STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7535

Investigation into: (1) petition of AARP, for the	)
establishment of reduced rates for low-income	)
consumers of Green Mountain Power Corporation and	)
Central Vermont Public Service Corporation; and (2) as	)
expanded to possibly include general applicability to all	)
Vermont retail electric utilities	)

Order entered: 5/5/2010

ORDER RE: AARP OBJECTION TO EXPERT TESTIMONY

I. INTRODUCTION

In this Docket, the Vermont Public Service Board ("Board") is considering the establishment of reduced rates for low-income electricity consumers in Vermont. AARP has filed an objection to the admission into evidence of the prefiled expert testimony filed by two witnesses on behalf of the Vermont Department of Public Service ("Department" or "DPS"). In this Order, I overrule AARP's objection to the direct testimony of Department witnesses John Becker and Tamera Pariseau. My decision in this Order to deny AARP's objection in no way eliminates or limits AARP's opportunity to use the tools of cross-examination and briefing to challenge the weight to be accorded, or the merits of the policies reflected in, the prefiled testimony of Mr. Becker and Ms. Pariseau.

II. PROCEDURAL HISTORY

On May 19, 2009, AARP filed a petition, pursuant to 30 V.S.A. § 218(e), requesting that the Board establish reduced rates for low-income residential customers in the service territories of Green Mountain Power Corporation ("GMP") and Central Vermont Public Service Corporation ("CVPS") (the "AARP Proposal").

On September 21, 2009, the Board issued an Order expanding the scope of this proceeding to "include consideration of program-related issues, including design, that may have application beyond the service territories" of GMP and CVPS.[1]

On January 15, 2010, the Department filed the direct testimony of witnesses Becker and Pariseau.

On February 4, 2010, AARP deposed Department witnesses Becker and Pariseau.

On February 17, 2010, AARP made a filing pursuant to Board Rule 2.216(C) entitled "AARP Motion to Strike Testimony of DPS Witnesses Becker and Pariseau" ("AARP Motion").[2]

On March 12, 2010, responses to the AARP Motion were filed by the Department,[3] CVPS,[4] and International Business Machines, Inc. ("IBM").[5]

III. THE POSITIONS OF THE PARTIES

At the heart of the AARP Motion lies the question of whether the direct testimony of DPS witnesses Becker and Pariseau is admissible as expert testimony pursuant to Rule 702 of the Vermont Rules of Evidence.

In the prefiled direct testimony at issue, Mr. Becker identifies himself as a "Utilities Finance & Economics Analyst" whose "duties include review of rate cases, tariffs, special contracts, financings, and various other financial and economic matters related to utility

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1. Docket 7537, Order of 9/21/09 at 1.

2. In this Order, I have declined to refer to the AARP Motion as a motion to strike the Department's testimony. The language of Board Rule 2.216(C) does not contain the term "motion to strike," nor does it provide a standard for deciding such motions. Rather, that rule prescribes a process for objecting in Board proceedings to the admissibility of prefiled testimony. Thus, because Rule 2.216(C) is intended to deal with testimony that has not yet been admitted into the evidentiary record, it is more accurate to style a filing pursuant to Rule 2.216(C) as an "objection" instead of as a "motion to strike." Generally, a "motion to strike" is filed pursuant to Rule 12(f) of the Vermont Rules of Civil Procedure, which permits such motions in order to seek removal "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," or is made to strike evidence after it has come into the evidentiary record.

3. *DPS Response to AARP Motion to Strike Testimony,* dated March 12, 2010 ("DPS Reply").

4. *Letter from Jeanne E. Burns, Esq., to Susan Hudson,* dated March 12, 2010 ("CVPS Reply").

