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' POST-TRIAL BRIEF

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Plaintiffs respectfully submit this post-trial brief, *first*, to address the Court's four questions—(1) What is Plaintiffs' response to Defendants' affirmative defenses?; (2) Are Acts 74 and 160 severable from the pre-existing Vermont statutes that they amended?; (3) What Vermont statutes other than Acts 74, 160, and 189 bear on the PSB's authority over VY?; and (4) What relief do Plaintiffs request?—and, *second*, to summarize the key evidence at trial that established each of Plaintiffs' three Counts under the governing legal standards.

ARGUMENT

I. DEFENDANTS FAILED TO ESTABLISH THEIR AFFIRMATIVE DEFENSES

Contrary to Defendants' assertions (*see* Def. Pretrial Br. (Sept. 4, 2011) ("DPreT"), ECF 143 at 18-25), the evidence did not show any inequitable conduct barring Plaintiffs' preemption challenge. Far from acceding to the *General Assembly*'s seizure of control over the CPG process in Acts 74 and 160, Plaintiffs agreed in the 2002 MOU only to forego a preemption challenge to "the jurisdiction of the *Board*" under then "current law." PX 361 ¶ 12 (emphasis added). Indeed, Entergy raised preemption issues when the PSB was considering dry cask storage. PX 362 at 14. Far from "propos[ing] and lobb[ying] for the bill that ultimately became Act 74," DPreT 21, Plaintiffs sought a much more limited bill, *compare* PX 460, *with* Act 74; Tr. 378:23-379:11[1]—and did so only after the Vermont Attorney General suddenly opined that a statutory exemption for SNF storage, which Entergy thought was part of the "current law" referenced in the 2002 MOU, Tr. 374:17-375:16, did not apply to Plaintiffs, PX 90A-B (LA 22); PX 95A (LA 22); PX 308; Tr. 375:17-377:2. Far from supporting Act 160, Plaintiffs opposed its enactment. *See, e.g.*, PX 126A (LA 36); PX 128A (LA 40); PX 134C (LA 45); PX 155C

[1] Entergy official Jay Thayer's comment that Act 74 was "good news," DX 1225, meant only that "the plant would continue to operate for another four years," Tr. 341:13-19, not that Plaintiffs were happy to be forced to return to the General Assembly for permission to store SNF from post-2012 operations, Tr. 381:24-382:9.

(LA 52-53). And far from relying on any prior statements by Plaintiffs regarding preemption, the State has been anticipating Plaintiffs' preemption claims for years. *See, e.g.*, Tr. 164:9-20, 409:5-9, 409:14-410:7. Defendants thus failed to establish any of their asserted equitable defenses:

Waiver. "Preemption is a power of the federal government, not an individual right of a third party that the party can 'waive.'" *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 883-84 (9th Cir. 2006); *see also Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 50 (D. Me. 2000). Even if Plaintiffs could have waived their ability to assert that Acts 74 and 160 were preempted, they did not do so in the 2002 MOU, which spoke only to *PSB* jurisdiction. Nor did Plaintiffs do so in any subsequent petitions to the PSB,[2] which in any event could not preclude them from challenging Vermont's scheme as preempted. *See Me. Yankee*, 107 F. Supp. 2d at 50 (rejecting argument that participating in state law process waived preemption).

Laches. Defendants failed to show an "unreasonable lack of diligence [by Plaintiffs] under the circumstances in initiating an action" or "prejudice [to Defendants] from such delay." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004) (quotation omitted).[3]

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[2] For example, Entergy's 2008 petition to the PSB for relicensing, DX 1012, and December 18, 2008 letter to legislators acknowledging that Entergy would need approval from the General Assembly for continued operation, DX 1230, merely recognized that Act 160 existed on the books and required legislative approval for continued operations past March 2012—they nowhere conceded that the General Assembly could deal with preempted safety concerns. And Plaintiffs consistently described the PSB as better equipped than the General Assembly to make CPG decisions affecting VY. *See, e.g.*, DX 1220; Tr. 838:15-839:13.

[3] Defendants incorrectly refer (DPreT 20-25) to Vermont law on affirmative defenses; because Plaintiffs have alleged federal claims, federal law governs. *See Howlett v. Rose*, 496 U.S. 356, 375-76 (1990) ("[t]he elements of, and the defenses to, a federal cause of action are defined by federal law"); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152 (11th Cir. 2006). The asserted defenses would also fail under Vermont law, whose elements largely resemble federal law. *See, e.g., In re Estate of Lovell*, 25 A.3d 560, 564 (Vt. 2011) (laches); *Boivin v. Town of Addison*, 5 A.3d 897, 902-03 & n.3 (Vt. 2010) (judicial estoppel; noting that court "has not explicitly recognized this doctrine"); *Starr Farm Beach*

Plaintiffs cannot be faulted for waiting to file this action until *after* the NRC had granted VY a renewal license for post-March 2012 operations, 76 Fed. Reg. 17,162-01 (Mar. 28, 2011), without which this case might have been moot, and until *after* Governor Shumlin had rejected Plaintiffs' good-faith efforts to negotiate a settlement, ECF 46-1 at ¶ 22, which might have avoided the need for this litigation. Nor did Defendants prove the slightest prejudice from Plaintiffs not bringing their preemption claims earlier: Defendants failed to show how they were harmed by the PSB proceedings they cited, Tr. 332:1-336:3, involving approval of construction of fences, DX 1286-87, access gates, DX 1286; DX 1293, or a parking lot, DX 1292, at VY; the PSB never deemed Plaintiffs' failure to raise preemption in those proceedings relevant, Tr. 371:18-374:11; and any efforts expended unnecessarily on Entergy's pending 2008 petition for a CPG for post-2012 operation is a harm of the General Assembly's own making, as it has withheld from the PSB the authority to make any decision on that petition.

