UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

Plaintiffs,

v.

PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, in his official capacity 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' POST-TRIAL BRIEF

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

Scot L. Kline
Bridget C. Asay
Michael N. Donofrio
Kyle H. Landis-Marinello
Assistant Attorneys General
Justin E. Kolber
Special Assistant Attorney 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
jkolber@atg.state.vt.us

Attorneys for Defendants

David C. Frederick
Scott H. Angstreich
Jeffrey M. Harris
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dfrederick@khhte.com
sangstreich@khhte.com
jharris@khhte.com

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS, STATUTES, BILLS, AND REGULATIONS

OTHER MATERIALS

Acts 74, 160, and 189 address legitimate, non-preempted state interests and accomplish a result—not allowing VY's continued operation beyond its original state approval—that is permissible under federal law. ENVY's preemption claim turns entirely on its view that the Court should disregard the statutes and instead attempt to discern the motivations of individual legislators by reviewing fragmented legislative history drawn from years of proceedings. ENVY is wrong about the preemption inquiry, and its summary of the legislative record is incomplete and flawed. Applying the proper standard, the Court should uphold Vermont's laws.

I. Legislative text is dispositive, not the alleged motivations of individual legislators, and the challenged statutes further legitimate, non-preempted state purposes.

A. Under binding precedent, the preemption inquiry focuses on the challenged law's actual effects and avowed purpose, not the motivations of individual legislators. ENVY urges the Court to disregard the express purposes of Acts 74 and 160, and instead search through legislative history for evidence of legislators' "true" or "actual" purpose. That focus on uncovering evidence of pretext based on the subjective motivations of individual legislators is foreclosed by *PG&E*. There, the Supreme Court accepted California's "avowed economic purpose" for its moratorium and expressly refused—despite some discussion of safety in the legislative history—to "become embroiled in attempting to ascertain California's true motive." *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 216 (1983). While an authoritative committee report presented to all legislators might help *confirm* a statute's "avowed purpose," *PG&E* did not suggest that legislative history can be used to *refute* that purpose. To the contrary, as the Court explained, "inquiry into legislative motive" is "often an unsatisfactory venture." *Id.* "What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id*. The inquiry is "particularly pointless" where, as here, the state may "refus[e] on economic grounds to issue certificates of public

convenience in individual proceedings." *Id.* The Supreme Court's refusal in *PG&E* to inquire into the motives of legislators applies with equal force here, and is binding on this Court.

ENVY cites several cases to convince the Court that, despite *PG&E*, it should engage in this unwarranted exercise here. These cases provide no basis for departing from *PG&E*, however, because they addressed state statutes that had the *effect* of actually conflicting with federal law. *See Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 107-08 (1992) (Court looked beyond "professed purpose" of challenged state statute because it "directly, substantially, and specifically regulate[d]" matters committed to federal regulators); *id.* at 107 (whatever the purpose of the state law, "preemption analysis cannot ignore the effect of the challenged state action"); *Vango Media, Inc. v. City of N.Y.*, 34 F.3d 68, 73 (2d Cir. 1994) (finding that "effect" of challenged state law was to "educate the public as to the adverse health risks of smoking," which was a task Congress reserved exclusively to the federal government); *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999) (statute's "effect" was "clearly" an intrusion into exclusively federal matters in the same manner as *Vango Media* statute). Nothing in these rulings suggests that a statute *without* a preempted effect can be invalidated based on the allegedly impermissible motivations of the individual legislators who voted for that law.

Proof that the reasoning in these cases is not applicable here is found right in *PG&E*. The passage that ENVY cites from *Gade* and *Greater New York* is a quotation from *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). The *PG&E* petitioners cited the same passage from *Perez*, Pet'r's Br., 1982 WL 957209, at *33, but the Supreme Court held that the reasoning in *Perez* did not provide a basis for rejecting California's "avowed" purpose or finding preemption:

> Petitioners correctly cite *Perez v. Campbell* . . . for the proposition that state law may not frustrate the operation of federal law simply because the state legislature in passing its law had some purpose in mind other than one of frustration. In *Perez*, however, unlike this case, there was an actual conflict between state and federal law. . . . Only if there

> were an actual conflict between [California's law] and the Atomic Energy Act, such that adherence to both were impossible or the operation of state law frustrated accomplishment of the federal objective, would *Perez* be apposite.

PG&E, 461 U.S. at 216 n.28. Here, as in *PG&E*, there is no "actual conflict" between the challenged state laws and the Atomic Energy Act. As previously explained, the Atomic Energy Act allows states to prevent continued operations of nuclear power plants. Doc. 143 at 7-8; Doc. 39 at 8-13; Exs. 1369 & 1370 (NRC preparing for possible VY closure). Thus, *Perez*—and cases citing it like *Gade* and *Greater New York*—are not "apposite." *PG&E*, 461 U.S. at 216 n.28.

Decisions from other circuits confirm that ENVY's attempt to rely on the motivations of individual legislators should be rejected. The Eleventh Circuit has emphasized that a court's sole task in a preemption case is to "determine the extent to which the *actual effects* of the local regulation interfere with the intended functioning of the federal law." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 n.12 (11th Cir. 2001) (emphasis added). Even if city officials had a "hostile motivation" for enacting the challenged laws, that fact is irrelevant so long as there is "no frustration of the federal objective" through the state law's provisions. *Id*. The court thus rejected preemption challenges to zoning and licensing ordinances despite statements by city officials suggesting impermissible purposes. *Id.* at 1339.

