UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC LLC and ENTERGY NUCLEAR OPERATIONS, INC. Plaintiffs, v. PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, as 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.	)	Civil Action No. 11-cv-99

DEFENDANTS' SUR-REPLY TO PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PRELIMINARY INJUNCTION

WILLIAM H. SORRELL
ATTORNEY GENERAL

Scot L. Kline
Bridget C. Asay
Michael N. Donofrio
Kyle H. Landis-Marinello
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171
skline@atg.state.vt.us
basay@atg.state.vt.us
mdonofrio@atg.state.vt.us
kylelm@atg.state.vt.us

Attorneys for Defendants Peter Shumlin, in his official capacity as Governor of the State of Vermont, William H. Sorrell, as 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

ENVY's reply memorandum raises new facts and legal arguments. Where necessary, certain new facts are addressed in the brief sur-reply declarations accompanying this memorandum. As for ENVY's new legal arguments on likelihood of success on the merits, two issues warrant a brief response.

I. FERC authority does not preempt state authority to regulate power plants.

In its opening memorandum, ENVY argued, incorrectly, that states are wholly preempted from regulating whether a nuclear plant can continue operating once the NRC has renewed its license. Mem. 2. Defendants showed that this assertion was contrary to federal law, and even ENVY now acknowledges that passages from *Pacific Gas* and NRC statements "suggest that states retain a non-preempted role in re-licensing decisions." Reply 3. ENVY now claims that FERC jurisdiction preempts state authority over the licensing of electric generating plants that sell power into the interstate market. *Id*. This argument is likewise mistaken.

First, with the exception of hydroelectric facilities, FERC does not regulate the licensing or relicensing of power plants—nuclear, wind, solar, geothermal, biomass, or otherwise. To be sure, the rates, terms, and conditions of wholesale power sales are regulated by FERC, and Vermont has not claimed to the contrary. But FERC does not regulate generating facilities. The Federal Power Act expressly preserves state authority in this area, declaring that FERC "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).[1]

As the D.C. Circuit has held, and as FERC itself has acknowledged, while FERC has "broad

[1] The exceptions referring to "this subchapter and subchapter III" are narrow and do not apply here. *See* 16 U.S.C. § 824b(a)(1)(D)(i) & (ii) (acquisition of certain generating facilities by public utilities); 16 U.S.C. § 825d (interlocking board or officer positions).

power" over interstate tariffs, it is "'obviously correct that the Act prohibits the Commission from directly regulating generating facilities.'" *Conn. Dept. of Pub. Util. Control v. FERC* (*CDPUC*), 569 F.3d 477, 481 (D.C. Cir. 2009) (alteration marks omitted) (quoting Respondent FERC's Brief at 22). In *CDPUC*, the D.C. Circuit reviewed FERC's authority to set penalties and charges for installed capacity in New England's interstate forward capacity market. Connecticut challenged FERC's action, arguing that FERC was essentially regulating generating facilities by setting these charges. The court disagreed, noting that while FERC's actions created incentives for market participants to develop adequate capacity, states are not obligated to build new facilities, but instead have a range of options, including purchasing power elsewhere. *Id.* In ruling in favor of FERC, the court acknowledged that FERC's actions did not usurp states' broad authority over generating facilities, including the right to retire existing generators:

> State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission.

Id. While FERC plays a crucial federal role with respect to rates and market oversight, the states' traditional control over power-generating infrastructure—including siting and retiring facilities within their borders—is unchanged. And that is true for merchant generator plants like VY as it is for other facilities. In short, FERC's regulation of interstate sales does not preempt Vermont's requirement that every power generator must have a State-issued certificate of public good (CPG) to operate.[2]

[2] While ENVY does not contest that Vermont law requires every power generator to have a valid CPG to operate in Vermont, Vt. Stat. Ann. tit. 30, §§ 102, 203, 231, & 248, ENVY claims for the first time in its reply that "these provisions are inapplicable" and that this Court could grant ENVY's requested relief without striking down those laws as applied to ENVY. Reply 7 n.7. Not true. Even if ENVY were correct (and it is not) that Act 160 is unconstitutional, then the remedy of striking down Act 160 would leave in place the background requirements in Vt. Stat.

