

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

**Petition of Chelsea Solar LLC for a certificate of)
public good, pursuant to 30 V.S.A. § 248,) Case No. 17-5024-PET
authorizing the installation and operation of a 2.0)
MW solar electric generation facility located off)
Willow Road in Bennington, Vermont)**

**PETITIONER’S MOTION FOR CLARIFICATION AND IN THE ALTERNATIVE
RECONSIDERATION OF THE ORDER GRANTING
THE TOWN’S MOTION FOR A PROTECTIVE ORDER**

Chelsea Solar LLC (the “Petitioner” or “Chelsea”) seeks clarification and, in the alternative, reconsideration of the order dated August 7, 2018, granting the Town’s motion for a protective order (the “Order”).

Chelsea interpreted the Order as requiring Chelsea to accept a Rule 30(b)(6) deposition of the Town in lieu of deposing six Town selectboard members. Chelsea interpreted the order as still allowing the individual depositions of Daniel Monks, who has submitted prefiled testimony, and Stuart Hurd, the Town manager.

The Town, however, asserts that the Order limits Chelsea solely to a Rule 30(b)(6) deposition at which Monks or Hurd *may* be designated to respond to the topics specified in the Rule 30(b)(6) notice. *See* Exhibit A in which the Town’s counsel states:

neither Mr. Monks nor Mr. Hurd will be offering testimony separately as fact witnesses, pursuant to the protective order.

For reference, the relief requested was as follows:

That “discovery initiatives be limited to those aimed at the Town as an institution, and to the subject matter of this proceeding. Such discovery may include deposition(s) pursuant to 30(b)(6) based on matters designated in advance with “reasonable particularity” so that the municipality can respond appropriately and designate the appropriate responsive person pursuant to that rule.”

The Hearing Officer granted that motion, noting that “The Town has offered the Town Manager and the Town Planner as appropriate representatives of the Town to be deposed pursuant to V.R.C.P. 30(b)(6).”¹

The Town’s motion for a protective order and the Order itself focused on the depositions of the six selectboard members, and whether a 30(b)(6) deposition would serve in their stead. Barely a mention was made of the deposition notices as individual fact witnesses of Monks and Hurd.

The Order itself, as Chelsea has noted to the Town, implies that it was not quashing the deposition of Hurd and Monks, as individual fact witnesses. *See, e.g.*, Order at 7. (“The Town does not object to Chelsea’s further deposition of Mr. Monks or the deposition of Stuart Hurd, the Town Manager.”); *Id.* at 8 (“There is also no need for the depositions because there is other evidence, including the depositions of Mr. Monks and Mr. Hurd.”) The Order also states that it is “[q]uashing the depositions of the Selectboard members,” not those for Monks and Hurd. *Id.* at 8.

The Order also stated that: “While Chelsea argues that Mr. Monks’ testimony is hearsay, there has been no showing that Mr. Monks was not a percipient witness to the events and policy decision-making reflected in his testimony.” Monks cannot, as a rule 30(b)(6) designee, testify as a “percipient witness.”

As noted by Town’s counsel in her email “The Town can only designate who its witness or witnesses will be after we receive your ‘designation with reasonable particularity the matters on which examination is requested’ pursuant to VRCP 30(b)(6).” The Town is under no obligation

¹ *See also*, Exhibit B: “The Town will comply with the Hearing Officer’s Order granting the Town’s request that ‘discovery initiatives be limited to those aimed at the Town as an institution, and to the subject matter of this proceeding’ and that we produce ‘the Town Manager and the Town Planner as appropriate representatives of the Town to be deposed pursuant to V.R.C.P. 30(b)(6).’”

to designate either Hurd or Monks. Even if the Town intends to designate one or both of them, Monks' prefiled testimony is not organizational testimony. Rule 30(b)(6) allows the deposition of an organization. It does not permit or impliedly allow organizational direct testimony.

