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: 08/13/2018

ORDER OVERRULING OBJECTION TO THE ADMISSIBILITY OF THE PREFILED TESTIMONY OF DAVID RAPHAEL

I. INTRODUCTION AND BACKGROUND

On June 22, 2018, the Vermont Department of Public Service (the "Department") filed the prefiled testimony of David Raphael and a report summarizing his review of the proposed project ("Chelsea II"), exhibit PSD-DR-2, with the Vermont Public Utility Commission (the "Commission"). Mr. Raphael's prefiled testimony and report "outline his assessment of the potential impacts of the proposed Chelsea Solar Project with respect to aesthetics and orderly development of the region under 30 V.S.A. § 248(b)(5) and 30 V.S.A. § 248(b)(1)."[1]

On July 23, 2018, Chelsea filed a motion to exclude the Raphael testimony and report in their entirety (the "Chelsea Motion") because Chelsea asserts that the Department is obligated not to oppose the Chelsea II project. Chelsea further argues that Mr. Raphael's testimony and exhibit should be excluded from evidence because they are "based on unverified facts or unreliable assumptions,"[2] and requests a *Daubert*[3] hearing to make that demonstration.

On August 6, 2018, the Department filed objections to the Chelsea Motion (the Department Response").

No other parties filed any responses to the Chelsea Motion.

[1] David Raphael, Department ("Raphael") pf. at 1.
[2] Chelsea Motion at 2.
[3] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

In this Order, I deny Chelsea's request for a *Daubert* hearing and overrule Chelsea's objection to the admissibility of Mr. Raphael's prefiled testimony and report, with the exception of Mr. Raphael's comments about sound at page 25 of the report, exhibit PSD-DR-2.

II. LEGAL STANDARDS

Commission Rule 2.216, addresses evidence in Commission proceedings, and states, in part:

> (A) General rule. Evidentiary matters are governed by 3 V.S.A. § 810. In addition, except as to matters covered by the succeeding paragraphs of this rule, the provisions of the Vermont Rules of Civil Procedure, Rules 43 (Evidence), 44 (Proof of Official Record) and 44.1 (Determination of Foreign Law) shall apply in proceedings before the Commission.
>
> and,
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> (C) Procedure with respect to prefiled testimony and exhibits. Prefiled testimony, if admitted into evidence, shall be included in the transcript. Objections to the admissibility of prefiled testimony or exhibits shall be filed in writing not more than thirty days after such evidence has been prefiled or five days before the date on which such evidence is to be offered, whichever is earlier.

3 V.S.A. § 810 addresses the rules of evidence to be applied in contested administrative proceedings, and states:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

Vermont Rule of Evidence ("V.R.E.") 401 defines "relevant evidence" as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

V.R.E. 602 addresses the requirement that a witness not speculate when testifying, and states:

> The testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

V.R.E. 702 establishes a standard for reviewing the testimony of experts, and states:

> 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.

V.R.E. 703 addresses the factual bases of opinion testimony by experts, and states in part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

V.R.E. 704 addresses an opinion on the ultimate issue and states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it addresses an ultimate issue to be decided by the trier of fact.

III. POSITIONS OF THE PARTIES

Chelsea

Chelsea requests that the Commission exclude Mr. Raphael's prefiled testimony for three reasons: (1) the prefiled testimony violates the terms of two Memoranda of Understanding ("MOUs") between Chelsea and the Department entered into in the Chelsea I proceedings,[4] the obligations of which Chelsea argues have not terminated; (2) the Department has no justifiable reason for opposing the smaller, less impactful Chelsea II project after having previously agreed to the larger Chelsea I project; and (3) Mr. Raphael's prefiled testimony cannot be relied upon as expert testimony because it does not meet the *Daubert* standards, now codified in V.R.E. 702.

[4] *Petition of Chelsea 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 500 Apple Hill Road, Bennington, Vermont,* Docket 8302, petition denied by the Final Order of 2/16/16.

