STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8880

Joint Petition of NorthStar Decommissioning Holdings, LLC, NorthStar Nuclear Decommissioning Company, LLC, NorthStar Group Services, Inc., LVI Parent Corporation, NorthStar Group Holdings, LLC, Entergy Nuclear Vermont Investment Company, LLC and Entergy Nuclear Operations, Inc., and any other necessary affiliated entities to transfer ownership of Entergy Nuclear Vermont Yankee, LLC, and for certain ancillary approvals, pursuant to 30 V.S.A. §§ 107, 231, and 232	

Order entered: 02/08/2018

ORDER RE: OBJECTIONS TO ADMISSIBILITY

I. INTRODUCTION

NorthStar Decommissioning Holdings, LLC, NorthStar Nuclear Decommissioning Company, LLC, NorthStar Group Services, Inc., LVI Parent Corp., NorthStar Group Holdings, LLC ("collectively, "NorthStar"), Entergy Nuclear Vermont Investment Company, LLC, and Entergy Nuclear Operations, Inc. (collectively "Entergy")[1] filed with the Vermont Public Utility Commission (the "Commission") two separate motions objecting to the admission of certain prefiled testimony from the New England Coalition ("NEC") and the Conservation Law Foundation ("CLF"). In this order addressing both motions, we grant-in-part and deny-in-part the relief requested by the Joint Petitioners.

II. PROCEDURAL HISTORY

On September 29, 2017, the Joint Petitioners filed an objection to the admission of certain testimony and exhibits filed on August 30, 2017, by NEC witnesses Raymond Shadis and Arnold Gundersen ("First Objection").

On October 23, 2017, NEC filed a response to the Joint Petitioners' objection along with a motion to amend the testimony of Mr. Shadis.

[1] The combined NorthStar and Entergy entities are referred to herein as the "Joint Petitioners").

On November 2, 2017, the Joint Petitioners filed a reply to NEC's 10/23/17 response.

On December 28, 2017, the Joint Petitioners filed additional objections ("Second Objection") to surrebuttal testimony submitted on December 1, 2017, from the NEC witnesses Mr. Shadis and Mr. Gundersen, as well as objections to testimony from CLF witness Michael O. Hill.

CLF filed its response to the Joint Petitioners' Second Objection on January 11, 2018. NEC filed its response to the Joint Petitioners' Second Objection on January 12, 2018.

The Joint Petitioners filed a reply to CLF's January 11 response and NEC's January 12 response to the Second Objection on January 19, 2018.

III. LEGAL STANDARD

Vermont Rule of Evidence ("V.R.E.") 401 defines relevant evidence as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

V.R.E. 602 addresses the requirement that a witness not speculate when testifying, and states:

> The testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

V.R.E. 701 addresses opinion testimony by a lay witness and states:

> If the witness is not testifying as an expert, his 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 and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

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. 801 defines hearsay in the following manner:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
> (b) Declarant. A "declarant" is a person who makes a statement.
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

V.R.E. 802 states the "hearsay rule" and, with some exceptions, disallows the admission of hearsay:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.

The Vermont Administrative Procedures Act provides such an exception. 3 V.S.A. § 810(1) states that, in contested cases, the Commission may deviate from the Vermont Rules of Evidence, including the hearsay rule as follows:

> 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 men in the conduct of their affairs.

IV. DISCUSSION

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 the Commission in making such admissibility decisions pursuant to 3 V.S.A. § 810. Relevant evidence in some degree must advance the inquiry and thus 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."[2] In this capacity, the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence.[3]

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[2] *See In re Amended Petition of UPC Vermont Wind*, 2009 VT 19 ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6).

[3] *See Petition of Barton Solar LLC for a certificate of public good*, Docket 8148, Order of 5/9/14 at 2.

The Joint Petitioners made timely requests pursuant to Commission Rule 2.216(C) asking the Commission to find that:

- Mr. Shadis has not demonstrated the qualifications to offer expert opinions on the subject matter of his testimony and that he lacks the requisite personal knowledge to testify as a lay witness;
- Mr. Shadis's prefiled rebuttal and surrebuttal testimony includes quotations and exhibits that are hearsay and that do not fall within any hearsay exception;
- Mr. Gundersen disregarded certain evidence submitted by NorthStar in forming his opinion, rendering his opinions unreliable and therefore inadmissible;
- Mr. Gundersen's prefiled rebuttal and surrebuttal testimony includes several quotations and discussions that are hearsay and that do not fall within any hearsay exception; and
- Mr. Hill's prefiled surrebuttal testimony improperly attempts to rely on questions posed during his deposition by the questioning attorney as statements of fact.