5. *Limited Response of IBM to AARP's Motion to Strike the Testimony of DPS Witnesses Becker & Pariseau*, dated March 15, 2010 ("IBM Reply").

regulation."[6] In his prefiled testimony, Mr. Becker "discusses the significant cost shifting that is proposed in the AARP program, he highlights a concern that elements of the program may be considered unjust discrimination, and he makes a recommendation as to whether the Board should approve this petition."[7] Ms. Pariseau, in turn, identifies herself as the Department's Coordinator of Consumer Affairs and Public Information.[8] Her direct testimony "describes and summarizes the Department's analysis of the AARP proposal for the establishment of a reduced electric rate for low-income consumers and outlines the Department's overall position on the proposal."[9]

AARP

AARP contends that neither the direct testimony of Mr. Becker nor the direct testimony of Ms. Pariseau is admissible as expert testimony in this case. According to AARP, this testimony is not sufficiently reliable to pass muster under V.R.E. 702 because Mr. Becker and Ms. Pariseau both lack the requisite expertise and experience to qualify as testifying experts.[10] Relying heavily upon sworn deposition testimony given by Mr. Becker on February 4, 2010, AARP faults Mr. Becker's qualifications as an expert witness because he does not have "the necessary experience" and "can offer no 'scientific, technical or other specialized knowledge' that will assist the Board."[11] As for Ms. Pariseau, AARP characterizes her direct testimony as largely "an articulation of 'concerns' which are not based upon any evidence, personal knowledge, or expertise" and that contains neither a "factual basis" nor "data."[12]

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6. *Prefiled Testimony of John M. Becker on Behalf of the Vermont Department of Public Service* dated January 15, 2010, at 1. I note that I have not admitted this testimony into the evidentiary record at this stage in this docket. While the nature of the AARP Motion requires that I describe the direct testimony in order to decide the motion, in making such references I express no opinion as to the weight to be given this testimony at this time, nor do I otherwise rely upon it as evidence in making any findings of fact on the merits of the case.
7. See cover page of Becker Direct Testimony.
8. *Prefiled Testimony of Tamera S. Pariseau on Behalf of the Vermont Department of Public Service* dated January 15, 2010, at 1. As in the case of the Becker Direct Testimony, I have neither admitted Ms. Pariseau's direct testimony into evidence, nor have I relied on it at this stage in the proceeding for any purpose other than for resolving the pending AARP Motion.
9. See cover page of Pariseau Direct Testimony.
10. AARP Motion at 15, 17-19.
11. AARP Motion at 15.
12. AARP Motion at 19.

The Department

The Department opposes the AARP Motion on three grounds. First, it argues that the prefiled testimony in dispute is admissible under Rule 702 because witnesses Becker and Pariseau have gained "experience as employees of the Department of Public Service to qualify as experts in their respective fields."[13] Second, as employees of the Department, witnesses Becker and Pariseau are "policy witnesses on the positions of the Department," and as such are imbued with "special expertise" due to the Department's statutory charge pursuant to 30 V.S.A. § 2(b) to "represent the interests of the people of the state."[14] Third, the Department contends that AARP's objections to the testimony at issue in fact concern the weight that should be accorded to this testimony, and not its admissibility under V.R.E. 702.[15]

CVPS

CVPS argues that the AARP Motion should be denied because the experience of the DPS witnesses constitutes "sufficient knowledge of matters that could assist the Board" in weighing the issues raised in this docket. Observing that much of the AARP Motion "is focused on contradicting or attacking the witness' testimony as was attempted during AARP's deposition" of Mr. Becker and Ms. Pariseau, and noting further that "the majority of the motion quotes the deposition transcript and not the prefiled testimony itself," CVPS agrees with the Department that the gist of AARP's argument goes to the weight that should be accorded to the prefiled testimony at issue, and not to the admissibility of the testimony as evidence.[16] In addition to noting the Board's "broad discretion" in regard to questions of admitting evidence, CVPS points out that AARP "can readily address its objections through cross examination of the witnesses at the hearing."[17]

IBM

IBM has filed "a limited response" to the AARP Motion in which IBM asks the Board to "disregard the misleading assertions made by AARP" with regard to an Economic Development

13. DPS Reply at 2.
14. *Id.* at 5.
15. *Id.* at 6.
16. CVPS Reply at 1.
17. *Id.* at 2.

Agreement ("EDA") between IBM and GMP that was approved by the Board on December 22, 2003, in Docket 6867.[18] According to IBM, AARP has engaged in "blatant mischaracterizations" of the Board's Docket 6867 Order by implying in the AARP Motion that a cross-subsidy resulted from the EDA.[19] The IBM Reply does not otherwise deal with AARP's substantive arguments as set forth in the AARP Motion.[20]

IV. DISCUSSION

My analysis of the AARP Motion begins with a review of the legal framework applicable to such evidentiary questions in Board cases.