Chelsea argues that its objection is timely pursuant to Commission Rule 2.216(C) and that evidence in Commission proceedings is governed by 3 V.S.A. § 810 which provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded." Chelsea also asserts that the *Daubert* standards should apply in this proceeding because they otherwise apply in a bench trial when a judge, in the absence of a jury, should use the standards to find whether an expert's testimony is relevant and reliable.[5] Chelsea contends that Mr. Raphael's testimony fails to meet the criteria under V.R.E. 702 because it is not based on sufficient facts or data, is the product of unreliable principles and methods, and does not apply the relevant principles and methods reliably to the facts of the case.

Specifically, Chelsea argues that:

> [Mr.] Raphael's methodology is nothing more that a vacuous bid to do an end-run around the constitutional limits imposed by the Vermont Supreme Court. His conclusions cannot be separated from his unreliable methodology that seeks to do indirectly, what the Vermont Supreme Court has prohibited directly. His testimony and report therefore must be excluded in their entirety.[6]

Chelsea also makes specific objections to Mr. Raphael's comments about potential sound and wind effects from the Chelsea II project at page 25 of exhibit PSD-DR-2 and argues that these specific statements should be excluded because they are outside of Mr. Raphael's area of expertise. Chelsea further asserts that Mr. Raphael's comments regarding sound and wind are made without having taken into account the prefiled testimony of the Chelsea's sound and wind experts.[7]

Chelsea contends that Mr. Raphael's testimony as to orderly development in the Town of Bennington, having been done "without analysis or reasons related to the region," is immaterial to the orderly development review required by Section 248(b)(1).[8]

Chelsea challenges Mr. Raphael's conclusion that even though "the Project is not visible" the Chelsea II project would have an adverse effect on aesthetics "simply from the change in purported 'open space' from a vegetated state to a cleared field."[9] Chelsea also asserts that Mr.

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[5] Chelsea Motion at 5.
[6] *Id*. at 9.
[7] *Id*. at 26.
[8] *Id*. at 14 (citing broadly to *In re Petition of Rutland Renewable Energy*, 2016 VT 50).
[9] *Id*. at 17.

Raphael's opinion on orderly development was "based upon errors of law, errors of facts, incomplete investigation, and an unreliable methodology."[10]

Finally, Chelsea argues that Mr. Raphael's legal conclusions must be excluded because he is "tendering opinions on ultimate legal issues or credibility in litigation" and uses an interpretive methodology "that appoints him the self-appointed czar of what is intended or not intended to be permitted."[11]

The Department

The Department opposes the Chelsea Motion because:

> (1) [I]t is premature to exclude the testimony before [an] evidentiary hearing takes 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.[12]

First, the Department argues that evidence is not admitted until an evidentiary hearing occurs and it would be premature for the Commission to exclude Mr. Raphael's testimony before that hearing and would be "prejudicial to the Department and its participation in this proceeding."[13] The Department maintains that "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."[14]

Second, the Department asserts that Chelsea has failed to establish that Mr. Raphael's testimony is inadmissible under V.R.E. 702. The Department contends that the *Daubert* standard is an admissibility standard and "the expert witness remains subject to cross-examination."[15] The Department further argues that as an administrative tribunal with specialized knowledge and significant experience reviewing testimony like that of Mr. Raphael, rather than a trial judge

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[10] *Id*. at 17-18.

[11] Chelsea Motion at 39 (citing *Rathe Salvage, Inc. v. R. Brown & Sons*, 2012 VT 18, at ¶ 22 (Polygrapher per se excluded from providing expert testimony as to whether a fraud defendant was innocent of fraud)).

[12] Department Response at 1.

[13] Department's Response at 2. I also observe that in the proceedings in the neighboring *Petition of Apple Hill Solar LLC*, Docket 8454, the Department filed prefiled testimony of Mr. Raphael and later withdrew that testimony and did not seek to admit it into evidence. *See* letter from Traci Leibowitz, Esq., to Judith Whitney, Clerk of the Commission, dated February 28, 2018.

