12-707-CV(L)

12-791-CV(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ENTERGY NUCLEAR VERMONT YANKEE, LLC
and ENTERGY NUCLEAR OPERATIONS, INC.,
Plaintiffs – Appellees – Cross-Appellants,

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 – Appellants – Cross-Appellees.

On Appeal from the United States District Court for the District of Vermont

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BRIEF OF APPELLANTS

WILLIAM H. SORRELL
Attorney General for the State of Vermont
SCOT L. KLINE
BRIDGET C. ASAY
KYLE H. LANDIS-MARINELLO
Assistant Attorneys General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
WILLIAM J. RINNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Attorneys for Defendants – Appellants – Cross-Appellees
Peter Shumlin, William Sorrell, James Volz, John Burke and David Coen

June 4, 2012

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GLOSSARY

Act 160	2006 Vt. Acts & Resolves No. 160
Act 74	2005 Vt. Acts & Resolves No. 74
AEA	Atomic Energy Act
Board	Vermont Public Service Board
CPG	Certificate of Public Good
D.E.	Docket Entry (from district court proceedings)
DPS	Department of Public Service
Entergy	Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.
H.J.	Vermont House Journal, *available at* http://www.leg.state.vt.us/ResearchMain.cfm (click on "Main Legislative Documents page")
NRC	Nuclear Regulatory Commission
PG&E	*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)
S.J.	Vermont Senate Journal, *available at* http://www.leg.state.vt.us/ResearchMain.cfm (click on "Main Legislative Documents page")
Vermont Yankee	Vermont Yankee Nuclear Power Plant

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment on January 20, 2012, and Defendants timely appealed on February 18, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The district court entered an injunction pending appeal on March 19, 2012. Defendants filed a timely amended notice of appeal on March 23, 2012.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding Act 160 preempted, and in granting declaratory and injunctive relief invalidating Act 160 and enjoining its enforcement?

2. Did the district court err in granting injunctive relief under the dormant Commerce Clause against speculative and uncertain future conduct?

3. Did the district court err in holding one provision in Act 74 preempted, and in granting declaratory and injunctive relief invalidating that provision and enjoining its enforcement, as well as granting an injunction pending appeal regarding a separate provision of Act 74?

STATEMENT OF THE CASE

In 2005 and 2006, the Vermont Legislature passed two statutes, each of which required Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear

Operations, Inc. (collectively, "Entergy") to obtain legislative approval to operate the Vermont Yankee Nuclear Power Plant ("Vermont Yankee") beyond March 21, 2012. On that date, the plant's original 40-year federal license and its original certificate of public good ("CPG") from the Vermont Public Service Board ("Board") were set to expire.

The Vermont Legislature did not approve Entergy's continued operations. The U.S. Nuclear Regulatory Commission approved a renewed federal license for the plant in March 2011. Entergy then filed this suit alleging that the Atomic Energy Act ("AEA") preempted these two Vermont laws. Entergy also brought preemption claims under the Federal Power Act and the dormant Commerce Clause, based on allegations that state officials were insisting on "below-wholesale-market" rates for sales of electricity to in-state utilities.[1]

In June 2011, the district court (Murtha, J.) denied Entergy's request for a preliminary injunction because it had not shown irreparable harm. SA112. After a three-day bench trial in September 2011, the district court issued its final decision on January 19, 2012. — F. Supp. 2d —, 2012 WL 162400 (D. Vt. Jan. 19, 2012).

[1] Entergy sued, in their official capacities, the three members of the Board, the governor, and the attorney general (collectively, "Defendants"). Appellants' counsel represents all Defendants for purposes of this case but has not consulted with the Board (which is an independent, quasi-adjudicative body) on litigating strategy or positions.

The court held that the AEA preempted the 2006 law, known as Act 160, as well as part of the 2005 law, Act 74. In reaching both decisions, the court relied not on the statutory text, but on parts of the legislative history, including committee hearings and comments by witnesses at those hearings. The court permanently enjoined Defendants from enforcing the preempted statutory requirements. SA100-01.

With respect to Entergy's dormant Commerce Clause claim, the court permanently enjoined Defendants "from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power-purchase agreement between [Entergy] and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states." SA101. The court's dormant Commerce Clause ruling formed the basis for Entergy's subsequent request that the State of Vermont reimburse Entergy for more than $4.62 million in attorney's fees in this case. *See* Motion for Attorney's Fees, Expenses, and Costs, and for Leave To File Supplemental Evidence in Support of Motion (filed Feb. 3, 2012) (Docket Entry "D.E." 184).

The State timely appealed, JA1979, and Entergy timely cross-appealed, JA1981.

On March 19, 2012, the district court entered an injunction pending appeal with respect to an additional provision of Act 74, § 6522(c)(2), which on one reading of the statute might allow the Board to prohibit Entergy from continuing to store spent fuel generated after March 21, 2012. SA105-09. Defendants filed a timely amended notice of appeal. JA1983.

STATEMENT OF FACTS

A. Federal Statutory and Regulatory Framework

1. In 1954, Congress enacted the AEA, 42 U.S.C. § 2011 *et seq.* The AEA grants the federal government "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) ("*PG&E*"). The AEA gives the federal government exclusive authority to regulate "the radiological safety aspects involved in the construction and operation of a nuclear plant." *Id.* at 205.

Congress did not displace the states' traditional authority to regulate all other aspects of these electric generating facilities. The AEA includes two savings clauses expressly preserving state authority. One preserves state authority "with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission." 42 U.S.C. § 2018. The

other preserves state authority "to regulate activities [of nuclear power plants] for purposes other than protection against radiation hazards." *Id.* § 2021(k).

The Supreme Court has held that those savings clauses demonstrate that Congress "intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." *PG&E*, 461 U.S. at 205.