Pursuant to Board Rule 2.216(A) and 3 V.S.A. § 810(1), it is the general practice of the Board 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 Board'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."[21] The discretion that is afforded to the Board in crafting its evidentiary record reflects a legislative recognition of "the need of agencies to consider any evidence which may illuminate the case."[22] This need, in turn, arises from the very nature of the Board's cases, in which "its determinations necessarily are made in the context of proceedings that are legislative or policy-making in nature."[23] This docket is an example of such a "legislative or policy-making" proceeding.[24]

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18. IBM Reply at 1.

19. *Id.* at 3.

20. The IBM Reply further does not deal with the merits of the arguments made by the Department or CVPS. Accordingly, the IBM Reply raises no issue requiring a ruling in this Order. To the extent that either IBM or AARP wishes to further explore the precedential value, if any, of the Board's Order in Docket 6867, both parties remain free to use their judgment in doing so later when we reach the briefing stage of this docket. In any event, I have not relied upon AARP's characterization of the Docket 6867 Order in disposing of the AARP Motion.

21. 3 V.S.A. § 810(1).

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

23. Docket 5983, *Re Green Mountain Power Corporation*, Order of 2/27/98 at 9-10.

24. Accordingly, it is not clear that this docket constitutes a contested case proceeding that warrants the strict application of V.R.E. 702 as contemplated by AARP in the AARP Motion. On its face, § 810 of the Vermont Administrative Procedure Act applies to "contested cases," which are defined as proceedings involving "rate-

(continued...)

Turning to the AARP Motion, AARP has moved pursuant to Board Rule 2.216(C) to strike the prefiled direct testimony of Department witnesses Pariseau and Becker. AARP argues that the testimony of these Department witnesses does not qualify as admissible expert testimony pursuant to Rule 702 of the Vermont Rules of Evidence, which provides as follows:

> 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.[25]

Accordingly, under Rule 702, the trier of fact must find that such testimony is relevant and reliable before admitting expert testimony into evidence.[26] Trial judges "act as gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand . . . ."[27]

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24. (...continued)
making" or other cases "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). AARP's petition to establish reduced rates for low-income electricity customers was filed pursuant to 30 V.S.A. §218(e), which contains no language requiring "an opportunity for hearing" in reviewing AARP's petition. That said, a Board docket that is not a "contested case" often nonetheless will assume the qualities of such an adjudicative proceeding in which the rules of evidence are applied, even though the resulting decision actually is of a legislative nature that "applies prospectively and until further changed." Docket 5736, *Petition of Vermont Electric Power Producers, Inc.*, Order of 6/30/95 at 2, n.7. This blend of adjudicative process and legislative outcome is a reflection of the quasi-judicial nature of the Board as an administrative tribunal. Therefore, in choosing to employ the rules of evidence in dockets that are not "contested cases," the Board's objective is more weighted toward 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.

25. V.R.E. 702. 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 New England, Inc. v. Town of Rockingham*, 2004 VT 90, ¶ 18, 177 Vt. 193, 276 (2004). 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 v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 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; 177 Vt. at 201.

26. *USGEN*, 2004 VT at ¶19; 177 Vt. at 201.

27. *Id. See also In re Appeal of JAM GOLF, LLC*, 2008 VT 110, ¶ 6, 185 Vt. 201,205 (2008).

However, as an administrative tribunal, the Board has determined that its "gatekeeping" function is informed by its

> broad discretion as to the admissibility of all evidence, including expert testimony. The definition of "expert," *i.e.*, a person who can contribute expert testimony, is broad. Under the Vermont Rules of Evidence, moreover, an expert may be qualified on the basis of her skill, knowledge, or experience. Where a witness' experience or training is sufficient to provide assistance to the Board, that witness' testimony is admissible as expert testimony, whether it be in the form of opinion or otherwise.[28]

With this legal framework in mind, I now review AARP's objections to the prefiled direct testimony of the Department's witnesses.