[14] *Id*. at 3.

[15] *Id.* (citing *USGEN New England, Inc. v. Town of Rockingham*, 2004 VT 90, ¶ 18, 177 Vt. 193, 276 (2004)).

serving a gatekeeper function for jury members, the Commission has "broad discretion as to the admissibility of evidence, including expert evidence."[16]

The Department asserts that Mr. Raphael's prefiled testimony and report meet the *Daubert* standard, are properly admissible, and should not be excluded. The Department argues that the testimony and report will help the Commission "understand the evidence and determine a fact in issue."[17] This is because Mr. Raphael submitted a 39-page report, has over 30-years of experience, and has often testified before the Commission applying his specialized knowledge. The Department contends that Mr. Raphael's testimony on aesthetics is based on his review of the filings in the case and his use of the Quechee standard and his orderly development analysis is based on the recommendations of municipal and regional planning commissions and municipal legislative bodies.

The Department argues that Mr. Raphael's opinions are not immune from challenge, but that the Commission's determination under V.R.E. 702 "is limited to addressing the relevance and reliability of the testimony, not the merits of the expert's conclusions."[18] The Department asserts that while the opinions of Mr. Raphael may differ from those of Chelsea's aesthetics expert, that does not make those opinions unreliable and inadmissible.

In the alterative, the Department argues that even if the Commission were to accept Chelsea's assertion that Mr. Raphael's testimony does not meet the *Daubert* standard, the Commission may still admit it because the Commission has broad discretion "to admit testimony and evidence that does not meet the standards established by *Daubert*."[19]

Third, the Department argues that Chelsea's assertions go to the weight to be given to Mr. Raphael's testimony and report, not their admissibility.[20] In this regard, the Department observes that Chelsea will have ample opportunity to cross-examine Mr. Raphael during the evidentiary hearing.

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[16] *Id*. (citing *Investigation into Petition Filed by VDPS*, Docket 7466, order of 9/3/09, at 4; and *Sale of Vermont Yankee*, Docket 6545, order of 3/21/02, at 2).

[17] *Id*. at 4 (quoting V.R.E. 702).

[18] *Id*. (citing *Investigation into Petition of AARP*, Docket 7535, order of 5/5/10, at 10; and *985 Associates, Lts., et. al. v. Daewoo Electronics America, Inc.*, 2008 VT 14, § 11, 183 Vt. 208, 215 (2008)).

[19] *Id.* at 5 (citing *Petition of Vermont RSA Limited Partnership and Cellco Partnership*, Docket 8601, order of 3/10/17 at 3).

[20] *Id*. (citing *Petition of Dairy Air Wind, LLC*, Docket 8887, order of 4/12/18, at 1; and Docket 7466, order of 9/3/09, at 5).

Finally, the Department asserts that the MOUs between the Department and Chelsea have terminated by their own terms when Chelsea I was denied and assert that this was acknowledged by Chelsea's own affirmation that the Chelsea I MOUs do not apply in Chelsea II, and therefore do not affect the Department's obligations or recommendations in Chelsea II. The Department argues that Chelsea's "reversal" is "simply an attempt to exclude unfavorable testimony and should not be condoned."[21]

IV. DISCUSSION AND CONCLUSION

The Chelsea Motion is framed as a motion to exclude Mr. Raphael's testimony and assessment report pursuant to Commission Rule 2.216(C) because the Department may not take the position reflected in Mr. Raphael's testimony and report and because they are not relevant and reliable under the *Daubert* standards. Consistent with Commission practice, I am treating the Chelsea Motion as a motion *in limine* in which Chelsea objects to the admissibility of Mr. Raphael's prefiled testimony and report.[22] As discussed further below, Chelsea's objection is overruled, with the exception of Mr. Raphael's comments about sound in his report.