Judicial Estoppel. Defendants failed to show that "(1) plaintiffs adopted a factual position 'clearly inconsistent with [their] earlier position'; (2) the prior position was 'adopted in some way by the court in the earlier proceeding'; and (3) plaintiffs would 'derive an unfair advantage' against defendants in asserting the inconsistent statements." *Welfare Fund, New Eng. Health Care Emps. v. Bidwell Care Ctr., LLC*, 419 F. App'x 55, 59 (2d Cir. 2011) (summary order) (quoting *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010)). Plaintiffs made no inconsistent statements: Plaintiffs' 2002 agreement to forego a preemption challenge went only to the *PSB's*, not the *General Assembly*'s, authority; and Plaintiffs stated in the Court of Federal Claims merely that preemption of Act 74 was not "cut and dry." DX 1020 at 18; DX 1308 at 220:7-221:4; Tr. 418:9-419:11. As Plaintiffs never made a prior inconsistent

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Campowners Ass'n, Inc. v. Boylan, 811 A.2d 155, 160 (Vt. 2002) (equitable estoppel and unclean hands).

statement, no prior court ever adopted such a statement. Nor, as discussed above, did Defendants prove any prejudice from any supposed change in Plaintiffs' preemption position.

Equitable Estoppel. Defendants failed to show that "(i) the [plaintiff] made a definite misrepresentation of fact, and had reason to believe that the [defendant] would rely on it; and (ii) the [defendant] reasonably relied on that misrepresentation to his detriment." *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 56 (2d Cir. 2003). Plaintiffs' 2002 statements waiving preemption over the jurisdiction of the *PSB* were in no way false when made: Plaintiffs could not have anticipated that the *General Assembly* would seize authority over CPG issuance and do so based on preempted safety purposes. And, contrary to Defendants' assertions (DPreT 21), a State's freedom to change its statutory allocation of power prospectively does not include the power to impair its own existing contracts. *See* U.S. CONST. art. 1, § 10, cl. 1; *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-32 (1977); *Ass'n of Surrogates & Supreme Court Reporters Within City of N.Y. v. New York*, 940 F.2d 766, 771-74 (2d Cir. 1991). Nor, as discussed, did Defendants show any prejudice from Plaintiffs' alleged change of preemption positions.

Unclean hands. For all the reasons set forth above, Defendants offered no evidence that Plaintiffs acted inequitably or in bad faith—the two grounds for invoking the doctrine. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

II. THE PREEMPTED PROVISIONS ADDED BY ACTS 74 AND 160 ARE SEVERABLE

Act 74's Section 2 (10 V.S.A. § 6522) and Act 160 (30 V.S.A. §§ 248 (e)(2), (m), 254) are severable and thus their invalidation does not require invalidating any other Vermont statutory provision.[4] Severability is governed by Vermont law, *see Vermont Right To Life*

[4] Because Act 189 does not amend a pre-existing statute, no severability issue is raised as to it. Plaintiffs address the invalidity of Acts 74, 160, and 189 in Point IV, *infra*.

Committee, Inc. v. Sorrell, 221 F.3d 376, 389 (2d Cir. 2000), and provides that "portions of a statute or ordinance which fully operate as law apart from the portion declared invalid may be severed," *City of Burlington v. N.Y. Times Co.*, 532 A.2d 562, 566 (Vt. 1987); *see Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 423-24 (D. Vt. 1998); 1 V.S.A. § 215.

Act 74. Act 74 accomplished two discrete goals that function entirely separately: (1) it authorized Plaintiffs to build an SNF storage facility while requiring that Plaintiffs return to the General Assembly for approval of storage of SNF derived from post-March 2012 operations, 10 V.S.A. § 6522; and (2) it created the CEDF, *id.* § 6523. The CEDF is the only part of Act 74 that directly furthers the purposes stated in Act 74's preamble "to support investment in clean energy resources in order to permit adequate power supply diversity," 10 V.S.A. § 6521(7); SNF facility approval has nothing to do with these non-safety purposes. Under Vermont severability law, the separate operation and purpose of the preempted provision of Act 74, 10 V.S.A. § 6522, clearly permits its severance from the CEDF provisions, 10 V.S.A. §§ 6521, 6523.