Under certain circumstances, VCRP 32(a) permits the introduction of *deposition* testimony—including Rule 30(b)(6) testimony—by an adverse party for any purpose at trial, but it does not contemplate the introduction of live Rule 30(b)(6) testimony. *See Roundtree v. Chase Bank USA, N.A.*, 13-239 MJP, 2014 WL 2480259 (W.D. Wash. June 3, 2014) (“FRCP 30(b)(6) is inapplicable to the issue of witness testimony at trial.”). In other words, Rule 30(b)(6) allows corporate representatives to testify to matters within the corporation’s knowledge during deposition, and VRCR Rule 32(a)(2) and the corresponding federal rule permits an *adverse* party to use that deposition testimony during trial. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006). There is no rule authorizing live trial testimony by a Rule 30(b)(6) witness or resolving the conflict with Rule of Evidence 602, which limits the scope of a witness’s testimony to matters that are within his or her personal knowledge, and Rules of Evidence 801–805, which address hearsay.

The leading case discussing Rule 30(b)(6) trial testimony, is *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App’x 899, 907–08 (5th Cir. 2010), the Fifth Circuit held that “a corporate representative may not testify to matters outside his own personal knowledge to the extent that information [is] hearsay not falling within one of the authorized exceptions.” *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App’x 899, 908 (5th Cir. 2010) (internal quotations omitted). *Union Pump* has been interpreted to suggest that “while Rule 30(b)(6) permits [a corporate witness’] deposition testimony to be based on matters outside his personal knowledge, Rule 602 limits his trial testimony to matters that are within his personal knowledge.” *Indus. Eng’g*

& Dev., Inc. v. Static Control Components, Inc., 8:12-CV-691-T-24-MAP, 2014 WL 4983912, at *3 (M.D. Fla. Oct. 6, 2014) (At trial, “Rule 30(b)(6) does not eliminate Rule 602’s personal knowledge requirement.”). *See also L-3 Commc’n Corp. v. OSI Sys., Inc.*, No. 02 Civ. 9144(PAC), 2006 WL 988143, at *2 (S.D.N.Y. Apr.13, 2006) (“[A]t trial, [a non-adverse party] may only offer testimony from [its corporate representative] as a Federal Rule of Evidence 602 limits the scope of a witness's testimony to matters that are within his or her personal knowledge.”) Other courts have followed a similar approach. *See Brooks v. Caterpillar Global Mining Am., LLC*, 2017 U.S. Dist. LEXIS 125093, *15 (W.D. Ky 2017) (“contrary to Defendant's argument, Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement.”); *Stryker Corporation v. Ridgeway*, 2016 U.S. Dist. LEXIS 163131, 2016 WL 6585007, *2 (W.D. Mich. 2016) (same); *Reuther v. Gardner Realtors*, 2016 U.S. Dist. LEXIS 130347, 2016 WL 5337839, *3 (E.D. La. 2016); *TIG Ins. Co. v. Tyco Int'l Ltd.*, 919 F. Supp. 2d 439 (E.D. Pa. 2013) (“Although Rule 30(b)(6) allows a corporate designee to testify to matters within the corporation's knowledge during deposition, at trial the designee may not testify to matters outside his own knowledge to the extent that information is hearsay not falling within one of the authorized exceptions.”) (internal quotations and citations omitted.)

Monks has submitted prefiled testimony as an individual fact witness, even though all the facts are hearsay. Chelsea is entitled to depose Monks as an individual fact witness. For all the reasons set forth in Chelsea’s opposition to the Town’s motion for a protective order, it would be extraordinary and a manifest violation of Chelsea’s rights to due process to prohibit the deposition of a fact witness such as Monks who has offered testimony. The same applies to Hurd, the full-time Town manager, even though he has not offered testimony. Chelsea is entitled to depose him individually as a fact witness as well. Hurd and Monks have generally been present together at all

Town discussions of the Chelsea project. Hurd is also a fact witness on the same issues that Monks' has filed testimony on, and Chelsea is entitled to depose Hurd to obtain that and other evidence related to the project.

Conclusion.

For the reasons stated above, Chelsea moves for clarification that Chelsea is entitled to take three Town-related depositions: an individual deposition of Mr. Monk, an individual deposition of Mr. Hurd, and a rule 30(b)(6) deposition in which the Town may designate Hurd, Monks or some other person to testify on the noticed topics.