AARP's Objection to the Becker Testimony

Mr. Becker's prefiled testimony essentially states that AARP's low-income rate proposal, if adopted, would result in impermissible inter-class and intra-class cost shifting and would produce unjustly discriminatory rates in violation of applicable Board precedent and Vermont statutory law.[29] Mr. Becker also contends that AARP's substantive testimony to date in this case is devoid of quantifiable data regarding how implementing low-income rates would produce any off-setting benefit for the commercial and industrial class of customers, or the residential customers who would not qualify for the low-income rates.[30] Mr. Becker also takes issue with AARP's testimony that adopting low-income rates would produce cost-savings such as reduced collections expenses – Mr. Becker contends such savings would be compromised by the new costs of administering the low-income rate proposal.[31] Finally, Mr. Becker criticizes the AARP petition for lacking details about how the program would be administered, and by whom.[32]

In the AARP Motion, AARP argues that Mr. Becker is incompetent as an expert to offer his critique of the AARP Proposal because he lacks any meaningful training or experience in rate-setting and, in AARP's judgment, exhibited an unacceptable unfamiliarity during his

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28. Docket 7466, *Investigation into Petition Filed by VDPS Re: Energy Efficiency Utility Structure*, Order of 9/3/09 at 4 (*citing* Docket 6545, *Sale of Vermont Yankee*, Order of 3/21/02, at 2).
29. Becker pf. at 2.
30. Becker pf. at 3.
31. Becker pf. at 4.
32. Becker pf. at 6.

deposition with traditional rate-design principles as articulated by the likes of Professor Bonbright[33] and as applied by the Board in prior rate-design cases.[34] AARP further faults Mr. Becker's command of relevant Board precedent and prior DPS positions in previous low-income rate proceedings before the Board, and his awareness of approved cross-subsidies in existing rate designs for GMP and CVPS.[35]

Turning first to the question AARP has raised about Mr. Becker's competency as an expert, I do not find AARP's criticisms of Mr. Becker's qualifications to be persuasive. It is well-established in Vermont that skill, knowledge or experience are each adequate bases upon which to qualify an expert.[36] AARP contends that Mr. Becker has no skill, knowledge or experience to bring to bear in this case, but Mr. Becker's prefiled testimony indicates otherwise: he holds a bachelor's degree and a master's degree in business administration; he has worked as a utilities analyst at the Department for a year, during which his duties have included reviewing "rate cases, tariffs, special contracts, financings, and various other financial and economic matters related to utility regulation."[37]

AARP points out that Mr. Becker has not testified in a rate-design case and has no formal education in rate design, rate-setting or utility regulation, but "[t]he mere fact that a witness lacks a particular professional certification is but one factor in the assessment of competency; the key question is always whether, in light of training and experience or both, the witness has expertise in the area in question."[38] I note that, as the Department contends, Mr. Becker's expert testimony includes "a succinct revenue analysis by customer class."[39] This analysis is comprised of a chart that illustrates in numbers and percentages Mr. Becker's concerns about the potential

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33. Professor Bonbright is the author of a treatise entitled *Principles of Public Utility Rates*. According to AARP, Mr. Becker "necessarily would have to understand and apply" the rate-design principles articulated by Professor Bonbright in order to deliver testimony that would be of "material assistance" in deciding this case. AARP Motion at 3.

34. *See* AARP Motion generally.

35. *Id.*

36. *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*, 138 Vt. 389, 392 (1980). *See also* Docket 7466, Order of 9/3/09 at 4.

37. Becker pf at 1.

38. *O'Bryan Construction Company, Inc., v. Boise Cascade Corp.*, 139 Vt. 81, 89 (1980).

39. Department Reply at 4.

cost-shifting effects of the AARP Proposal.[40] Mr. Becker's chart demonstrates that he possesses the type of expertise and analytical skills typically employed by experts who testify before the Board in rate-design and rate-making proceedings. The expertise and skills that went into creating Mr. Becker's chart are consistent with his educational background and employment as an accountant and a utilities analyst. I therefore conclude that Mr. Becker qualifies pursuant to V.R.E. 702 to testify as an expert in this proceeding.