Act 160. Act 160, which is preempted in its entirety, is similarly severable. Act 160 added subsections (e)(2) and (m) to the pre-existing 30 V.S.A. § 248, and added a new provision, 30 V.S.A. § 254, that set forth the framework for the General Assembly's newly arrogated authority over CPG issuance. Section 254 can readily be struck from V.S.A. chapter 30 without any impact on the pre-Act 160 version of the statute, which functions independently and which the General Assembly would have wanted to keep intact. *See City of Burlington*, 532 A.2d at 566; *Rockwood*, 21 F. Supp. 2d at 423-24 ("Under Vermont law, whether the unconstitutionality of a portion of a statute renders the entire statute invalid depends on whether the legislative body would have enacted the statute without the invalid portion."); 1A SUTHERLAND STAT. & STAT. CONSTR. § 22:37 (7th ed.) ("If an amendatory act is wholly invalid, the statute sought to be

amended remains in full force."). For similar reasons, 30 V.S.A. § 248(e)(2) and (m) may be struck without affecting the operation of the remaining pre-Act 160 version of that section.

III. THE PSB RETAINS NON-PREEMPTED AUTHORITY OVER VY

Once the preempted sections added by Acts 74 and 160 are stricken and removed, Vermont statutes would still confer residual authority upon the PSB over VY, so long as that authority is exercised for non-preempted purposes consistent with federal law. Specifically, the PSB would have authority to consider a CPG for VY's continued operation under 30 V.S.A. § 231(a) (a company "which desires to own or to operate a business over which the [PSB] has jurisdiction under the provisions of this chapter shall first petition the board to determine whether the operation of such business will promote the general good of the state"), but *not* under 30 V.S.A. § 248 (covering only "site preparation for or construction of an electric generation facility or electric transmission facility within the state," *id.* § 248(a)(2)(A), and other activities inapposite here).[5]

To the extent the PSB relies upon the enumerated § 248(b) factors to inform CPG review under § 231's "general good" standard, it may not do so on preempted grounds. These preempted grounds include consideration of radiological safety under the rubric of "public health and safety," § 248(b)(5). They also include economic grounds preempted by the FPA as to a wholesale generator doing business in interstate commerce, *see Pac. Gas & Elec. Co. v. State*

[5] The Vermont Supreme Court held in 2003, before Act 160 was enacted, that § 231 gave the PSB authority to approve transfer of VY, but that § 248 did not apply to VY as an already constructed plant. *In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 829 A.2d 1284, 1287-88 (Vt. 2003). Only Act 160's addition of subsection (e)(2) to § 248 expanded that section to cover the continued operation of VY. With § 248(e)(2) invalidated, PSB's review of a CPG for continued operation of VY will again be governed not by § 248 but by § 231, along with such ancillary provisions as 30 V.S.A. §§ 2(c) (PSB "may issue orders on its own motion and may initiate rule-making proceedings"); 102 ("For good cause, … [PSB] may amend or revoke any certificate awarded under the provisions of this section."); 203 & 209 (general grants of PSB jurisdiction).

Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 205-06 (1983) ("*PG&E*"). Specifically, Vermont may not rest a CPG decision concerning VY's continued operation upon "need for present and future demand for service," § 248(b)(2), "system stability and reliability," § 248(b)(3), "compliance with the [State's] electric energy plan," § 248(b)(7), or "economic benefit to the state and its residents," § 248(b)(4), to the extent the latter is interpreted as a basis to extract a below-market PPA despite FERC's exclusive jurisdiction over interstate power pricing as opposed to considering other sorts of economic benefit, Tr. 316:21-317:10.

IV. THE ATOMIC ENERGY ACT PREEMPTS ACTS 74, 160, AND 189 (Count I)

A. The Governing Legal Standard

There is no dispute that, where a State directly regulates a nuclear plant and that regulation is "grounded in safety concerns," the State's enactment is preempted by the AEA. *PG&E*, 461 U.S. at 213; *accord*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004).[6] Three key principles govern application of this standard:

First, the Court's determination whether the challenged state law is "grounded in safety concerns" turns on whether the law was "written with safety purposes *in mind*." *PG&E*, 461 U.S. at 215 (emphasis added). Thus, contemporaneous legislative history of actual purpose is the touchstone, *see id.* at 213 (relying on legislative committee report)[7]—not hypothetical efforts to construct non-safety purposes after the fact, *see, e.g.*, *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 148 (2d Cir. 2006) (rejecting proffered non-preempted purpose as

[6] The presumption against preemption is obsolete and in any event inapplicable. *See* Pl. Reply Mem. Of Law In Further Support Of Mot. For P.I. (May 31, 2011), ECF 46 at 7 & n.6.

[7] Legislative history includes documents, statements by legislators, and witness testimony. *See Skull Valley*, 376 F.3d at 1252 (statements by legislator and governor); *Corley v. United States*, 129 S. Ct. 1558, 1569 (2009) (draft bill); *Disabled in Action Metro. N.Y. v. Hammons*, 202 F.3d 110, 126 n.16 (2d Cir. 2000) (statements by "Committee members"); *DePierre v. United States*, 131 S. Ct. 2225, 2234-35 (2011) (witness testimony).