The Third Circuit has also held—in the public-utility-regulation context—that "the remarks of individual legislators cannot be binding as to legislative intent," and that "[t]he motivation of particular members of the state legislature does not render a valid statute invalid." *Ky. W. Va. Gas Co. v. Pa. Pub. Utils. Comm'n*, 837 F.2d 600, 616 (3d Cir. 1988). The Eighth Circuit has similarly emphasized that a state statute "is constitutional if there is objective evidence of facts sufficient to render that statute valid, even if those facts were not operating subjectively in the minds of the legislators to motivate them when they enacted that statute." *Mo. Republican Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001). Any other rule "would prove unworkable" because

"the minds of legislators are largely unknowable, individual legislators have various motives for voting the same way on the same bill, and legislative history is nonexistent in many states." *Id.*

B. The statutory purposes for Acts 74, 160, and 189 are legitimate, plausible, and consistent with Vermont's decades-long energy planning process. The record dispels ENVY's assertion that the laws' purposes are "so implausible as to necessarily be pretextual." Doc. 4-1 at 23. Dr. Steinhurst explained that Vermont has long pursued the "goal of a sustainable energy future," Tr. 183; that cost, reliability, energy efficiency, a diverse energy portfolio, and the promotion of renewable, environmentally sound energy sources have for decades been part of Vermont's energy plans and legislation, Tr. 182-86, 190-92, 202-03, 206-09, 211-21, Exs. 1340-46; and that the Legislature has taken a "[v]ery hands-on," "intense" and "detailed" approach to energy policy, "concerned with long-range policy objectives," Tr. 182, 187, 219-21. Dr. Steinhurst further gave unrebutted testimony that legislators reasonably could be concerned that renewing VY's CPG would conflict with these longstanding goals. Tr. 223-24. The "sheer size" of the plant and difficulty for new sources to compete with it, given its sunk costs, would "hamper[]" efforts to "advance diversification" and "renewable energy," and have a "dampening effect on the development of alternatives," while closing it would make it easier to promote energy diversity and sustainable resources. *Id.* This is true regardless of VY's status as a merchant generator or whether Vermont utilities buy any power from VY.

Mr. Bradford similarly explained that states regulate nuclear plants with respect to economics, reliability, energy planning, land use, and aesthetics, and that other states have made decisions in these areas that have led to the closing or cancellation of nuclear power plants. Tr. 428, 437-39, 442-43, 445-46, 456-57. States have legitimate interests in these areas as well as in promoting renewable, environmentally sustainable energy sources, and in the economic and

land-use issues relating to long-term storage of nuclear waste. Tr. 475-76.

ENVY agrees that the State's interests in energy planning and promoting renewable energy are not preempted, but counters unpersuasively that the State's interests are "theoretical." Tr. 611. There is nothing theoretical about the statutory purposes debated and adopted by the Legislature. As the Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). And ENVY is simply wrong to assert that the legislative record of the State's interests is "silen[t]." Tr. 23. The State has provided relevant excerpts for Act 74,[1] Act 160,[2] and Act 189,[3] as well as for the Senate's vote on S.289.[4] Also, House Speaker Smith described his legitimate, non-preempted concerns in 2010, Tr. 292-96—

[1] Legislator statements: App. 52:20-53:4 (trust and transparency); 55:13-56:17 (not safety); 60:4-11 (renewables); 60:19-25, 61:20-25, 62:9-21 (federal role on spent fuel); 64:17-65:16 (energy planning); 125:25-127:20 (not safety); 129:13-22 (aesthetics); 136:19-137:4 (economics and renewables). Other testimony: App. 131:7-132:18 (energy diversity); 140:4-141:1 (explaining jurisdiction). ENVY agreed to the legislative role: App. 75:17-22; 82:2-8; 84:5-17; 85:3-87:3.

[2] Senate floor debate: App. 160:14-161:13 (not safety); 163:19-25 (energy planning); 165:24 (renewables); 167:11-14, 169:1-2 (economics). Committee hearings: App. 172:13-25 (energy planning); 175-177 (reliability); 187:19-189:19 (economics of long-term spent-fuel storage); 193-194:7 (reliability); 215:15-25 (not safety); 232:15-19 (legislator on preemption); 233 (legislator on electric policy); 234:8-19 (legislative counsel on proper state role); 236:24-237:13 (energy policy); 239:21-23 (legislator on state role).

[3] Committee of Conference: App. 269:23, 271:4 (reliability and economics). Senate floor debate: App. 276:4-13, 284:12-23 (reliability and economics); 287:10-21 (not safety); 295:11-17 (economics); 289:16-22, 297:2-8, 299:10-17 (energy planning). Committee hearings: App. 313:4-9, 318:22-320:22 (not safety); 306:1-16, 333:6-12, 338:22-25, 340:8-25, 351:10-16, 352:15-353:16 (NRC).

