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	

Order entered: 08/31/2018

DENIAL OF INTERVENORS' RECONSIDERATION MOTION

I. INTRODUCTION

On August 6, 2018, Libby Harris, the Apple Hill Homeowners Association represented by Lora Block, and the Mt. Anthony Country Club represented by Maru Leon (collectively, the "Intervenors") filed a motion requesting that the Vermont Public Utility Commission ("Commission") reconsider the hearing officer's July 31, 2018 Order. That Order denied the Intervenors' motion to grant a protective order and quash their depositions. In this Order, we deny the Intervenors' Reconsideration Motion.

II. BACKGROUND

On July 5, 2018, the Intervenors, in response to the discovery requests of Chelsea Solar LLC ("Chelsea"), filed a motion for a protective order and a motion to quash their depositions (the "Intervenors' Motions"). The Intervenors' Motions requested that their noticed depositions be quashed because: (1) the interrogatories and deposition will be duplicative of the information the Intervenors provided in their prefiled testimony; (2) the depositions will impose an unreasonable burden on the Intervenors and will "impede their ability to maintain their own business and personal schedules"; (3) the cost of responding to the depositions will harm the Intervenors; and (4) Chelsea has created a hostile environment and the Intervenors are afraid of being sued by Chelsea.[1] The Intervenors argued that because of these factors, extraordinary

[1] Intervenors' Supplementary Brief on the Intervenors' Motions at 20-21.

circumstances exist meeting the standard for a protective order in Rule 26(c). The Intervenors further argued that if the protective order request is denied, they are entitled to an award of attorney's fees to pay for their being represented by counsel at the depositions.

On July 31, 2018, the hearing officer issued an order denying the Intervenors' Motions. The hearing officer stated that he was "not persuaded that the Intervenors have met the high standard Rule 26(c) sets for limiting discovery"[2] but reminded "Chelsea to ensure that its discovery and depositions of Ms. Harris, Ms. Block, and Ms. Leon are limited to the scope of each of their respective prefiled testimony."[3] The July 31 Order also denied the Intervenors' request that the Commission order Chelsea to pay for the cost of the Intervenors' legal representation during the depositions.

On August 6, 2018, the Intervenors filed the Intervenors' Reconsideration Motion.

On August 10, 2018, Chelsea filed comments in opposition to the Intervenors' Reconsideration Motion ("Chelsea's Reply").

On August 13, 2018, the Vermont Department of Public Service filed comments stating that it did not object to the Intervenors' Reconsideration Motion (the "Department's Comments").

No other comments were filed on the Intervenors' Reconsideration Motion.

III. POSITIONS OF THE PARTIES

The Intervenors

The Intervenors' Reconsideration Motion requests that we reconsider and overrule the hearing officer's July 31 Order and grant their motion for a protective order and motion to quash. The Intervenors argue that as *pro se* litigants they are representing themselves and that the "role of *pro se* parties acting as their own attorney must be protected."[4] They observe that they responded to written interrogatories and assert that their prefiled testimony in this proceeding is not expert testimony and that "[c]onducting depositions of *pro se* parties who are also lay

[2] *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 7/31/18 at 2.
[3] *Id*. at 1.
[4] Intervenors' Reconsideration Motion at 2.

witnesses is unnecessarily burdensome" and therefore, pursuant to Vermont Rule of Civil Procedure 26(b)(2)(b),[5] should be limited by the factfinder.[6]

The Intervenors further assert that "[i]t would be unwise for *pro se* parties to submit to deposition by [Chelsea] unless represented by legal counsel" and that their payment for such counsel would be "an unreasonable burden and expense to place on Vermont citizens who have a right to participate in the only process available to them to protect their particularized interests regarding the siting of energy projects in Vermont."[7]

Finally, the Intervenors represent that if the Commission does not reconsider and overrule the hearing officer and grant their motion to quash and motion for a protective order, then "the *pro se* parties may have no choice but to withdraw from the case due to the unreasonable burden and expense that submitting to [Chelsea's] depositions places on them."[8] The Intervenors caution that if the Commission requires them to submit to depositions, "that decision will serve to discourage public participation at the PUC for the siting of electric generation facilities."[9]

