

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT  
YANKEE, LLC and ENTERGY NUCLEAR  
OPERATIONS, INC.,

Plaintiffs

v.

Docket No. 1:11-cv-99

PETER SHUMLIN, in his official capacity as  
GOVERNOR OF THE STATE OF  
VERMONT; WILLIAM SORRELL, in his  
official capacity as the ATTORNEY  
GENERAL OF THE STATE OF VERMONT;  
and JAMES VOLZ, JOHN BURKE, and  
DAVID COEN, in their official capacities as  
members of THE VERMONT PUBLIC  
SERVICE BOARD,

Defendants

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE**

Kathleen M. Sullivan (admitted *pro hac vice*)  
Faith E. Gay (admitted *pro hac vice*)  
Robert Juman (admitted *pro hac vice*)  
Sanford I. Weisburst (admitted *pro hac vice*)  
William B. Adams (admitted *pro hac vice*)  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22nd Floor  
New York, NY 10010  
Telephone: (212) 849-7000  
Fax: (212) 849-7100

Robert B. Hemley  
Matthew B. Byrne  
GRAVEL & SHEA  
76 St. Paul Street, 7th Floor  
P.O. Box 369  
Burlington, VT 05402-0369  
Telephone: (802) 658-0220  
Fax: (802) 658-1456

*Attorneys for Plaintiffs Entergy Nuclear Vermont Yankee, LLC  
and Entergy Nuclear Operations, Inc*

Plaintiffs Entergy Nuclear Vermont Yankee, LLC (“ENVY”) and Entergy Nuclear Operations, Inc. (“ENOI”) respectfully submit this opposition to Defendants’ motion to strike portions of Plaintiffs’ Supplemental Proposed Findings of Fact.

### **INTRODUCTION**

Following the preliminary injunction hearing on June 23-24, 2011, the Court issued a post-hearing Order (ECF No. 73), permitting Defendants to “file proposed conclusions of law of not more than 20 pages” and both Plaintiffs and Defendants to “supplement their pre-hearing proposed findings, which shall not exceed 15 pages.” On July 1, 2011, Plaintiffs submitted supplemental findings of fact totaling eight pages, well under the Court’s 15-page limit. Defendants now seek to strike major portions of Plaintiffs’ supplement. The Court should deny the motion.

### **ARGUMENT**

On a motion to strike, “the moving party bears a heavy burden, as courts generally disfavor motions to strike.” *Peters v. Molloy Coll. of Rockville Ctr.*, No. CV 07-2553, 2010 WL 3170528, at \*1 (E.D.N.Y. Aug. 10, 2010) (quotation omitted). Defendants have not met this heavy burden.

#### **I. PLAINTIFFS’ CHALLENGED SUPPLEMENTAL FACT FINDINGS AROSE AFTER THE HEARING AND/OR ARE PROPERLY SUBJECT TO JUDICIAL NOTICE**

“A district court has broad discretion to decide whether to admit or exclude evidence....” *Kramsky v. Chetrit Group, LLC*, No. 10 Civ. 2638, 2011 WL 2326920, at \*2 (S.D.N.Y. June 11, 2011). Defendants do not dispute the authenticity or accuracy of any of Plaintiffs’ supplemental fact findings, nor explain how they would be prejudiced by the Court’s consideration of such undisputed facts. Defendants object only that Plaintiffs’ supplemental findings include non-record evidence. Mot. 1-3. But as Defendants concede, virtually all of this non-record evidence

came into existence only after the hearing, and so could not have been presented at the hearing even though it is relevant to the issues before the Court.<sup>1</sup> The Court has ample discretion to consider such information. *See, e.g., Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124 (2d Cir. 2010) (holding district court erred in failing to consider a consent decree submitted on remand of summary judgment motion when it was submitted at the first opportunity available). Such an exercise of discretion is particularly appropriate in the preliminary injunction context, in which the Court is relying upon “procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Mullins v. City of N.Y.*, 626 F.3d 47, 51-52 (2d Cir. 2010) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

Moreover, the sources cited in the supplemental findings are subject to judicial notice and properly considered by the Court. *See Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 424-25 (2d Cir. 2008) (news articles properly subject to judicial notice); *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008) (“Judicial notice can be taken of prior complaints and legal proceedings, press releases and news articles and published analyst reports....”). It is well established that “[j]udicial notice may be taken at any stage of the proceeding.” Fed. R. Evid. 201(f); *see also Niagara Mohawk Power Corp.*, 596 F.3d at 124 n.12 (explaining that appeals court properly could consider evidence subject to judicial notice). Because the factual information in paragraphs 3-4, 8-9, and 18 is taken from the news articles, press release, and analyst report cited in those paragraphs, that information is subject to judicial notice and properly before the Court even though it is not in the hearing record. *Garb v.*

---

<sup>1</sup> The sole exception is a June 16, 2011 article referenced in paragraph 18 that merely provides context for the post-hearing articles that also are cited.

