

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Solar LLC for a)
certificate of public good pursuant to 30 V.S.A.)
§§ 248 and 8010, authorizing installation and) Case No. 21-2939-NMP
operation of a 500 kW (AC) photovoltaic group)
net-metering system in Randolph, Vermont)

**PETITIONER’S MOTION TO STRIKE PORTIONS OF
LANDOWNERS’ DIRECT PREFILED TESTIMONY AND EXHIBITS**

NOW COMES Randolph Davis Solar LLC (the “Petitioner”) and moves the Vermont Public Utility Commission (“Commission”) to strike certain prefiled testimony and exhibits submitted by witnesses Michael Binder and Joan Allen (collectively, the “Landowners”) dated May 6, 2022.

I. Mr. Binder’s Testimony and Exhibits That Challenge the Town of Randolph’s Decision to Issue Preferred Siting for the Randolph Davis Solar Project are Irrelevant to this Proceeding and Should be Stricken

A. Legal Standard

1. Objections to Admissibility of Evidence In Commission Cases

The Commission’s rules provide that “[o]bjections 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.” Rule 2.216(C). “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 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(1).” Order Granting in Part Petitioner’s Motion to Strike, *Petition of Bradford Solar, LLC*, Case No. 19-2659-NMP, Order of 6/25/20 at 3.

Evidentiary matters in Commission proceedings are governed by the Rules of Evidence as applied in civil cases. 30 V.S.A. § 810(1); Rule 2.216. The only exception is that “[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 [people] in the conduct of their affairs.” *Application of Michael Hespos*, Case No. 20-3422-NM, Order of 3/2/22 at 3 (emphasis added) (quoting V.S.A. § 810(1)).

2. Irrelevant, Immaterial, or Unduly Repetitious Evidence Shall be Excluded

Under the Vermont Rules of Evidence, “[i]rrelevant, immaterial, or unduly repetitious evidence *shall be excluded*.” V.R.E. 402; *Petition of Bradford Solar, LLC*, Case No. 19-2659-NMP, Order of 6/25/20 at 3 (emphasis added). “Evidence which is not relevant is not admissible.” V.R.E 402. “‘Relevant evidence’ means evidence 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.” *Id.* at 3-4 (quoting V.R.E 401). *See also Joint Petition of NorthStar Decommissioning Holdings, LLC et al*, Docket No. 8880, Order of 2/8/18 at 3 (“Relevant evidence in some degree must advance the inquiry and thus have probative value”).

Even if relevant, evidence may be excluded “‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” *Id.* at 4 (quoting V.R.E. 403).

3. A Witness Must Qualify as an Expert in the Field to Offer an “Expert” Opinion

The Vermont Rules of Evidence distinguish between expert opinions and lay witness testimony. Under V.R.E. 702, only “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise” V.R.E. 702. The Commission “must find an adequate foundation for the admission of expert testimony.” *Trotier v. Bassett*, 174 Vt. 520, 523, 811 A.2d 166 (Vt. 2002). The foundation for expert testimony must establish the following:

First, ‘the testimony is based upon sufficient facts or data,’ second, it is ‘the product of reliable principles and methods,’ and third, “the witness has applied the principles and methods reliably to the facts of the case.’

State v. Kolts, 2018 VT 131, ¶¶ 32, 34, 205 A.3d 504 (quoting V.R.E. 702)(expert opinion excluded where witness having a degree in psychology gave a psychological opinion, but failed to “explain how [her] experience le[d] to the conclusion reached, why that experience [wa]s a sufficient basis for the opinion, [or] how that experience [wa]s reliably applied to the facts”).

“Expert testimony must meet a standard of ‘reasonable probability.’” *Everett v. Town of Bristol*, 164 Vt. 638, 639, 674 A.2d 1275 (Vt. 1996). “[A]n expert's opinion may not be based on mere speculation.” *Turgeon v. Sneider*, 150 Ct. 268, 274-45, 553 A.2d 548 (Vt. 1987). “Opinion based on speculation is irrelevant, and is not admissible.” *Id.* at 275 (quoting V.R.E. 401, 402). Where a self-professed “expert” lacks experience and cannot demonstrate that the foundational opinions offered are based upon reliable principles or methods, or prior experience, the testimony should be excluded. *State v. Kolts*, 2018 VT 131, 205 A.3d 504.