"*post-hoc*"). Moreover, a State cannot escape a preempted actual purpose simply by relying on nominal "articulated" statements of non-preempted purpose in the text of statutes. *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999) (courts cannot "blindly accept" such "articulated" purposes in preemption cases lest legislatures use such techniques to "'nullify nearly all unwanted federal legislation'") (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992)), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39 (2001); *see also, e.g.*, *Skull Valley*, 376 F.3d at 1252.

Second, a State cannot escape AEA preemption by invoking non-safety purposes only as pretexts for its true, preempted safety purpose, or as the inevitable consequences of the preempted safety purpose. *See Vango Media, Inc. v. City of N.Y.*, 34 F.3d 68, 73 (2d Cir. 1994) ("It is a truism that almost all matters touching on matters of public concern have an associated economic impact on society. But such economic concern does not displace a local government's primary interest—whether it be public safety, the common good, or in this case public health.").

Third, even if the General Assembly actually had in mind both safety and true non-safety purposes,[8] the non-safety purposes must be plausibly advanced by a shutdown of VY. *See McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 872-73 (2005); *Loyal Tire*, 445 F.3d at 145-48 (rejecting town's proffered purpose because means chosen were not "genuinely responsive" to it). The presence of a radiological safety purpose shifts the burden to the State to show that it would have taken the same actions absent consideration of radiological

[8] Arguably, the presence of a safety purpose alone triggers preemption without further inquiry. *See, e.g.*, *Cnty. of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 58, 59 (2d Cir. 1984) (holding that county "could not even consider the safety aspects" of a nuclear plant, and that county's lawsuit seeking to halt operations of plant was preempted because the complaint "appears, at least in some respects, to be motivated by safety concerns"); *Me. Yankee Atomic Power Co. v. Me. Pub. Utils. Comm'n*, 581 A.2d 799, 806 (Me. 1990) (state statute preempted because it invoked "public health" and "safety," among other purposes).

safety. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (multi-member school board, *see id*. at 276); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (multi-member zoning board, *see id.* at 258).

Contrary to Defendants' assertions (DPreT 4), the "effects" test of *English v. General Electric Co.*, 496 U.S. 72, 84 (1990), does not apply here. That case involved a generally applicable state tort law rather than, as here and in *PG&E*, a state law that singles out nuclear power, where no inquiry into whether an "effect" on federal interests in nuclear safety is required. In any event, even if Defendants' test were applicable, it is clearly met, as a safety-based shutdown of VY, a federally relicensed nuclear power plant, undoubtedly has a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 496 U.S. at 85.

B. Direct Evidence Demonstrated That The General Assembly's Purpose In Enacting Acts 74, 160, And 189 Was To Regulate Nuclear Safety

Plaintiffs presented overwhelming direct evidence from the legislative record of Acts 74, 160, and 189 that those Acts were based on radiological safety concerns and that the language of non-safety concerns—not their substance—was invoked only in an effort to avoid preemption. Defendants, by contrast, failed at trial to present even one instance in that history of a legislator explaining why a shutdown of VY furthered a supposed non-safety concern. Despite Defendants' superior access to the legislators, which put Defendants "in the best position to put forth the actual reason for [the General Assembly's] decision[s]," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000), Defendants chose to remove the DPS's Sarah Hofmann (the key General Assembly witness/advisor) from their witness list, and to elicit testimony from House Speaker Shapleigh Smith only as to 2010 events that post-dated Acts 74, 160, and 189.

Act 74. Legislators repeatedly invoked radiological safety concerns as the reason for the General Assembly to regulate dry-cask storage at VY. *E.g.*, PX 58A (LA 16) (SNF might "burn and then the stuff would float around and come down"); PX 114B (LA 30) ("I … trust the 180 people up here … a lot more than I trust the NRC in terms of their ability to act as an advocate for the population.").[9]

Although legislators plainly had a purpose to regulate radiological safety, they were coached to avoid intoning the word "safety." The history shows that non-safety concerns were invoked only as cover for the safety concern and not because they were actually in the legislators' minds as free-standing purposes. *E.g.*, PX 65A (LA 16-17) (a "creative use of statute" would be to have "a safety issue in mind" but to "tal[k] about aesthetics" of berms shielding dry casks); PX 31A (LA 12); PX 50A (LA 14-15); PX 57A (LA 15).

The effort to shield Act 74 from a preemption challenge also manifested itself in documentary evidence. Technical requirements regarding the dry casks—requirements that overlap with the NRC's regulations, Tr. 384:21-385:5; 10 C.F.R. §§ 72.122, 72.128—were located in the 2005 MOU to avoid their appearance in Act 74 itself, *see* PX 110B-C (LA 27); PX 112A (LA 29). Removal of these items from the bill did not, however, purge the General Assembly's safety purpose in requiring Plaintiffs to obtain legislative approval for storage of SNF derived from post-March 2012 operations—a provision plainly based on radiological safety concerns, as the U.S. Government agrees. PX 306 at 99 ("[T]he state of Vermont's CPG statute and review process are preempted by federal law … because … clearly predicated upon 'nuclear safety concerns.'") (quoting *PG&E*, 461 U.S. at 212).

