

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	
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Order entered: 06/11/2021

**PROCEDURAL ORDER DENYING MOTION TO RECUSE ATTORNEY THOMAS MELONE**

**I. INTRODUCTION**

On April 21, 2021, the Apple Hill Homeowners Association, Mount Anthony Country Club, and Libby Harris (the “Intervenors”) filed a motion with the Vermont Public Utility Commission (“Commission”) requesting that Attorney Thomas Melone be recused as an attorney in this matter (the “Intervenors’ Motion”).<sup>1</sup> The Intervenors’ Motion relies on Rule 3.7 of the Vermont Rules of Professional Conduct, which addresses the circumstances in which an attorney can be both a lawyer and a witness in the same case.<sup>2</sup> In this Order, we deny the Intervenors’ Motion.

**II. PROCEDURAL HISTORY**

On April 21, 2021, the Intervenors’ Motion was filed.

On May 5, 2021, Thomas Melone, Esq., of Allco Renewable Energy Limited (“Allco”) filed a response in opposition to the Intervenors’ Motion. Allco argues that the Intervenors’

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<sup>1</sup> Thomas Melone, Esq., along with Michael Melone, Esq., and Kimberly K. Hayden, Esq., are listed in ePUC as counsel for Allco’s subsidiaries Chelsea Solar LLC and Apple Hill Solar LLC in this proceeding.

<sup>2</sup> Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;  
(2) the testimony relates to the nature and value of legal services rendered in the case; or  
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Amended June 17, 2009, eff. Sept. 1, 2009.

Motion “is baseless and should be denied” (the “Allco Response”).<sup>3</sup> Allco also requests legal fees.

No other responses to the Intervenors’ Motion have been filed.

### III. POSITIONS OF THE PARTIES

#### *The Intervenors*

The Intervenors assert that:

Thomas Melone is attorney of record for all of the developer’s entities [and is] . . . the primary fact witness in this case and will be during the penalty phase as well. As sole owner of and directly controlling all of his corporate entities, Thomas Melone will be the source for information regarding the economic resources of the respondent [Allco] for purposes of the civil penalty that will be imposed [in this case] pursuant to 30 V.S.A. § 30. Thus, Melone has been and continues to be a material fact witness, who will be subpoenaed to testify by the Intervenors in the event he chooses not to voluntarily testify in this matter. Therefore, Melone cannot continue to serve as counsel for the developer’s entities because of his conflicting role of material fact witness, and attorney in this case, which makes it impossible to keep track of whether the words coming from Thomas Melone’s lips are under oath as a sworn witness, or just the repetition of “facts” and argument. This is the very problem that Rule 3.7 is designed to avoid: confusion and prejudice arising from the loss of the distinction between testimony and legal argument. Hence, why recusal is required.<sup>4</sup>

#### *Allco*

Allco contends that:

[The] Intervenors’ theory of the case undermines the Intervenors’ Motion. [The] Intervenors’ theory of the case is that [Allco] and Thomas Melone are fully aligned in their interests. As such there is no danger that “prejudice may occur [to the witness-advocate’s client] and that the likelihood of prejudice occurring [to the witness-advocate’s client] is substantial.”<sup>5</sup>

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<sup>3</sup> Allco Response at 7.

<sup>4</sup> Intervenors’ Motion at 3-4 (citing *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, 209 Vt 244, 267 n.2 (“Rule 3.7 counsels strongly against permitting an attorney to ask a witness questions that introduce the attorney’s personal knowledge of the subject of the witness’s testimony.”)).

<sup>5</sup> Allco Response at 3-4 (citing *Lamborn v. Dittmer*, 873 F.2d. 522, 531 (2d. Cir. 1989) (trial court rulings denying disqualification of trial counsel and quashing subpoena of trial counsel reversed because of materiality of trial counsel’s projected testimony)).

Allco argues that the Intervenor's Motion "fails to demonstrate specifically how and as to what issues in this case [Allco] may be prejudiced by the testimony of Thomas Melone" and "fails to identify why further testimony is necessary."<sup>6</sup>

Allco asserts that the Intervenor's Motion should be denied because "there is no probability of the Commission being misled" because all of Mr. Melone's testimony has been uncontested.<sup>7</sup> Allco further argues that there is a *pro se* exception to Rule 3.7 and that "the ethical canons do not prohibit a lawyer from representing himself."<sup>8</sup> Allco contends that it and the other respondents are "essentially proceeding *pro se*" and that Commission Rule 2.201 permits "an officer representing a company to proceed *pro se*."<sup>9</sup>

