

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' MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY  
EXPRESSING LEGAL CONCLUSIONS AS TO THE PREEMPTIVE SCOPE OF THE  
ATOMIC ENERGY ACT, THE PURPOSE OF THE CHALLENGED VERMONT  
STATUTES, OR THE CONTRACTUAL EFFECT OF A CHANGE IN STATE LAW**

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

Plaintiffs Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (“Plaintiffs”) respectfully submit this motion *in limine*, pursuant to Fed. R. Evid. 702, seeking a ruling from this Court, prior to scheduled depositions of Defendants’ proffered experts, that precludes Defendants from offering at trial certain expert testimony that states a legal conclusion. Defendants have served three expert witness reports that purport to offer far-ranging opinions upon purely legal questions involving the scope of preemption and the State’s legislative purpose—questions that lie at the heart of this case and within the exclusive province of this Court. Plaintiffs and the Court should not be forced to expend the very limited trial time available on such testimony, and this Court should rule now that it will be excluded at trial.

**I. THE PROPOSED EXPERT TESTIMONY CONTAINS INADMISSIBLE CONCLUSIONS OF LAW**

Federal Rule of Evidence 702 permits expert testimony only where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ....” Thus, “[i]n evaluating the admissibility of expert testimony,” the Second Circuit “requires the exclusion of testimony which states a legal conclusion.” *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994); *see also DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005) (upholding determination of inadmissibility in part because business ethics expert’s opinion “drew a legal conclusion”). Likewise, this Court has ruled that “opinions on the ultimate legal issues before the Court ... are not admissible.” *Prof’l Consultants Ins. Co. v. Employers Reinsurance Co.*, 2006 WL 751244, \*22 (D. Vt. Mar. 8, 2006) (Murtha, J.) (legal conclusion as to contract’s ambiguity is inadmissible).

For these reasons, opinions about the preemptive scope of the AEA are clearly inadmissible. “A determination regarding preemption is a conclusion of law.” *Island Park, LLC*

v. *CSX Transp.*, 559 F.3d 96, 100 (2d Cir. 2009) (quoting *Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006)).

Similarly, the “purpose” of a state statute alleged to be preempted under the AEA is a question of law for the court to decide. As the Supreme Court noted in *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission*, 461 U.S. 190 (1983) (“*PG&E*”), state legislative purpose in regulating nuclear power plants is a matter of statutory interpretation. There, the Court described the Ninth Circuit’s conclusion that California had aimed at “purposes other than protection against radiation hazards” as an “*interpretation[] of state law reached by the federal court[] of appeals.*” *Id.* at 214 (emphasis added); cf. *McCreary Co., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (“Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country ...”). Treating “purpose” as a legal inquiry is particularly appropriate here since the State’s “purpose” is the central question in determining whether the AEA preempts Vermont’s laws. Cf. *Island Park*, 559 F.3d at 100.

Here, Defendants have proffered three expert reports, each of which contains conclusions of law on the central legal issues in this case that this Court should hold inadmissible:

**William Steinhurst.** Dr. Steinhurst is a Senior Consultant with Synapse Energy Economics. He has been “retained by the State of Vermont to assess *whether the challenged statutes were enacted for the purpose of regulating the radiological safety of the Vermont Yankee Nuclear Power Station (VY).*” Expert Report of William Steinhurst, at 1 (Aug. 8, 2011) (emphasis added) [Adams Decl. Ex. A]. His opinion—reached without reviewing *any* of the legislative record—is that the laws and legislative acts in question “*have been enacted and implemented within the State’s traditional authority ....*” *Id.* (emphasis added).

These and all related passages in the Steinhurst Report offer purely legal opinions that are not the proper subject of expert testimony. *First*, what the General Assembly's purpose was in enacting the challenged statutes and in considering S.289 is a legal question that is exclusively for this Court to decide. *See, e.g., PG&E*, 461 U.S. at 214; *McCreary*, 545 U.S. at 861. *Second*, it is similarly solely for this Court to decide the legal question of whether that purpose remains part of the State's traditional authority or is preempted by the AEA. *See, e.g., Island Park*, 559 F.3d at 100; *Duncan*, 42 F.3d at 101; *Prof'l Consultants*, 2006 WL 751244, at \*22.

**Peter Bradford.** Mr. Bradford is a law professor and the President of Bradford Brook Associates, a firm that advises on utility regulation and energy policy. Among other things, he offers his opinion that:

- “*States may regulate nuclear plants with respect to a variety of non-safety issues.*” Expert Report of Peter A. Bradford, at 5 (Aug. 8, 2011) (“Bradford Report”) (emphasis added) [Adams Decl. Ex. B].
- “The NRC’s primary role in regulating nuclear safety preempts state regulation that has a direct and substantial effect on nuclear safety, but *does not mean that state officials and state legislators are unable to consider issues related to nuclear safety.*” Bradford Report at 12 (emphasis added).
- “The reliability assessment called for by *Act 189 did not intrude on the NRC’s regulatory authority.*” Bradford Report at 13 (emphasis added).
- “The legislative purposes set forth in Acts 74, 160, and 189 address matters that are appropriate and reasonable state interests and *are not preempted by federal law.*” Bradford Report at 14 (emphasis added).
- “The generally understood power of a legislature to modify regulatory laws and institutions *does not cause a breach, or relieve a contracting party of its duties*, in a contract referencing a regulatory body unless the state has explicitly promised that no such modifications will occur.” Bradford Report at 15 (emphasis added).

