

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 21-2939-NMP

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Petition of Randolph Davis Solar LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500 kW group net-metered solar electric generation system in Randolph, Vermont	
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Order entered: 10/31/2022

**ORDER GRANTING IN PART AND DENYING IN PART PETITIONER’S MOTION TO STRIKE**

**I. INTRODUCTION**

In today’s Order, I rule on the evidentiary objections filed by Randolph Davis Solar LLC (“Petitioner”) on September 12, 2022. The Petitioner requests that certain exhibits and testimony filed by Joan Allen and Michael Binder (“Landowners”) be struck as inadmissible hearsay or lay-opinion testimony. For the reasons described below, the motion is granted in part and denied in part.

**II. LEGAL STANDARD**

The Vermont Rules of Evidence (“V.R.E.”) Rule 701 addresses opinion testimony by a lay witness and states:

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 [V.R.E.] 702.

V.R.E. 702 addresses testimony by 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 establishes the factual bases of opinion testimony by experts and states in relevant 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. 802 states that hearsay is not admissible except as provided by the rules of evidence or by other rules prescribed by the Vermont Supreme Court or by statute. V.R.E. 803 establishes several exceptions to the hearsay rule, including the admission of hearsay contained in certain government reports and learned treatises. Additionally, the Vermont Administrative Procedure Act, 3 V.S.A. § 810(1), provides that, in contested cases, the Commission has leeway to admit evidence according to the following standard:

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 [people] in the conduct of their affairs.

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 to the Commission in making such admissibility decisions under 3 V.S.A. § 810. Relevant evidence must in some way advance the inquiry to 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."<sup>1</sup> In this capacity, the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence.<sup>2</sup>

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<sup>1</sup> *In re Amended Petition of UPC Vermont Wind*, 2009 VT 19, ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6).

<sup>2</sup> *Petition of Barton Solar LLC for a certificate of public good*, Docket 8148, Order of 5/9/14 at 2.

The Commission has traditionally favored a general presumption that each party's evidence should at least be admitted for consideration. The Commission may then exercise its discretion in weighing the admitted evidence as it sees fit.

### III. DISCUSSION

#### *Hearsay Objections*

The Petitioner objects to the admission of Exhibits JA-20, JA-21, JA-23, MB-40, MB-42, MB-43, MB-44(A&B), MB-45, MB-46, MB-47, MB-48, MB-52, and MB-54, on the basis that they are inadmissible hearsay containing “out-of-court statement[s] offered for the truth of the matter asserted.”<sup>3</sup>

The Landowners respond that the documents are admissible under various exceptions to the hearsay rule. Specifically, the Landowners argue that Exhibits JA-20, JA-23, MB-42, MB-43, MB-44(A&B), MB-45, MB-46, MB-47, MB-48, and MB-52 are admissible as public reports. According to the Landowners, Exhibit JA-21 is admissible as a learned treatise. Finally, the Landowners argue that Exhibit MB-54, which is a newspaper article describing stormwater rules in Virginia, is not hearsay because it is not being offered for the truth of the matter asserted. The Landowners argue in the alternative that if Exhibit MB-54 is inadmissible, the Commission should admit Exhibits MB-55(A&B), which were attached to the Landowner's response and are memoranda from the Virginia Department of Environmental Quality describing the Virginia stormwater rules. Exhibits MB-55(A&B) were filed after the deadline for the Landowners to file evidence.

V.R.E. 803(8) provides an exception to the hearsay rule for “public records and reports” of a government agency “setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.” I have reviewed Exhibits JA-20, JA-23, MB-42, MB-43, MB-44(A&B), MB-45, MB-46, MB-47, MB-48, and MB-52 and conclude they each is either a record of a regularly recorded activity or developed pursuant to a legal duty, or an investigation made pursuant to authority. Accordingly, those documents are admitted.

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<sup>3</sup> Motion at 1.

Exhibit JA-21 is an article from Living Bird Magazine. V.R.E. 803(18) allows for the admission of hearsay contained in a learned treatise “to the extent called to the attention of an expert witness upon cross-examination, or relied upon by [the witness] in direct examination.”<sup>4</sup> However, this exception to the hearsay rule does not allow for the admission of the article itself as an exhibit. Therefore, this exhibit is excluded.

Exhibit MB-40 is a compilation of materials from various sources. According to the Landowners, the document contains testimony of Mr. Binder that references excerpts of stormwater manuals from other states and the Project’s site plan. As discussed above, the out-of-state stormwater manuals have been admitted under V.R.E. 803(8). The remainder of the document is admissible as Mr. Binder’s testimony. As discussed further below, Mr. Binder has sufficient expertise to offer opinions on stormwater issues. Therefore, the document MB-40 is not admitted as an exhibit but instead is admitted as Mr. Binder’s testimony.

