

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8585

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

RESPONDENT'S MOTION TO COMPEL
V.R.C.P 30(B)(6) DESIGNATION AND DEPOSITION ON PENALTY ISSUES

NOW COMES Respondent in the above-captioned matter, by and through the undersigned counsel, and moves pursuant to V.R.C.P. 37¹ for an order compelling discovery and for costs against the Department of Public Service. The basis for this motion is set forth in the memorandum below and is supported by an accompanying affidavit of counsel in accordance with V.R.C.P. 26(h).

MEMORANDUM

The question presented by this motion is straightforward: whether the Department of Public Service is required by V.R.C.P. 30(b)(6) and the Hearing Officer's August 6, 2016 *Order Re: Motion To Quash Depositions* in this matter to designate a representative to answer questions via deposition about the topics related to the Department's penalty recommendation. This Memorandum explains why the answer to that question is an unambiguous yes.

On June 29, 2016, Respondent issued a notice of deposition pursuant to Rule 30(b)(6) asking for a designated Department representative to address three topics

¹ Rule 37 is applicable to Commission proceedings pursuant to Commission Rule 2.214(A).

directly related to the question of a penalty in this proceeding. These topics were identified in the notice as follows:

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.

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.

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.²

The Department moved to quash the deposition,³ and the Hearing Officer denied that motion in the aforementioned *Order Re: Motion To Quash Depositions* dated August 6, 2016.

Three days later, counsel for the Department filed an affidavit responding to the Rule 30(b)(6) notice that stated, in part, that the Department did not, "at this time," have a designee that was able to testify on the penalty-related topics set out in the notice.⁴ On the date Department counsel executed the Rule 30(b)(6) affidavit, the Department had in its possession – for at least five (5) months – all of the discovery that had been requested from Respondent, as well as Respondent's December 2015 prefiled testimony.

² Affidavit of Counsel Pursuant to V.R.C.P. 26(h), Jan. 28, 2020, Exh. A ("Aff. Counsel").

³ Aff. Counsel, Exh. B.

⁴ Aff. Counsel, Exh. C.

The record is silent as to why, by August 2016, the Department had not yet developed a position on the financial penalty it considered to be appropriate for the violation of law that it was claiming merited one.

Fast forward to December 20, 2019, twelve-hundred twenty-eight (1,228) days after the Department's Rule 30(b)(6) affidavit. On December 20, the Department filed a document with the Commission, *Department of Public Service's Recommendation re: Civil Penalty*, in which the Department finally presented its position on a penalty amount using the criteria enumerated in 30 V.S.A. § 30(c).⁵ On January 15, 2020, Respondent's counsel contacted counsel for the Department about a supplement to the August 9, 2016 Rule 30(b)(6) affidavit identifying a witness to appear for a deposition on the penalty-related topics noticed on June 29, 2016. The Department objected. Counsel for Respondent and the Department communicated by email and spoke three times by telephone to try to resolve their dispute, but were unable to reach an agreement.

Respondent has waited more than three years for the deposition that the Hearing Officer ruled he was entitled to take in 2016 on penalty-related issues. This motion seeks to vindicate Respondent's right to take that deposition. It is not believable that the Department does not have a designee to speak on its behalf to penalty issues, under oath, considering that its December 20, 2019 filing makes a recommendation to the Commission on those very issues. An order compelling a Rule 30(b)(6) designation as

⁵ *Department of Public Service's Recommendation re: Civil Penalty* (Dec. 20, 2019).

noticed on June 29, 2016 is required to satisfy Respondent's right to discovery and to due process.

Vermont law is clear. If an "entity fails to make a designation under Rule 30(b)(6), an order compelling a designation is the remedy.⁶ Before a motion to compel may be considered, the moving party must demonstrate, through a sworn affidavit by counsel, that a good faith attempt was made to the resolve the dispute.⁷ If the motion is granted, the Commission "shall" require "the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees."⁸

Counsel's affidavit supporting this motion sets forth the material facts and describes the contact between counsel that took place to resolve the issue without need for Commission intervention. Respondent has satisfied the prerequisite for a motion to compel under Rule 26(h).