I further conclude that Mr. Becker's cost-shifting analysis is based on "sufficient facts or data" as required by Rule 702. The data used to generate the percentages reflected in Mr. Becker's charts appear to be derived from AARP's exhibits that were filed as attachments to its own prefiled direct testimony in this docket.[41] At this time in the docket, I have not been presented with any basis for questioning the sufficiency or reliability of the data contained in any of AARP's prefiled exhibits.

I consider next AARP's objection that Mr. Becker's expert testimony is unreliable because he does not appear to be thoroughly familiar with Board precedent, previous DPS positions on low-income rate proposals,[42] and the application of traditional rate-design principles as articulated by Professor Bonbright. I do not find this objection compelling. Ultimately, when the merits of this case are weighed, AARP may prove persuasive in arguing that Mr. Becker fatally parts company with Professor Bonbright and Board precedent when he cites the single rate-design principle of avoiding cost-shifting as the basis for his opinion that the AARP petition should be denied. But, for purposes of the Rule 702 inquiry at hand, I observe that by comparing and contrasting Mr. Becker's analysis with Professor Bonbright's standards and prior Board cases, AARP has implicitly conceded that Mr. Becker is reliably applying to the facts of this case a rate-design principle that has been recognized as reliable, though others may not accord it the singular

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40. Becker pf. at 3.

41. Becker pf. at 3. Mr. Becker specifically identifies the following AARP exhibits as the sources for his data for his cost-shifting analysis: exh. AARP-JH-3; exh. AARP-JH-4; exh. AARP-JH-5; and exh. AARP-JH-6. *Id.*

42. As the Department points out, "the Department retains discretion to revise its position over time . . . ." Department Reply at 7. I therefore perceive no basis for questioning Mr. Becker's competency as an expert on the basis of any inconsistency the Department may choose to display in changing its policy positions. Such policy changes reflect upon the credibility of the Department, and not upon Mr. Becker. This points to a basis for cross-examining testimony, not for striking it.

primacy that Mr. Becker does. Thus, while AARP views Mr. Becker's testimony as unreliable because it appears to clash with established expert opinion in rate-design, such a divergence does not render Mr. Becker's testimony inadmissible as an expert opinion. Rather, as the Department and CVPS have suggested, the effect of AARP's argument is to call into question how much weight Mr. Becker's expert opinion should be accorded. That is an issue that is best explored through cross-examination and legal briefing.

In 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.[43] I find Mr. Becker's testimony helpful, and therefore relevant, because it presents the Department's critique of the AARP proposal based on the Department's policy priorities. I find Mr. Becker's expert opinion to be reliable because of his educational background and on-the-job experience.[44] Therefore, in regard to Mr. Becker's testimony, I deny the AARP Motion because the objection is not well-founded and is directed at prematurely rebutting the merits of Mr. Becker's expert conclusions.

AARP's Objection to the Pariseau Testimony

Ms. Pariseau's prefiled testimony essentially states that the AARP Proposal is incomplete in terms of the information that would be needed to "to assess the program's viability and potential impact to consumers," thus "making it difficult for the Department to make a recommendation of the potential impact of the program."[45] Ms. Pariseau voices a variety of concerns in this vein, such as the potential inequity of requiring customers who barely fail to qualify for the proposed low-income rates to subsidize their poorer neighbors' electricity usage,

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43. *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).

44. Having reached this conclusion about Mr. Becker's competency, there is no need to resolve, and I therefore do not address, whether he would qualify as a testifying expert with "specialized knowledge" under Rule 702 by virtue of his position as a Department employee who has been designated to present the Department's policy positions to the Board through testimony in this case. *See* Department Reply at 5.

45. Pariseau pf. at 2.

and the conceptual and mechanical complications of administering the "one-time" arrearages forgiveness element of the AARP Proposal.[46]

As in the case of Mr. Becker, AARP argues that Ms. Pariseau's prefiled testimony is unreliable for purposes of admissibility as expert testimony under Rule 702 because she lacks "training, education or experience" in rate-setting or rate-design.[47] In the AARP Motion, AARP contrasts numerous examples of statements made by Ms. Pariseau in her prefiled testimony with statements from her deposition testimony to show that, when pressed to elaborate during her deposition, Ms. Pariseau was not able to support her prefiled testimony to AARP's satisfaction.[48] According to AARP, Ms. Pariseau's testimony lacks the "factual basis" or "data" that is required to be considered reliable as expert testimony under Rule 702.[49]