The Commission has accordingly stricken witness testimony involving scientific or technical matters where the witness failed to demonstrate that he had the requisite skill, experience or training to qualify as an expert on a subject. *Joint Petition of NorthStar Decommissioning Holdings, LLC et al*, Docket No. 8880, Order of 2/8/18 at 6 (striking witness testimony on nuclear radiation exposure and health outcomes where witness failed to demonstrate he was qualified to provide expert testimony on potential health risks associated with exposure to radiation).

4. Hearsay Evidence is Inadmissible

Under V.R.E. 801, hearsay, which is “an out-of-court statement offered for the truth of the matter asserted”, is inadmissible. *See* V.R.E. 801, 802; *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, Order of 2/2/10 at 4 (excluding landowner exhibits consisting of newspaper articles and letters from anti-wind organizations).

B. Mr. Binder's Testimony Regarding the Town of Randolph's Preferred Siting Process is Irrelevant and Therefore Inadmissible

Under the Vermont Net-Metering Rule, a proposed 500 kW net-metering system, like the Randolph Davis Solar Project, is eligible to participate in the net-metering program only if the system is located on a preferred site. *In re Petition of LK Holdings, LLC*, 2018 VT 109, ¶ 12; Rule

5.100 §§ 5.103, 5.104. The Randolph Davis Solar Project is preferred because the Project received a joint letter of support as a preferred site from the Town of Randolph and the regional planning commission. Rule 5.103; exh. RDS MS-5.

The Town of Randolph June 1, 2020 letter to the Public Service Board of Vermont (the Commission) is signed by Randolph Planning Commission Chair, the Randolph Selectboard Vice Chair and additionally signed by the Two Rivers-Ottawaquechee Regional Commission, being the duly authorized municipal legislative body and the municipal and regional planning commissions in the community where the net-metering system is proposed. The letter designates the Randolph Davis Solar proposal as preferred and further states “having made our review, we wish to support the Project and declare our desire to have the Location designated as a ‘preferred site’ under Section 5.103 of your Rule 5.100.”

A significant proportion of Mr. Binder's testimony and numerous exhibits are offered solely to challenge the Town of Randolph's decision and process for their determination. This includes Answer 4, beginning with “and Second ...” as well as the entirety of Questions and Answers 14 through 40. Mr. Binder states that this testimony is being offered solely to urge the Commission to “give no consideration to the Preferred Sites Letters from the Town of Randolph,” because Mr. Binder argues that the Town's decision was in error. See Binder pf. at 2. This testimony is legally irrelevant to the Commission's statutory § 248 review, and therefore inadmissible under 30 V.S.A. § 810 and V.R.E. 402.

This proceeding is to determine whether the Randolph Davis Solar Project satisfies the 30 V.S.A. § 248 review criteria and be granted a certificate of public good. The subject of the Town of Randolph's *process* for making its decision to designate the site preferred is not relevant to this proceeding. Town planning commissions and selectboards are governed by Title 24 of the Vermont Statutes Annotated and this Commission is not the arbiter of town officials' procedures or considerations when they issue preferred site letters. The Commission has not been delegated any role by the Legislature, in the context of Section 248 review or otherwise, to override the Town of Randolph's decision to issue a preferred site letter for the Randolph Davis Solar Project, and equally has no jurisdiction to review the merits or process of those decisions. The cited testimony

is irrelevant to this Section 248 proceeding and therefore inadmissible under 3 V.S.A. § 810 and V.R.E 402.

For the same reason, Exhibits 9, 11, 12, 13, 17, 21, 22, 23, 27, 28, 29, and 30, all of which are offered to challenge the Town's preferred site process and decision, are irrelevant and inadmissible.

II. Mr. Binder is Not Qualified to Testify Regarding Purported Vernal Pool or Wetland Impacts

When it comes to matters involving opinions of a scientific or technical nature, only experts qualified "by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" V.R.E. 702; *Irving v. Agency of Trans.*, 172 Vt. 527, 530, 768 A.2d 1286 (Vt. 2001); *In re L.A.*, 154 Vt. 147, 156, 574 A.2d 782 (Vt. 1990). Here, Mr. Binder has described his qualifications in aspects of medical science and land surveying. He has not offered or demonstrated that he qualifies as an expert on wetlands or vernal pools. Mr. Binder has clearly failed to establish that he satisfies the 3-part test for qualifying an expert under V.R.E. 702: "First, 'the testimony is based upon sufficient facts or data,' second, it is 'the product of reliable principles and methods,' and third, 'the witness has applied the principles and methods reliably to the facts of the case.'" *Kolts, supra*. As such, his Question and Answer 7, as well as Exhibit MB-2, should be stricken for failing to satisfy V.R.E. 702 and exceeding the scope of lay witness testimony under V.R.E. 701.

