

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 22-2230-PET

Petition of Vermont Gas Systems, Inc., for approval of an out-of-state renewable gas purchase contract with a term exceeding 5 years pursuant to 30 V.S.A. § 248(i)

Catherine Bock’s Response to Vermont Gas Systems, Inc. (“VGS”) Motion to Strike Prefiled Testimony of Geoffrey Gardner

By this filing, I, Catherine Bock, am responding to the motion of VGS to strike the prefiled testimony of Geoffrey Gardner, dated 2 September 2022. VGS cites as basis for its Motion to Strike V.R.E. 701 and V.R.E. 702.

I certainly agree that, pursuant to 3 V.S.A. § 809(g), “the Commission must make findings of fact in contested cases based on “evidence,” as VGS asserts. I also note that in PUC Case No. 17-5024-PET the Order Overruling Objection to the Admissibility of the Prefiled Testimony of David Raphael, August 13, 2018, pages 10-11, the Commission wrote the following in explaining its application of the standard of evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),

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. 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*.

This was in line with the Vermont Supreme Court’s interpretation, in *State v. Tester*, 2009 VT 3 ¶ 18, 185 Vt. 241, 968 A.3d. 895 that *Daubert* did not narrow but expanded the ability to introduce expert testimony.

On page 11 of the same PUC Order in PUC Case No. 17-5024-Pet cited above, the Commission also wrote:

The *Daubert* test that is codified in V.R.E. 702 is primarily intended to protect inexperienced 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. However, these judicial “gatekeeping” concerns that were identified in *Daubert* and its progeny are not as pronounced in administrative proceedings, 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.”

I believe that the testimony and evidence offered by Mr. Gardner is of a kind and quality to be admissible under these principles established by the Commission. To provide just one example, Mr. Gardner does not offer judgment or proof of how much any specific pipeline or gas storage facility leaks. Rather the point of his testimony with respect to pipeline leakage is that it occurs within a relatively wide range significant enough to be a factor the Commission should consider in this case. Were he to offer an opinion about specific measurements of leaks from the pipelines used to deliver natural gas to Vermont, Mr. Gardner would be well beyond his competence and expertise. His more general opinion about the importance of considering pipeline leaks as a critical factor for the Commission to consider in reaching its decision in this case involves a different level and kind of competence, well within the bounds of what the Commission has deemed admissible.

There is no issue here of a jury being misled or duped by “junk science” or by “giving undue deference to the ‘apparent’ expertise” of a witness. Rather Mr. Gardner’s submits his testimony to the Commission, a tribunal of experts whose “experience, technical, competence, and specialized knowledge may be utilized in the evaluation of evidence.” The direction of much of his testimony is to present to the Commission for their consideration and judgment factors and evidence that without his testimony might otherwise not be present in the case. His testimony and its adequacy and relevance will be subject to cross examination. It will also be subject to the Commission’s judgment of its value and relevance.

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

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.

I believe that the kind and quality of the evidence Mr. Gardner offers in his testimony as well as the sources it is based on are of “a type commonly relied upon by reasonably prudent” people” in the conduct of their affairs. To recognize this is not to prejudge its accuracy, usefulness or relevance to the issues of this case. That will be determined by the Commission after cross examination of Mr. Gardner.

Therefore, the VGS motion to strike Mr. Gardner’s prefiled testimony should be denied.

Dated September 19, 2022

/s/ Catherine Bock

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