#### IV. DISCUSSION

The Intervenor's argue that we should order the recusal of Thomas Melone as the lead attorney for Allco "to avoid prejudice to the rights of the opposing party and to protect the trier of fact from being misled or confused."<sup>10</sup> Having heard Mr. Melone act as counsel and witness for his company, Allco, we are not persuaded that the rights of the parties have been prejudiced and that we, as the trier of fact, are being misled or confused in this proceeding. We therefore deny the Intervenor's Motion. We agree with Mr. Melone that as the sole proprietor and director of the various corporate entities named as respondents in this investigation, he is essentially proceeding in a *pro se* capacity, and we will not forbid him from doing so.<sup>11</sup>

Proceedings before the Commission regularly include the participation of *pro se* parties. For example, the Intervenor's in this case participated as *pro se* parties in the related proceedings

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<sup>6</sup> Allco Response at 3-4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 6 (citing *O'Neil v. Borgen*, 452 A.2d 337, 344 (D.C. App. 1982) and *Borman v. Borman*, 378 Mass 775, 393 N.E.2d 847, 856 (1979)).

<sup>9</sup> *Id.* at 7.

<sup>10</sup> Intervenor's Motion at 2.

<sup>11</sup> We observe that an exception to the "*pro se* exception" to Rule 3.7 cited by Allco is stated at footnote 11 in *O'Neil v. Borgen* and cites to *Gasoline Expwy., Inc. v. Sun Oil Co.*, 64 A.D.2d 647, 648 (1979), for the proposition that an attorney who is a sole shareholder in a corporation, by doing business in corporate form, has waived her right to represent her corporation "*pro se*." This exception was not unanimously accepted by the Court in *Gasoline Expressway* or introduced and litigated by the parties here. We note this exception to the *pro se* exception does not exist in Rule 3.7 but does exist in case law. The cited cases are not binding on us and we will not rely on these cases as precedent here.

where Allco was denied certificates of public good to build solar facilities on Apple Hill in Bennington.<sup>12</sup>

Hence, we are familiar with and know how to respond to parties that serve as both self-advocates and witnesses in our proceedings. What we have here is an unusual circumstance where Rule 3.7 is implicated because a *pro se* party, Mr. Melone, is both the attorney for Allco and its principal material witness. Nonetheless, we are not a criminal court with a jury that needs to be reminded that the arguments of counsel are not facts to be considered as evidence. Further, a *pro se* witness like Mr. Melone, whether an attorney or not, must take an oath and is subject to cross-examination and credibility challenges.

In short, we have procedural safeguards against unfairly prejudicing the parties when *pro se* advocates also serve as witnesses, and the Intervenors have failed to show that those protections are inadequate here. There has been no example drawn from the record to highlight where Mr. Melone's status as an attorney has by itself created prejudice to anyone but himself or Allco, or that we have been confused or misled. The Intervenors do not contend that they have been prejudiced in our conclusions that Allco violated Section 248(a)(2)(A) by doing site preparation without a CPG and is now subject to civil penalties pursuant to 30 V.S.A. § 30.

## V. CONCLUSION

The Intervenors' Motion is denied.


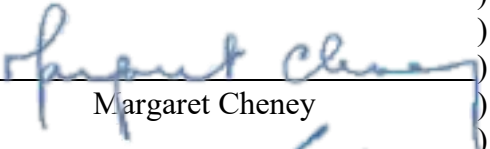
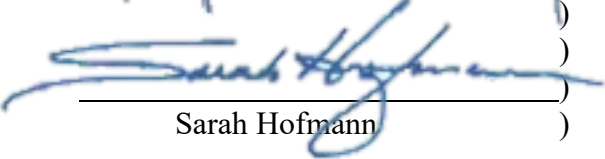
There has been no showing that would support the awarding of legal fees to Allco.

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<sup>12</sup> See *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 "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-PET, Order of 6/12/19; and *Petition of Apple Hill 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 at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20.

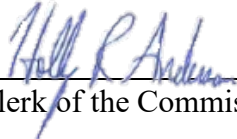
**SO ORDERED.**

Dated at Montpelier, Vermont this 11th day of June, 2021.

 _____ )	) PUBLIC UTILITY
Anthony Z. Roisman )	
) )	
 _____ )	) COMMISSION
Margaret Cheney )	
) )	
 _____ )	) OF VERMONT
Sarah Hofmann )	
) )	

OFFICE OF THE CLERK

Filed: June 11, 2021

Attest:   
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Clerk of the Commission

*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](mailto:puc.clerk@vermont.gov))*