III. Portions of Ms. Allen's Testimony Should Be Stricken Because it is Irrelevant, Without Foundation, and She Has Not Demonstrated That She is Qualified to Offer the Opinions She Provides

A. Stormwater

Ms. Allen's testimony at Answer 1 describes her qualifications in land conservation, and references an MS degree in Natural Resources Management, but fails to specify in any respect that she otherwise satisfies V.R.E. 702s 3-part test to qualify her to testify as an expert. She has not established any education, training or experience in the technical engineering requirements for stormwater management and design under applicable Vermont stormwater regulations. She is not a Vermont licensed engineer, and has not offered or demonstrated that she qualifies as an

expert on stormwater, water quality or flood resiliency. As such, she is not qualified to offer an expert opinion on such topics under V.R.E. 702, and the entirety of her Questions and Answers 8, 9, and 10 are inadmissible and should be stricken.

Ms. Allen's testimony regarding purported stormwater impacts also lacks any foundation in that it fails to apply reliable principles and data based upon applicable Vermont stormwater laws and regulations. Question and Answer 8, beginning at line 18, starting with "a review ..." through the rest of Answer 8, is entirely irrelevant, because it relies upon purported mostly unidentified statements from third-party entities, rather than the Vermont stormwater rules and standards. At page 5, lines 2-8, Ms. Allen discusses her Exhibit JA-2, a "publication" that speaks to development on steep slopes. Exhibit JA-2 is from a New York planning board located along the border of Pennsylvania. This document has no relevance to this case or Vermont Stormwater Regulations. Stormwater management in Vermont and in this proceeding is governed by 10 V.S.A. § 1264, the Vermont Stormwater Management Statute, and the regulations, general permits and rules developed by the Department of Environmental Conservation ("DEC") of the Vermont Agency of Natural Resources ("ANR"), including but not limited to, Vermont Construction General Permit ("CGP") 3-9020, issued February 19, 2020, effective May 19, 2020, and the Vermont Low Risk Handbook for Erosion Prevention and Sediment Control dated February, 2020. The cited testimony and Exhibit JA-2 are irrelevant and should be stricken.

Exhibit JA-2 is inadmissible because it is hearsay.

Exhibit JA-3 is a document titled "Soil Characteristics & Analysis". No foundation has been laid to identify who prepared it, what the calculations mean, what standards were applied, or their relevance in this case. The document is irrelevant and therefore should be excluded under V.R.E. 402, and because "its probative value is substantially outweighed by the danger of unfair prejudice [and] and confusion of the issues." V.R.E. 403.

B. Necessary Wildlife Habitat

Ms. Allen has failed to specify that she has any education, training or experience that would qualify her to offer an opinion as an expert as to whether the Project site qualifies as "necessary wildlife habitat" under the Vermont legal standards that govern such designation.

She has not demonstrated that she is qualified to offer an expert opinion on such topics under V.R.E. 702, and the entirety of her Questions and Answers 11 through 14 are inadmissible and should be stricken. In fact, Answer 14, page 11, lines 12 through 14, concedes that she “cannot testify with certainty” that any portion of the Project site rises to the level of “necessary wildlife habitat.” Her testimony is essentially mere speculation and, under the Vermont Supreme Court’s ruling in *Turgeon v. Sneider, supra*, should be stricken.

Exhibit JA-6 labeled “Forest Conservation Targets” is an unidentified document with respect to its origin, and is provided possibly in partial form with no context. Page 9 lines 11-12 of Ms. Allen’s testimony cites it to support her statement that: “Early successional habitat is documented as declining in Vermont, and numerous studies and reports call for their protection.” Yet, Exhibit JA-6 fails to cite a single study, nor identify the author, the author’s qualifications, year of publication, or intended purpose of the document. No foundation has been laid as to what this exhibit is, who prepared it, whether it is a complete document or a selected excerpt, or its relevance. The Exhibit and testimony quoted is inadmissible for lack of foundation, because it is hearsay, it is irrelevant, and its introduction will only cause confusion.

Exhibit JA-7, labeled “Shrubland and Young Forest Dependent Species of Greatest Conservation Concern”, is cited at page 9 line 15 of Ms. Allen’s testimony. It appears to have been prepared by the “Wildlife Management Institute” circa 2011. No foundation has been laid for the introduction of this exhibit, its relevance, or its author(s), and it is hearsay. The exhibit and testimony referencing it should be stricken as inadmissible.