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[9] *See also* PX 3A (LA 2); PX 25A (LA 8); PX 27A-C (LA 9); PX 27G-H (LA 10-11); PX 28A (LA 11); PX 45A (LA 13); PX 46B (LA 13); PX 47A (LA 14); PX 80A (LA 20); PX 101A (LA 23-24); PX 110D (27-28); PX 119A-B (LA 31-32); PX 124A (LA 32); PX 124C-F (LA 32-34).

Act 160. The legislative history of Act 160 likewise reveals a continued focus on radiological safety, *e.g.*, PX 135A (LA 46) ("if we base our legislation on what we learn from our constituents most of that is going to be about safety"),[10] and attempts to "talk" about safety using other words, *e.g.*, PX 134A (LA 42-44) ("Okay, let's find another word for safety."),[11] including by inserting a superficially non-safety preamble into the final Act with the deliberate goal to avoid preemption, *see* PX 144B (LA 48) ("[I]n the preamble of the bill, … we think we can help you with some language to prevent preemption problems."); PX 144C (LA 48). The Act 160 history also includes a draft bill that listed "safety" as an objective, PX 401 (II LA 3-4), before that term was scrubbed out of the final Act, consistent with the preemption coaching the General Assembly members received, *e.g.*, PX 134A-B (LA 42-45); PX 134D (LA 45).

The legislative history also reveals that the General Assembly took into its own hands the PSB's longstanding authority over CPGs for electricity generating plants precisely because the General Assembly was less constrained than the PSB in taking safety into account. *See* PX 135B (LA 46-47) (Senator Cummings, Chair of the Senate Finance Committee, explaining that "we can have a much broader range of ability to hear [about "sterile sheep" and "three-headed turtles"] than the Board does. The board for good reasons has much more constraint."); PX 134E (LA 45) (General Assembly should have "latitude" to consider "safety questions").

Act 189. Act 160 called for the DPS to arrange for studies on enumerated topics and with enumerated objectives, 30 V.S.A. § 254(b)(1)-(2), with the resulting studies and their objectives to be considered by the PSB, *id.* § 254(c). In Act 189, the General Assembly provided further

[10] *See also* PX 126E-F (LA 37-38); PX 127A (LA 38-39); PX 140B (LA 47-48); PX 146A (LA 49).

[11] *See also* PX 134B (LA 45); PX 136A (LA 47); PX 144D (LA 49); PX 151A (LA 50); PX 154C (LA 51); PX 155A (LA 52).

instruction as to the content of one study, which, once completed, would also inform the General Assembly's exercise of its CPG role. *See* Act 189, § 6(d).

Act 189's genesis was a report by Arnie Gundersen, which expressly called for an audit for radiological safety reasons. PX 407 at 21; *see also id.* at 1, 2, 3, 5. As Plaintiffs' witness John Herron and Defendants' witnesses Jay Thayer and Bruce Hinkley agreed, Act 189 is focused almost entirely on the safety-related systems of VY that are regulated by the NRC,[12] and ignores the crucial systems that are not safety-related but do bear directly on reliability (*i.e.*, the turbine and generator, which convert steam into electricity), Tr. 66:17-68:23, 557:24-558:10; PX 614.

The direct evidence of the General Assembly's radiological safety purpose for enacting Act 189 is again voluminous. Then-Senator Shumlin introduced the draft bill that ultimately became Act 189) as a bill for an "independent *safety* inspection," PX 164A (LA 55) (emphasis added); the General Assembly was coached to use the term "reliability" as a substitute for safety concerns, PX 186B (LA 69); PX 186F (LA 71); PX 195A (LA 79); PX 212A (LA 85); the word "safety" was scrubbed from the original bill's title and numerous of its sections, *compare* PX 427 (II LA 8), *with* Act 189; and a bevy of legislators and witnesses criticized the NRC for failing to adequately address radiological safety concerns and described Act 189 as a means to address those concerns, *e.g.*, PX 195B (LA 79-80) (testimony of Defendant's expert witness Peter Bradford).[13] But legislators continued to refer to Act 189 as having called for a safety

[12] *See* Tr. 52:8-63:12, 391:22-394:22, 542:21-549:19; *see also* PX 186D-E (LA 70); PX 187C (LA 74); PX 189C (LA 76); PX 194F (LA 79); PX 194G (LA 79); PX 226B (LA 88-90); PX 303; 10 CFR §§ 50.46, 50.49, 50.59, 50.65, Part 50 App. J, K, R, Part 100 App. A.

[13] *See also* PX 164B (LA 55); PX 168B (LA 55-56); PX 168D (LA 56-57); PX 170A (LA 58); PX 173C (LA 59); PX 175A (LA 59); PX 177A (LA 60); PX 180A-I (LA 61-62); PX 180L (LA 62); PX 183A-B (LA 63); PX 183D-F (LA 63-64); PX 185E (LA 67); PX 185G (LA 68);

assessment of VY, PX 302; PX 417, and the Public Oversight Panel recognized that the Act 189 audit "accomplished many of the aspects of a comprehensive safety assessment." PX 382 at 10.