The MOUs

Chelsea argues that the Department is obligated by the Chelsea I MOUs not to oppose Chelsea II because the Commission approved the Chelsea I MOUs even though it denied the Chelsea I petition. The Department disagrees with Chelsea's assertion that the Chelsea I MOUs are binding upon the Department in Chelsea II. I find Chelsea's argument to be legally and factually unsupported, and contrary to public policy.

The MOUs between Chelsea and the Department related to the Chelsea I project and were limited by their own terms to that petition, a petition that was denied.

The MOUs provide in relevant part:

> The Stipulating Parties agree that this Stipulation shall not be construed by any party or tribunal as having precedential impact on any future proceeding involving

[21] *Id*. at 7.

[22] *See* Docket 8887, order of 4/12/18; *e.g. Joint Petition of Northstar Holdings, et al*, Docket 8880, Order of 2/8/18; *Petition of Swanton Wind*, Docket 8816, order of 3/2/17; Docket 8601, order of 3/10/17; *Petition of Vermont Solar Farmers, LLC*, Docket 8843, order of 7/27/15; Docket 7535, order of 5/5/10; and *Joint Petition of Green Mountain Power Corp.*, Docket 7628, Order of 12/27/10 at 1 n. 1.

> the Stipulating Parties, except as necessary to implement this Stipulation or to enforce an order of the [Commission] resulting from this Stipulation.
>
> And:
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> The Stipulating Parties agree that this Stipulation should not be construed by any party or tribunal as having precedential or any other impact on any other proceedings involving a different project, different subject matter, or other parties. With respect to such proceedings, the Stipulating Parties reserve the right to advocate positions that differ from those set forth in this Stipulation.[23]

Therefore, by the MOUs' own express terms, the Department is not bound by the Chelsea I MOUs in Chelsea II.

The existence of the Chelsea I MOUs has no bearing on Mr. Raphael's testimony in Chelsea II, nor should it as a matter of public policy. The use of MOUs by parties in Commission proceedings facilitates factual stipulations between parties related to the specific cases in which they arise. MOUs document agreements of the parties concerning a petition, simplify review and reduce litigation related to a petition, and are solely relevant to that petition. It would be improbable, as a matter of law and public policy, that the Commission would adopt an MOU that would abrogate the Department's legal responsibilities under Title 30 to review a future, different petition under Section 248. That is precisely what Chelsea is asking the Commission to do here. I am denying that request. The Chelsea I MOUs were agreed to by the Department after its review of the record in the Chelsea I petition and were only applicable that proceeding.

Chelsea also asserts that the "Department is estopped from offering testimony except with respect to the changes in the Project." If Chelsea I were still before the Commission and had been amended before a final order was issued denying the Chelsea I petition, this might be a valid argument. The Department would be obligated by the MOUs to limit its testimony in Chelsea I. But this circumstance is purely hypothetical. After Chelsea I was denied, Chelsea filed Chelsea II and presented its new proposal for a thorough *ab initio* review by the Department under Section 248.

[23] ¶¶ 7 and 8 of the first MOU, dated 2/9/15, and ¶¶ 6 and 7 of the second MOU, dated 6/17/15.

Chelsea II as filed is a smaller project than Chelsea I and Chelsea argues that Chelsea II should have fewer impacts than the larger Chelsea I project. It would not be unreasonable for Chelsea to inquire why the Department made a "complete 180-degree turn in position."[24] Chelsea has the opportunity now to satisfy this inquiry through the cross-examination and discovery that is inherent in the Section 248 review of the Chelsea II petition. Chelsea's opportunity to conduct such an inquiry would be severely limited if the Commission acted to exclude the Department's witnesses.