[4] App. 405:10-19, 427:18-22, 434:6-16, 435:1-436:2, 440:19-441:15 (renewables and energy policy); 378:22-379:1, 395:16-396:5 (reliability); 490-494 (economics); 382:15-384:21, 399:12-400:15, 401:7-12, 426:9-13, 467 (economics of PPA); 371:17-23, 374:23-376:25, 377:6-15, 379:7-11, 381:7-382:9, 384:24-385:6, 400:20-401:6, 401:13-402:8, 402:9-403:15, 427:23-428:19, 436:24-437:8, 449:7-9, 453:14-19, 455:5-20, 460:19-461:24 (economics of Enexus, long-term spent-fuel storage, and decommissioning and greenfielding); 379:7-11, 381:25-382:9, 385:7-9, 404:5-16, 436:6-23, 463:25-464:5, 464:20-465:10, 469:12-21 (trust and transparency).

concerns that are consistent with the record for S.289 and ENVY's documents, *see infra* 12-13.[5]

C. The fact that ENVY is a merchant generator in no way undermines the State's legitimate regulation. While FERC regulates the terms and conditions of wholesale power sales, FERC does not regulate generating facilities. States do. *Conn. Dep't Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (FPA prohibits FERC from regulating facilities; states decide to allow new facilities or retire existing ones); *see also* Tr. 461-64.

ENVY's repeated incantation of "don't buy power from us," Tr. 622, is an about-face from what ENVY told legislators for years. ENVY touted its power-purchase agreement (PPA) as a commitment to Vermont and a basis for being part of Vermont's energy future *after* 2012—repeatedly telling legislators a PPA was imminent. *E.g.*, Exs. 1273 at 1; 1366 at ¶¶ 1 & 8; 1240; 1380 at 30:1-7, 57:20-58:4; 1208; App. 75:3-11. ENVY told the Legislature in 2005 that VY would be part of the State's energy mix post-2012 pursuant to a PPA. App. 109 (Thayer: "The important point here is that, if we talk about operation beyond 2012 . . . we would be talking to Vermont distribution companies about power contracts after 2012."); App. 84. The Legislature's reasonable assumption that VY would supply power to Vermont if it continued to operate post-2012 provides substantial further support for the State's legitimate, non-preempted concerns with plant reliability, economics, energy planning and other matters. *See also* Tr. 475 (reasonable to believe ENVY would sell power into Vermont if it operated post-2012). And even if the Legislature was mistaken, or if other options were available for promoting the Legislature's legitimate goals, that does not mean that the Legislature had a preempted purpose. Essentially,

[5] Even if the Court were to find mixed motives, there is no preemption. The *PG&E* Court found "both safety and economic aspects to the nuclear waste issue," 461 U.S. at 196, and yet still held that there was no preemption so long as the state law had "a" non-safety rationale. *Id.* at 213. The *PG&E* Court also summarily dismissed the argument that contemporaneous related statutes that expressly addressed nuclear safety "taint[ed]" the law under review. *Id.* at 216 & n.27.

ENVY asks this Court not only to ignore the statutes' stated purposes, but also to consider a new policy argument that was never raised at the time the laws were passed and hold that this new policy argument provides a basis for rejecting the rationales that legislators actually relied upon.

ENVY's present position also contrasts sharply with what it told the PSB when it purchased VY. ENVY recognized then that a PPA with Vermont utilities was relevant to PSB review. Ex. 1018 at 14. ENVY correctly argued to the PSB, citing *PG&E*, that the State was not preempted from considering "need, reliability, cost and other related state concerns," and agreed that a future proceeding on a new CPG would be "similar in scope" to the sale docket. *Id.* at 13. In the sale docket, the PSB relied on ENVY's PPA with Vermont utilities and addressed other economic and energy planning matters, including decommissioning. Ex. 378 at 38-43, 120-21, 156. ENVY made these arguments about the scope of state authority over post-2012 operations *knowing* VY was a merchant generator. Nowhere in its filings did ENVY say that VY's merchant generator status limited state authority. ENVY was right in 2002 and is wrong now. Particularly given the PSB's reliance on positions taken by ENVY in approving the 2002 sale, the Court should not allow ENVY to use its merchant generator status to avoid state regulation.

II. The Court should not rely on ENVY's piecemeal presentation of the legislative record, particularly where ENVY's assertions are contradicted by its own documents.

The Court should not accept ENVY's invitation to hunt through the legislative record for a "true motive." Not only does *PG&E* foreclose that approach, but indeed a closer examination of the record confirms *PG&E*'s conclusion that such an inquiry is "pointless." 461 U.S. at 216.

A. The legislative narrative that ENVY presented at trial did not happen. The Court should reject ENVY's depiction of the legislative history of the challenged statutes as a single linear narrative driven by a hidden safety agenda. In fact, the legislative process simultaneously incorporates a wide array of fact- and policy-driven agendas and cannot possibly be reduced to

or characterized by any single narrative or purpose. ENVY's careful selection and compilation of relatively few statements, many by non-legislators, to try to show that legislators held a uniform, nefarious purpose over the course of years is not the real story.

