

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	
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**DEPARTMENT OF PUBLIC SERVICE’S
MOTION TO QUASH NOTICE OF DEPOSITION**

The Vermont Department of Public Service (“Department”) hereby moves the Vermont Public Utility Commission (“Commission”), pursuant to V.R.C.P. 26(b), to quash a Rule 30(b)(6) Notice of Deposition issued by Chelsea Solar LLC (“Chelsea”) on June 29, 2018 (the “Notice”). The Commission should quash the Notice because the information Chelsea seeks is (1) beyond the scope of the Department’s prefiled testimony; (2) overly broad and/or irrelevant; (3) a violation of the work product doctrine and/or subject to attorney-client privilege; or (4) appropriate for the Department’s expert witness to address. In support of this Motion, the Department relies on the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

I. INTRODUCTION

This Motion comes after numerous good-faith attempts by the Department to resolve differences between it and Chelsea relating to discovery in this case. Instead of meeting in the middle, Chelsea is choosing to utilize a scorched earth approach against not only the Department, but all parties to this proceeding, many of whom are *pro se*.

The Vermont Rules of Civil Procedure grant broad procedural rights to engage in discovery through a variety of tools such as depositions, requests for production of documents, interrogatories, and requests for admission. 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. Here, 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 designed to exploit and exhaust all parties to this proceeding, and diminish their capacity to participate in the proceeding. For the following reasons, the Notice should be quashed, and reasonable restrictions should be imposed to prevent further mistreatment of the Commission's permitting process.

II. LEGAL ARGUMENT

Depositions generally are a form of permissible discovery pursuant to Vermont Rule of Civil Procedure 26, as applied to this proceeding pursuant to Commission Rule 2.214(A) (“[p]arties may obtain discovery by...depositions upon oral examination or written questions...”). Any party “has a due process right to be permitted to engage in discovery in order to prepare for [an] evidentiary hearing.” *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 07/31/2018 at 3. However, discovery must be relevant to a party's claim or defense and proportional to the needs of the case, and any burden or expense of the proposed discovery will be weighed against its likely benefit. V.R.C.P. 26(b)(1).

Any 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 therefore irrelevant to Chelsea's claim and disproportionate to the needs of the case. In its most recent order from July 31, 2018, the Commission explicitly stated that “[q]uestioning

that...goes beyond the scope of the Intervenor's prefiled testimony such that it is not reasonably likely to result in relevant, admissible evidence *should not occur...*" Case No. 17-5024-PET, Order of 7/31/2018 at 3 (emphasis added). The Commission should take the same approach here and ensure that any discovery and deposition of the Department is limited to the scope of its prefiled testimony. Adopting a different approach would be prejudicial to the Department.

Furthermore, 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 U.S. District Court for the State of Vermont has stated:

[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.

Sec. & Exch. Comm'n v. McGinnis, No. 5:14-CV-6, 2015 WL 13505396, at *2 (D. Vt. Jan. 13, 2015). 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).

Any topics subject to attorney-client privilege should also be quashed pursuant to V.R.E. 502(b). Further, where topics are within the scope of the Department's prefiled testimony but overly broad, they require clarification and specificity. Finally, where topics

pertain to aesthetics and orderly development for the Project, such lines of inquiry should be addressed by the Department's expert witness, David Raphael.¹

The following is a comprehensive list of the topics identified by Chelsea in the Notice (also attached hereto as Exhibit A). The Department has identified the topics that (1) should be quashed and why; (2) need clarification; and (3) should be addressed by the Department's expert witness.

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

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, overly broad and violation of work product doctrine.

2. Orderly development of the Bennington region.

Quash. Appropriate for expert witness David Raphael to address.

3. The Act 174 planning process.

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

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

Quash. Violation of work product doctrine and attorney-client privilege. Appropriate for expert witness David Raphael to address.

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.