These portions of the Bradford Report and related passages express purely legal opinions that invade the exclusive province of this Court by purporting to resolve the very legal issues that the Court must decide in this case. *First*, they state a legal conclusion about the scope of field

preemption with respect to nuclear safety—the issue at the very heart of the Supreme Court’s decision in *PG&E*, 461 U.S. at 212. *Second*, they state a legal conclusion as to whether the NSA’s “reliability assessment” is preempted under the AEA—an issue going to the scope of preemption. *See Island Park*, 559 F.3d at 100. *Third*, they state a legal conclusion as to the “legislative purposes” of Acts 74, 160, and 189—again, a matter of statutory interpretation reserved for the Court, *see, e.g., PG&E*, 461 U.S. at 214; *McCreary*, 545 U.S. at 861. *Fourth*, they state a legal conclusion as to whether Vermont has breached the 2002 MOU. *See, e.g., OfficeMax Inc. v. W.B. Mason Co.*, 2011 WL 2173789, \*15 (D. Vt. June 2, 2011) (Sessions, J.) (“Interpretation of an unambiguous contract is a question of law for the court ....”) (internal quotation marks omitted); *Prof’l Consultants*, 2006 WL 751244, at \*22.

**Bruce Hinkley.** Mr. Hinkley is a nuclear industry consultant. He opines, in part, that “[t]here are *legitimate state interests in decommissioning ....*” Expert Report of Bruce E. Hinkley, at 9 (Aug. 8, 2011) (emphasis added) [Adams Decl. Ex. C]. Whether and to what extent a State has a role in nuclear plant decommissioning is a question of law—not fact—as it addresses the AEA’s preemptive force and the extent of a State’s residual authority in this area. *See, e.g., Island Park*, 559 F.3d at 100. Mr. Hinkley’s legal conclusion is thus not proper expert testimony. *See, e.g., Duncan*, 42 F.3d at 101; *Prof’l Consultants*, 2006 WL 751244, at \*22.

## **II. THE PROPOSED EXPERT TESTIMONY WOULD NOT ASSIST THE COURT**

The proposed expert testimony should also be excluded because determining the purpose of the challenged statutes and the preemptive scope of the AEA does not require “scientific, technical, or other specialized knowledge.” FED. R. EVID. 702. The Second Circuit has long held that, “[f]or an expert’s testimony to be admissible under [Rule 702], ... it must be directed to matters within the witness’ scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert’s help.”

*Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). This limitation on “expert” testimony is equally applicable in a bench trial. *See, e.g., U.S. Bank Nat’l Ass’n v. James*, 741 F. Supp. 2d 337, 343 (D. Me. 2010) (“A statement of the obvious—which is within the ken of a lay jury or a judge presiding at a bench trial—is not a proper subject of expert testimony.”) (quoting *Ankuda v. R.N. Fish & Son, Inc.*, 535 F. Supp. 2d 170, 174 (D. Me. 2008)); *Brister v. Universal Sodexho*, 2006 WL 5156736, \*1 (E.D. La. Sept. 12, 2006) (stating, that in a bench trial, the “Court will not allow [the expert] to offer common-sense opinions or useless technical information”).

Here, there is no reason to believe that the Court needs the assistance of an “expert” to determine the purpose of the challenged state statutes or the preemptive scope of the AEA. Examination of legislative purpose is an exercise in which courts routinely engage, *see, e.g., McCreary Co.*, 545 U.S. at 861, and the Court is fully able to assess the traditional indicia of legislative purpose—*e.g.*, “text, legislative history, and implementation of the statute,” *id.* at 862—to determine the General Assembly’s purpose here and thus whether its actions are preempted by the AEA. Testimony on these topics therefore should be excluded.

### **CONCLUSION**

The Court should order before August 26, 2011, that Defendants may not offer expert testimony that states a legal conclusion, including but not limited to the following issues: (1) the preemptive scope of the AEA both generally and in relation to the challenged Vermont statutes and legislative actions (including whether and to what extent Vermont retains authority to regulate the Vermont Yankee Station or has legitimate interests in doing so); (2) the purpose of the challenged Vermont statutes and legislative actions; and (3) whether the challenged statutes and legislative actions constitute a breach of the 2002 MOU.

Dated: August 18, 2011

Respectfully submitted,

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

By their attorneys,

s/ Kathleen M. Sullivan

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**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 and that it is available for viewing and downloading from the ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel:

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Dated: August 18, 2011

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