Second, ENVY's argument that the wholesale nature of its sales deprives Vermont of any legitimate economic interest that would justify its exercise of authority under *Pacific Gas* (Reply 3-4, 7) is based on the faulty premise that the rates, terms, and conditions of power sales and transmission (which lie within FERC jurisdiction) are the *only* economic concerns a state may have over continued operation of a power plant. The Supreme Court held in *Pacific Gas* that the unknown financial cost of spent fuel management is an appropriate, non-preempted state economic concern. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213-14 (1983) (state law not preempted when aimed at addressing "the nuclear waste problem [which] could become critical leading to unpredictably high costs"). The text of Act 74 and Act 160 reflects, among other economic concerns, the exact economic concern that was upheld in *Pacific Gas*. *See* 2005 Vt. Acts & Resolves No. 74 (Act 74), § 2, as codified at Vt. Stat. Ann. tit. 10, § 6522(b)(1)-(2) (addressing need for "[a]dequate financial assurance . . . for the management of spent fuel . . . for as long as it is located in the state" and "consistent with applicable federal standards"); 2006 Vt. Acts & Resolves No. 160 (Act 160), § (1)(a) (addressing "economics and environmental impacts of long-term storage of nuclear waste"). Almost three decades after *Pacific Gas*, there is still no long-term solution for the storage of spent fuel, so the concerns recognized in *Pacific Gas* are, if anything, more substantial now.

As discussed in detail in Defendants' Opposition, the text of Act 74 and Act 160 also reflects the State's interest in siting non-nuclear renewable energy within its borders—an interest that

---

Ann. tit. 30, §§ 102, 203, 231, & 248—which require all Vermont power generators to have a valid CPG. This Court cannot grant ENVY permission to operate for the next 20 years without a State-approved CPG unless this Court strikes down each of these statutes, as well as the other laws and orders cited by Defendants. Opp. 14-15. Indeed, ENVY's failure to challenge these provisions of Title 30 means that the Court cannot grant the broad injunction ENVY seeks. *See, e.g.*, *City of N.Y. v. Mickalis Pawn Shop, LLC*, ___ F.3d ___, Nos. 08–4804–cv & 09–1345–cv, 2011 WL 1663427, at *24 (2d Cir. May 4, 2011) (overturning district court's grant of overbroad injunctive relief because relief must be "narrowly tailored to fit specific legal violations").

necessarily involves economic concerns such as job creation, tourism, and land use.[3]

These bona fide areas of state interest justify state regulation regardless of whether VY's output is sold at wholesale or retail. Further, these concerns apply whether a plant is new or up for relicensing: an additional 20 years of VY operations would increase significantly the amount of spent fuel at the site (especially since the plant now operates at significantly higher output than historically) and would hinder the State's efforts to promote jobs, tourism, and land use through the development of non-nuclear renewable energy. A state would, for the same essential reason, be perfectly within its rights to refuse construction of a coal-fired plant or other plant that caused some other environmental harm affecting land use and economics in the state.

II. The challenged statutes regulate matters reserved to state authority and were not motivated by radiological safety concerns.

ENVY now claims that a handful of statements from the legislative record supports its legislative "pretext" argument. Relying on these statements, ENVY asks the Court to disregard the stated purposes of Acts 74 and 160 in favor of an ad hoc analysis of the purported motives of individual legislators. The Court should not do so.

The legislative record does not support ENVY's extraordinary pretext argument. Although ENVY does not acknowledge it, the record shows that legislators and witnesses repeatedly emphasized that the purposes of the challenged statutes were to regulate matters that fall within the State's proper regulatory authority. For instance:

Act 74:

- Outline draft bill, stating that regardless of "whether the plant is relicensed" or "shut

[3] ENVY's senior liaison engineer, David McElwee, acknowledged in legislative hearings on Act 74 that aesthetics and economic effects on tourism were legitimate concerns: "That's certainly a very important question and one that we, actually, is one of the criteria for the section 248 [CPG] process that we go through, is the environmental-aesthetic impact that it has." Kolber Ex. 30 (David McElwee, witness, Nat. Res. & Energy Comm. (Apr. 7, 2005)), at Track 1.

down," the "GOAL [is] future power supply, more diverse, environmentally sustainable, economically sound." Kolber Ex. 29 ("Outline draft 2" (Apr. 15, 2005)), at 1.