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

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

¹ The Department has no objection to the deposition of its expert witness, David Raphael. Mr. Raphael is scheduled to be deposed on August 15, 2018.

Quash. Overly broad. Appropriate for expert witness David Raphael to address.

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

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

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").

Quash. Appropriate for expert witness David Raphael to address.

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.

Quash. Appropriate for expert witness David Raphael to address.

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

Quash. Beyond the scope of Department's prefiled 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").

Quash. Overly broad and appropriate for expert witness David Raphael to address.

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

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

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

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

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

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

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

Quash. Overly broad and appropriate for expert witness David Raphael to address.

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

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

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

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

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

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

19. Development of cell towers in the RCON.

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

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

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

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

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

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

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

23. Information provided to DPS regarding the Project.

Quash. Overly broad. Chelsea must identify with specificity what "information provided to DPS" entails.

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.

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

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

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

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.

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

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.

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

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

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.

29. DPS Comprehensive Energy Plan.

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.

30. DPS Total Energy Study.

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.

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

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

32. The legal status of the MOUs.

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

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

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

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

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.

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

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.

36. The effect of PFOA contamination on orderly development.

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

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

Quash. Overly broad and violation of work product doctrine.

III. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Commission quash the Notice or, in the alternative, grant in part this Motion to Quash where the questioning goes beyond the scope of the Department's prefiled testimony, is overly broad and irrelevant, is a violation of work product doctrine and/or attorney-client privilege, or is appropriate for the Department's expert witness to address.

Dated at Montpelier, Vermont, this 3rd day of August, 2018.

Vermont Department of Public Service

By: /s/Sarah L. J. Aceves
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PUBLIC UTILITY COMMISSION

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CERTIFICATION PURSUANT TO V.R.C.P. 26(h)

I hereby certify that, on July 12, 2018, July 17, 2018, and July 30, 2018, James Porter, Jake Clark, and the undersigned, counsel for the Vermont Department of Public Service, conducted consultations via telephone with Kimberly K. Hayden, Thomas Melone, and Michael Melone, counsel for Chelsea Solar LLC, in a good faith effort to resolve the issues raised in the foregoing Motion to Quash. The parties were unable to resolve the dispute.

Dated at Montpelier, Vermont, this 3rd day of August, 2018.

Vermont Department of Public Service

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EXHIBIT A

**STATE OF VERMONT
BEFORE THE
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)	Docket No. 17-5024-PET
)	
)	NOTICE OF DEPOSITION OF THE
)	VERMONT DEPARTMENT OF PUBLIC
)	SERVICE
)	
)	Date: August 27, 2018
)	Time: 9:00 am
)	Place: Paul Frank + Collins,
)	One Church Street,
)	Burlington, VT 05401

PLEASE TAKE NOTICE that Petitioner Chelsea Solar LLC (“Chelsea”) will take the deposition of the Vermont Department of Public Service (“DPS”), on August 27, 2018. The deposition will occur at Paul Frank + Collins, One Church Street, Burlington, VT 05401, beginning at 9:00 a.m. The deposition will be conducted by oral examination before a certified shorthand reporter duly authorized to administer oaths under the laws of the State of Vermont and will be recorded stenographically. Chelsea may also record the testimony using audio/video technology and through the instant visual display of testimony.

Pursuant to Rule 30(b)(6) of the Vermont Rules of Civil Procedure (“VRCP”), DPS must designate and produce at the deposition one or more officers, directors, or managing agents, or other persons who consent to testify and who possess sufficient knowledge to testify about the following:

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 (Docker 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.

The person(s) designated must testify about all information known or reasonably available to the Town concerning the foregoing topics.

PLEASE TAKE FURTHER NOTICE that pursuant to Rules 30 and 34 of the VRCP, DPS must produce at the deposition all documents and materials that its representative(s) reviewed or relied upon in preparation for the deposition.

Dated: June 29, 2018

/s/ Michael Melone

Michael Melone

Attorney for Chelsea Solar LLC