C. Defendants Failed To Meet Their Burden To Show That Acts 74, 160, And 189 Would Have Been Enacted Or Applied To Shut Down VY Absent A Nuclear Safety Purpose

Once Plaintiffs demonstrated overwhelmingly the Legislature's preempted safety purpose, the burden shifted to Defendants to show that Vermont's supposed non-safety rationales justify a shutdown of VY. *See supra*, at 8-9. Defendants failed to meet that burden. Defendants did not present at trial a single instance of an actual contemporaneous legislator explaining that a shutdown of VY would advance a non-safety purpose. *See also* Tr. 590:14-591:18 (none of the studies commissioned by Vermont recommended shutting down VY to further a non-safety purpose). Instead, at trial, Defendants proffered paid consultants such as William Steinhurst and Peter Bradford to speculate after the fact on whether a *hypothetical* legislature could have devised a non-safety reason to shut down VY; Defendants' other witnesses, including Speaker Smith and Curt Hebert, addressed only events in 2010, not events leading up to Acts 74, 160, and 189. Defendants' *post hoc* non-safety purposes should be rejected out of hand. Even if they are considered, they must be rejected either because they are not plausibly advanced by a shutdown of VY, they are effectively safety concerns, or they are proscribed by other federal laws.

One crucial fact bears on several of Defendants' *post hoc* non-safety purposes: VY is an exempt wholesale generator under federal law. *E.g.*, Tr. 98:18; PX 105B (LA 25). Aside from any voluntarily agreed PPA, which has not been executed for the post-March 2012 period, Tr. 112:22-24, Vermont utilities need not buy power from VY, and VY need not sell power to

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PX 186A (LA 68); PX 186C (LA 69-70); PX 194A (LA 77); PX 195D-E (LA 78); PX 197A (LA 82); PX 199A (LA 82); PX 201A (LA 83-84).

Vermont utilities, Tr. 107:11-14; 488:16-21.[14] The FPA thus preempts Vermont's regulation of the economic aspects of VY's operation, including need, cost, reliability, and related state energy planning. *See PG&E*, 461 U.S. at 205-06 (the "broad authority of [FERC under the FPA] over the need for and pricing of electrical power transmitted in interstate commerce" is an "exception" to the tradition that "economic aspects of electrical generation have been regulated for many years and in great detail by the states").

Reliability. Because Vermont's own studies concluded that VY is in fact reliable, PX 387; PX 391; Tr. 553:19-554:7 (Hinkley), and ISO-NE found that a shutdown of VY may make the grid less reliable, PX 343, 344 (II LA 50), reliability cannot be a plausible non-safety purpose for Vermont's statutory scheme to shut down VY. In fact, Defendants and Vermont legislators used reliability only as "another word for safety," PX 134A (LA 42-44), or looked at VY's ability reliably to produce power only as a consequence of its safety-related systems, *e.g.*, Tr. 508:13-24; PX 127A (LA 38-39). But even if reliability were distinct from safety, a shutdown does not further Vermont's supposed reliability concern because shutting down VY does not improve its reliability, and Vermont can simply choose not to purchase power from VY after March 2012 and instead purchase from suppliers it deems more reliable.

Energy diversity. Defendants' supposed energy-diversity purpose likewise is not plausibly furthered by shutting down VY. Because Vermont utilities need not purchase power from VY, Vermont's state-regulated utilities may pursue energy diversity by choosing (or being ordered) to purchase from non-nuclear suppliers. Tr. 238:19-239:12 (Steinhurst).[15] (Belying

[14] Legislators were well aware of this fact when enacting Acts 74, 160, and 189, and hence did not reasonably assume that Vermont utilities had to continue to purchase power from VY after March 2012. *See, e.g.*, PX 105C (LA 25); PX 130B (LA 40); PX 134F (LA 46).

[15] Mr. Steinhurst speculated that VY's presence in the regional market could depress power prices, "acting as a dampening effect on the development of alternatives." Tr. 222:3-4. But

this purpose, Green Mountain Power recently entered into a PPA to purchase power from New Hampshire's Seabrook nuclear plant. PX 353; Tr. 108:22-25.) Vermont's General Assembly, for its part, is free to promote diverse non-nuclear sources without regard to the status of VY, as it has in fact done through creation of the CEDF and other laws. Tr. 237:6-238:10.

Trust. Defendants' emphasis on corporate "trustworthiness" begs the question, "trust to do what?" Defendants' witness Curt Hebert explained in his videotaped deposition, and contemporaneous documentary evidence confirms, that it was trust *to keep the plant safe* in the wake of the tritium leak. Thus, Mr. Hebert's May 2010 e-mail phrased the concern as "Credibility of VY Officials in PSB Testimony on Tritium." DX 1251 at QEVY00027712. The e-mail referred to "daily" media stories on the issue, *id.*, and those stories described the issue as safety, *see, e.g.*, DX 1250 at QEVY00027516, as did Mr. Hebert in his videotaped deposition, DX 1379 at 56:11-25. In any event, shutting down VY does not further Vermont's supposed concern about not trusting VY as a business partner—a concern Defendants can satisfy after March 2012 by choosing to purchase power from suppliers that Vermont trusts.