*Republic of Poland*, 440 F.3d 579, 594 n.18 (2d Cir. 2006) (considering non-record material subject to judicial notice).

## **II. PLAINTIFFS' CHALLENGED SUPPLEMENTAL LEGAL CONCLUSIONS ARE PROPERLY BEFORE THE COURT**

Defendants argue that Plaintiffs impermissibly included “legal briefing” (Mot. at 4) in paragraphs 1, 2, and 5 of the supplemental findings of fact. Nothing in the Court’s order, however, prohibited Plaintiffs from adding proposed legal conclusions relevant to the issues before the Court; the Court ordered only that “Plaintiffs and Defendants *may supplement their pre-hearing proposed findings*, which shall not exceed 15 pages,” without any express limitation to findings of fact. ECF No. 73. Given that Plaintiffs included pre-hearing proposed findings of law as well as fact, it was reasonable for Plaintiffs to supplement both so long as they respected the Court’s request for “brevity.”

Moreover, Defendants had the benefit of hearing the Court’s questions on legal issues before they filed any proposed conclusions of law; it would create unfair advantage to Defendants to bar Plaintiffs from supplementing their conclusions of law in response to the Court’s specific questions at the preliminary injunction hearing. For example, paragraph 5 directly addresses the Court’s question: “But how do we know what the legislature did, what the reasons were for the legislature not, for denying the bill to allow Yankee to continue, [E]ntergy to continue beyond 2012?” (Tr. 158:9-12 (June 24, 2011)), and paragraphs 1 and 2 directly address the Court’s question: “What difference would that make?” (Tr. 8:24 (June 23, 2011)), in response to counsel’s explanation that Vermont Yankee is a wholesale, as opposed to retail, nuclear power plant.

To the extent Defendants are making a technical objection to the nomenclature of Plaintiffs’ supplemental proposed findings, Plaintiffs hereby resubmit them for the assistance of

the Court restyled, per the attached Exhibit A, as a revised eight-page document broken out into “findings of fact” and “conclusions of law.”

**CONCLUSION**

This Court should deny Defendants’ motion to strike. Plaintiffs have no objection to Defendants’ submission of additional findings of fact or conclusions of law that address any new facts or arguments, should the Court so order.

Dated: July 12, 2011

Respectfully submitted,

Entergy Nuclear Vermont Yankee, LLC and  
Entergy Nuclear Operations, Inc.

By their attorneys,

s/ Kathleen M. Sullivan  
Kathleen M. Sullivan (admitted *pro hac vice*)  
Faith E. Gay (admitted *pro hac vice*)  
Robert Juman (admitted *pro hac vice*)  
Sanford I. Weisburst (admitted *pro hac vice*)  
William B. Adams (admitted *pro hac vice*)  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22nd Floor  
New York, New York 10010  
Telephone: (212) 849-7000  
Fax: (212) 849-7100

s/ Robert B. Hemley  
Robert B. Hemley  
Matthew B. Byrne  
GRAVEL & SHEA  
76 St. Paul Street, 7th Floor  
P.O. Box 369  
Burlington, VT 05402-0369  
Telephone: (802) 658-0220  
Fax: (802) 658-1456

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel:

Bridget C. Asay, Esq.  
Michael N. Donofrio, Esq.  
Scot L. Kline, Esq.  
Justin Kolber, Esq.  
Kyle H. Landis-Marinello, Esq.

*Counsel for Defendants*

Dated: July 12, 2011

s/ Kathleen M. Sullivan  
Kathleen M. Sullivan  
(admitted *pro hac vice*)  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22nd Floor  
New York, New York 10010  
Telephone: (212) 849-7000  
Fax: (212) 849-7100

*Attorney for Plaintiffs*