Admissibility

In ruling on an objection to the admissibility of testimony, the Commission does not determine the persuasive weight to be given to that testimony. Rather, the Commission decides the narrower question of whether the testimony may be admitted into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Commission in making such admissibility decisions pursuant to 3 V.S.A. § 810. Relevant evidence in some degree must advance the inquiry and thus have probative value. The Commission's review of a project or transaction under Title 30 is as an expert body that is engaged in a "legislative, policy-making process."[25] In this capacity, the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence.[26]

Pursuant to Board Rule 2.216(A) and 3 V.S.A. § 810(1), it is the general practice of the Commission to follow the Vermont Rules of Evidence as applied by the superior courts of Vermont in civil cases. However, this practice is tempered by the Commission's authority to relax the rules of evidence: "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The discretion that is afforded to the Commission in crafting its

[24] Chelsea Motion at 1.

[25] *See In re Amended Petition of UPC Vermont Wind*, 2009 VT 19, ¶ 2 (citing *In re Vt. Elec. Power Co*., 2006 VT 69, ¶ 6).

[26] *See Petition of Barton Solar LLC for a certificate of public good*, Docket 8148, Order of 5/9/14 at 2; *see also* Docket 8880, Order of 2/8/18, at 2.

evidentiary record reflects a legislative recognition of "the need of agencies to consider any evidence which may illuminate the case."[27]

V.R.E. 602 provides that the "testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." V.R.E. 702 provides that a witness may be "qualified as an expert by knowledge, skill, experience, training, or education" and "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."[28]

V.R.E. 702 applies differently in Commission proceedings than it does in a jury trial. The Vermont Supreme Court has adopted the *Daubert* approach for V.R.E. 702 determinations of the reliability of expert testimony. However, it has also determined that the standards are more relaxed in the absence of a jury. In a bench trial, the judge has the discretion to admit questionable expert testimony but must not give it more weight than it deserves.[29] Additionally, the Commission is a body of specialized knowledge with significant experience in reviewing testimony and exhibits on this issue, suggesting even greater discretion to admit testimony and evidence that does not strictly meet the standards established by *Daubert*.[30]

Finally, V.R.E. 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."

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[27] *In re Central Vt. Public Service Corp.*, 141 Vt. 284, 292 (1982)(citing B. Schwartz, ADMINISTRATIVE LAW § 115 at 336 (1976)).

[28] The last three clauses of V.R.E. 702 were added in 2004 to codify the U.S. Supreme Court's holding in *Daubert*, a case in which the Court construed the corollary Federal Rule of Evidence 702 for admitting expert testimony. *USGEN*, 2004 VT at ¶ 18. The *Daubert* Court held that the adoption of Federal Rule of Evidence 702 had altered the then-prevailing test for admission of novel scientific evidence that was first articulated in 1923, replacing it with more flexible standards of relevance and reliability that now require trial judges to ensure that all expert evidence that is admitted "is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786, 2795 (1993). The Vermont Supreme Court adopted the *Daubert* analysis in 1993. *State v. Brooks*, 162 Vt. 26, 30 (1993). However, the Vermont Supreme Court also has emphasized that *Daubert* "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*, 2004 VT at ¶19.

[29] *USGEN* 2004 VT 90 at ¶ 26 (citing and quoting *Smithkline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D.Ill.2003)).

[30] Docket 8816, order of 3/2/17, at 5.

Application of *Daubert* and these rules in this circumstance reveals that Mr. Raphael is qualified as an expert in orderly development and aesthetics as documented in his prefiled testimony and resume.[31] As an expert, Mr. Raphael is permitted to offer his opinion on the impact of the Project on those Section 248 criteria addressed in his report and to base that opinion on facts made known to him outside the hearings in this matter.[32]

I find that the prefiled testimony of Mr. Raphael is admissible as expert testimony because it meets the *Daubert* test of "relevant and reliable" as codified in V.R.E. 702 and tempered for Commission administrative proceedings. I am not persuaded by Chelsea's arguments overall and find that, with the exception of Mr. Raphael's comments related to sound,[33] his expert opinion would be useful to the Commission, is based on "sufficient facts or data" and is derived from the reliable application of "reliable principles and methods" to the facts of this case.