● "We're very cognizant that when it comes to issues of safety, we are preempted by the Federal government. A lot of these questions have to do with just the aesthetics of these casks. How will they be viewed by the public? What impact will the presence of these casks have on tourism, for example, a very important economic driver for the state of Vermont?" Kolber Ex. 30 (Committee Member, Nat. Res. & Energy Comm. (Apr. 7, 2005)), at Track 1.

Act 160:

● "I'm not seeing this as nuclear policy, I'm seeing this as Vermont's electric policy, how this is one piece . . . to come up with what is the future for Vermont electricity?" *Id.* (Committee Member, Nat. Res. & Energy Comm. (Apr. 4, 2006)), at Track 2.

● "We'll also learn things in these 4 years . . . all kinds of *economic* issues." *Id.* (Sen. Gander, Bill Reporter, Nat. Res. & Energy Comm. (Mar. 22, 2006) (discussing the purpose of Act 160, emphasis added)), at Track 3.

● "Is it still in the public interest of the people of Vermont to continue this plant? . . . [T]his would be the same procedure if someone came in and asked to construct a new plant—we would go back to this procedure which is what we did 40 years ago." *Id.* (Sen. Cummings, Chairperson, Fin. Comm. (Feb. 28, 2006)), at Track 4.

Act 189:

● "Safety is outside the purview of the State of Vermont . . . when you start looking at the economic aspects of having a plant . . . that could become something that's untenable, uneconomical, so we're going to be looking at this issue." *Id.* (Sen. Cummings, Chairperson, Fin. Comm. (Jan. 29, 2008)), at Track 5.[4]

● "From a financial standpoint, the idea is that [we] the NRC do not regulate commerce, we regulate safety, the point is to make sure that there is no radiological contamination left." *Id.* (Michael Dusaniwskyi Test., NRC Lead Technical Reviewer, Fin. Comm. (Jan. 29, 2008)), at Track 6.

[4] Although the Court need not look at statements from the legislative history of Act 189 or any of the other challenged statutes, if the Court is going to do so, this statement from the Chair of the Committee that introduced Act 189 should be afforded more weight. *See, e.g.*, *In re Spong*, 661 F.2d 6, 8 (2d Cir. 1981) (remarks of "principal sponsors" given greater weight); *United States v. Oates*, 560 F.2d 45, 70 n.26 (2d Cir. 1977) (weight of remarks depends on individual legislator's familiarity with and participation in shaping the legislation). Further, this contemporaneous quote from the introducer of the bill explaining that "[s]afety is outside the purview of the State of Vermont" directly refutes ENVY's claim that this case is distinguishable from *Pacific Gas* because "California took care specifically to explain that '[w]aste disposal *safety* . . . is not directly addressed by the bills.'" Mem. 19. The Vermont Legislature did the same here.

- "Thus the NRC's statutory authority does not extend to regulating the reliability of electrical generation from a nuclear power plant." Kolber Ex. 31 (letter in Act 189 bill file from Dale Klein, NRC, to Gov. Douglas (Apr. 11, 2008)), at 1.

The few quotes that ENVY cites, when read in context, show legislators doing what they should do: attempting to ascertain the bounds of their constitutional authority. *See, e.g.*, Ngau Ex. 45A at 5 of 44, line 22, through 6 of 44, line 10. Most of ENVY's quotes are from witnesses, not legislators, and those witnesses were advising the Legislature about the scope of state authority.[5] Indeed, when the Legislature was contemplating Act 189, it sought testimony and written advice from the NRC to ensure that the Legislature was not acting in preempted areas. *See* Kolber Exs. 30 (Track 6) & 31. The act of seeking advice on constitutional bounds shows that the Legislature intended to stay within those bounds, not, as ENVY claims, that the Legislature intended to act—and did act—outside those bounds.

