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	

DEPARTMENT OF PUBLIC SERVICE'S OPPOSITION TO CHELSEA SOLAR'S MOTION TO EXCLUDE TESTIMONY OF DAVID RAPHAEL AND FOR A *DAUBERT* HEARING

The Vermont Department of Public Service ("Department") hereby opposes Chelsea Solar LLC's ("Chelsea") Motion of July 23, 2018 seeking to exclude the expert testimony of David Raphael ("Motion"). The Department opposes the Motion because (1) it is premature to exclude the testimony before evidentiary hearing take place; (2) Chelsea fails to establish that the testimony is inadmissible pursuant to V.R.E. 702; and (3) Chelsea's objections to the testimony concern the weight that should be given to it, not the admissibility. Furthermore, the Department is not bound by the memoranda of understanding between the Department and Chelsea. In support of this Opposition, the Department relies on the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

I. INTRODUCTION

Chelsea is once again using every legal avenue available to it to discredit the Department and the expert testimony of the Department's witness, David Raphael. The Motion is the latest in a very long line of other motions, briefs, and oppositions filed by Chelsea in an effort to overwhelm, burden, and out-maneuver the other parties to the case. For the following reasons, the Department again asks the Commission to impose reasonable restrictions in this case in order for

the Department to fulfill its statutory obligation to effectively serve the residents of Vermont in all proceedings before the Commission.

II. LEGAL ARGUMENT

a. It is premature to exclude Mr. Raphael's testimony before evidentiary hearings are held.

The question before the Commission is whether it is proper to exclude Mr. Raphael's testimony before the hearing stage of the § 248 process, not whether Mr. Raphael's testimony is material or relevant. Section 801 of the Vermont Administrative Procedure Act applies to "contested cases," which are defined as proceedings "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." 3 V.S.A. § 801(b)(2). For § 248 petitions, the Commission is required to hold technical hearings under 30 V.S.A. § 248(a)(4)(B). "The format of a technical hearing is most useful for at least the admission of testimony and exhibits, and it would be most unusual, even in the most uncontentious construction project, that the [Commission's] staff would have no questions about the final details." *Petition of Cross Pollination, Inc.*, Docket No. 7645, Order of 12/3/10 at 1.

Were the Commission to exclude Mr. Raphael's testimony before a hearing is even held, it would contravene Commission procedure and effectively be prejudicial to the Department and to its participation in this proceeding. Part of the role a technical hearing plays in the § 248 approval process is to determine the admissibility of testimony and to ascertain the weight given it. Furthermore, as a quasi-judicial body, the Commission's objective in employing the rules of evidence has more to do with "promoting an orderly development of the evidentiary record, and less toward ensuring the rigorous application of evidentiary rules that are intended for use in adjudicating individual cases before trial judges and juries in civil and criminal courts."

Investigation into Petition of AARP, Docket 7535, Order of 5/5/10 at 6, FN 24. Accordingly, to promote an orderly development of the evidentiary record, it is vital that *all* testimony, including Mr. Raphael's, come before the Commission at the hearing stage.

b. Chelsea fails to establish that Mr. Raphael's testimony is inadmissible under V.R.E. 702.

The Commission follows the Vermont Rules of Evidence pursuant to Commission Rule 2.216 and 3 V.S.A. § 810. Before admitting testimony into evidence, a trier of fact must find that the testimony is relevant and reliable as provided in Rule 702 of the Vermont Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Otherwise known as the *Daubert* standard, the Vermont Supreme Court has emphasized that it "presents an admissibility standard only. The admitted evidence does not alone have to meet the proponent's burden of proof on a particular issue, and, of course, the expert witness remains subject to cross examination." *USGEN New England, Inc. v. Town of Rockingham,* 2004 VT 90, ¶ 18, 177 Vt. 193, 276 (2004).

As an administrative tribunal with specialized knowledge and significant experience in reviewing testimony on issues like the one before it, the Commission has "broad discretion as to the admissibility of evidence, including expert testimony." *Investigation into Petition Filed by VDPS,* Docket No. 7466, Order of 9/3/09 at 4 (citing *Sale of Vermont Yankee,* Docket No. 6545, Order of 3/21/02 at 2). Furthermore, the standard for who can contribute expert testimony is broad. "Where a witness' experience or training is sufficient to provide assistance to the [Commission],

that witness' testimony is admissible as expert testimony, whether it be in the form of opinion or otherwise." *Id.*

Mr. Raphael's testimony is properly admissible and should not be excluded because it meets the *Daubert* standard. First, Mr. Raphael's "scientific, technical, or other specialized knowledge" will help the Commission "understand the evidence or to determine a fact in issue." V.R.E. 702. Mr. Raphael submitted a very detailed, 39-page report putting forth his review of aesthetics and orderly development for the proposed project. He has over 30 years' experience as a landscape architect and planner, and applied his specialized knowledge in that capacity in his analysis. David Raphael, Landworks ("Raphael") pf. Exhibit-PSD-DR-1. Second, Mr. Raphael's testimony is based on sufficient facts or data because the data used to generate the findings reflected in Mr. Raphael's testimony is derived from the testimony and exhibits that were filed as attachments to Chelsea's petition for the project. *See, e.g.,* Raphael pf. Exhibit-PSD-DR-2 at 26. Third, Mr. Raphael's testimony is the product of reliable principles and methods. He used the Quechee standard in his aesthetics analysis and relied upon the recommendations of the municipal and regional planning commissions and municipal legislative bodies in his orderly development analysis. *See, e.g., id.* at 30. Finally, Mr. Raphael has reliably applied these principles and methods to the facts of this case. *See generally* Raphael pf. Mr. Raphael's testimony therefore clearly falls within Vermont Rule of Evidence 702 as relevant and reliable testimony.