Decommissioning. The adequacy of VY's decommissioning fund is directly regulated by the NRC because an adequate fund is necessary to nuclear safety in removing the site from service. *See* PX 618; 10 CFR § 30.35; 10 CFR Part 30 App. C; Tr. 397:1-398:15, 585:20-586:9. Thus, as with trust, the concern regarding decommissioning is effectively a concern *about safety*. In any event, Vermont's supposed concern that VY's decommissioning fund is inadequate is not

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there is no evidence that this was actually in the mind of any legislator before Acts 74, 160, or 189 were passed, and this rationale is contradicted by Defendants' own evidence that the General Assembly wanted a below-market PPA, *e.g.*, DX 1251 at QEVY00027713; DX 1379 at 91:24-93:19 (Hebert), and by Mr. Bradford's testimony that diverse power sources have successfully developed notwithstanding the existence of a nuclear power plant in the grid, Tr. 441:18-442:8.

plausibly furthered by shutting down VY in 2012, for decommissioning VY reduces available decommissioning funds. PX 327 at 6-14 (Vermont-commissioned GDS Report).[16]

Enexus. The supposed "Enexus" concern again is a concern about decommissioning and hence about safety. As Mr. Hebert explained in his 2010 e-mail, the concern was that the new Enexus entity would be "inadequately capitalized" and therefore that, by spinning off VY into Enexus, Entergy would "shed decommissioning risk and ultimately stick Vermont taxpayers with the cost of decommissioning VY." DX 1251 at QEVY00027712. But even if the Enexus concern could be characterized as distinct from safety, it is again not plausibly furthered by shutting down VY. Rather, the logical response to the Enexus concern would be to deny Plaintiffs authorization to spin VY off into Enexus, as the PSB in fact did.[17]

Lack of a sufficiently favorable PPA. The absence of a sufficiently favorable PPA for the period after March 2012, *see* DX 1379 at 91:24-93:19 (Mr. Hebert's testimony that "a major obstacle to relicensing" was Vermont utilities' and Governor Shumlin's claim that Plaintiffs' PPA offer "wasn't low enough"), is not a plausible reason to shut down VY given Vermont utilities' freedom to purchase from other power suppliers. In any event, this ground for denying a CPG is preempted by the AEA as in fact safety-related,[18] or by the FPA, *see* Point V, *infra*.

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[16] To the extent the State relies on a theoretical decommissioning interest going further than removal of radioactive elements (the NRC's purview) to clearing the site for greenfield status, *see* Tr. 538:22-539:2, that interest was not invoked by the General Assembly in enacting Acts 74 or 160, and in any event is not plausibly furthered by shutting down VY because the greenfield step of decommissioning will require funds that are diminished by shutting down VY, as explained in the GDS Report.

[17] Vt. Pub. Serv. Bd., Dkt. 7404, 2010 WL 2584276 (Vt. Pub. Serv. Bd. June 24, 2010) (final order); *see also Entergy Nuclear Fitzpatrick, LLC*, Nos. 08-E-0077, 10-E-0402, 2010 WL 3297408 (N.Y. Pub. Serv. Comm'n Aug. 19, 2010) (NY PSC's rejection of spin-off of New York plant into Enexus).

[18] The legislative history makes clear that the demand for a favorable PPA was itself traceable to the General Assembly's radiological safety concern; the General Assembly wanted financial compensation for the perceived safety risk of having VY on its soil. *E.g.*, PX 80A (LA 20); PX

Thus, even if Vermont's proffered non-safety concerns were both contemporaneous *and* plausible as reasons to shut down VY, they would not contradict Plaintiffs' showing from the direct evidence that radiological safety was one of the General Assembly's purposes, and they fail to show that the General Assembly would have taken the same actions absent consideration of radiological safety.

V. THE FEDERAL POWER ACT AND THE COMMERCE CLAUSE FORBID DEFENDANTS FROM REQUIRING THAT PLAINTIFFS SELL VY'S POWER TO VERMONT UTILITIES AT A BELOW-MARKET PRICE (Counts II and III)

No State has ever shut down an operating wholesale nuclear plant for failure to offer a below-market PPA. Tr. 497:21-496:2 (Bradford); Tr. 584:16-585:11 (Kee). States have negotiated PPAs with companies as part of the company's initial acquisition of a wholesale plant, but such negotiations occur at arms' length and without the coercion of a threat to shut down an operating plant. Tr. 150:7-151:5. Here, the evidence established that, by contrast, Vermont expressly conditioned the approval of a renewed CPG—a coercive, regulatory measure—on VY agreeing to favorable, below-market rates for Vermont utilities.[19]

Vermont's attempt to impose a rate more favorable than the market-based rate approved by FERC for VY as an exempt wholesale generator for its sale of power is preempted by the

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127A (LA 38-39); PX 155B (LA 52); PX 186J (LA 72); PX 251C (LA 91-92); *see also* PX 555 at 21 (DPS' David Lamont in PSB Dkt. 7440: "The basis of the bargain should be that ratepayers are afforded a materially favorable power supply agreement in return for accepting certain risks that are unique to a nuclear facility.").