The legislative history for Act 74, Act 160, and Act 189 totals over 2,500 pages of bill files and over 200 CDs of recorded hearings. *See* Kolber Ex. 32 (index of legislative record). ENVY's approach to preemption asks the Court to hunt through this extensive record looking for isolated comments that suggest pretext—and then to attribute any such comments to the Legislature as a whole and to Governor Douglas, who signed all three challenged bills. But this Court need not, and should not, engage in this kind of subjective inquiry into legislative motive, untethered from the statutory text. *See, e.g.*, *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); Opp. 20-24 (citing U.S. Supreme Court and Second Circuit precedent on avoiding inquiries into legislative

[5] ENVY identifies one of those witnesses as "PSB's James Volz." Reply 8. Defendant Volz was not a member of the PSB at the time he made the quoted statements.

motive and not attributing the stray comments of individual legislators to the legislature as a whole).[6]

The Supreme Court in *Pacific Gas* rejected the same pretext argument that ENVY makes here. In *Pacific Gas*, the petitioners and amici argued that the "true motive" of the California legislature was regulating safety. They pointed, for example, to an earlier ballot initiative, Proposition 15 (called the "Nuclear Power…Safeguards Act"), that was the basis for the challenged laws, and made numerous references to nuclear safety and radiological concerns. *See Pacific Gas*, 461 U.S. at 215-16; Kolber Ex. 33 (Pac. Legal Found. Amicus Br. (Sept. 3, 1982)), at 8-10 (Appendix: Proposition 15). ENVY's argument here echoes the assertions of petitioners and their amici in *Pacific Gas*. *See* Kolber Ex. 33 at 5 (accusing California legislature of putting radiological safety regulation into the "Emperor's New Clothes"); Kolber Ex. 34 (Legal Found. of Am. Amicus Br. (Sept. 10, 1982)), at 4 ("[L]egislators masked their motivations by pretext."). The Supreme Court refused to "become embroiled in attempting to ascertain California's true motive" and accepted the state's "avowed economic purpose." *Pacific Gas*, 461 U.S. at 216. The Court expressly rejected the petitioners' effort to use legislative history, including past bills,

[6] ENVY's approach to determining pretext is particularly unhelpful here, because virtually any proposed regulation of nuclear power is likely to elicit questions about safety, even when the resulting regulation has no impact on or relation to safety. The discussion on Act 74 illustrates this point. As the State has explained, the purpose, text, and legal effects of Act 74 all fall well within the bounds of proper State authority. Opp. 17-18. The Act notes that all actions taken pursuant to the bill must comply with "any order or requirement of the Nuclear Regulatory Commission." Vt. Stat. Ann. tit. 10, § 6522(c)(2); *see Chamber of Commerce v. Whiting*, No. 09-115 (U.S. May 26, 2011), slip op. at 13 (noting, in rejecting preemption challenge to Arizona immigration law, that state law deferred to federal government on those areas within federal authority). Despite Act 74's deference to the NRC on all matters within the NRC's authority, the legislative discussion of Act 74 necessarily contains references to safety—not because the Act regulated safety, but because legislators defending the bill had to explain to colleagues that the dry-cask storage that ENVY was requesting would not have an effect on safety. *See* Opp. 23 n.9 (explaining that context shows legislative statements were meant merely to assure opponents of Act 74 that the law did not negatively impact safety, nor could it do so since safety concerns are left to the NRC, and nothing in Act 74 could have—or did—address safety).

to show that the law was "tainted" by improper concerns:

> [P]etitioners note that Proposition 15, the initiative out of which § 25524.2 arose, and companion provisions in California's so-called nuclear laws, are more clearly written with safety purposes in mind. It is suggested that § 25524.2 shares a common heritage with these laws and should be presumed to have been enacted for the same purposes. The short answer here is that *these other state laws are not before the Court, and indeed, Proposition 15 was not passed; these provisions and their pedigree do not taint other parts of the Warren-Alquist Act*.

Pacific Gas, 461 U.S. at 215-16 (emphasis added).

ENVY wrongly suggests, citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 104-08 (1992), that a state statute is preempted if it was motivated in any part by safety concerns. Reply 6. That is not the legal standard. *See* Opp. 6-8. *Gade* addressed not legislative *purpose*, but the effect of a challenged law. *See Gade*, 505 U.S. at 107 ("Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field."). The Supreme Court has specifically articulated that the Atomic Energy Act can preempt state laws for having improper effects only when the challenged laws have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities *concerning radiological safety levels*." *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (emphasis added). *Gade* and *English* do not support ENVY's argument here, because the State's decision on whether to re-license VY has no effect, much less a direct and substantial effect, on the radiological safety practices regulated by the NRC. *See* Opp. 8-13 (NRC recognizes states' licensing role).