A. NEC's Motion to Amend

In conjunction with its response to the Joint Petitioners' First Objection, NEC filed a motion to amend Mr. Shadis's prefiled testimony to address several issues raised in the First Objection. NEC's motion to amend Mr. Shadis's testimony is granted, and Mr. Shadis's testimony will be reviewed in this Order as amended.

B. 8/30/17 Prefiled Testimony of Raymond Shadis on Behalf of NEC

The Joint Petitioners argue that the entirety of Mr. Shadis's prefiled testimony should not be admitted if offered as expert testimony because he is not an expert in any of the discussed subject matter. The Joint Petitioners alternatively argue that, to the extent Mr. Shadis is testifying as a lay witness, his prefiled testimony should be limited to his experiences as an observer of the Maine Yankee decommissioning process and his personal observations regarding the Vermont Yankee site.[4] Finally, the Joint Petitioners raise specific evidentiary objections to several exhibits to and excerpts in Mr. Shadis's prefiled testimony.

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[4] First Objection at 3-7.

1. <u>The Joint Petitioners' Objection to Mr. Shadis's Expert Qualifications</u>

NEC disputes the Joint Petitioners' criticism of Mr. Shadis's credentials and provides a question-by-question defense of his testimony. NEC also explains that Mr. Shadis's responses to questions 16-18 of his prefiled testimony are not in an expert capacity, but instead set forth NEC's positions on the issues raised by the questions.

As the Joint Petitioners acknowledge, we have previously admitted Mr. Shadis's testimony over objections to his qualifications from Vermont Yankee Nuclear Power Corporation. As we stated there:

> Mr. Shadis is an "activist who has been involved over the years in efforts to shut down Maine Yankee." At page two of his prefiled testimony, Mr. Shadis has described himself as a Staff Advisor to the Coalition whose responsibility it is to "identify, track, and address nuclear safety and environmental issues at New England's five operating and four decommissioning nuclear power stations." He is also a member of the Maine Yankee Atomic Power Company Community Advisory Panel on Decommissioning, and has held that position since 1997. This experience, in our view, constitutes sufficient knowledge of matters that could assist the [Commission] in understanding the issues before us. Of course, the level of Mr. Shadis' experience will go to the weight that we give his testimony.[5]

Mr. Shadis's qualifications from 2002 are now augmented by an additional 16 years of experience as a technical consultant and staff technical advisor to the NEC in the areas of nuclear safety, environmental issues, and decommissioning. As Mr. Shadis explains, his duties at the NEC continue to be "tracking and reading nuclear power plant operational and compliance documents, regulatory issuances, and power industry journals."[6] Mr. Shadis's experience constitutes sufficient knowledge of matters that could assist the Commission in understanding the issues before us as much today as it did in 2002, and the level of Mr. Shadis's experience will go to the weight that we give his admitted testimony. Accordingly, the Joint Petitioners' objection to Mr. Shadis's qualifications as an expert is overruled.

We agree with the Joint Petitioners, however, that Mr. Shadis's prefiled testimony exceeds the scope of his expertise in several respects. The Joint Petitioners specifically object to

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[5] *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation*, Docket 6545, Order of 1/31/02.

[6] Shadis 8/30/17 pf. at 4.

Mr. Shadis's discussion of "nuclear radiation exposure and health outcomes."[7] We agree with the Joint Petitioners that NEC has not demonstrated that Mr. Shadis is qualified to provide expert testimony on potential health risks associated with exposure to radiation. This includes the discussion in Mr. Shadis's answer 13, beginning on page 17 with "In 1996…" and ending on page 19 with "…in any other context," and the discussion beginning on page 19 with "Although ignored…" and ending on page 21 with "…rubbilization, grading, and fill." We sustain the Joint Petitioners' objection to these passages.