2. For decades, the Nuclear Regulatory Commission ("NRC") has explicitly acknowledged that preserved area of state authority. As the NRC has repeatedly explained, an NRC license, including a renewed license, does not determine whether a plant operates:

> After the NRC makes its decision based on the safety and environmental considerations, the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers. This final decision will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction.

61 Fed. Reg. 28,467, 28,473 (June 5, 1996); *see*, *e.g.*, 10 C.F.R. § 51.71(f) n.4 ("The [NRC's] consideration of reasonable alternatives . . . in no way preempts, displaces, or affects the authority of States . . . to address these issues.").

The NRC has thus recognized that, even if it grants a license renewal, the plant might "still not operate." JA796. That is "because the NRC does not have a

role in the energy-planning decisions of state regulators and licensee officials," who are free to make decisions based on "factors such as the need for power or other matters within the state's jurisdiction or the financial interests of the owners." *Id.*

In considering the relicensing of Vermont Yankee, the NRC specifically acknowledged that state regulators will "ultimately decide" whether the plant continues to operate, and that "the NRC does not have a role in the energy-planning decisions of State regulators and utility officials as to whether a particular nuclear power plant should continue to operate." JA801-02; *see also* JA799 (state "decide[s]" continued operation).

B. Vermont's Historical Energy Regulation and Policy

Vermont requires state approval for all electric generating plants to operate, in the form of a valid, non-expired CPG. *See* Vt. Stat. Ann. tit. 30, §§ 102, 203, 231, 248. Some of these laws have been in place since the early 1900s, predating the development of atomic energy. *See* 1908 Vt. Acts & Resolves No. 116, § 3 (source of Vt. Stat. Ann. tit. 30 § 203); 1915 Vt. Acts & Resolves No. 163, § 1 (source of Vt. Stat. Ann. tit. 30 § 102).

For decades, Vermont has engaged in energy planning to move from nonrenewable sources of energy, such as oil, gas, and nuclear, toward energy efficiency and renewable energy sources, such as solar, wind, and biomass.

Vermont's formal "state energy policy" dates back to 1981. Vt. Stat. Ann. tit. 30, § 202a. Its goals include encouraging in-state economic activity, energy efficiency, and the development of sustainable, renewable energy sources. *See id.* That same year, the Legislature required the Department of Public Service ("DPS") to create its first long-term, 20-year electric plan, which the DPS has since continually updated and revised. *See id.* § 202b; JA184.

Vermont's energy planning is "intense[ly] concern[ed] with energy efficiency and renewable energy" toward achieving the "goal of a sustainable energy future." JA184. Over the past decade, the Legislature has passed numerous statutes that address energy efficiency, diversity, reliability, and the promotion of renewable energy.[2] Vermont's decades of energy planning have also specifically addressed Vermont Yankee's retirement in 2012 and the need to

[2] *See, e.g.*, 2011 Vt. Acts & Resolves No. 47 (provisions to increase energy 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. 209 (same); 2008 Vt. Acts & Resolves No. 92 (creating Vermont's "25 by 25" goal of producing "25 percent of the energy consumed within the state through the use of renewable energy sources, particularly from Vermont's farms and forests"); 2006 Vt. Acts & Resolves No. 208 (energy efficiency and renewables); 2006 Vt. Acts & Resolves No. 201 (business and technical assistance to harvest biomass, convert biomass to energy, and produce biofuel); 2005 Vt. Acts & Resolves No. 61, §§ 1-4 (new renewable source requirements for retail electricity providers, and creation of the Sustainably Priced Energy Enterprise Development (SPEED) program); 2003 Vt. Acts & Resolves No. 69 (energy efficiency and renewable energy programs); and 2002 Vt. Acts & Resolves No. 145 (looking at energy efficiency and impacts on renewable energy resources).

transition to smaller, renewable sources of energy for those sources built and located in Vermont.

1. Vermont's Promotion of Energy Efficiency

Vermont is a national leader in promoting energy efficiency. In 2000, "Vermont became the first state in the nation to have its energy efficiency programs administered by a statewide entity funded through an Energy Efficiency Charge . . . on all electric utility customers' bills." JA1026. That program — known as Efficiency Vermont — is now widely viewed as "one of the best electric efficiency programs in the country." JA191. Vermont's 2011 energy plan continues that policy. JA1057. Efficiency Vermont implemented efficiency goals proposed in earlier state energy plans. *See* JA1008 (1988 plan advocated "demand side management" as an alternative to generating power); JA1003 (1983 plan introduced requirements for maximizing energy efficiency). Indeed, as early as 1973, Vermont incorporated energy conservation principles into its statewide land-use law. 1973 Vt. Acts & Resolves No. 85, § 10, codified at Vt. Stat. Ann. tit. 10, § 6086(a)(9)(F).

2. Vermont's Preference for In-State Renewable Generation

In 1983, the DPS's first long-term electric plan stated that the "development of secure, in-state renewable energy is a key step toward establishing a sustainable future energy supply." JA1006. Future plans continued that focus.

The 1991 energy plan reiterated the need to build more in-state renewable energy power plants. JA1030. That plan noted that Vermont's energy future should "reduce[ ] the use of nonrenewable fuels," JA1030, and "transition to clean, renewable resources," JA1029. The 2005 plan explained how the development of renewables is necessary both to meet the statutory requirement of a sustainable energy future and to benefit the local economy. JA1024. The 2011 energy plan reflects Vermont's continued drive to promote the development of in-state renewable energy sources. JA1057.

3. Planning To Reduce Reliance on Nuclear Power

Vermont's 1998 Comprehensive Energy Plan discussed the economic benefits of reducing "reliance on petroleum, coal, and nuclear energy," and moving toward renewable energy. JA1042. The 1991 energy plan noted that an increase in the use of renewable biomass fuels from Vermont forests would "strengthen[ ] the state and local economies" because Vermont has those resources at its disposal, whereas the State does not manufacture oil, gas, coal, or nuclear fuel. JA1028.