Turning first to AARP's objection to Ms. Pariseau's competency, I do not find this objection persuasive. The AARP Proposal on its face is intended to establish reduced rates for low-income electricity consumers. As AARP's deposition questioning established, Ms. Pariseau has "experience working with poor people and ...know[s] the difficulties they have in paying their bills."[50] Furthermore, as AARP acknowledges, Ms. Pariseau "has served as the director of the Department's Consumer Affairs and Public Information Division for over four years."[51] As the Department points out, Ms. Pariseau "deals with the consuming public every day on a wide variety of issues including disconnection for nonpayment of charges."[52] It is reasonable to infer from Ms. Pariseau's professional experience at the Department that she possesses significant, relevant expertise concerning the conceptual and practical considerations that may attend the implementation of the AARP Proposal, should it be approved as a result of this docket. If nothing else, Ms. Pariseau's professional occupation has given her an expert perspective that enables her to identify numerous "how will this work" questions about the AARP Proposal that

46. *Id.* at 3-4.
47. AARP Motion at 10.
48. *Id.* at 10-12.
49. *Id.* at 19.
50. AARP Motion at 10.
51. *Id.* at 9.
52. Department Reply at 3.

appears to be relevant to the ultimate outcome of this case.[53] I therefore conclude that "in light of training and experience or both," Ms. Pariseau qualifies under Rule 702 as "a witness has expertise in the area in question."[54]

Turning next to AARP's objection that Ms. Pariseau's prefiled testimony lacks the requisite "factual basis" or "data" for admission under Rule 702, I find this contention to be wholly without merit. In making this argument, AARP is standing the issue on its head. Ms. Pariseau's prefiled testimony repeatedly points to the "fact" that it is the AARP Proposal that is lacking in facts and data.[55] According to Ms. Pariseau, it is the "fact" of this "data gap" left by AARP that is preventing the Department from assessing "the potential impact of the program" on consumers.[56] Thus, for purposes of determining its admissibility under Rule 702, AARP has failed to persuade me that Ms. Pariseau's expert testimony is unreliable in raising questions and concerns about the AARP Proposal. To the contrary, as in the case of Mr. Becker's prefiled testimony, I find that Ms. Pariseau's prefiled testimony is helpful, and therefore relevant, because it presents the Department's critique of the AARP Proposal based on the Department's policy

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53. For instance, Ms. Pariseau points to uncertainty about who will bear certain administrative responsibilities and costs in implementing the AARP Proposal. Pariseau Direct Testimony at 5. Ms. Pariseau also identifies issues about how the AARP Proposal would interact with existing utility and Department policies and practices concerning seasonal residential customers, tenant customers, transient college customers and customers with disconnection histories. *Id.* at 3-5.

54. *O'Bryan*, 139 Vt. 89. AARP has specifically questioned Ms. Pariseau's competence to opine on matters of cost-shifting and unjust discrimination. AARP Motion at 10-11. As the AARP Motion shows, on these subjects Ms. Pariseau specifically defers to Mr. Becker for more detailed analysis and testimony. *Id.* It is my assessment that in making these statements, Ms. Pariseau is not representing herself as an expert on these subjects. Rather, she is simply serving as an "umbrella" witness who is providing a "road-map" by outlining the Department's overall position and pointing to the witness who will be testifying as to those identified subjects. Such umbrella testimony is an accepted practice in Board proceedings and is not deemed to reflect on the admissibility of the evidence, as the opposing party will have an opportunity to cross-examine the witness who actually presents the testimony in question to the Board. Docket 6545, Order of 3/21/02 at 4. I therefore find no basis for objecting to the admissibility of Ms. Pariseau's umbrella testimony.

55. Pariseau pf. at 2, 3, 4, 5 and 7.

56. Pariseau pf. at 2.

priorities. I further find Ms. Pariseau's expert opinion to be reliable because of her professional background and on-the-job experience at the Department.[57]

Accordingly, AARP's objection to Ms. Pariseau's prefiled expert testimony is overruled. My ruling that Ms. Pariseau's testimony is admissible as expert testimony will not be prejudicial to AARP because AARP may avail itself of the scheduled opportunity to file rebuttal testimony in this proceeding that addresses the Department's concerns about missing information, whether by providing more data or by explaining why such data is not needed to support approval of the AARP Proposal.