1. ENVY's portrayal of a tidy, single-purpose legislative process cannot be reconciled with the dynamic, wide-ranging, "inherently chaotic" process that actually unfolds as legislators consider scores of bills over multiple legislative sessions. The "text book model" of all legislators sitting through full debates and understanding the issues "bears little resemblance to reality," as legislators in fact miss debates, fail to read materials, and regularly come and go during proceedings. *Nash Metal Ware Co. v. Council of the City of N.Y.*, No. 400331/06, 2006 WL 3849065, at *13 (N.Y. Sup. Ct. 2006); *accord, e.g., Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 40 (D.D.C. 2004). This reality has led courts to note that "laws may be better not observed in their making," and to reject the kind of inquiry into intent that ENVY proposes here: "What the law is and what the legislative body meant must be determined after the fact, by the Court from the official text of the actions of the body, and not from an inquiry into the unexpressed intent . . . ." *Nash*, 2006 WL 3849065, at *13; *see also, e.g., In re Ondras*, 846 F.2d 33, 36 (7th Cir. 1988) ("[L]egislative compromise often produces a legislative work product whose internal logic is less than perfect."). The Tenth Circuit has similarly held that "legislative preferences do not pass unfiltered into legislation" but instead the laws that emerge from the "rough and tumble of the legislative process" may reflect, for instance, "unrecorded compromise" or "unknowable strategic behavior." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006) (quotation omitted); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (legislative process "involves the balancing of competing values and interests").

ENVY's assertion of a single, safety-driven narrative that motivated all legislators as they

deliberated and voted on bills from 2005-2010 (a period spanning six sessions and two elections) simply does not comport with the recognized reality of the legislative process. The real legislative process—which unfolds not just in recorded hearings but in unrecorded hallway and cafeteria conversations—cannot be neatly parsed to yield a single, fixed motive. *See* Tr. 296 (Speaker Smith: "State House is a fluid place, and so you talk to people in general, you run into people all the time"); Ex. 1380 at 35 (Meehan: lobbying takes place in corridors and cafeteria).

And even the recorded history has major gaps. The House does not record floor debates, which here included "strike-all" amendments and committee statements, *see* H.J. 1469-79 (May 31, 2005); H.J. 1378-84 (Apr. 27, 2006); H.J. 1477-87 (Apr. 25, 2008), and some Senate debates and House hearings are missing or incomplete, *see, e.g.*, S.J. 1275 (May 4, 2006) (unrecorded discussion of S.124); Ex. 413 at 9 (Disk 2008-106 "missing"); *compare* Ex. 207 at 1:16:00 *with* Ex. 208 at 0:00 (gap in testimony). *Cf. Dresser Indus. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 497 n.1 (3d Cir. 1997) ("At best, the legislative history is incomplete and does little to illuminate the statute."); *Linquist v. Bowen*, 813 F.2d 884, 889-90 (8th Cir. 1987) (ascertaining "[legislative] intent from vague or missing legislative history would be hazardous at best").

While creating these transcripts and edited volumes of legislative history for trial contributes to an illusion of an organized, continuous process, the reality is that the legislators themselves had none of these newly created materials. To suggest, as ENVY does, that "the legislature" over a period of years "knew" something because it was said by a witness in a hearing is untenable. Tr. 832. Unlike an "authoritative" committee report, *Garcia v. United States*, 469 U.S. 70, 76 (1984), as was referenced in *PG&E*, which would have been presented to the *entire* Legislature, statements made in a hearing would have been heard by only the few legislators present—legislators who may have been discussing something that did not end up in legislation, may have

disregarded the comments, or may not have been in the Legislature for later votes. ENVY's after-the-fact effort to connect up pieces of a 7-year record "is not legislative history. This is speculation at its airiest." *Latimer v. Sears Roebuck & Co.*, 285 F.2d 152, 156 (5th Cir. 1960).

2. ENVY relies on selected statements from the available record to draw unfounded, sweeping conclusions of legislative pretext. ENVY presents an unfair and incomplete view of the legislative history by excerpting very short statements from a mere handful of individuals, many of which are taken out of context. *Compare, e.g.*, Ex. 180E (Sen. Starr) *with* Ex. 180 (Track 7, 3:37) (Starr's full, pro-VY statement on economic development); Exs. 277A-E (short excerpts from Sen. Shumlin) *with* Ex. 277 (Track 2, 3:40) (Shumlin's 8-minute explanation based on 5 non-preempted reasons and the need to "move on to renewables"). To illustrate:

Act 74:

- ENVY cites only pieces of 19 out of 38 committee hearings. Pls.' App. 1-34. The Legislature debated Act 74 for four months on over 40 occasions in four standing committees, one joint committee, and both chambers. App. 31-46. Around 118 hours of audio was recorded. Ex. 1035 at 1.
- ENVY's submission names only 11 legislators (it is not clear whether "unnamed" members are the same or different persons). Pls.' App. 1-34. But 32 legislators participated in committees of jurisdiction, and 145 voted on it.[6] *See* S.J. 1321 (Jun. 3, 2005); H.J. 1469-78 (May 31, 2005).
- Of ENVY's 103 total cites, most: (i) are witness statements, including unaffiliated citizens (*e.g.*, Exs. 3C; 27A-H; 28A-C; 45A; 46A-D; 47A) and ENVY witnesses (Exs. 6A; 25F; 66B; 81A; 90A-B; 95A); or (ii) pertain to other issues (*e.g.*, Exs. 5A-F; 43A; 66C; 105A-C). Fewer than one-third involve legislator statements on safety-related matters, and those are frequently short single statements.