Consistent with the State's long-term energy goals, Vermont long planned for Vermont Yankee's scheduled retirement. The 1988 energy plan cited the state's "dependence on Vermont Yankee" as a weakness in the State's energy future and noted its scheduled retirement date. JA1010-11. The 1998 plan linked the retirement of Vermont Yankee to the State's goal of promoting renewables:

> Opportunities to replace non-renewable energy sources with renewable sources should not be missed. . . . Expiration of Vermont Yankee nuclear station's license in 2012 offers a rare opportunity *to substantially increase our use of renewables* . . . .

JA1036 (emphasis added). The plan recommended that the State make use of the "lead time" before 2012 "to ensure that nuclear plants are replaced in an orderly way with efficiency improvements and renewable and sustainable power sources." JA1039.

C. Vermont's Regulation of Vermont Yankee

Vermont has regulated Vermont Yankee since its construction in the 1960s and its opening in 1972. In 2002, Entergy needed (and received) state approval to purchase Vermont Yankee from the in-state utilities that had co-owned it. As part of that process, Entergy agreed that it had state approval to operate Vermont Yankee only until March 21, 2012 — the existing expiration date of both the plant's NRC license and its Vermont CPG. JA558, 825. In approving that purchase, the Board relied on the 2012 expiration date and on Entergy's obligation to obtain further state approval to operate after that date. JA602, 1354.

1. Act 74

In 2005, Entergy was planning to increase the generating capacity of Vermont Yankee and, therefore, needed to build a dry-cask storage facility to store the additional spent nuclear fuel that would be created. Recognizing that it would need state approval, Entergy proposed draft legislation that became the foundation

for Act 74. JA865-67, 224. Entergy's proposal specifically limited the number of dry-cask storage units to those needed for Entergy's operations through March 21, 2012. JA1220-21, 224.

The Vermont Legislature passed Act 74 in June 2005. *See* 2005 Vt. Acts & Resolves No. 74 (Act 74), codified at Vt. Stat. Ann. tit. 10, §§ 6521-6523. The Act gives legislative approval for the storage facility and notes that the facility must comply with "any order or requirement" of the NRC. Vt. Stat. Ann. tit. 10, § 6522(c)(2). Consistent with Entergy's representation that it sought approval only through March 21, 2012, the Act requires Entergy to obtain further legislative approval to store spent fuel generated after that date.

Act 74 also includes other provisions intended to help move Vermont toward a more diverse energy plan with emphasis on renewable energy sources. The Act states that the Legislature sought to ensure that Vermont's "future power supply" would be "diverse, reliable, economically sound, and environmentally sustainable." *Id.* § 6521(3).

Act 74 was passed simultaneously with a Memorandum of Understanding between Entergy and the DPS that required Entergy to make payments into a Clean Energy Development Fund to promote the development of non-nuclear clean energy sources. JA226.

The Board subsequently approved construction of the dry-cask storage facility.

2. Act 160

In 2006, the Legislature passed Act 160, which requires legislative approval before the Board may issue a renewed CPG for continued operation of a nuclear power plant in the state, thereby giving the Legislature a direct role in deciding Vermont's energy future. *See* 2006 Vt. Acts & Resolves No. 160 (Act 160).

The Act's express "Legislative Policy and Purpose" is to serve the interests of the State by allowing the Legislature to have a "full, open, and informed public deliberation and discussion" of Vermont's "need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives." *Id.* § 1(a).

The Act addresses licensing of nuclear plants by amending a preexisting statute that had long required legislative approval before the Board can issue a CPG for construction of a new nuclear plant in Vermont. *See* Vt. Stat. Ann. tit. 30, § 248(e)(1). That preexisting statute, dating back to 1977, *see* 1977 Vt. Acts & Resolves No. 11, has functionally imposed a moratorium on the construction of new nuclear plants.

Act 160 added a new subsection to the existing law, providing that no nuclear plant may continue operating beyond the date authorized in its CPG in

force as of January 1, 2006, "unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section." Vt. Stat. Ann. tit. 30, § 248(e)(2). This section also provides that, even if the Legislature has not yet authorized a plant's continued operation by July 1, 2008, the Board may commence proceedings "relating to the storage of radioactive material," but the Board may not issue a CPG for this operation "until the general assembly determines that operation will promote the general welfare and grants approval for that operation." *Id.*

Act 160 also called for studies and a public engagement process to gather information and guide the work of the Board and the Legislature. *See id.* § 254.

3. Legislative History of Acts 74 and 160

The Vermont Legislature, a part-time citizen body, does not produce formal committee reports like those Congress prepares, and it has no requirement to preserve complete records of its proceedings. Committee hearings are generally recorded, but are not contemporaneously transcribed, and often do not identify the speaker. Floor debates are usually recorded in the Senate, but not in the House of Representatives.

The Legislature considered the bill that became Act 74 from February to June 2005. The bill was debated in several committees and on the floor of both

chambers of the General Assembly. Although approximately 118 hours of testimony and debate were recorded on Act 74, the legislative record is incomplete. There are no recordings of the House floor debates, where the House adopted, on May 31, 2005, "strike-all" amendments — that is, amendments that replace the text approved by the Senate with entirely new language. *See* House Journal ("H.J.") 1469-79 (May 31, 2005), *available at* http://www.leg.state.vt.us/docs/2006/journal/HJ050531.htm.

For Act 160, there are approximately 35 hours of recorded hearings. Although the Senate Finance Committee took testimony on the bill, the House later struck all of the Senate bill and substituted an amended version that substantially changed the legislation. *See* H.J. 1378-84 (Apr. 27, 2006), *available at* http://www.leg.state.vt.us/docs/2006/journal/HJ060427.htm. The House version became Act 160. *See* Senate Journal ("S.J.") 1217 (May 2, 2006), *available at* http://www.leg.state.vt.us/docs/2006/journal/SJ060502.htm. The House floor debates were not recorded.