Dated: August 18, 2018

Respectfully submitted,

/s/ Thomas Melone

Thomas Melone

Bar No. 5456

Allco Renewable Energy Limited

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New York, NY 10019

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Email: Thomas.Melone@AllcoUS.com

Attorneys for Chelsea Solar LLC

EXHIBIT A



Thomas Melone <thomas.melone@gmail.com>

Deposition schedule

Thomas Melone <thomas.melone@gmail.com>
To: Merrill Bent <Merrill@greenmtlaw.com>

Thu, Aug 16, 2018 at 4:41 PM

Hello Merrill,

Thank you. That will give us time, as I see we now need to go back to the PUC for clarification. The order also says: "The Town does not object to Chelsea's further deposition of Mr. Monks or the deposition of Stuart Hurd, the Town Manager." I read that as allowing us to also depose Monks and Hurd as individual fact witnesses. The order repeats that theme in explaining why there is no need to depose the selectboard members "because there is other evidence, including the depositions of Mr. Monks and Mr. Hurd."

Please confirm that absent a further order from the PUC that you are refusing to produce Monks and Hurd as individual witnesses for deposition.

regards
Tom

On Thu, Aug 16, 2018 at 4:03 PM, Merrill Bent <Merrill@greenmtlaw.com> wrote:

Hi Thomas:

Those dates are fine with me, so I will follow up with the Town and get back to you.

The Town can only designate who its witness or witnesses will be after we receive your "designation with reasonable particularity the matters on which examination is requested" pursuant to VRCP 30(b)(6).

To clarify, neither Mr. Monks nor Mr. Hurd will be offering testimony separately as fact witnesses, pursuant to the protective order.

For reference, the relief requested was as follows:

That "discovery initiatives be limited to those aimed at the Town as an institution, and to the subject matter of this proceeding. Such discovery may include deposition(s) pursuant to 30(b)(6) based on matters designated in advance with "reasonable particularity" so that the municipality can respond appropriately and designate the appropriate responsive person pursuant to that rule."

The Hearing Officer granted that motion, noting that "The Town has offered the Town Manager and the Town Planner as appropriate representatives of the Town to be deposed pursuant to V.R.C.P. 30(b)(6)."

Thanks,

Merrill

Merrill E. Bent, Esq.

Woolmington, Campbell, Bent & Stasny, P.C.

P.O. Box 2748 (4900 Main Street)

Manchester Center, VT 05255

www.greenmtlaw.com

802-362-2560

If you received this communication in error, please let me know by return e-mail and then destroy your copy. Thank you very much.

From: Thomas Melone [mailto:thomas.melone@gmail.com]

Sent: Thursday, August 16, 2018 3:47 PM

To: Merrill Bent <Merrill@greenmtlaw.com>

Subject: Deposition schedule

Hello Merrill

If it is agreeable with you and your client I propose that the deposition of Dan Monks, Stu Hurd and the 30(b)(6) be moved to September 11-12.

This will give us more time to receive discovery from the Town, resolve any discovery disputes and potentially resolve some matters

Regards

Tom

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Sent from Gmail Mobile

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Thomas Melone
Chief Executive Officer
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(801) 858-8818 (fax)

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EXHIBIT B



Thomas Melone <thomas.melone@gmail.com>

RE: Intervenor Discovery Deficiency Letters [PFC-CLIENTS.FID432788]

Merrill Bent <Merrill@greenmtlaw.com>

Fri, Aug 17, 2018 at 5:22 PM

To: Thomas Melone <thomas.melone@gmail.com>

Cc: "Kimberly K. Hayden" <KHayden@pfclaw.com>, Michael Melone <mjmelone@allcous.com>

I am not requiring you to do anything. If you want a different Order than the one we got, that is your prerogative.

Merrill E. Bent, Esq.

Woolmington, Campbell, Bent & Stasny, P.C.

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802-362-2560

If you received this communication in error, please let me know by return e-mail and then destroy your copy. Thank you very much.