Act 160:

- ENVY cites 42 excerpts, but only 18 involve legislators and safety. Pls.' App. 35-53. These snippets are drawn from over 35 hours of recorded hearings. Ex. 1035 at 2. The majority of the excerpted hearings occurred in Senate Finance before the House began its strike-all

[6] The Senate and House committees have 5 and 11 members, respectively. For House Natural Resources, many of ENVY's quotes are from just one member. *See* Exs. 15A, 24A, 25C, 50A, 70B, 70C, 85A. In the Senate floor debate, ENVY cites only 3 out of 27 voting senators. Pls.' App. 32-34; S.J. 1321 (Jun. 3, 2005).

amendment that substantially changed the Act. *See id.*; H.J. 1378-84 (Apr. 27, 2006).

- ENVY's submission names only 5 legislators. Pls.' App. 35-53. But 16 members participated in committees of jurisdiction, and 156 members voted on Act 160. App. 150-58; S.J. 322-26 (Mar. 14, 2006); H.J. 1378-84 (Apr. 27, 2006).
- ENVY cites *no* Senate floor debate, yet 26 senators voted. S.J. 322-26 (Mar. 14, 2006).

Act 189:

- ENVY cites 15 of 32 hearings over a four-month period. Pls.' App. 54-86; Ex. 1168.
- Of ENVY's 97 cites, nearly all are short snippets, and fewer than half involve legislators and safety-related issues. Almost one-third (27 cites) involve 3 witnesses talking to legislators on March 25 and 26, 2008, more than 10 weeks before the Act passed. Pls.' App. 65-75.
- ENVY quotes just 5 senators from 1 day of floor debate, out of 27 voting senators and 3 days of debate. Pls.' App. 60-62; Defs.' App. 256; S.J. 302-03 (Mar. 12, 2008). ENVY quotes just 3 House members by name (others are unnamed) out of 127 voting members and 16 committee members. Pls.' App. 63-86; Defs.' App. 256; H.J. 1477-87 (Apr. 25, 2008).

Act 160 is the primary law that ENVY challenges, yet ENVY does not provide a single floor debate cite. Instead ENVY draws on committee discussions that involved 16 legislators. The only statement of legislative intent that the Court knows was presented to the other 140 legislators who voted on Act 160 is the text of that act, which ENVY asks this Court to ignore.[7]

Further, ENVY's "safety" cites generally prove little. Many show legislators ascertaining the bounds of their jurisdiction. *See, e.g.*, Exs. 24A, 25B-D, 50A, 101B (Act 74); Exs. 130D, 134A, 136A, 144B-C, 154C (Act 160); Exs. 183A, 183F-G, 183J, 185D, 186E, 195A, 195C, 211A, 219A (Act 189). ENVY emphasizes comments about types of dry cask storage in Act 74 hearings, *see, e.g.*, Ex. 119B, but the Act says nothing about that, making those comments irrelevant. And the Legislature cannot be faulted for discussions of safety prompted by ENVY's

[7] Although Act 160 contains a reference to "public health," the State has briefed why that term should not be interpreted to mean radiological safety, *e.g.*, Doc. 143 at 10-11, and ENVY itself has acknowledged that there are non-preempted public health matters associated with the State's regulation of VY. Tr. 358 (Thayer testimony regarding VY environmental permits, including thermal discharge permit); Ex. 1006 (listing of permits); *see also, e.g.*, 42 U.S.C. § 7412(d)(9) (allowing states to adopt "more stringent" standards for "emissions of radionuclides"); 10 C.F.R. § 50.47(a)(2) (recognizing states' role in emergency preparedness).

own direction—when legislators said not to talk about it. *See* Ex. 1277 at 3; *see also* Exs. 1366; 1365 at 5, 15; 1272. Considered in context, as it must be, ENVY's submission cannot displace the presumption that text, not legislative history, is the best evidence of legislative intent.

B. ENVY's contemporaneous documents, including Mr. Hébert's 2010 internal memo, contradict ENVY's assertion that the Vermont Legislature was driven by safety concerns. Executive VP Curt Hébert's May 2010 memo to Entergy's CEO is telling evidence that Vermont legislators were not focused on radiological safety. Mr. Hébert's memo describes seven major challenges facing ENVY, including "Legislative Control over VY License Renewal." Ex. 1251; Ex. 1379 at 50-52. Mr. Hébert testified that the challenge for such approval stemmed from deep negative public opinion, which he attributed to "the testimony, the tritium leak, the [Enexus] spin, miscommunication, lack of communication, lack of timely communication." Ex. 1379 at 96. Nowhere in the memo do the words "safety" or "radiological safety" appear, and the memo does not say that Mr. Hébert or anyone else believed that Vermont legislators and Governor Douglas were acting on a hidden agenda of nuclear safety. Ex. 1379 at 192-95; Ex. 1251.[8] Indeed, rather than suggesting that legislators' concerns were a "pretext" for safety, the memo addresses strategies to rebuild confidence in ENVY, including "taking full responsibility for Entergy and VY's missteps," and improving communications with key officials. Ex. 1251 at 2-3.

Contrary to ENVY's newfound "pretext" theory, this internal memo to Entergy's CEO in 2010 confirms that ENVY believed the Vermont legislature was motivated by legitimate, non-preempted concerns about VY. And other ENVY documents and statements are similarly

[8] Although Mr. Hébert stated that he believed safety was "implicit" in the tritium leak, his memorandum says nothing about safety. It cites the tritium leak as calling "Entergy and VY's competence into question," which Mr. Hébert defined as the ability to run the plant in an "open and transparent" fashion, and causing Entergy's allies to be intimidated by the "tide of negative news." Ex. 1379 at 75-76; Ex. 1251 at 1.

inconsistent with ENVY's claim of pretext.[9] In short, ENVY has consistently acknowledged that the Legislature has taken a legitimate role in its regulation of VY. *See, e.g.*, App. 84 (Act 74 testimony: "legislature needs to be involved in that future decision about Vermont's energy mix"); Ex. 364 (ENVY "likes" Act 160 and "commend[s] the Legislature" for "fully addressing the question of Vermont's future energy supplies"); Ex. 417 (2008 email from ENVY's lobbyist: "the legislative intent of [Act 189] was all about reliability of the plant, not safety").

