition notice.[3] Mr. Blittersdorf asserts that this is further confirmed by the Department's affidavit dated August 9, 2016, in which the Department stated that it was not prepared to designate a witness to address the penalty issue "at this time." According to Mr. Blittersdorf, this statement indicates that the Department intended to produce a witness to address the amount of a penalty, should one be imposed.[4]

Mr. Blittersdorf also argues that the Department has a history of producing witnesses to testify about recommended penalty amounts and that the Department's December 20, 2019, filing is "replete with opinion and factual inferences" that he is entitled to examine through

[3] Blittersdorf motion at 1-4, 6-7.
[4] Blittersdorf motion at 2-3, 6-7; Blittersdorf response at 3-4.

discovery.[5] Lastly, Mr. Blittersdorf claims that the Department waived all objections to the deposition by failing to assert them in 2016 and by making its December 20, 2019, filing on a recommended penalty amount, and that the Department's claim of undue burden is without merit.[6]

The Department opposes Mr. Blittersdorf's efforts to depose a Department official on the recommended penalty amount. According to the Department, the deposition sought by Mr. Blittersdorf is in violation of the work-product doctrine, beyond the scope of the deposition notice, unreasonably cumulative and duplicative, and disproportional to the needs of the case.[7]

IV. DISCUSSION

The parties' dispute centers around the question of whether the Department must designate a representative for deposition on its recommended penalty amount of $2,500 for Mr. Blittersdorf's failure to obtain a certificate of public good pursuant to 30 V.S.A. § 246 before installing a meteorological tower on his property in 2010.[8] While much of the dispute appears to be focused on whether the Department must designate a representative for deposition pursuant to V.R.C.P. 30(b)(6), I find that the dispute is resolved by the requirements of V.R.C.P. 26.

Rule 26 states in relevant part:

> 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.[9]

Mr. Blittersdorf largely relies on the August 4, 2016, order denying the Department's motion to quash the original notice of deposition for the proposition that he is entitled to depose a Department witness regarding the Department's recommended penalty amount of $2,500.

I do not find Mr. Blittersdorf's reliance on the 2016 order persuasive in the context of the discovery he seeks. That order simply confirmed that Mr. Blittersdorf had the right to use depositions as a means of conducting discovery. It did not confirm his right to seek any specific

[5] Blittersdorf motion at 5.
[6] Blittersdorf response at 7-14.
[7] DPS opposition, generally.
[8] *See* Case No. 8585, order of 9/12/19.
[9] V.R.C.P. 26(b)(1).

information during discovery. The hearing officer clearly stated that "I make no ruling as to whether particular inquiries in the depositions are appropriate."[10]

The current motion places before me the question of whether the involuntary deposition of a Department employee on the identified topics is appropriate given the limitations imposed by V.R.C.P. 26(b)(1). I conclude that it is not. I find that the information sought by Mr. Blittersdorf as described in his motion to compel is not proportional to the needs of the case and in large part is protected by the work-product doctrine.

1. Proportional to the Needs of the Case

Rule 26(b)(1) requires that discovery not only be relevant, but that it also be proportional to the needs of the case. In deciding whether particular discovery inquiries are proportional to the needs of a case, a court must consider 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.

Mr. Blittersdorf's motion seeks to compel the Department to designate a witness for deposition on the Department's recommended $2,500 penalty. I find that the time, effort, and resources to be expended in the deposition of a Department employee, particularly in the absence of testimony from a Department witness, is disproportional to the recommended $2,500 penalty.[11] While I do not doubt the importance of the recommended penalty amount to Mr. Blittersdorf, I am required to view it in the context of the overall case and the impact to all parties involved.

I also do not believe, given its amount, that the recommended $2,500 penalty is the primary issue in this case. The primary issue is the question of Mr. Blittersdorf's liability for his failure to obtain a certificate of public good before installing the meteorological tower on his property. While I issued a summary judgment decision finding that Mr. Blittersdorf violated 30 V.S.A. § 246 for that failure, that decision is not yet final and remains subject to review by the full Commission. Therefore, the significant question of whether Mr. Blittersdorf is liable to pay

[10] Case No. 8585, order of 8/4/16 at 3.

[11] The time, effort, and resources required for the deposition include the time for travel to and attendance at the deposition, attorney costs, and the cost of a court reporter and transcript.

any penalty amount at all, much less the $2,500 recommended by the Department, remains a live issue in this proceeding.