During discussions of the bills and proposals that became Acts 74 and 160, legislators discussed the need for energy planning and diversity and the desire to foster renewable sources of energy. For instance:

Act 74:

"[W]e must begin in earnest now to create a portfolio of resources that cuts the dependence and builds our own set of diverse and sustainable power sources." JA1205 (Senator Lyons).

"And the [Clean Energy Development Fund] money would be used specifically to help bridge that gap for the time when Entergy will not be providing us with electricity. So it will be used to support in-state, mostly renewable energy projects . . . ." JA1276 (Representative Dostis).[3]

Act 160:

"I would think that it would be derelict of this body, both bodies, not to — not to take a central role in the plans for the future." JA1303 (Senator Gander, reporting bill to Senate).

"And the legislature is free in that consideration to take into account its perception of what this does for Vermont's energy future, how it helps rate payers, what the economic trade-offs are, whatever negotiations may occur between the administration and/or the legislature and the licensed applicant." JA1308-09 (Senator Welch).

"[T]his bill . . . extends the legislature's ability. We've asked the public service board to conduct extensive public review to do extensive research into the economic impacts on the state. Basically, the economic impacts on the state . . . ." JA1307 (Senator Cummings).[4]

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[3] *See also, e.g.*, Senate floor debate at JA1192-93 (trust and transparency), 1195-96 (state responsibility for spent fuel), 1200 (renewables), 1200-02 (federal role on spent fuel), 1204-05 (energy planning); and committee hearings at JA1269 (aesthetics), 1276-77 (economics and renewables).

[4] *See also, e.g.*, Senate floor debate at JA1300-01 (energy policy), 1305 (renewables); and committee hearings at JA1312 (energy planning), 1315-17 (reliability), 1327-29 (economics of long-term spent-fuel storage), 1333-34 (reliability), 1373 (legislator on electric policy), 1376-77 (energy policy).

Some legislators also commented on matters of radiological safety, and some committee members heard from constituents who talked about such concerns. For instance, when considering Act 74, some legislators asked questions about the safety of dry-cask storage or raised concerns about Entergy's plan to store spent fuel. In all, these recorded comments involved only a handful of legislators.

The legislative history of both bills also includes legislators explicitly acknowledging that they *cannot* regulate radiological safety:

> *Act 74:*
>
> "[W]e're very cognizant that, when it comes to issues of safety, we are preempted by the federal government." JA1269.[5]
>
> *Act 160:*
>
> "[T]his bill is not about the safety of nuclear fission or any entity that exists in the state. Safety is the pure duty of the NRC to determine." JA1300.
>
> "[O]ur position is that everything that's not preempted is on the table." JA1379.[6]

Both bills had widespread, bipartisan support. The bill that became Act 160 passed the Senate by a three-to-one margin, and passed unanimously in the House (130 to 0). S.J. 331 (Mar. 15, 2006), *available at* http://www.leg.state.vt.us/docs/2006/journal/SJ060315.htm; H.J. 1406 (Apr. 28,

[5] *See also, e.g.*, JA1266-67.

[6] *See also, e.g.*, JA1355, 1372, 1374.

2006), *available at* http://www.leg.state.vt.us/docs/2006/journal/HJ060428.htm. Senate support for Act 74 was similar, and the House approved the bill 113 to 5. S.J. 1325 (June 3, 2005), *available at* http://www.leg.state.vt.us/docs/2006/journal/SJ050603.htm; H.J. 1476 (May 31, 2005), *available at* http://www.leg.state.vt.us/docs/2006/journal/HJ050531.htm. Governor Douglas, a Vermont Yankee proponent, signed both Act 74 and Act 160.

At the time both bills were passed, Entergy praised them. When Act 74 passed, Entergy agreed that the "legislature needs to be involved in that future decision about Vermont's energy mix." JA1224. Entergy likewise "commend[ed] the Legislature" for passing Act 160 in order to "fully address[ ] the question of Vermont's future energy supplies." JA570.

4. Subsequent Events and Legislative Action

In 2008, Entergy filed a petition with the Board for renewal of its CPG to operate Vermont Yankee until March 21, 2032. The Board held hearings on the petition but did not issue a decision, given Act 160's requirement for legislative approval before the Board could act. After the Board's 2009 hearings, its docket remained open though inactive.

That same year, Entergy proposed spinning off several of its older nuclear power plants — including Vermont Yankee and two New York plants — into a separate corporate entity known as "Enexus." As one Entergy senior manager

noted, Vermonters expressed "deep mistrust" for this proposal because it was viewed as a "ploy by Entergy to shed decommissioning risk and ultimately stick Vermont taxpayers with the cost of decommissioning" Vermont Yankee. JA959. Entergy abandoned this proposal after it failed to obtain clearance for the spinoff from New York regulators in March 2010. *See* JA962.

In January 2010, Entergy disclosed that tritium, a low-level radiological byproduct of nuclear fission, was leaking from underground pipes at Vermont Yankee despite Entergy's earlier misstatements (made in sworn testimony to the Board) that such pipes did not even exist. *See* JA959. Eleven employees were disciplined, Entergy's senior manager in Vermont was transferred, and his replacement acknowledged that the incident "had a corrosive effect on [Entergy's] supporters throughout the state, particularly with [Entergy's] strongest and most visible supporter: Vermont Governor James Douglas, who stated that he had lost confidence in Entergy and [Vermont Yankee]." *Id.*

In late February 2010, the Vermont Senate debated the future of Vermont Yankee and voted 26 to 4 against a bill that would have provided the legislative approval required by Act 160 for Vermont Yankee to operate beyond March 21, 2012. S.J. 51 (Feb. 24, 2010), *available at* http://www.leg.state.vt.us/docs/2010/journal/sj100224.pdf. In that debate, senators spoke about the need for renewables, Vermont's overall energy policy, the

economics of Entergy's then-pending Enexus spin-off proposal, and distrust of Entergy, which had recently been less than transparent in its dealings with Vermont:

> "[We need] a better energy future . . . based on conservation and efficiency, and renewable energy . . . [which will] create jobs in the State of Vermont." JA1580-81 (Senator Racine).
>
> "[W]e will see economic development as a result of the decisions that we make here today." JA1575 (Senator Lyons).
>
> "[Enexus] will be a very highly leveraged company. . . . [I]t's a very high risk . . . . [G]iven this high [risk] situation, what happens if Enexus goes bankrupt? What happens if more than one plant needs to be decommissioned at one time? Where is the money coming from?" JA1516 (Senator Cummings).