V. CONCLUSION

In this Order, I have found that the prefiled testimony of DPS witnesses Becker and Pariseau is admissible as expert testimony because it meets the *Daubert* test of "relevant and reliable" as codified in V.R.E. 702. Both witnesses have furnished expert opinions that are based on "sufficient facts or data" and are derived from the reliable application of "reliable principles and methods" to the facts of this case.

Furthermore, I conclude that even if this testimony did not qualify for admission as expert testimony under a strict application of V.R.E. 702, it nonetheless is admissible as expert testimony at the Board's discretion pursuant to 3 V.S.A. § 810(1). The *Daubert* test that is 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.[58] However, these judicial "gatekeeping" concerns that were identified in *Daubert* and its progeny are not as pronounced in administrative proceedings, [59] where the Board is

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57. Having reached this conclusion about Ms. Pariseau's competency, there is no need to resolve, and I therefore do not address, whether she would qualify as a testifying expert with "specialized knowledge" under Rule 702 by virtue of her position as a Department employee who has been designated to present the Department's policy positions to the Board through testimony in this case. *See* Department Reply at 5.

58. *See, e.g.*, *Daewoo*, 2008 VT at ¶8 and ¶10, 183 Vt. at 213-14. *See also Daubert*, 509 U.S. at 595, 113 S.Ct. at 2798 (expert evidence "can be both powerful and quite misleading because of the difficulty in evaluating it.")

59. *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.")

acknowledged to be an expert tribunal whose "experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence."[60]

As AARP correctly insists, the Board's discretion to admit evidence pursuant to Section 810 "does not create a standard-less exception to the evidence rules."[61] My ruling, though, that the opinions of Mr. Becker and Ms. Pariseau are admissible as expert testimony is neither exceptional nor "standard-less." Rather, in applying the Board's "experience, technical competence, and specialized knowledge" in determining whether to approve the AARP Proposal or to otherwise make a policy judgment about establishing low-income electricity rates in Vermont, I find it would be common, reasonable and prudent to rely upon the opinions of Department personnel who have been designated by that agency to articulate "the interests of the people of the state" where the regulation of public utilities is at issue.[62]

Because no party has raised the issue, I have made no determination as to whether the DPS testimony in dispute concerns policy statements that may be admissible pursuant to V.R.E. 701.[63] In conjunction with the AARP Motion, AARP has amply made clear its view of the limitations of Mr. Becker and Ms. Pariseau to serve as the Department's proponents of expert testimony.[64] If 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.'" AARP will have an opportunity at the technical hearings and in the briefing phase to develop the

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60. 3 V.S.A. § 810(4).

61. AARP Motion at 12.

62. *See* 3 V.S.A. § 810(1) and (4) and 30 V.S.A. § 2(b).

63. V.R.E. 701 provides that a lay witness may deliver opinion testimony under the following circumstances:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

In the interest of clarity, it bears noting that admission pursuant to V.R.E. 702, as opposed to V.R.E. 701, carries with it certain advantages. Expert witnesses qualified under V.R.E. 702 may base their opinions upon facts other than those previously and personally perceived by them, *see* V.R.E. 703, and, under V.R.E. 705, need not state those facts by way of foundation for their opinions or their conclusions. Thus, expert testimony does not have to specifically address the factual basis for the opinion offered; opponents can explore that issue through cross-examination. *In re New England Teleph. & Tel. Co.*, 135 Vt. 527, 536 (1978).

64. *USGEN*, 2004 VT at ¶38, 177 Vt. at 282 (quoting *Cappiallo v. Northrup*, 150 Vt. 317, 319 (1988)).

argument, if any, that it wishes to make concerning the weight the Department's expert testimony should be given.

Thus, for the reasons discussed in this Order, the AARP Motion is denied in its entirety. If AARP wishes to file any rebuttal testimony in this case, it shall do so within 14-calendar days of the date of this Order.[65]

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of May, 2010.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: May 5, 2010

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

65. Docket 7535, Order of 3/15/10 at 2.