Exhibit MB-54 is a newspaper article describing Virginia’s adoption of changes to its stormwater rules for solar facilities. This document is hearsay, and it is excluded. The Landowners have requested the admission of two memoranda from Virginia’s Department of Environmental Quality that address the same topic. The time for pre-filing exhibits has passed and therefore, the Landowners’ request to admit Exhibits 55(A&B) is denied.

### *Objections to Lay Witness Testimony*

The Petitioner objects to the admission of Answers 8 through 11 and 14 through 18 of Mr. Binder’s surrebuttal testimony under V.R.E. 701 and 702. The Petitioner argues that the testimony “goes well beyond his personal perceptions” and offers “scientific, technical[,] and other specialized knowledge” that requires expertise that the Petitioner asserts Mr. Binder lacks.<sup>5</sup>

The Intervenors respond that the subject matter of the disputed testimony does not require any particular scientific or specialized knowledge. The Intervenors argue that Mr. Binder’s testimony is based on his understanding of the purpose of stormwater control structures and the various regulatory documents he has read.

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<sup>4</sup> V.R.E. 803(18).

<sup>5</sup> Motion at 2.

I find that the Petitioner's arguments go to the weight that should be given Mr. Binder's surrebuttal testimony, not its admissibility. Some of Mr. Binder's testimony does not contain opinions on scientific or technical issues and, therefore, is admissible under V.R.E 701. For example, Mr. Binder's testimony in Answer 8 that solar panels are impervious is the type of factual statement that a lay witness can make based on their perceptions.

To the extent that Mr. Binder's testimony does contain opinions addressing technical matters, they are admissible under V.R.E. 702. In a previous order, I ruled that Mr. Binder could not offer hearsay addressing how the loss of forested habitat affects a vernal pool ecosystem.<sup>6</sup> In doing so, I noted that Mr. Binder is a lay witness. However, a witness may be an expert for purposes of Rule 702, even if he has not been formally offered as one.<sup>7</sup> Mr. Binder's experience as a land surveyor is sufficient to qualify him to offer opinions about erosion control at construction sites.<sup>8</sup> Therefore, the Petitioner's motion to strike Mr. Binder's surrebuttal testimony is denied.

#### IV. CONCLUSION

For the reasons stated above, the Petitioner's motion to strike is granted in part and denied in part. Exhibits JA-21 and MB-54 are excluded. The remaining exhibits and testimony are admitted. The Landowners' request to admit Exhibits 55(A&B) is denied.

**SO ORDERED.**

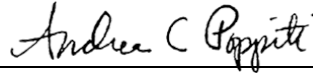
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<sup>6</sup> Order of 6/23/2022 at 4.

<sup>7</sup> *Batchelder v. Mantak*, 136 Vt. 456, 463 (1978).

<sup>8</sup> Exh. MB-31.


Dated at Montpelier, Vermont, this 31st day of October, 2022.



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Andrea Poppiti  
Hearing Officer

OFFICE OF THE CLERK

Filed: October 31, 2022

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](mailto:puc.clerk@vermont.gov))*

PUC Case No. 21-2939-NMP - SERVICE LIST

Parties:

Kevin Anderson (for Vermont Agency of Natural Resources)  
Vermont Agency of Natural Resources  
1 National Life Drive  
Davis 2  
Montpelier, VT 05620-3901  
Kevin.Anderson@vermont.gov

Michael Binder, *pro se*  
1953 Davis Rd.  
Randolph Center, VT 05061  
michaeljbinder@yahoo.com

L. Brooke Dingledine, Esq. (for Joan Allen)  
Valsangiacomo, Detora & McQuesten, P.C.  
P.O. Box 625  
Barre, VT 05641  
lbrooke@vdmlaw.com

Eric B. Guzman (for Vermont Department of Public Service)  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620  
eric.guzman@vermont.gov

Kimberly K. Hayden, Esq. (for Randolph Davis Solar LLC)  
Paul Frank + Collins PC  
One Church Street 05402  
P.O. Box 1307  
Burlington, VT 05401  
khayden@pfclaw.com

Melanie Kehne, Esq. (for Agency of Agriculture, Food & Markets)  
Office of the Attorney General (for Vermont Agency of Agriculture, Food and  
109 State Street Markets)  
Montpelier, VT 05609-1001  
melanie.kehne@vermont.gov

Aaron Kisicki, Esq. (for Vermont Agency of Natural Resources)  
Vermont Agency of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05620  
aaron.kisicki@vermont.gov