The first full paragraph of Mr. Shadis's testimony in response to question 13 also exceeds his expert qualifications and strays into speculative territory. NEC's amendment of that testimony to rely on the prefiled testimony of Rich Holschuh does not cure the speculative nature of Mr. Shadis's comments. Accordingly, we also sustain the Joint Petitioners' testimony with respect to Mr. Shadis's discussion on page 25, beginning with "First…" and ending with "…hate crime."

2. <u>The Joint Petitioners' Objection to Mr. Shadis's Lay Testimony</u>

NEC's response to the Joint Petitioners' objection states that Mr. Shadis's answers to questions 16, 17, and 18 are not offered in an expert capacity, but instead present NEC's position with respect to the issues addressed. Mr. Shadis's answer to question 16, for example, sets forth NEC's position that Entergy's commitment in prior proceedings to not engage in rubbllization is binding on subsequent owners of the site such as NorthStar. Mr. Shadis's answer to question 17 presents NEC's position that rubblization would require certain waste disposal permits from the State of Vermont. Finally, Mr. Shadis's response to question 18 sets forth NEC's view that NorthStar has not shown that it is a fair partner for Vermont.

NEC was granted intervention on issues relating to several criteria under 30 V.S.A. § 248, including subsections (b)(1) (orderly development of the region), (b)(4) (economic benefit to the State and its residents), and (b)(5) (aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety).[8] The NEC positions set forth by Mr. Shadis in his testimony are relevant to these issues and of concern to NEC and its members, many of whom have homes or businesses in the vicinity of the Vermont

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[7] First Objection at 5.

[8] *Joint Petition of NorthStar Decommissioning Holdings, LLC*, Docket 8880, Order of 2/22/17.

Yankee site.[9] The Joint Petitioners' objections to Mr. Shadis's answers to questions 16, 17, and 18 are overruled.

3. The Joint Petitioners' Objections to Mr. Shadis's Testimony and Exhibits

In addition to objecting to the admissibility of Mr. Shadis's testimony on expert qualification and factual knowledge grounds, the Joint Petitioners also raise several hearsay objections to specific exhibits and excerpts contained within Mr. Shadis's testimony. We discuss the Joint Petitioners' objections below.

Shadis Exhibit 2

The Joint Petitioners object to Exhibit 2 to Mr. Shadis's prefiled testimony, an excerpt from an Electric Power Research Institute report ("EPRI Report") titled "Maine Yankee Decommissioning Experience Report" as hearsay that should not be admitted. NEC responds that the EPRI Report provides details about the Maine Yankee decommissioning, a subject on which Mr. Shadis has personal knowledge. NEC explains that Mr. Shadis cites to the EPRI Report instead of adding substantial additional testimony. Mr. Shadis states in an affidavit filed with the Commission that all the facts in the report are within his personal knowledge.

The Joint Petitioners' objection to the EPRI Report is overruled. Under 3 V.S.A. § 810, the Commission may admit evidence that is otherwise inadmissible under the Vermont Rules of Evidence if it is "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs" and is "necessary to ascertain facts not reasonably susceptible of proof" under the Vermont Rules of Evidence. We find that the exhibit in question meets these standards. The Commission is familiar with the reports of the Electric Power Research Institute and has cited them in previous proceedings. The information collected in the EPRI Report would be difficult to duplicate. Requiring NEC, a citizen-based organization, to produce one of the authors of the EPRI Report would not be reasonable given the extensive cost and effort it would require for minimal value to the Commission in rendering its decision in this proceeding.

Quotation of the Outdoor Industry Association

The Joint Petitioners object to the Outdoor Industry Association press release ("OIA Statement") quoted by Mr. Shadis on page 11 of his prefiled testimony as hearsay that should not

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[9] NEC Motion to Intervene, *Joint Petition of NorthStar Decommissioning Holdings, LLC*, Docket 8880, filed 1/27/2017.

be admitted. NEC responds that the Mr. Shadis is not relying on the OIA Statement as an exhibit but is instead quoting the statement to illustrate potential alternative uses of the Vermont Yankee site in the future.

The Joint Petitioners' objection to Mr. Shadis's quotation of the OIA Statement is overruled. Mr. Shadis cites the OIA Statement in explaining that there are potential non-industrial uses for the Vermont Yankee site that should be considered. The truth of the assertions in the OIA Statement—for example, the truth of the assertion that "[o]utdoor recreation is a huge economic force in the state of Vermont"—is irrelevant to Mr. Shadis's point that outdoor recreation is one alternative use of the Vermont Yankee site. Accordingly, the OIA Statement is not hearsay as used by Mr. Shadis. Even if Mr. Shadis was relying on the OIA Statement for a hearsay purpose, he may do so under V.R.E. 703, and allowing Mr. Shadis to refer to the OIA Statement in his testimony has no prejudicial effect in this proceeding.