[19] *See, e.g.*, Tr. 151:16-21 ("The utilities were very clear … that they would need to have, and again they used the terms interchangeably, additional incremental value or a below-market PPA before the State would approve the continued operation of Vermont Yankee."); Tr. 403:21-404:11 (similar); DX 1379 at 91:24-93:19 ("a major obstacle to relicensing" was Vermont utilities' and Governor Shumlin's claim that Plaintiffs' PPA offer "wasn't low enough"); PX 557 at 60-62 & n.37 (similar statement in DPS brief); PX 555 at 21 (similar); PX 367 & 520 (letters to Mr. Thayer from Governor Shumlin and Speaker Smith regarding need for favorable PPA); Tr. 406:18-407:11 (PSB's David Coen indicated that "if there was not a [PPA], … it was going to be very difficult for [relicensing] to proceed").

FPA (Count II). Specifically, because the "favorable" rates required by Vermont differ from those that would result from arms-length negotiations, the FPA preempts Vermont's insistence on a below-market PPA as a condition of continued operation.[20] Defendants resist (DPreT 18) Plaintiffs' reliance on the "filed-rate" doctrine, but Defendants ignore decisions holding that market-based rates are subject to it. *See, e.g., Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 510 (5th Cir. 2005); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Inc.*, 379 F.3d 641, 651 (9th Cir. 2004); *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000).

Vermont's below-market PPA condition also violates the Dormant Commerce Clause (Count III) by facially discriminating against out-of-state interests. *See, e.g., New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 336, 339 (1982). Vermont may not require Plaintiffs to charge a higher price to out-of-state utilities than they would to Vermont utilities.

VI. PLAINTIFFS' REQUESTED RELIEF

A. The Court should declare facially invalid, as preempted by the AEA, Section 2 of Act 74 (10 V.S.A. § 6522), Act 160 (30 V.S.A. §§ 248(e)(2), (m), 254), and Act 189 (not codified).

B. The Court should permanently enjoin Defendants, as preempted by the AEA, from enforcing Acts 74, 160, and 189 against VY; or from denying VY a CPG for

[20] Defendants erroneously assert that FERC must "approve" any (and thus a below-market) PPA. DPreT 18. In fact, exempt wholesale generators merely *submit* information about their PPAs to FERC on an *ex post* quarterly basis, which does not lead to FERC approval. 18 C.F.R. § 35.4.

continued operation based on consideration of the invalidated Acts 74, 160, and 189, or of any studies or evidence derived therefrom.[21]

C. The Court should permanently enjoin Defendants, as preempted by the AEA, from denying VY a CPG for continued operation or otherwise regulating VY based on concerns about radiological safety or pretexts for radiological safety concerns or inevitable consequences of radiological safety concerns.

D. The Court should permanently enjoin Defendants, as preempted by the FPA and/or prohibited by the Dormant Commerce Clause, from denying a CPG for continued operation on the basis in whole or in part that VY (an exempt wholesale generator) has not agreed to sell and/or will not be selling favorably priced power to Vermont utilities, or otherwise regulating VY on that basis.

E. The Court should permanently enjoin Defendants, as preempted by the FPA, from denying a CPG for continued operation of VY (an exempt wholesale generator) on the basis in whole or in part of "need, reliability, [or] cost," *PG&E*, 461 U.S. at 205, including the effect of VY on energy diversity, or otherwise regulating VY on that basis.

F. The Court should permanently enjoin Defendants from taking any action designed to, or having the effect of, forcing VY to curtail operations pending a decision by

[21] In particular, the PSB should be barred from considering Act 189 and the resulting audit and supplemental audit, as Act 160 otherwise would have required. *See* 30 V.S.A. § 254(c) (requiring PSB to consider "the objectives of the studies to be arranged by the department … and the general and specific issues that the studies are required to address"); *id.* § 254(b)(2)(B) (objectives include "public health").

the PSB on Plaintiffs' petition for a CPG for continued operation of VY, and any judicial review of that PSB decision.[22]

G. The Court should retain jurisdiction over the parties and the subject matter of the Injunction to enforce its terms.

H. The Court should grant such other and further relief as the Court deems appropriate.

CONCLUSION

The Court should enter an order granting the relief requested in Point VI, *supra*.

Dated: September 26, 2011

Respectfully submitted,

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

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[22] *See* 3 V.S.A. § 814(b) (Vermont's timely renewal rule for "licenses"); *In re Entergy Nuclear Vt. Yankee Discharge Permit*, 989 A.2d 563, 569 n.4 (Vt. 2009) (applying § 814(b) to an application for a "permit"); *cf.* 10 C.F.R. § 2.109 (NRC's timely renewal rule).

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CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, hereby certify that on September 26, 2011, I electronically filed the foregoing Plaintiffs' Post-Trial Brief with the Clerk of the Court of the United States District Court for the District of Vermont by using the CM/ECF system and that they are 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 for Defendants:

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