Mr. Raphael's limited comments about sound in exhibit PSD-DR-2 appear to be speculative and not based on any of his own data gathering or the opinion and data gathering of Chelsea's sound expert. Therefore, should the Department seek to admit exhibit PSD-DR-2 into the record at the evidentiary hearing, the statement "along with the potential for related impacts such as highway noise" at page 25 of that document will not be admissible unless supported by further data gathering and factual assessment by Mr. Raphael. I do not agree with Chelsea's assertion that Mr. Raphael's similar comments about wind do not have a factual basis.

The *Daubert* test that as codified in V.R.E. 702 is primarily intended to protect inexpert lay juries in ordinary civil and criminal trials from being misled by "junk science" or from giving undue deference to the "apparent" expertise of witnesses testifying in regard to subjects with which jurors typically are not familiar.[34] However, these judicial "gatekeeping" concerns that

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[31] Raphael pf. at 1-3; exh. PSD-DR-1.

[32] V.R.E. 702 and 703.

[33] Exh. PSD-DR-2 at 25 ("loss of an existing forestland . . . along with the potential for related impacts such as highway noise").

[34] *See, e.g., 985 Associates, Ltd., et al. v. Daewoo Electronics America, Inc.*, 2008 VT 14, ¶11, 183 Vt. 208, 215 (2008)(citing *Daubert* and finding abuse of discretion in trial court's pre-trial exclusion of expert fire-causation testimony as unreliable, instead of relying on cross-examination to explore merit of expert causation conclusions that relied on inferences and included no review of fire department report or examination of microwave oven implicated in fire). *See also Daubert*, 509 U.S. at 595 (expert evidence "can be both powerful and quite misleading because of the difficulty in evaluating it.").

were identified in *Daubert* and its progeny are not as pronounced in administrative proceedings,[35] where the Commission is acknowledged to be an expert tribunal whose "experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence."[36]

Legal Conclusions

In the alternative, Chelsea argues that Mr. Raphael's testimony should be excluded because it makes final legal conclusions as to credibility and the ultimate issue in this case. Chelsea cites to *Rathe Salvage* in support of this proposition. I am not persuaded for two reasons. First, the holding in *Rathe Salvage*, in which the Vermont Supreme Court excluded a polygrapher's expert testimony as to whether a fraud defendant was innocent of fraud, is factually distinguishable from this case because Mr. Raphael is not a polygrapher testifying as to the credibility of Chelsea's witnesses. Second, Mr. Raphael's opinions as to whether the Project would unduly interfere with orderly development or would have an undue adverse effect on aesthetics are not legal conclusions as to the ultimate issue in this case, which instead is whether Chelsea II would be in the public good pursuant to Section 248. And, even if Mr. Raphael's testimony were to address that ultimate issue, such testimony would not be objectionable under V.R.E. 704.

Daubert Hearing

Finally, the Chelsea Motion also requests a *Daubert* hearing to address Mr. Raphael's prefiled testimony, but provides no authority requiring such a hearing either in a jury trial or in an administrative proceeding like this one. Mr.Raphael's testimony is admissible, as explained above. A hearing would not serve to further illuminate the issues. Therefore, having addressed the substance of Chelsea's objection to Mr. Raphael's testimony and overruled the objection without a hearing, I am also denying Chelsea's request for a *Daubert* hearing.

[35] *See USGEN*, 2004 VT at ¶ 26, 177 Vt. at 278 (holding that absence of jury diminishes screening function of judge, but "*Daubert* must still be followed, albeit in a somewhat more relaxed manner.")

[36] 3 V.S.A. § 810(4).

SO ORDERED.

Dated at Montpelier, Vermont, this 13th day of August, 2018 .

Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: August 13, 2018

Attest: _____
Deputy 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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