

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-3550-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged failure of Vermont Gas Systems, Inc. to comply with the certificate of public good in Docket 7970 by burying the pipeline at less than required depth in New Haven, Vermont	
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Order entered: 08/28/2020

ORDER DENYING INTERVENORS’ MOTION TO STRIKE PARTS OF BYRD TESTIMONY

On July 24, 2020, Kristin Lyon, Nathan and Jane Palmer, Lawrence Shelton, and Rachel Smolker (the “Intervenors”) jointly filed a motion with the Vermont Public Utility Commission (“Commission”) pursuant to Commission Rules 2.216 “for an order striking those parts of the testimony of witness William Byrd that act as conduits for the opinion testimony of witnesses who are not testifying.”

On August 6, 2020, Vermont Gas Systems, Inc. filed comments opposing the Intervenors’ motion.

On August 7, 2020, the Vermont Department of Public Service filed comments recommending that the Commission deny the Intervenors’ motion.

In this Order, I deny the Intervenors’ motion.

As an administrative tribunal, the Commission has broad discretion as to the admissibility of all evidence, including expert testimony. In ruling on an objection to the admissibility of testimony, like that made in the Intervenors’ motion to strike, the Commission decides the narrow question of whether the testimony may be admitted into the evidentiary record pursuant to the rules of evidence and the discretion afforded to the Commission in making admissibility decisions pursuant to 3 V.S.A. § 810(1).¹ This discretion shall exclude the admission of

¹ 3 V.S.A. § 810(1) 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.

evidence that is “irrelevant, immaterial, or unduly repetitious.” When considering such objections, the Commission does not determine the persuasive weight to be given to that testimony. The weight given to testimony may be tested on cross-examination and considered after its admission into evidence.

In contrast to a superior court, the Commission’s review of a project under Title 30 is as an expert body that is engaged in a “legislative, policy-making process.” In this capacity the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence.² The testimony objected to in Intervenors’ motion is information that Mr. Byrd relied upon and is admissible under the relaxed evidentiary rules for administrative proceedings. The testimony by others referred to by Mr. Byrd are factual predicates that are relevant because Mr. Byrd relied on them in forming his opinion as an expert in this matter.

The Intervenors’ concerns under 3 V.S.A. § 810(3)³ may be appropriately addressed on cross-examination at the evidentiary hearing scheduled in this matter. All parties will be provided a full opportunity to challenge Mr. Byrd’s opinions outlined in his testimony and report, including Mr. Byrd’s reasonable reliance upon information obtained from consultations and the basis for those opinions. The concerns raised by Intervenors about Mr. Byrd’s basis for his opinions contained in his report go to the weight of the evidence presented rather than to its admissibility.

The sources of the statements relied upon by Mr. Byrd that the Intervenors object to will not be available for cross examination. While these statements are relevant and admissible, their weight is limited to the reasonableness of Mr. Byrd’s reliance on them, not to the truth of the matter asserted.⁴ I will recommend that the Commission not make findings based on the truth of the facts that underlie these statements but I may recommend findings as to Mr. Byrd’s reasonable reliance on them.

² *Joint Petition of Northstar Decommissioning Holdings, LLC, Northstar Nuclear Decommissioning Co., LLC, Northstar Grp. Servs., Inc., Lvi Parent Corp., Northstar Grp. Holdings, LLC, Entergy Nuclear Vermont Inv. Co., LLC & Entergy Nuclear Operations, Inc., & Any Other Necessary Affiliated Entities to Transfer Ownership of Entergy Nuclear Vermont Yankee, LLC, & for Certain Ancillary Approvals, Pursuant to 30 V.S.A. §§ 107, 231, & 232, Docket No. 8880, Order of 2/8/18 at 2.*

³ 3 V.S.A. § 810(3) states: A party may conduct cross-examinations required for a full and true disclosure of the facts.

⁴ Under V.R.E. 703, an expert witness “may rely on inadmissible facts or data. . . in forming his opinions ‘if of a type reasonably relied upon by experts in the particular field. . . otherwise inadmissible facts or data may also be admitted for the limited purpose of demonstrating the basis of an expert’s opinion” *Id.* at 7

The Intervenors' motion of July 24, 2020, to strike certain parts of Mr. Byrd's prefiled testimony is denied.

SO ORDERED.

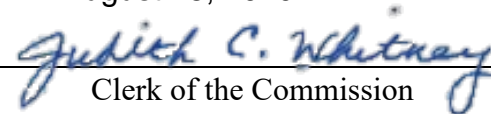
Dated at Montpelier, Vermont, this 28th day of August, 2020.



Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: August 28, 2020

Attest: 
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)

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