Quotation of Email from J. Goodman

The Joint Petitioners object to an email quoted by Mr. Shadis on pages 16-17 of his prefiled testimony as hearsay ("Goodman Email"). The Goodman Email, dated July 10, 2017, is from Jenny Goodman to Mary Lampert. Ms. Goodman's signature block states that she is a Manager in the Bureau of Environmental Radiation at the New Jersey Department of Environmental Protection. NEC responds that Mr. Shadis relies on the email to demonstrate that New Jersey, like several other states that he discusses, has statutory radiation limits that go into effect once decommissioning is complete and the NRC's licenses are terminated. NEC has amended Mr. Shadis's testimony to clarify the purpose for which Mr. Shadis cites the Goodman Email and argues that the Goodman Email is the type of information on which experts in decommissioning rely.

The Joint Petitioners' objection to the Goodman Email is sustained. The Goodman Email is hearsay not subject to any exception. The Goodman Email is also lacking any other indicia of reliability as a reasonably prudent individual would require before relying on it. Mr. Shadis is not a party to the email and he has not demonstrated any knowledge of its origin. He does not explain the circumstances and discussions that preceded the email, nor does he address Ms. Goodman's authority to speak on behalf of the State of New Jersey. As NEC explains, New Jersey's radiation limits are publicly available in New Jersey's statutes, making Mr. Shadis's

reliance on the Goodman Email largely unnecessary.[10] The Goodman Email, therefore, does not satisfy the requirements of 3 V.S.A. § 810.

Under V.R.E. 703, Mr. Shadis may rely on inadmissible facts or data such as the email in forming his opinions "[i]f of a type reasonably relied upon by experts in the particular field." Additionally, otherwise inadmissible facts or data may also be admitted for the limited purpose of demonstrating the basis for an expert's opinions.[11] The lack of sufficient indicia of reliability discussed above also prevents us from admitting the Goodman Email under V.R.E. 703. To the extent that Mr. Shadis can provide additional information demonstrating his knowledge of the details of the Goodman Email, he may re-raise the issue of its admissibility.

Reference to Letter from C. Browner

The Joint Petitioners object to a letter quoted by Mr. Shadis on page 17 of his prefiled testimony as hearsay ("Browner Letter"). We have already sustained the Joint Petitioners' objection to Mr. Shadis's testimony quoting the Browner Letter as beyond the scope of Mr. Shadis's expertise and need not address the Joint Petitioners' specific hearsay objection.

Quotation of National Academies Committee Report

The Joint Petitioners object to a report quoted by Mr. Shadis on pages 17-18 of his prefiled testimony as hearsay ("National Academies Report"). We have already sustained the Joint Petitioners' objection to Mr. Shadis's testimony quoting the National Academies Report as beyond the scope of Mr. Shadis's expertise and need not address the Joint Petitioners' specific hearsay objection.

Shadis Exhibit 3

The Joint Petitioners object to an affidavit quoted by Mr. Shadis on page 23 of his prefiled testimony as hearsay ("Irwin Affidavit").[12] NEC states that Mr. Shadis's citation of the Irwin Affidavit is no longer necessary due to prefiled testimony submitted by other parties and has amended Mr. Shadis's prefiled testimony to remove the reference to the Irwin Affidavit.[13] The Joint Petitioners' objection is overruled as moot in light of Mr. Shadis's amended testimony.

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[10] NEC 10/23/17 Response at 16.

[11] *In re E.T.*, 184 Vt. 273, 280 (2008).

[12] The Irwin Affidavit is included as Exhibit 3 to Mr. Shadis's testimony.

[13] NEC has withdrawn the testimony beginning on page 22 with "On June 11…" and ending on page 23 with Dr. Irwin's second quote stating "…environment at risk." NEC has also amended page 23 to remove the reference to "Dr. Irwin's statements" and the incorrect reference to "Exhibit 4."