Even well-known supporters of Vermont Yankee were among the 26 Senators who voted against continued operations. For instance, one senator who previously supported Vermont Yankee voted "no" based on his concern with "financial arrangements [*i.e.*, the proposed Enexus spin-off] that will leave us with a debt-ridden, highly-leveraged company that does not make economic sense." JA1576-77 (Senator Brock).

As part of its CPG renewal strategy, Entergy entered into negotiations with Vermont utilities in an attempt to reach a long-term power-purchase agreement. Entergy's existing power-purchase agreement with those utilities, like its CPG, was set to expire on March 21, 2012. The negotiations focused on price, quantity of power, and other terms such as credit requirements, contingencies, and the value

of an existing revenue-sharing agreement between Entergy and the utilities. JA165-66. The negotiations fell apart for reasons other than price. JA171-74.

In April 2011, soon after receiving NRC approval for its renewed federal license, Entergy filed this suit, seeking to set aside all state legislative and Board approvals needed for continued operation past March 21, 2012.

D. The District Court's Decision

Following a three-day trial, the district court issued an opinion finding for Entergy on its preemption claims as to Act 160 and Act 74, and its dormant Commerce Clause claim relating to purported requirements that Entergy provide below-wholesale-market rates to Vermont utilities.

The bulk of the district court's opinion addresses the legislative history of Acts 160 and 74. SA12-41, 70-82.

The court discussed the scope of field preemption under the AEA, and noted *PG&E*'s holding that the state law's avowed purpose should control and that courts "'should not become embroiled in attempting to ascertain California's true motive.'" SA63 (quoting *PG&E*, 461 U.S. at 216). However, the district court viewed other preemption decisions in cases that did not involve the AEA to call for analysis of legislative history or purpose beyond that contained in the statutory text. The court also reasoned that the analysis of purpose in a preemption case

should be similar to the assessment of purpose or motive in discrimination and Establishment Clause jurisprudence. SA68, 73-74, 78.

The district court recognized that the "Legislative Policy and Purposes" set forth in Act 160 "do not refer to any preempted purposes." SA73. Yet the court expressed concern about one reference to "public health" in a separate section of the law, SA72, and about what the court called the "virtually unreviewable" power of the Legislature to not allow renewal of Entergy's CPG, SA71. The district court found these aspects of Act 160 sufficient to justify delving into its legislative history to determine whether Vermont legislators acted with a preempted motive "in mind." SA72.

The district court reproduced quotations from a handful of participants (some legislators, some witnesses) in the legislative proceedings — nearly all from previous versions of the bill that were later replaced by substantial amendments. Based on its review of the available legislative history, the district court concluded that "the legislature's motivation to regulate radiological safety . . . emerges substantially net positive." SA75. Finding "insufficient evidence the legislature, absent this radiological safety motivation, would have enacted Act 160 for the purposes articulated in its text," *id.*, the district court held that Act 160 is preempted by the AEA. SA78.

With respect to Act 74, the district court employed the same mode of analysis, asking "whether this provision was enacted with a preempted purpose in mind." SA79. The district court gave no weight to the Act's express findings regarding energy planning and the development of renewable energy, stating that the findings in Section 1 of the Act were relevant only to the unchallenged Clean Energy Development Fund provision in Section 3, not to the challenged provisions in Section 2. SA78. Instead, the district court cited statements from the legislative record relating to safety concerns, and it explained that "[n]one" of the passages expressing non-safety concerns "persuades the Court that the legislature would have enacted the provision . . . had the legislature not also been motivated to regulate radiological safety." SA81. It concluded "after reviewing the legislative history and transcripts, and listening to recordings of relevant legislator statements," that safety was "the primary motivating force" for legislators. *Id.* Thus, it found preempted the provision requiring legislative approval for the storage of spent nuclear fuel generated after the date on which Entergy's licenses were set to expire. SA99 (striking down one sentence of Vt. Stat. Ann. tit. 10, § 6522(c)(4)).

The district court also granted Entergy injunctive relief on its dormant Commerce Clause claim. It explained that the dormant Commerce Clause prevents States from engaging in economic protectionism. SA86. Turning to Entergy's

allegations, the district court stated that "there is evidence of intent to condition continued operation" of Vermont Yankee on the provision of "below-wholesale-market" rates to Vermont utilities. SA88. The district court cited briefs and testimony submitted by the DPS to the Board in 2009, as well as letters from two legislators explaining their interest in a power-purchase agreement between Entergy and Vermont utilities. SA89-92.

On this basis, the district court "permanently enjoined" the Board, as well as Vermont's governor and attorney general, "from conditioning the issuance of a [CPG] on the existence of a below-wholesale-market power purchase agreement between [Entergy] and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states." SA101.

E. The District Court's Injunction Pending Appeal

Shortly after the district court issued its opinion, Entergy returned to the Board and asked it immediately to grant Entergy's pending CPG petition to authorize Vermont Yankee to continue operating after March 21, 2012. (The Board's CPG docket, though inactive, had remained open.) The Board sought briefing on Entergy's motion and asked the parties to address several issues, including the scope of the Board's authority under state law. D.E. 195-1. In response to that request, Entergy immediately sought further relief in the district

court, asking for an injunction to bar enforcement of two other provisions of Act 74, *see* Vt. Stat. Ann. tit. 10, § 6522(c)(2) & (5), and to prevent the State from taking action to close Vermont Yankee pending the Board's decision and judicial review of that decision. D.E. 190-196. Entergy also cross-appealed the district court's judgment, seeking the same relief as to these provisions of Act 74. D.E. 189.