Chelsea

Chelsea asserts that "[t]he Intervenors have not provided any basis on which the [hearing officer's] order should be reconsidered."[10] Chelsea recommends that the Intervenors' Reconsideration Motion be denied because Ms. Harris, Ms. Block, and Ms. Leon each filed prefiled testimony and "[t]here is no basis on which to preclude the deposition of a witness that files testimony and the Intervenors cite none . . . . [T]he case law establishes that Chelsea is entitled to take the oral deposition of Harris, Block, and Leon."[11]

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[5] Vermont Rule of Civil Procedure 26(b)(2)(B) states:

> Orders Limiting Frequency or Extent of Discovery. On motion or on its own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the proposed discovery is outside the scope permitted by paragraph (b)(1) of this rule.

[6] Intervenors Reconsideration Motion at 3.
[7] *Id*. at 4.
[8] *Id*.
[9] *Id*.
[10] Chelsea's Reply at 1.
[11] *Id*. at 2.

Chelsea observes that if "the Intervenors withdraw from the case, and withdraw their testimony, in order to avoid a deposition, those parties still have the avenue of submitting public comments with the Commission in order to make their positions and concerns known."[12]

Specifically, Chelsea argues that: (1) the Intervenors have not shown "good cause" for the issuance of a protective order; (2) the depositions are proportional to the needs of the case; (3) there is no basis on which to condition the depositions on the payment of attorney's fees; and (4) the Intervenors provide no basis to support their argument that as *pro se* litigants they are shielded from deposition by the work-product doctrine.

The Department

The Department states that it has no objection to the Intervenors' Reconsideration Motion but that if reconsideration is denied "the Department believes questioning limited to the Intervenor's prefiled testimony, as established by the Commission in the [hearing officer's] Order, to be reasonable."[13]

IV. DISCUSSION AND CONCLUSION

Although we regret the hardship the Intervenors are facing, the Intervenors Reconsideration Motion is a plea for help that we cannot give. Like the hearing officer, we are not persuaded that the Intervenors' asserted hardship meets the high standard of extraordinary circumstances for a protective order set in Rule 26(c). And the Intervenors provide no new arguments for granting the motions denied in the July 31 Order. Chelsea has a due-process right to prepare for the evidentiary hearing. Pursuant to Commission Rule 2.214, this includes the right to take deposition that could be used to challenge witnesses' prefiled testimony. We also observe that the use of depositions may have the effect of shortening an evidentiary hearing and encourage parties to introduce deposition testimony at evidentiary hearings in lieu of conducting live cross-examination that would repeat the same questions and answers. Finally, the law favors open discovery, and factfinders are discouraged from placing limits on that discovery.[14]

[12] Chelsea's Reply at 2.

[13] Department's Comments at 1.

[14] *See Schmitt v. Lalancette*, 2003 VT 24, ¶ 13, 175 Vt. 284, 289 (quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d. Cir. 1975) ("Restrictions which may impede the development, presentation and determination of facts should be avoided.")).

We are not insensitive to the challenges facing *pro se* parties participating in Commission proceedings. We must balance this concern with our responsibility to ensure that the due-process rights of all parties are appropriately observed in our proceedings. Accordingly, the Intervenors' Reconsideration Motion is denied. Nonetheless, we restate the hearing officer's admonition that all deposition questioning must be strictly limited to the scope of the Intervenors' prefiled testimony. To ensure this, and in recognition of the fact that they provided lay testimony rather than expert testimony, we are setting a two-hour time limit for each of Chelsea's depositions of Ms. Harris, Ms. Block, and Ms. Leon. We also remind all the parties that, as is the case with any deposition in a Commission proceeding, the hearing officer will be available by telephone via the Clerk of the Commission, at (802) 828-2358, to resolve any disputes that may arise during a deposition.

SO ORDERED.

Dated at Montpelier, Vermont this 31st day of August, 2018.

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

OFFICE OF THE CLERK

Filed: August 31, 2018

Attest: Judith C. Whitney
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)

PUC Case No. 17-5024-PET - SERVICE LIST

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