With respect to the parties' relative access to relevant information, it is Mr. Blittersdorf who controls much of the relevant information in this case because he is the one who made the decision to install the meteorological tower without a CPG. With respect to the items identified in his deposition notice, Mr. Blittersdorf states he seeks discovery on the following topics:

> What factors the [Department] will recommend that the Public [Utility Commission] take into account when assessing whether to impose a penalty if the [Commission] determines in this Docket No. 8585 that the Respondent violated the law.
>
> What aggravating circumstances the [Department] will recommend that the Public [Utility Commission] consider in assessing a penalty if the [Commission] determines in this Docket No. 8585 that the Respondent violated the law.
>
> What mitigating circumstances the [Department] will recommend that the Public [Utility Commission] consider in assessing a penalty if the [Commission] determines in this Docket No. 8585 that the Respondent violated the law.

Mr. Blittersdorf already has access to the information described in the notice of deposition because the Department set forth the factors that it recommends the Commission consider when assessing a penalty in this matter in its filing of December 20, 2019 – including the existence or non-existence of any mitigating or aggravating factors.

Mr. Blittersdorf argues that the Department's December 20 filing contains facts, opinions, and inferences that he should be allowed to examine through discovery. Mr. Blittersdorf states:

> 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 the violation. Similarly, Respondent may discover admissible evidence from deposition testimony on the basis (or lack of it) 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. Finally, evidence bearing on the credibility of the Department's recommendation may be adduced through the deposition on the topics identified in the June 29, 2016 deposition notice.

The topics Mr. Blittersdorf describes in his motion can fairly be described as argument by the Department based on facts already in the record. Mr. Blittersdorf is free to argue for a

contrary result. For example, Mr. Blittersdorf can argue, based on facts in the record of this proceeding, that December 17, 2019, is legally the incorrect date for use as an endpoint for a violation.

Additionally, it appears from his filing that Mr. Blittersdorf seeks to uncover the thoughts and impressions of the Department's legal representative in this case.[12] A Rule 30(b)(6) deposition is not a proper vehicle to pursue such a purpose.

> [W]hile 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.[13]

I also find no merit in Mr. Blittersdorf's arguments based on the Department's history of producing fact witnesses in penalty investigations and the Department's response to the notice of deposition that stated that it did not at that time have a witness to address the question of a penalty amount. There is no general requirement for the Department to produce a fact witness to testify as to a recommended penalty amount, and the Department was therefore free to not put on such a witness in this case. In so doing the Department has waived its opportunity to supplement the factual record and has limited itself to arguments based on the existing record. The fact that the Department did not state back in 2016 that it did not intend to produce a witness also has no bearing on the outcome of the pending motion. The Department may well have intended to present testimony on the penalty amount when it responded to the deposition notice. However, the Department has since apparently decided that it did not need to present a witness and opted instead to make its case based on the existing record.

Mr. Blittersdorf's assertion that the posture of the case is no different now than it was at the time the hearing officer denied the Department's motion to quash is not accurate. At the time the motion to quash was denied, there was a schedule in place that contemplated the filing of testimony by the Department, and the hearing officer allowed for discovery in advance of that testimony.[14] Such is not the case currently. The Department's final opportunity to prefile

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[12] Mr. Blittersdorf makes his intentions clear by arguing that the Department waived privilege when it filed its December 20, 2019, memorandum recommending the $2,500 penalty. I address this issue below.

[13] *Sec. & Exch. Comm'n v. McGinnis*, Case No. 5:14-CV-6, 2015 WL 13505396, at *6 (D. Vt. Jan. 13, 2015).

[14] Case No. 8585, order of 8/4/16 at 2-3.

testimony has passed, and it elected to forego that opportunity. There will be no supplementation of the factual record by the Department. Therefore, the two situations are markedly different.

Today's order is also consistent with a recent hearing officer order in what may be the only other Commission case addressing the propriety of a Rule 30(b)(6) deposition. In Case No. 17-5024-PET, the hearing officer granted a motion by the Department to quash a Rule 30(b)(6) deposition.[15] In that case, the Department had relied on a witness to provide testimony on the topic of aesthetics. The petitioner sought to have the Department designate a Department representative other than that witness for deposition on the Department's position. The hearing officer concluded that the petitioner could "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." However, the petitioner could *not* "depose witnesses who have not presented—***and never will present***—testimony or other evidence in this case."[16] I reach the same conclusion here.