III. The State has not violated the Federal Power Act or the Dormant Commerce Clause.

Conceding that ENVY's offering, and some legislators' consideration of, PPAs with in-state utilities is "not preempted under *PG&E*," Tr. 620-21, ENVY argues that the State coerced such PPAs in violation of the Federal Power Act (FPA) and the Dormant Commerce Clause. Not so.

A. ENVY's FPA claim is premised on its assertion that "the 'favorable' rates Vermont seeks to extract would differ from rates arrived at through arms-length negotiations," allegedly in violation of the market-based rate ENVY has on file with FERC. Doc. 144 at 24. This argument fails, first, because ENVY has no evidence that the State coerced it into departing from its filed rate. In the wholesale-power market, only FERC may set aside or revise *filed* rates. *See, e.g.*, *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). But here, ENVY's market-based rate tariff says only that sales "shall be made at rates established by agreement between the purchaser and Entergy Nuclear VY." Ex. 1030 at 2. Because ENVY's filed rate does not dictate any specific rate, an effort by the State to seek a "favorable rate" through negotiations would not suggest, much less prove, a state-directed *departure* from ENVY's filed market-based

[9] *See, e.g.*, Ex. 1230 (Thayer's 2008 letter, after Acts 74 and 160, recognizing legislators' concern with Vermont's energy future); Ex. 1208 (Thayer's 2009 letter promising a PPA); Ex. 1277 at 3 (2005 email acknowledging legislative committees "have asked that safety not be discussed"); Ex. 1278 (2006 email noting that Legislature's Act 160 review is similar to PSB); Ex. 1279 (2008 email noting legislative concerns "were not about safety"); Ex. 1380 at 17-21, 81-82, 122, 127.

rate. The filed rate contemplates a negotiated rate, and ENVY concedes that "the State is free to negotiate for favorable power rates. Of course it is. Of course it is." Tr. 843-44.

In any event, the evidence undermines ENVY's claim that it was being coerced to agree to a "below-market" rate. The lowest price ENVY ever offered Vermont utilities in a proposed PPA was higher than the price Green Mountain Power obtained in the first year of an arms-length PPA with a New Hampshire plant. *See* Ex. 1050 at ¶¶ 3-4 (citing Exs. 1068 and 1069). Further, ENVY never reached a PPA, and Mr. Potkin testified that PPA negotiations fell apart because the utilities were insisting that ENVY sell the plant, not because of the price. Tr. 142. Mr. Potkin also explained other aspects of these complex negotiations, including ENVY's desire to end its revenue-sharing agreement with the utilities. Tr. 113-16, 140-44. The record suggests only that ENVY and the utilities both bargained extensively and never reached a final agreement.

Given all of this, it is not surprising that ENVY offered no concrete evidence of what a "favorable" or "below-market" rate might be in this case, let alone how such a rate would depart from its filed rate or "differ from rates arrived at through arms-length negotiations." Doc. 144 at 23. This failure in itself is fatal to ENVY's claim. *See, e.g.*, *Cogen. Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (prices in power markets can be established only by expert testimony on a litany of intricate factual matters).

Second, ENVY cannot point to any statute, regulation, or ruling requiring ENVY to provide "below-market" or "favorable" rates for Vermont utilities. It is undisputed that it was the utilities—not the State—who negotiated the PPAs. Tr. 141-43. ENVY concedes that no one from the State ever told ENVY what it *had* to charge purchasers. Tr. 136-37. In fact, ENVY at times was disgruntled by the State's *lack* of involvement in PPA negotiations. *See* Ex. 1379 at 130:8-12 (Hébert: ENVY favored Governor stepping in to compel Vermont utilities to agree to PPA).

B. ENVY's Dormant Commerce Clause claim fails for similar reasons: ENVY has not shown it was required to provide a "below-market" PPA, and even if state officials were seeking a favorable PPA, a state "may seek low prices for its residents" without violating the Dormant Commerce Clause. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986). What the State may not do is regulate "out-of-state transactions"; Vermont "may not project its legislation into other States by regulating the price to be paid for [goods] in those States." *Id.* (quotation and alteration marks omitted). ENVY identifies no out-of-state transaction alleged to have been regulated—or even influenced—by the State. Mr. Potkin said Vermont never required ENVY to sell power, at any price, to a purchaser outside the State, and that negotiations with such purchasers would be subject solely to free-market influences. Tr. 152-53. ENVY has no Dormant Commerce Clause claim on these facts. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978) (holding that Dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations").