The district court ruled that Entergy had made a sufficient showing that it was likely to succeed on the merits as to section 6522(c)(2) and entered an injunction pending appeal that bars the Board from relying on that provision.

After the court's post-judgment ruling, and after taking written submissions and argument from the parties to the Board proceeding, the Board effectively closed the former CPG docket, ordered Entergy to file a new CPG petition, and entered a scheduling order for the new docket on that petition.[7] The scheduling order calls for hearings during the summer of 2013, with briefing to conclude on August 26, 2013.[8]

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[7] *See* Order, PSB Dkt. #7440 (Mar. 29, 2012), *available at* http://psb.vermont.gov/sites/psb/files/orders/2012/2012-4/2012-5/7440%20order%20re%20motion%20for%20issuance%20and%20procedural%20matters.pdf.

[8] *See* Prehearing Conference Memorandum, PSB Dkt. # 7862 (May 4, 2012), *available at* http://psb.vermont.gov/sites/psb/files/orders/2012/2012-4/7862%20PrehearingConfMemo.pdf.

SUMMARY OF ARGUMENT

I.A. The Supreme Court long ago confirmed that states have the authority to decide whether nuclear power plants will operate within their borders and are preempted only from regulating matters of radiological safety. In analyzing whether a state law regulates radiological safety, the Supreme Court held that the "avowed" purpose of the state law controls, so long as the substance of the law does not encroach on the preempted field. *PG&E*, 461 U.S. at 216. The Court refused to analyze legislative history, and thus "become embroiled in attempting to ascertain [the state's] *true* motive" for enacting a law that, on its face, was not preempted. *Id.* (emphasis added).

B. Under this framework, Act 160 is not preempted because it is a process statute — as relevant here, a sunset provision — by which the Legislature granted itself a role in deciding whether Vermont Yankee would continue to operate past the date on which its existing licenses were set to expire. Act 160 sets forth the Legislature's purposes for making this change to the CPG renewal process, and those purposes are consistent with decades of Vermont energy policy: to provide the people of Vermont a greater say over the State's energy planning and the economics associated with a nuclear plant operating within the state, as well as to promote the use of in-state renewable energy sources. All of these

purposes fall squarely within the permissible scope of state authority over nuclear plants.

C. In finding Act 160 preempted, the district court largely ignored the text of the law and, instead, delved into the legislative history to attempt to divine whether legislators had improper purposes "in mind" when they voted on Act 160. This approach is flatly inconsistent with *PG&E*. Each of the district court's rationales for disregarding the Supreme Court's approach lacks merit.

First, the district court mistakenly viewed a reference to "public health" in Act 160 as sufficiently similar to public *safety* from radiation to warrant an investigation into legislative history, even though public health incorporates a multitude of non-radiological safety matters, and *PG&E* makes clear that a statute is not preempted even if safety is one of multiple motives. Second, the district court misread *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), to justify probing into legislative history, even though that decision merely states the principle — not applicable here — that the professed purpose of a state law cannot save it from preemption if it regulates in a preempted field. Third, the district court erred in importing a burden-shifting framework from discrimination and Establishment Clause jurisprudence, requiring Vermont to prove that Act 160 was *not* motivated by radiological safety concerns. Finally, the court erroneously believed that the lack of reviewability of the Legislature's

decision not to approve Vermont Yankee's continued operation justified analyzing legislative history, even though the same was true of the California moratorium the Supreme Court upheld in *PG&E*.

D. Even if legislative history *were* relevant to the preemption analysis, the district court badly misread the legislative record, key aspects of which were incomplete or unrecorded. It gave excessive weight to a small sliver of statements by a handful of legislators, and it disregarded statements by legislators consistent with the avowed purposes of the Act, as well as statements evincing a recognition that radiological safety falls within the purview of the NRC.

II. The district court additionally erred by enjoining Defendants under the dormant Commerce Clause, despite the absence of any evidence of an ongoing violation of the Constitution, or even an impending one. Entergy's claim therefore is speculative and premature. Furthermore, the court's injunction is based on a misunderstanding of interstate power markets. And enforcing the injunction would require the district court to act as superintendent of the Board, in violation of principles of comity and federalism.

III. The Court need not reach whether the two provisions of Act 74 the district court addressed in its decision and injunction pending appeal are preempted. If this Court reverses the district court's preemption ruling as to Act 160, Entergy's freestanding challenges to the requirement of legislative approval

for storage of spent nuclear fuel would become moot. If the Court does reach Act 74, the judgment below should be reversed for committing the same error — relying on legislative history rather than statutory text — as it did with respect to Act 160.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's application of preemption principles." *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 209 n.3 (2d Cir. 2011) (quotation omitted). Questions of law decided in connection with issuing injunctive relief, including "whether a district court should have reached the merits of a requested injunction," are reviewed de novo, and the issuance of an injunction itself is reviewed for abuse of discretion. *American Express Fin. Advisors Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998).

ARGUMENT

I. ACT 160 IS A PERMISSIBLE EXERCISE OF VERMONT'S AUTHORITY TO DECIDE WHETHER A NUCLEAR PLANT MAY CONTINUE OPERATING

Act 160 altered the process for relicensing a nuclear power plant in Vermont. By its terms, Act 160 does not regulate radiological safety — the field over which the federal government retains exclusive authority. Instead, Act 160 operates entirely within the scope of authority Congress preserved for the states.

The district court's erroneous contrary finding overrides the statute's clear text and expressed purposes, based on snippets of legislative history. Because the Supreme Court has rejected that very approach, this Court should reverse the district court's finding that Act 160 is preempted.