Shadis Exhibit 4

The Joint Petitioners object to Exhibit 4 to Mr. Shadis's prefiled testimony and his discussion of Exhibit 4 on page 24 as hearsay that should not be admitted. Exhibit 4 is an excerpt from a report from Synapse Energy Economics, Inc. ("Synapse Report") titled "Financial Insecurity: The Increasing Use of Limited Liability Companies and Multi-Tiered Holding Companies to Own Nuclear Power Plants." NEC responds that the Synapse Report is cited only for the quotation from a staff report from the Nuclear Regulatory Commission ("NRC Report") on pages 15-16, although it has included the entire Synapse Report in Exhibit 4. NEC states that the NRC Report is a publicly available document issued by the NRC and is the type of document reasonably relied on by experts such as Mr. Shadis.

The Joint Petitioners' objection to the excerpt from the Synapse Report is overruled. Mr. Shadis is relying on the Synapse Report as one basis for his opinion that NorthStar should be required to post a bond to avoid cost surprises that may occur during site restoration. Under V.R.E. 703, Mr. Shadis may rely on inadmissible facts or data such as the Synapse Report in forming his opinions "[i]f of a type reasonably relied upon by experts in the particular field." The Commission is familiar with reports from Synapse and has referenced them in the past, and agrees that Mr. Shadis's reliance on the Synapse Report excerpt is reasonable. Pages 15-16 of the Synapse Report will be admitted for the limited purpose of demonstrating the basis of Mr. Shadis's opinion.

Shadis Exhibit 5

The Joint Petitioners have included Exhibit 5 to Mr. Shadis's prefiled testimony in the list of material to which they object but, as NEC points out in its response, do not raise any arguments against Exhibit 5 in the First Objection. Exhibit 5 is an excerpt from the cross-examination testimony of Mr. Uldis Vanags, a former nuclear engineer for the State of Vermont, before the Commission in Docket 7440. In their reply brief, the Joint Petitioners state that the basis for their objection to Exhibit 5 is hearsay. NEC anticipated the basis of the Joint Petitioners' objection and argues that Exhibit 5 is admissible under V.R.E. 801(d)(2) as an admission by party-opponent either because Entergy has manifested its adoption or belief in the statement or because the statement was made by Entergy's agent within the scope of his agency or employment.

The Joint Petitioners' objection to exhibit 5 is overruled. We do not agree with NEC that Exhibit 5 satisfies the requirements of V.R.E. 801(d)(2). Mr. Vanags was not testifying on behalf of the Joint Petitioners, and Entergy's attorney's questioning on cross-examination cannot be read as an admission or adoption of Mr. Vanags's testimony. Instead, we admit Exhibit 5 under 3 V.S.A. § 810. The testimony comes from one of our prior proceedings involving the Vermont Yankee plant and it is reasonable for Mr. Shadis to rely on that testimony. Mr. Vanags no longer appears to be an employee of the State of Vermont, and requiring his presence for the narrow point for which Mr. Shadis cites his testimony would be unnecessarily burdensome with minimal benefit given the availability of Mr. Vanags's prior testimony.

C. 12/01/17 Prefiled Testimony of Raymond Shadis on Behalf of NEC

The Joint Petitioners object to an excerpt from a conference paper ("Meisner Quote") quoted on pages 14-15 of Mr. Shadis's prefiled surrebuttal testimony as hearsay that should not be admitted. NEC responds that Mr. Shadis may rely on the Meisner Quote in his capacity as an expert and that any prejudicial effect due to admitting the paper is outweighed by its probative value.[14]

The Joint Petitioners' objection is overruled. Mr. Shadis may rely on hearsay "[i]f of a type reasonably relied upon by experts in the particular field." Although the Meisner Quote is of little probative value beyond the testimony that Mr. Shadis may already provide, it also lacks any prejudicial effect. We will admit the Meisner Quote for the limited purpose of demonstrating the basis of Mr. Shadis's opinions, but not for the truth of any underlying facts set forth therein.