IV. Equity provides a complete defense to ENVY's claims.

A. Waiver. The Court should reject ENVY's effort to avoid its knowing and voluntary 2002 waiver. *See* Ex. 361 at ¶ 12. Preemption claims are waivable. *See, e.g., Bath Petroleum Storage, Inc. v. Sovas*, 155 Fed. Appx. 23, 24-25 (2d Cir. 2005) (holding that plaintiff "waived the right to assert a preemption defense" by entering into a consent order with a state agency and thereby "agreeing to [the state agency's] jurisdiction"). Here, ENVY has long represented that it would engage in the process to obtain a CPG for continued operation of its facility, and that it would not raise a preemption challenge to that process. *See* Doc. 143 at 18-25 and exhibits cited therein. Equity and fairness require that ENVY be held to its promises—promises the State relied on in granting ENVY numerous regulatory benefits over the last decade. *Id.*

Numerous other cases recognize that preemption claims may be waived through litigation

conduct. *See, e.g.*, *Dorado Beach Hotel Corp. v. Union de Trabajadores*, 959 F.2d 2, 5-6 (1st Cir. 1992) (claim waived by conduct, where party participated fully in state processes without raising preemption); *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 10-12 (1st Cir. 1995) (defendant waived preemption claim under Federal Food, Drug and Cosmetic Act "by raising it substantively for the first time after trial"); *Sweeney v. Westvaco Co.*, 926 F.2d 29, 37-41 (1st Cir. 1991) (preemption claim waived where not raised until motion for judgment notwithstanding verdict); *Dueringer v. Gen. Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (defendant "neglected this [preemption] defense too long to raise the issue first on appeal"). If a party can waive a preemption claim by inadvertently failing to raise it in a timely manner, it follows *a fortiori* that the party can *expressly* agree to waive such a claim—as ENVY did here.

B. Estoppel, laches, and unclean hands are also valid and complete defenses to ENVY's claims. The following points supplement the State's previous briefing on these defenses.

1. Evidence at trial confirms that ENVY made a knowing, deliberate decision not to challenge Act 74 in 2005, *e.g.* Tr. 346, and ENVY has yet to explain why its years-long delay in asserting its challenges to Acts 74 and 160 should be excused, given the prejudice to the State.

2. The State's equitable estoppel defense is further supported by ENVY's public statements regarding Act 74, *see* Ex. 1019 at 21, and Act 160, *see* Ex. 364, and its 2008 acknowledgement both that the Legislature would decide VY's continued operations and that such a decision was part of the Legislature's planning for Vermont's energy future, *see* Ex. 1230.

3. If ENVY had told the Court of Federal Claims what it argues to this Court now—namely, that Act 74 is clearly preempted—ENVY may not have obtained a substantial money judgment from that court. Judicial estoppel bars this effort to change litigating positions.

4. Bringing a claim based on safety when ENVY inserted safety into discussions despite

legislators requesting that ENVY not talk about it, Ex. 1277 at 3, is further evidence of ENVY's unclean hands. *See also* Exs. 1366; 1365 at 5, 15; 1272.

V. A decision by the Court invalidating Acts 74, 160, and 189 would not affect other, unchallenged bases for PSB and state authority over ENVY and VY.

A. ENVY is subject to PSB jurisdiction, *see* Vt. Stat. Ann. tit. 30, § 203, and accordingly must have a certificate of public good issued under §§ 231 and 248. These requirements predate Acts 74 and 160 and apply to power plants generally. Act 160 amended § 248 to add the requirement for legislative approval in § 248(e)(2). Even if Act 160 is invalidated, however, the PSB retains jurisdiction under Title 30, §§ 203, 231, and 248(a)-(b).

ENVY's present § 231 CPG expires on March 21, 2012, and it cannot continue operations unless the PSB "finds that the operation of such business will promote the general good of the state" and grants a new or renewed CPG. Vt. Stat. Ann. tit. 30, § 231(a). Once a CPG is issued, the PSB may revoke it for good cause. *Id.* ENVY concedes that it must also have a valid CPG under Title 30, § 248(a)-(b). Tr. 680:14-20; Ex. 1012. To grant a § 248 CPG, the PSB must find that VY's continued operation promotes the general good of the State, § 248(a), and make specific findings set forth in § 248(b). The PSB's review under § 248(b)(5) considers compliance with non-preempted state environmental regulations. *See generally, e.g.*, *supra* 11 n.7. An improvement or modification to a facility also triggers jurisdiction under § 248, as ENVY has recognized many times in the past. *See* Exs. 1286-1295 (petitions, nearly all of which cite § 248, among others, as providing jurisdiction); Tr. 330-35 (PSB approved ENVY's petitions).

B. Because § 248(e)(2) was added by a separate enactment in Act 160, it is severable from the remainder of § 248. Act 160 added §§ 248(e)(2) and 254—provisions that are severable from the pre-existing provisions of § 248. "The determinative state law question regarding separability is whether the legislature would have enacted the statute without the

invalid portion." *Bagley v. Dep't of Taxes*, 500 A.2d 223, 226 (Vt. 1985); *see also* Vt. Stat. Ann. tit.1, § 215 (severability provision); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 423-24 (D. Vt. 1998). Here, where § 248 predates the challenged amendment in Act 160, there can be no doubt that the Legislature would have intended the pre-existing provisions of the statute to remain in place if the amendment were struck. *See, e.g., State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 434-35 (Neb. 1991) (provision severable when added to amend existing code).