A. Preemption Under the AEA Is Limited to the Federally Occupied Field of Radiological Safety, and the State Law's Text Determines Whether That Law Is Preempted

The AEA provides for dual regulation of nuclear plants by federal and state governments. The AEA preempts only state regulation of radiological safety, *not* other regulation of nuclear plants. The AEA provides the federal government "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *PG&E*, 461 U.S. at 207 (citing 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114). But "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards," 42 U.S.C. § 2021(k), or to affect state authority "with respect to the generation, sale, or transmission of electric power produced" by nuclear plants, *id.* § 2018. As the Supreme Court has explained, Congress "intended that the federal government should regulate . . . radiological safety . . . but that the States retain their traditional responsibility in the field" to determine "questions of need, reliability, cost and other related concerns." *PG&E*, 461 U.S. at 205; *see also*

English v. General Elec. Co., 496 U.S. 72, 81-83 (1990). Congress did not intend to leave a "regulatory vacuum" over these important matters; rather, it created a framework of "dual regulation" over nuclear power plants. *PG&E*, 461 U.S. at 208, 211; *see also supra* pp. 4-6.

Because the scope of the federally occupied field — radiological safety — already has been defined, the only question is whether Act 160 falls within that scope. *See, e.g.*, *Goodspeed*, 634 F.3d at 211 (first defining "scope of [federal] preemption," and then concluding that "state laws at issue here do not interfere with federal laws and regulations sufficiently to fall within the scope of the preempted field").

The Supreme Court in *PG&E* showed how a court should approach that question. In *PG&E*, the Court considered whether California's moratorium on new nuclear power plants fell within the AEA's preemptive scope. The AEA, the Court held, "does not . . . require the States to construct or authorize nuclear power plants." 461 U.S. at 205. Accordingly, the Court explained that the law, which required legislative approval before the construction of a new nuclear plant, is preempted only if "grounded in safety concerns" because that judgment would "conflict directly with the countervailing judgment of the NRC." *Id.* at 213.

The Court concluded that the California moratorium was not preempted because, by its terms, it did not seek to regulate based on radiological safety

concerns. The Court accepted the "avowed" purpose for California's moratorium on nuclear plants — namely, economic concerns connected with the long-term storage of spent nuclear fuel — as a controlling "non-safety rationale" that defeated preemption. *Id.* at 213, 216.

The Court refused to look beyond the text and the State's proffered purpose to "become embroiled in attempting to ascertain California's true motive" for enacting the moratorium. *Id.* at 216. "[I]nquiry into legislative motive," the Court observed, "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.* And it was "particularly pointless" to engage in this hunt for an impermissible motive when the state was free, in any event, to prevent construction of plants on economic grounds. *Id.* In evaluating whether the AEA preempts Act 160, therefore, this Court's duty is to evaluate Act 160's plain terms, not the statements of legislators who debated its enactment.

B. Act 160 Does Not Regulate in the Preempted Field of Radiological Safety

A proper application of *PG&E* shows conclusively that Act 160 is not preempted. Act 160 altered the process by which nuclear plants in Vermont could renew a CPG, bringing that process into line with the pre-existing process for issuing a CPG for the construction of a new nuclear plant. Since 1977, Vermont has had in place a moratorium on new nuclear plants similar to the California law

upheld in *PG&E*. *See* Vt. Stat. Ann. tit. 30, § 248(e)(1). Under Act 160, both renewals and new construction require the Legislature's approval before the Board can grant a CPG. For an existing plant like Vermont Yankee, the effect of Act 160 was to create a sunset date for the plant of March 21, 2012, the date on which its original state CPG was set to expire.

In *PG&E*, the Supreme Court upheld a very similar process statute by which California barred all new nuclear plants. The parties who challenged the law on preemption grounds argued that California improperly adopted a legislative moratorium instead of allowing its expert state public utility commission to consider the matter. The Court rejected that argument, noting that the "economic uncertainties" associated with "nuclear waste disposal problems" do not tend to "vary from facility to facility," and thus a wholesale "legislative judgment" was appropriate. 461 U.S. at 215. Importantly, the Court also emphasized that the state "is certainly free to make these decisions" based on the economics of each plant "on a case-by-case basis." *Id.*

Act 160 is grounded in purposes unrelated to radiological safety. Its stated "Legislative Policy and Purpose" is to implement a "statutory process" for approving Vermont Yankee's continued operation "after full, open, and informed public deliberation and discussion" of factors including "the state's need for power, the economics and environmental impacts of long-term storage of nuclear

waste, and choice of power sources among various alternatives." Act 160, § 1(a)-(b).

These avowed purposes are consistent with decades of Vermont energy plans and legislation seeking to address issues of cost, reliability, energy efficiency, and the promotion of a diverse group of renewable, sustainable in-state energy sources. JA184-87, 189-94; *see supra* pp. 6-10. Unrebutted trial testimony, not mentioned by the district court, established that Vermont has long pursued the "goal of a sustainable energy future." JA184. None of these longstanding goals falls within the scope of the NRC's exclusive authority over matters involving radiological safety.

Moreover, Act 160 is designed to provide the Legislature — and thus the people of Vermont — a greater say over the future of the State's energy planning. The Act emphasizes the importance of "full, open, and informed public deliberation and discussion" on any decision to renew Vermont Yankee's operation. Act 160, § 1(a). It likewise sets forth "pertinent factors" to guide this decision-making process: "the state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives." *Id.*

The Legislature also viewed the issue of storage of spent fuel (the same concern California had in *PG&E*) "as a part of the larger societal discussion of

broader economic and environmental issues relating to the operation of a nuclear facility in the state." *Id.* § 1(d). To that end, the Legislature sought to assess "the potential need for the operation of the facility and its economic benefits, risks, and costs" and "alternatives that may be more cost-effective or that otherwise may better promote the general welfare." *Id.* This is the same "non-safety rationale" upheld in *PG&E*.[9]

Vermont's expressed intent in Act 160 is to promote a diverse group of renewable, sustainable, in-state energy sources. Congress left all of these matters under state authority. *See PG&E*, 461 U.S. at 205, 207 & n.18, 212. The NRC likewise recognizes that these matters are for states to decide, and disclaims any role in energy-planning decisions. *See supra* pp. 5-6. The Legislature's decision to adopt a process to help effectuate those goals is consistent with that intent.