C. Habitat Blocks

Answer 13 of Ms. Allen’s testimony addresses “habitat blocks”, and references Exhibits JA-11 and JA-12. No foundation has been laid to establish their source of origin or who prepared them. Lines 7 through 10 on page 11 offer a quote from a “Biofinder Update Report,” but fails to identify who prepared the report, its relevance, provide the report, or provide proper page citations for the quote. Answer 13 and Exhibit JA-12 are inadmissible because Ms. Allen has failed to lay a foundation, establish relevance, establish her qualifications to address the subject, and because its admission will only cause confusion.

There are no specific statutes, rules, policies, or standards articulated in Title 10 of Vermont Statutes Annotated (“Conservation and Development”) that limit forest clearing for solar or any other kind of development. *See* 10 V.S.A. §§ 2600 *et seq.* Just the opposite. Title 10 allows logging operations to clear cut swaths of Vermont forests, with the only limitations being that logging above 2,500 feet go through Act 250 review, and that “heavy cuts” of 40 acres or more must first file a notice of intent with ANR 15 days before the clear-cut operation. *See* 10 V.S.A. § 6001(3)(D)(i)(Act 250 clearing triggered only where above 2,500 feet); *In re Green Crow Corp.*, 2007 VT 137, ¶ 10 (Under Act 250, “[t]he construction of improvements for . . . logging . . . purposes below the elevation of 2,500 feet” is explicitly excluded from the term “development.”); 10 V.S.A. § 2625 (heavy cut statute).

Even if Title 10 included forest clearing limitations, which it does not, Section 248 does not incorporate any such provisions by reference. Section 248(b)(5) does not specify any standards that impose clearing restrictions on solar generation projects, does not mention forest fragmentation, or identify a statute, criterion, or legal requirement for clearing standards, nor are forest resources recognized generally as a protected resource. The statute incorporates by reference many of the Act 250 criteria, including the criterion covering rare and irreplaceable natural resources (“RINA”) and critical wildlife habitat, but there are no RINA or critical wildlife habitat on the Project parcel.

The Commission is a quasi-judicial body whose powers are limited to those expressly delegated to it by the Legislature. *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 30 A.2d 117, 120 (1941) (stating the PUC is “a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction. . . . It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.”). The broad reference in Section 248(b)(5) to the “natural environment”, is also not sufficient by itself to preclude the tree clearing proposed, because the “natural environment” language is overly broad and is as a matter of law an unenforceable and standardless standard under the Vermont Supreme Court’s ruling in *In Re Appeal of JAM GOLF, LLC*, 2008 VT 110. *JAM GOLF* holds that an environmental standard in a statute or regulation

must “specify sufficient conditions and safeguards to guide applicants and decisionmakers” with “adequate guidance” to avoid “unbridled discrimination” in government interpretation and enforcement of the statute or rule. *Id.*, ¶ 12. “Such standardless discretion violates property owners’ due process rights.” *Id.*, ¶ 14. Nothing in Section 248 addresses forest protection, forest health, or tree cutting *per se*. See *In re Agency of Administration*, 141 Vt. 68, 93, 444A.2d 1349, (1982)(“Act 250 was never meant to establish Environmental Board jurisdiction over historic sites, scenic areas, wildlife, water, air, soil, or schools and highways *per se*”). Equally, Section 248’s generalized reference to the “natural environment” confers no jurisdiction on the PUC to regulate tree cutting *per se*.

D. Wetlands

Answer 13 of Ms. Allen’s testimony and Exhibits JA-11 and JA-12 are irrelevant and should be stricken.

Questions and Answers 15-17 of Ms. Allen’s testimony comment on wetlands, but she is not a wetland biologist, ecologist or scientist. These Questions and Answers, along with Exhibit JA-14 (an excerpt from best logging practices), are inadmissible because Ms. Allen is not qualified to testify on these subjects and has failed to provide a proper foundation for her opinions.

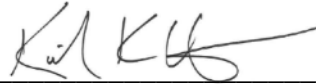
IV. REQUEST FOR RELIEF

Petitioner respectfully asks the Commission to timely issue an order prior to the June 24, 2022 rebuttal testimony deadline, striking the above-referenced evidence for the reasons provided herein.

Dated at Burlington, Vermont, this 31st day of May, 2022.

Respectfully submitted,

Randolph Davis Solar LLC



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