C. If the Court invalidates the provision of Act 74 that adds Vt. Stat. Ann. tit. 10, § 6522, that holding would not affect the pre-existing, separate provisions of Title 10, Chapter 157. Act 74 amended Chapter 157 (§§ 6501-6524) of Title 10. Section 6501, enacted in 1977, required then and still requires legislative approval for any "facility for deposit, storage, reprocessing or disposal of spent nuclear fuel elements or radioactive waste material." It exempts temporary storage by "Vermont Yankee Nuclear Power Corporation . . . at its present site," *id.*, an exemption that under state law does not apply to ENVY. In this lawsuit, ENVY challenges as preempted the provision of Act 74 that adds § 6522—a provision that both allowed the PSB to grant a CPG to ENVY for storage of VY's spent fuel for operations through March 21, 2012, and specified that storage of spent fuel for operations after March 21, 2012, required further legislative approval. These parts of § 6522 (as added by Act 74) "are 'so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other.'" *Rockwood*, 21 F. Supp. 2d at 424 (quoting *State v. Scampini*, 59 A. 201, 211 (Vt. 1904)). ENVY has not suggested otherwise. Thus, if the Court invalidates Act 74 as preempted, then nothing in § 6522 will have any remaining force or effect. Such a holding regarding Act 74 would not, however, affect § 6501, as adopted in 1977, which bars any storage of spent fuel absent legislative approval. To date, ENVY has made no claim that § 6501 is invalid; its

preemption arguments at trial focused entirely on the alleged bad motives of the Legislature beginning in 2005. Nor could ENVY make a successful challenge to the 1977 law, given *PG&E*'s holding that states may restrict or ban nuclear power based on economic concerns related to storage of spent nuclear fuel. Indeed, states commonly restrict or ban such storage. *See, e.g.*, Del. Code Ann. tit. 16, § 7417; Me. Rev. Stat. Ann. tit. 35-A, § 4371; Minn. Stat. Ann. § 116C.72; N.D. Cent. Code § 23-20.2-09.

Thus, even if ENVY prevails on its claims in this case, it still cannot store spent nuclear fuel at the site absent further legislative approval.

D. ENVY has continuing obligations under the 2002 MOU, the 2005 MOU, and other agreements with the State and is subject to regulation by other state agencies, including the Department of Health and the Agency of Natural Resources. Because ENVY here challenges only Acts 74, 160, and 189, *see* Doc. 144 at 25, these other, unchallenged obligations would be unaffected by any decision in this case.

E. The Court should not attempt to direct or limit the proceedings of the PSB under §§ 231 and 248(a)-(b). Even if the Court finds that Act 160 (adding §§ 248(e)(2) and 254) is preempted, the PSB should not be enjoined in any way. Not least, ENVY has "expressly and irrevocably agree[d]" that the PSB has jurisdiction over its continued operation and waived any claim that federal law preempts that jurisdiction. Ex. 361 at ¶ 12.

Even if that were not so, the Court has no basis to, and should not, interfere in the PSB's proceeding. Injunctive relief must be "narrowly tailored to fit specific legal violations." *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (quotation omitted). Despite its unsupported assertion that the PSB is "tainted," ENVY produced no evidence of "specific legal violations" by the PSB, and thus the record cannot support injunctive relief directed at that

adjudicative body. Moreover, comity and federalism caution against injunctive or declaratory relief directed at the PSB, which is a quasi-judicial body equivalent to a state court and subject to appellate review. Especially given these safeguards, the Court should presume that the PSB will base its decision on non-preempted grounds. *See, e.g.*, *Kerr-McGee Chem. Corp. v. City of W. Chi.*, 914 F.2d 820, 827 (7th Cir. 1990) (refusing to "pile one speculation upon another" to conclude that local officials will act in preempted manner in the future); *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 55-56 (D. Me. 2000) (recognizing "plaintiff has reason to be concerned" but denying injunctive relief because "[i]t has not been shown at this juncture that the state has acted, or intends to act beyond the scope of its legitimate authority").

Further, the PSB proceeding involves a dozen or more parties who have conducted discovery, hearings, and briefing, and have addressed many issues unrelated to preemption. In denying intervention in this case to a party to the PSB proceeding, the Court noted that the party's right to participate in the PSB proceeding was not at issue or "likely to be impaired" by the Court's ruling. Doc. 60 at 2.

For these reasons, the Court should not order a new docket or issue any other instructions to the PSB.

CONCLUSION

The presumption against preemption of state law is a "cornerstone[]" of preemption jurisprudence. *Wyeth v. Levine*, 120 S. Ct 1187, 1194-95 & n.3 (2009). ENVY has not come close to meeting its heavy burden of showing that federal law displaces Vermont's authority to choose not to approve the continued operation of VY. The Court should accordingly enter judgment for the State.

Dated September 26, 2011, at Montpelier, Vermont.

STATE OF 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
Justin E. Kolber
Special Assistant Attorney 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
jkolber@atg.state.vt.us

Attorneys for Defendants

David C. Frederick
Scott H. Angstreich
Jeffrey M. Harris
Kellogg, Huber, Hansen, Todd, Evans
& Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dfrederick@khhte.com
sangstreich@khhte.com
jharris@khhte.com

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the above 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.
Faith E. Gay, Esq.
Robert Juman, Esq.
Sanford I. Weisburst, Esq.
William B. Adams, Esq.

Dated: September 26, 2011

STATE OF VERMONT
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) 828-3171
kylelm@atg.state.vt.us

Counsel for Defendants