D. 8/30/17 Prefiled Testimony of Arnold Gundersen on Behalf of NEC

1. <u>The Joint Petitioners' Objection to Mr. Gundersen's Methodology</u>

The Joint Petitioners argue that Mr. Gundersen's prefiled testimony is based on an unreliable methodology that affects his prefiled testimony for answers A8-A10, A14-A15, and subparts 1, 3, and 4 of A19. In his testimony, Mr. Gundersen states that he reviewed certain proprietary material provided by NorthStar and concluded that "none of the material was useful in reaching any conclusions, so it is not incorporated into [his] report."[15] According to the Joint Petitioners, Mr. Gundersen's deliberate disregard of evidence is contrary to "the principled and

[14] We have also considered the supplemental affidavit submitted by Mr. Shadis on February 1, 2018.
[15] Gundersen 8/30/17 pf. at 3.

reliable methodology required to admit expert testimony." The Joint Petitioners do not challenge Mr. Gundersen's qualifications.

NEC responds by citing a discovery response in which NEC explained to the Joint Petitioners that Mr. Gundersen examined the proprietary materials but did not find them useful. According to NEC, Mr. Gundersen noted that the cost information in NorthStar's proprietary materials appeared to be chosen to achieve a specific cost outcome rather than dictated by the tasks to which they corresponded. NEC further explains that Mr. Gundersen was unable to evaluate the reliability of the cost information because NorthStar's proprietary materials also lacked any detailed engineering cost justifications. Finally, NEC argues that Mr. Gundersen's decision not to rely on NorthStar's proprietary materials is a subject for cross-examination, but does not render his opinion inadmissible.

The Joint Petitioners' objection to Mr. Gundersen's methodology is overruled. As an initial point, the Joint Petitioners' characterization of NorthStar's proprietary material as "evidence" is incorrect. The proprietary material does not appear to have been offered as an exhibit by the Joint Petitioners and, therefore, will not become part of the evidence in this proceeding. The Joint Petitioners' argument that Mr. Gundersen "ignored" that proprietary material is also inaccurate. Mr. Gundersen explained in his testimony that he reviewed the proprietary material but did not find it useful and, therefore, did not incorporate the material into his testimony. NEC further explains that the reason Mr. Gundersen did not find NorthStar's proprietary material to be useful was his inability to undertake a meaningful review of the information due to its lack of detail.

Under V.R.E. 702, Mr. Gundersen's testimony must be "based on sufficient facts or data." Mr. Gundersen's decision not to rely on NorthStar's proprietary information is a decision within the scope of his expertise and discretion. It does not, however, render the methodology of his analysis unreliable or inadmissible. The Joint Petitioners will have a full opportunity to challenge Mr. Gundersen's opinions, including his decision not to rely on NorthStar's proprietary material, through their own testimony and cross-examination at the evidentiary hearings.

2. The Joint Petitioners' Objections to Mr. Gundersen's Testimony and Exhibits

The Joint Petitioners object to three passages in Mr. Gundersen's prefiled testimony as hearsay. The three specific passages are: (1) Mr. Gundersen's quotation of an email dated January 19, 2011, from Sarah Hofmann, then Director for Public Advocacy for the Vermont Department of Public Service, to Mr. Gundersen ("DPS Email");[16] (2) an excerpt from a newspaper article in the *Keene Sentinel*, dated March 3, 2015 ("Sentinel Excerpt");[17] and (3) excerpts from several newspaper articles in the *Times Argus* in January and February of 2015 ("Times Argus Excerpts").[18]

NEC has withdrawn Mr. Gundersen's testimony referencing the DPS Email on page 8-9 and Mr. Gundersen's references to the Times Argus Excerpts on pages 20-21, rendering the Joint Petitioners' objection to those passages of Mr. Gundersen's testimony moot. NEC argues that the Sentinel Excerpt is not hearsay because it is not offered for the truth of the matter asserted.

The Joint Petitioners' objection to the Sentinel Excerpt is overruled. Mr. Gundersen is relying on the Sentinel Excerpt as a basis for his opinion that NorthStar underestimates the extent of contamination at the Vermont Yankee site. Under V.R.E. 703, Mr. Gundersen may rely on inadmissible facts or data such as the Sentinel Excerpt in forming his opinions "[i]f of a type reasonably relied upon by experts in the particular field." Much of the article consists of references to Mr. Gundersen himself and reports that he prepared for the Vermont Legislature. Mr. Gundersen's reliance on the Sentinel Excerpt as support for his opinion regarding NorthStar's knowledge of contamination at the Vermont Yankee site is an appropriate use of hearsay pursuant to V.R.E. 703.