Further, as Defendants have shown, Vermont's challenged statutes were not motivated—in whole or in part—by radiological safety concerns. The Legislature set forth and addressed non-preempted bases for both Acts 74 and 160, *see* Opp. 17-20, and, consistent with *Pacific Gas*, the Court should reject ENVY's pretext argument. Lastly, ENVY's suggestion that the State is

creating "*post hoc*" rationales for the challenged statutes, Reply 4 n.3 & 11, cannot be credited. In fact, the State has pointed to language in Acts 74 and 160 that demonstrate clear legislative intent to regulate areas well within the State's authority. *See* Opp. 17-20.[7] It is ENVY, not the State, that seeks to engage the Court in a post hoc inquiry to find a radiological safety motive that does not appear in the text or underlying purposes of the challenged laws. ENVY's arguments fall far short of demonstrating that the State's actions are preempted by federal law.

CONCLUSION

ENVY's motion for a preliminary injunction should be denied.

[7] ENVY concedes that the legitimate rationales articulated in *Pacific Gas* could be invoked as to an interstate wholesaler, but mistakenly argues, citing Act 189, that the Legislature considered only "reliability." Reply 4 n.2. Reliability is, of course, explicitly listed in *Pacific Gas* as properly within state authority. 461 U.S. at 205. More importantly, the fact that the Legislature required a non-preempted reliability review of VY does not mean that reliability is the State's only concern when considering whether VY will be part of Vermont's energy future. Act 189 itself states an intent to further "economic interests" through reliable power. 2008 Vt. Acts & Resolves No. 189 § 1(c). And Act 189 is only one statute; ENVY ignores the entire suite of statutes that the State has enacted over the last decade related to controlling the State's energy future. *See* 2011 Vt. Acts & Resolves No. 47 (enacting various energy provisions to increase efficiency, reliability, security, and the use of renewable energy, reduce costs and greenhouse gas emissions, and plan for future energy needs); 2010 Vt. Acts & Resolves No. 159 (same); 2009 Vt. Acts & Resolves No. 45 (same); 2008 Vt. Acts & Resolves No. 92 (same); 2008 Vt. Acts & Resolves No. 209 (same); 2006 Vt. Acts & Resolves No. 208 (same); 2006 Vt. Acts & Resolves No. 152 (establishing energy "efficiency standards" in order to "reduce pollution and other environmental impacts," "make electricity systems more reliable," "reduce or delay the need for new power plants, power transmission lines, and power distribution system upgrades," "contribute to the economy of this state," "sav[e] consumers and businesses money on energy bills," and "help the state and local economy"); 2006 Vt. Acts & Resolves No. 123 (regarding Vermont's participation in the Regional Greenhouse Gas Initiative); 2005 Vt. Acts & Resolves No. 61 (establishing requirements with respect to the use of new renewable energy sources); 2004 Vt. Acts & Resolves No. 82 (addressing stability and reliability during state of emergency); 2003 Vt. Acts & Resolves No. 69 (addressing renewable energy programs and the State's 20-year electric plan); and 2002 Vt. Acts & Resolves No. 145 (encouraging diversity of energy portfolio).

Dated June 13, 2011, at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: */s/ Scot L. Kline*

Scot L. Kline
Bridget C. Asay
Michael N. Donofrio
Kyle H. Landis-Marinello
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171
skline@atg.state.vt.us
basay@atg.state.vt.us
mdonofrio@atg.state.vt.us
kylelm@atg.state.vt.us

Attorneys for Defendants Peter Shumlin, in his official capacity as Governor of the State of Vermont, William H. Sorrell, as 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

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 (NEF) to the following NEF parties:

Robert B. Hemley, Esq.
Matthew B. Byrne, Esq.

Kathleen M. Sullivan, Esq.
Robert Juman, Esq.
Sanford I. Weisburst, Esq.
William B. Adams, Esq.

Dated: June 13, 2011

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: */s/ Kyle H. Landis-Marinello*

Kyle H. Landis-Marinello
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6906
kylelm@atg.state.vt.us

Counsel for Defendants