With respect to the parties' resources, I find that the Department has the resources to designate an individual for deposition. However, I do not find that it is appropriate to compel the Department to do so under the circumstances described above. Therefore, this factor does not weigh heavily in this analysis.

I also find that the information sought by Mr. Blittersdorf is not of significant importance to resolving the issue at hand. The issue at hand – what level of penalty I should recommend to the Commission – can be resolved based on the facts that have already been presented in this proceeding. Those facts consist of the prefiled testimony of Mr. Blittersdorf and discovery responses from both parties. The information sought by Mr. Blittersdorf would not materially assist in reaching that recommendation, particularly when it appears that Mr. Blittersdorf is seeking to obtain information that is subject to the work-product doctrine.

Lastly, given the reasons discussed above, any limited benefit that might be realized from the deposition is outweighed by the burden that would be imposed by compelling the Department to designate and produce a witness for the deposition.

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[15] *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, order of 8/27/18.
[16] Case No. 17-5024-PET, order of 8/27/18 at 7 (emphasis added).

2. Privileged Materials

Rule 26(b)(1) allows for the discovery of non-privileged materials. Rule 26(b)(4) is the source of the work-product doctrine and provides that materials prepared in anticipation of litigation or for trial are only discoverable after a showing of substantial need and undue hardship in obtaining equivalent materials by other means. Even when a court orders the discovery of tangible work product materials, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[17]

According to the Department, Mr. Blittersdorf is seeking information that is subject to the work-product doctrine, and likely within the realm of Department counsel's "mental impressions, conclusions, opinions, or legal theories." Mr. Blittersdorf does not challenge this assertion by the Department, and any claim to the contrary is belied by his contention that the Department waived any privilege protections it might have had by failing to raise them in response to the notice of deposition and by filing its penalty recommendation on December 20, 2019.

I disagree with Mr. Blittersdorf's claim that the Department has waived the protections afforded to it by Rule 26(b)(4). The August 4, 2016, order denying the Department's motion to quash expressly reserved to the Department its right to raise objections to specific discovery requests. The hearing officer stated that he made "no ruling as to whether particular inquiries in the depositions are appropriate. The Non-respondents remain free to raise objections over information that is privileged."[18] Based on that order, the Department remained free to raise privilege objections to specific questions as late as the actual taking of a deposition.

I also do not agree with Mr. Blittersdorf that the Department waived privilege when it filed its penalty recommendation on December 20, 2019. Accepting Mr. Blittersdorf's argument would compel the conclusion that privilege is waived any time an attorney makes a filing in a matter that states a legal position. This would have the unusual result of privilege being waived, for example, when an attorney files a complaint in a civil action alleging the elements of a cause

[17] V.R.C.P. 26(b)(4).
[18] Case No. 8585, order of 8/4/16 at 3.

of action. Such a filing clearly does not waive privilege and neither did the Department's filing of December 20, 2019.

V. CONCLUSION

For the reasons discussed above, Mr. Blittersdorf's motion to compel and for costs is denied. My denial of Mr. Blittersdorf's motion renders moot the Department's motion for a protective order. If, however, Mr. Blittersdorf seeks further discovery on these matters, despite my conclusion that he is not entitled to such discovery, I will address a renewed motion for a protective order at that time.

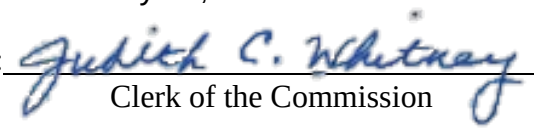
SO ORDERED.

Dated at Montpelier, Vermont this 28th day of February, 2020.

John J. Cotter, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: February 28, 2020

Attest: 
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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. 8585 - SERVICE LIST

Parties:

Leslie A. Cadwell, Esq. (for David Blittersdorf)
Legal Counselors & Advocates, PLC
P.O. Box 827
Castleton, VT 05735
lac@lac-lca.com

Eric B. Guzman (for Vermont Department of Public Service)
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov

Dr. Robert R. Holland (for Town of Irasburg)
Town of Irasburg
PO Box 88
4328 Route 14
Irasburg, VT 05845
kcf.rrh@gmail.com

James Porter, Esq. (for Vermont Department of Public Service)
Vermont Department of Public Service
112 State St
Montpelier, VT 05620
james.porter@vermont.gov

Kane Smart, Esq. (for Vermont Agency of Natural Resources)
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
kane.smart@vermont.gov