From: Thomas Melone [mailto:thomas.melone@gmail.com]

Sent: Friday, August 17, 2018 5:21 PM

To: Merrill Bent <Merrill@greenmtlaw.com>

Cc: Kimberly K. Hayden <KHayden@pfclaw.com>; Michael Melone <mjmelone@allcous.com>

Subject: Re: Intervenor Discovery Deficiency Letters [PFC-CLIENTS.FID432788]

Hello Merrill

I'm not sure why you could not directly answer the question but I interpret your response as now requiring us to go back to the PUC

Tom

On Fri, Aug 17, 2018 at 5:18 PM Merrill Bent <Merrill@greenmtlaw.com> wrote:

Hi Tom:

I will find out about Dan's availability the week prior and get back to you.

The Town will comply with the Hearing Officer's Order granting the Town's request that "discovery initiatives be limited to those aimed at the Town as an institution, and to the subject matter of this proceeding" and that we produce "the Town Manager and the Town Planner as appropriate representatives of the Town to be deposed pursuant to V.R.C.P. 30(b)(6)."

Merrill

Merrill E. Bent, Esq.

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If you received this communication in error, please let me know by return e-mail and then destroy your copy. Thank you very much.

From: Thomas Melone [mailto:thomas.melone@gmail.com]

Sent: Friday, August 17, 2018 5:13 PM

To: Merrill Bent <Merrill@greenmtlaw.com>

Cc: Kimberly K. Hayden <KHayden@pfclaw.com>; Michael Melone <mjmelone@allcous.com>

Subject: Re: Intervenor Discovery Deficiency Letters [PFC-CLIENTS.FID432788]

Hello Merrill,

Please see if there is a date the week before for Mr. Monks.

Also please confirm that the Town is prepared to produce Mr. Monks and Mr. Hurd for individual depositions, or whether we will need to go back to the PUC on that issue.

regards

Tom

On Fri, Aug 17, 2018 at 5:07 PM, Merrill Bent <Merrill@greenmtlaw.com> wrote:

Hi Kim,

I am not sure I understand your question. Petitioner asked about those dates, I told you the dates were fine with me but I'd have to find out if those representatives were available and get back to you. One of them is, and one of them is not, so I got back to you to tell you that, and asked whether you'd like to see if another date works or if you'd like to stick with the date noticed for Mr. Monks and Mr. Hurd.

Merrill

Merrill E. Bent, Esq.

Woolmington, Campbell, Bent & Stasny, P.C.

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802-362-2560

If you received this communication in error, please let me know by return e-mail and then destroy your copy. Thank you very much.

From: Kimberly K. Hayden [mailto:KHayden@pfclaw.com]
Sent: Friday, August 17, 2018 5:03 PM
To: Merrill Bent <Merrill@greenmtlaw.com>
Cc: Michael Melone <mjmelone@allcous.com>; Tom Melone Gmail <thomas.melone@gmail.com>
Subject: Re: Intervenor Discovery Deficiency Letters [PFC-CLIENTS.FID432788]

Hi Merrill, I understood that extending this date was to deal with the resolution of discovery issues?

Sent from my iPhone

On Aug 17, 2018, at 4:43 PM, Merrill Bent <Merrill@greenmtlaw.com> wrote:

Mr. Hurd is available on either day. Unfortunately Mr. Monks is out on vacation that week so he is unavailable. Did you want us to keep open the 29th or see if there is a date during the prior week that works?

We have not seen your 30(b)(6) topics, so I do not know which one will be responsive to them (perhaps both).

Merrill

Merrill E. Bent, Esq.

Woolmington, Campbell, Bent & Stasny, P.C.

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802-362-2560

If you received this communication in error, please let me know by return e-mail and then destroy your copy. Thank you very much.

From: Kimberly K. Hayden [mailto:KHayden@pfclaw.com]

Sent: Friday, August 17, 2018 8:37 AM

To: Merrill Bent <Merrill@greenmtlaw.com>

Cc: Michael Melone <mjmelone@allcous.com>; Tom Melone Gmail <thomas.melone@gmail.com>

Subject: RE: Intervenor Discovery Deficiency Letters [PFC-CLIENTS.FID432788]

Merrill, please confirm that Mr. Monks will be made available for deposition on either the 11th or 12th