Furthermore, "[i]n reviewing a Rule 702 challenge to expert testimony, the court's inquiry is limited to addressing the relevance and reliability of the testimony, not the merits of the expert's conclusion." Docket No. 7535, Order of 5/5/2010 at 10 (citing *985 Associates, Lts., et. al. v. Daewoo Electronics America, Inc.,* 2008 VT 14, § 11, 183 Vt. 208, 215 (2008)). Therefore, while Chelsea views Mr. Raphael's testimony as unreliable because it conflicts with Chelsea's expert

opinion, that does not render Mr. Raphael's testimony inadmissible. Rather, the effect of Chelsea's argument calls into question how much weight Mr. Raphael's expert opinion should be accorded, which as explained herein, is an issue best explored through cross-examination and legal briefing.

Even if Chelsea's claims regarding Mr. Raphael's testimony are correct, they still do not meet the standard for excluding testimony. The Commission has broad discretion "to admit testimony and evidence that does not strictly meet the standards established by *Daubert*," *Petition of Vermont RSA Limited Partnership and Cellco Partnership,* Docket No. 8601, Order of 3/10/17 at 3. Therefore, even if Mr. Raphael's testimony didn't meet the *Daubert* standard, the Commission could still admit the testimony as it sees fit.

c. Chelsea's assertions address the weight given to Mr. Raphael's testimony, not the admissibility.

In ruling on an objection to the admissibility of testimony, the Commission "does not decide the persuasive weight to be accorded to that testimony, rather the Commission decides the more narrow question of whether that testimony may be admitted into the evidentiary record pursuant to the Vermont Rules of Evidence and 3 V.S.A. § 810(1)…" *Petition of Dairy Air Wind, LLC,* Docket No. 8887, Order of 4/12/18 at 1. The Commission has ruled that "the extent of [one's] expertise will affect the weight that the [Commission] places on [one's] testimony, as is the case with any witness offering expert opinions." Docket No. 7466, Order of 9/3/09 at 5. Thus, Chelsea will have ample opportunity to cross-examine Mr. Raphael during evidentiary hearings and legal briefings, which are the appropriate settings in which to question the weight the Commission places on Mr. Raphael's testimony.

Chelsea asserts that because Mr. Raphael's testimony for the project is contradicted by his methodology in the Thomas Dairy Solar report, his testimony is unreliable and based on inappropriate methodology.

> The main goal of the trial court in considering the admission of expert testimony under V.R.E. 702 is to avoid the possibility of misleading the jury by allowing a witness to enjoy a greater credence than his qualifications would otherwise allow. Where an expert's limitations are made clear, both on direct testimony and cross-examination, the court may not be said to have abused its discretion in allowing the testimony.

Cappiallo v. Northrup, 150 Vt. 317, 319, 552 A.2d 415, 417 (1988).

As a quasi-judicial body with specialization regarding the types of projects like the proposed Chelsea project, the Commission knows that every project is different and consequently, expert testimony for each project will vary, even when it is put forth by the same expert. The Commission is well qualified to make accurate judgments regarding the credibility and weight to be afforded a witness. Moreover, there is no possibility of misleading a lay jury.

d. The Memoranda of Understanding between Chelsea and the Department terminated upon the Commission's denial of a CPG in Docket No. 8302.

Chelsea argues that the Memoranda of Understanding ("MOUs") with the Department in Docket No. 8302 (identified as (i) Partial Memorandum of Understanding, dated February 9, 2016 and Second Partial Memorandum of Understanding, dated as of June 17, 2015 (collectively, the "MOUs")) should preclude the Department from entering Mr. Raphael's testimony in this proceeding. Chelsea's argument is flawed for two reasons.

First, both agreements clearly state that if the Commission failed to approve the MOUs in Docket No. 8302, they would terminate and would not have "precedential impact on any testimony or positions that may be [advanced] in these proceedings." *Partial Memorandum of Understanding*, Docket No. 8302, Feb. 9, 2015 at 3; *Second Partial Memorandum of*

Understanding Docket No. 8302, June 17, 2015 at 3-4. Although the hearing officer in Docket No. 8302 recommended that the Commission issue a Certificate of Public Good ("CPG") for the project and adopt the MOUs as conditions for approval of the project, *Petition of Chelsea Solar LLC*, Docket No. 8302, Order of 2/16/16 at 47 ("Order") ("I recommend that the [Commission] accept the MOUs with all of their provisions and conditions without material change or condition and require Chelsea to comply with the terms and conditions of the MOUs as a condition of any [Commission] approval of the Project."), the Commission denied Chelsea a CPG, which effectively terminated the MOUs. Chelsea argues that because the Commission ordered "[t]he findings, conclusions, and recommendations of the [h]earing [o]fficer…hereby adopted," *id.* at 62, that this includes the hearing officer's recommendation to adopt the MOUs, even though the Commission denied the CPG. Chelsea's argument that the Order simultaneously denied the CPG and adopted the MOUs as a condition for approval of the project is illogical and highly unlikely to have been the intention of the Commission.

Second, Chelsea expressly acknowledged that the MOUs are no longer applicable, in direct contradiction to its new claim that the MOUs preclude the Department from filing Mr. Raphael's testimony. *See* Tr. 3/2/18 at 12 (Melone) ("…I understand completely that this is a new petition. *I understand that the DPS MOU is no longer applicable*, and the same with ANR…" (emphasis added)). Chelsea's sudden reversal of its position regarding status of the MOUs is simply an attempt to exclude unfavorable testimony and should not be condoned.

III. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Commission deny the Motion.

Dated at Montpelier, Vermont, this 6th day of August, 2018.

Vermont Department of Public Service

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