Although NEC argues that Mr. Gundersen is not relying on the Sentinel Excerpt for the truth of its content, Mr. Gundersen's prefiled testimony indicates otherwise. Mr. Gundersen's introductory language to the Sentinel Excerpt states that "news reports and testimony to the state legislature and other regulators made it well-known that Strontium 90 generated by Entergy's operation of ENVY had entered the site's groundwater as detailed in the *Keene Sentinel*."[19]

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[16] *Id.* at 8-9.
[17] *Id.* at 17-18.
[18] *Id.* at 20-21.
[19] *Id.* at 17.

Even if Mr. Gundersen is relying on the article to show that "NorthStar was on Notice of the contamination" as NEC contends, he is still relying on the article for its truth—that Strontium 90 had entered the groundwater. As stated, however, Mr. Gundersen may rely on the Sentinel Excerpt pursuant to V.R.E. 703, and we will allow Mr. Gundersen's reference to the excerpt for the limited purpose of demonstrating the basis of his opinion but not for its truth.

E. 12/01/17 Prefiled Testimony of Arnold Gundersen on Behalf of NEC

The Joint Petitioners object to Mr. Gundersen's recounting of a discussion he had with a presenter at a conference on decommissioning during a question-and-answer period ("Conference Q & A") as hearsay that should not be admitted. NEC responds that Mr. Gundersen may rely on the Conference Q & A in his capacity as an expert and that any prejudicial effect of allowing Mr. Gundersen to discuss the substance of his conversation is outweighed by its probative value.[20]

The Joint Petitioners' objection is overruled. Mr. Gundersen may rely on hearsay under V.R.E. 703. We agree that Mr. Gundersen's reliance on information that he personally learned at decommissioning conferences is reasonable. Additionally, as NEC explains, the substance of the conversation on which Mr. Gundersen relies has little prejudicial effect because it merely confirms prefiled testimony that Mr. Gundersen has already provided. We will admit Mr. Gundersen's discussion of the Conference Q & A for the limited purpose of demonstrating the basis of Mr. Gundersen's opinions, but not for the truth of any underlying facts set forth therein.

F. 12/01/17 Prefiled Testimony of Michael Hill on Behalf of CLF

The Joint Petitioners object to Mr. Hill's reliance on questions asked by counsel for the Joint Petitioners during Mr. Hill's deposition as "statements made by or on behalf of Petitioners."[21] CLF defends Mr. Hill's reliance on the deposition questions, arguing that they are factual predicates to the questions asked and not hearsay because they are admissions of a party opponent.

The Joint Petitioners' objection to Mr. Hill's reliance on the questions of the Joint Petitioners' counsel during his deposition is sustained. We see no basis to assume that the questions asked by the Joint Petitioners' counsel are assertions of fact shared by the Joint

[20] We have also considered the supplemental affidavit submitted by Mr. Gundersen on February 1, 2018.
[21] Hill 12/01/17 pf. at 2.

Petitioners, as CLF contends. Juries are routinely advised by courts that "statements, questions, objections or arguments made by the lawyers are not evidence in the case."[22] The same is true for depositions. Under Rule 26 of the Vermont Rules of Civil Procedure, discoverable information may exceed the scope of admissible evidence. Questions posed by an attorney to a witness during discovery, therefore, may not be premised on admissible facts at all, but may encompass hypothetical premises for witnesses to address.

Here, Mr. Hill was being questioned about his opinions, which included an opinion that the proposed transaction involved a transfer of liability. The Joint Petitioners' counsel was free to question Mr. Hill on the bases of his opinions, including Mr. Hill's understanding of the liability transfer, even if counsel did not agree with Mr. Hill's opinions. The questions posed by the Joint Petitioners' counsel, however, are not evidence. We sustain the Joint Petitioners' objection to Mr. Hill's prefiled testimony from page 4, line 35 to page 5, line 6.

SO ORDERED.

[22] *See, e.g.*, *State v. Dow*, 202 Vt. 616 (2016) ("[T]he jury had been told 'many times' that attorney questions are not evidence to be considered.").

Dated at Montpelier, Vermont, this 8th day of February, 2018.

_________________________)	PUBLIC UTILITY
Margaret Cheney)	COMMISSION
Sarah Hofmann)	OF VERMONT

OFFICE OF THE CLERK

Filed: February 8, 2018

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)

PSB Case No. 8880 - SERVICE LIST

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