Respondent anticipates that the Department will claim that it does not have to designate a representative to defend its position because it chose not to prefile testimony. Rules 30(b)(6) and 37(a)(2) do not support that claim, and neither does the August 9, 2016 *Order Re: Motion To Quash Depositions*. As that order makes clear, Respondent's first round of discovery was not limited to a certain set of issues or to a

⁶ V.R.C.P. 37(a)(2).

⁷ V.R.C.P. 26(h).

⁸ V.R.C.P. 37(a)(4).

particular discovery method. Moreover, similar to the present circumstances, the Department had not filed any testimony prior to Respondent's 2016 deposition notices and written interrogatories. An order compelling a Rule 30(b)(6) designee to appear for deposition is appropriate to prevent the Department from evading its obligations as a party in this proceeding.

Respondent anticipates the Department will also claim that the issue of a penalty is a legal issue that no non-lawyer Department representative must address. This position is untenable. There is a long history of the Department offering testimony on the Section 30(c) factors in compliance proceedings.⁹ Although the Department has chosen not to prefile evidence in support of its positions, Respondent may use evidence adduced in a Rule 30(b)(6) deposition at the evidentiary hearing to rebut the Department's contentions regarding a proposed penalty.¹⁰

In this case, the Department's penalty recommendation is replete with opinion and factual inferences that Respondent is entitled to examine through discovery. For example, the Department recommends a "significant penalty" because the met mast

⁹ See, e.g., Prefiled Testimony of Hal Cohen on Behalf of the Vermont Department of Public Service (July 14, 2017) in *Investigation pursuant to 30 V.S.A. §§ 30 and 247 into alleged violations by GMPSolar-Hartford, LLC of a certificate of public good, issued in Docket 8580, concerning the construction and operation of a solar generation facility located in Hartford, Vermont, Case No. 17-3048-INV*; Prefiled Testimony of Daniel Potter on Behalf of the Vermont Department of Public Service (June 30, 2017) in *Investigation pursuant to 30 V.S.A. §§ 30 and 209 and Public Service Board Rule 5.110(D) into alleged lack of adequate notice and violations of certificate of public good #NMP-7438 concerning the construction of a group net-metered solar electric generation facility in Guilford, Vermont, Case No. 8843*. These documents are attached as an Appendix to this Motion.

¹⁰ See V.R.C.P. 32(a)(2) (allowing adverse party to use testimony taken in Rule 30(b)(6) deposition at trial for any purpose).

was still on Respondent's property in December 2019¹¹ (as Respondent intended when he installed it). 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.

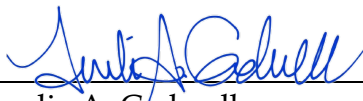
Respondent's interest taking a Rule 30(b)(6) deposition to better understand the Department's recommendation on a penalty has been clear since issuing the June 29, 2016 deposition notice. The Department cannot now claim surprise that Respondent would seek to exercise his right to depose a Department representative on the penalty topics before the evidentiary hearing. If the Department never intended to designate a representative to address the penalty topics in Respondent's deposition notice, then counsel's August 9, 2016 Rule 30(b)(6) affidavit should have made that clear. It did not. Instead, the "at this time" wording of counsel's affidavit left the clear impression that a

¹¹ *Department of Public Service's Recommendation re: Civil Penalty* at 3.

designation would be made in the future when the Department took a position on a penalty.

CONCLUSION

The Department does not have a good faith basis to deny Respondent his right to depose a Department designee pursuant to V.R.C.P. 30(b)(6) when that deposition was properly noticed and already survived a motion to quash. The regulatory oversight process is ill served by allowing the State's statutory public advocate to evade its obligations under the law and to seek to influence the outcome of a compliance proceeding while denying the Respondent his rightful discovery. An order must issue compelling the Department to designate an individual for deposition pursuant to Rule 30(b)(6) on the penalty topics listed in Respondent's June 29, 2016 notice, with costs and attorneys fees associated with having to file this motion being taxed to the Department.

By: 

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