Under *PG&E*, the purposes set forth in the statutory text are controlling, and there is no need to engage in further inquiry into state legislative motive or intent to conclude that Act 160 is not preempted. *See* 461 U.S. at 216 (accepting state's

[9] The specter of "unpredictably high costs" relating to spent nuclear fuel, *PG&E*, 461 U.S. at 214, rings even truer today than it did 30 years ago. Now that the proposed facility at Yucca Mountain has been withdrawn, the federal government has no plan at all for permanent disposal of spent fuel. If plant operators such as Entergy become insolvent or abandon their obligations, the financial burdens will fall on host states.

"avowed economic purpose as the rationale" for enacting law that did not regulate radiological safety and whose text did not reveal a preempted purpose).

C. In Finding Act 160 Preempted, the District Court Employed the Very Mode of Analysis the Supreme Court Rejected in *PG&E*

Although Act 160 sets forth a non-preempted purpose consistent with decades of Vermont energy policy, the district court nevertheless engaged in the "pointless" and "unsatisfactory" exercise of "attempting to ascertain [the Legislature's] true motive," which the Supreme Court has rejected. *PG&E*, 461 U.S. at 216. The court reasoned that it could not rely on the purposes set forth by the Legislature in the text of Act 160, but instead had to consider whether legislative history pointed in some other direction. *E.g.*, SA65, 68-69. It noted throughout its decision that it was evaluating whether legislators had improper purposes "in mind." SA49 n.20, 72, 77, 79, 82.

The court suggested four reasons for engaging in such an analysis of legislative history despite binding Supreme Court precedent holding that this methodology is impermissible under the AEA. *Cf., e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (noting that, if Supreme Court precedent "has direct application in a case," the lower court "should follow the case which directly controls" until the Court elects to overturn its own precedent). Those reasons are neither persuasive nor consistent with *PG&E*.

1. The district court mistakenly viewed a reference in Act 160 to "public health" to reflect a potential motive to regulate radiological safety, which, in its view, required probing into legislative history. SA73. The court was mistaken because the "public health" language is contained only in one provision of the Act that merely calls for studies that look broadly at "long-term environmental, economic, and public health issues, including issues relating to dry cask storage of nuclear waste and decommissioning options." Act 160, § 4.

The operation of any major generating facility on the banks of the State's largest river raises a range of potential public health issues, including storm-water runoff, thermal discharges, and potential releases of diesel fuel and other *non-radioactive* contaminants at the facility.[10] Given the range of environmental and public health issues legitimately within the State's regulatory authority, the words "public health" cannot be lifted out of one section of a process statute, relabeled as "public *safety*," and seized upon to justify an analysis of legislative history.

Further, even if the solitary reference to "public health" could be read to somehow create mixed motives by the Legislature, there is no preemption. The district court held that "multiple purposes, some permissible, others impermissible"

[10] For instance, the plant's air emissions are a public-health matter within the State's purview, because the Clean Air Act preserves state authority "to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent" than the federal standard. 42 U.S.C. § 7412(d)(9).

will "doom the statute and it will be preempted," SA65, but this holding is foreclosed by *PG&E*. The *PG&E* Court found "*both* safety and economic aspects to the nuclear waste issue," 461 U.S. at 196 (emphasis added), and yet still held that California's moratorium was not preempted because the state law had "a" non-safety rationale. *Id.* at 213. The *PG&E* Court also summarily dismissed the argument that the legislature's contemporaneous consideration of related statutes expressly addressing nuclear safety concerns "taint[ed]" the law under review. *Id.* at 215-16 & n.27.[11]

2. The district court erroneously relied on *Greater N.Y.*, 195 F.3d 100, to justify probing into legislative history because that decision did so in another field preemption context. *Greater N.Y.* did not involve preemption under the AEA. Yet the evaluation of a statute's preemptive scope is necessarily a statute-specific inquiry that turns on congressional intent in that context. *See, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008). In addition, this Court's holding in *Greater N.Y.* is *consistent* with the principle that a state's professed purpose controls unless the act itself regulates within a field preempted by federal law.

[11] Even in the Establishment Clause context — which the district court mistakenly viewed as analogous — this "mixed motives" analysis is incorrect. As this Court recently explained, invalidating legislation "on the ground that a secular purpose [is] lacking" should occur "only" when there is "no question" that the statute "'was motivated *wholly* by religious considerations.'" *Commack Self-Service Kosher Meats, Inc. v. Hooker*, — F.3d —, 2012 WL 1633143, at *6 (2d Cir. May 10, 2012) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

The district court's reliance on *Greater N.Y.* to disregard the avowed purpose of state law is inconsistent with *PG&E*. In *PG&E*, the Court addressed the same question presented here — how to determine whether a state law is preempted by the AEA — and the Court refused to look beyond California's "avowed economic purpose" for adopting a moratorium on nuclear plants. 461 U.S. at 216. Although any tension that might be perceived between *PG&E* and *Greater N.Y.* is best understood as reflecting different congressional purposes to preempt under the two federal statutes at issue in those cases, the Supreme Court's decision under the AEA controls here. *See, e.g.*, *Global–Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011) (noting the "special force of the doctrine of *stare decisis* with regard to questions of statutory interpretation" (quotation omitted)).

The district court erred further because *Greater N.Y.* is not, in fact, in tension with the Supreme Court's approach in *PG&E*. In *Greater N.Y.*, this Court considered whether New York City's cigarette advertising rules were preempted. The relevant federal law preempted any "'requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes.'" 195 F.3d at 104 (quoting 15 U.S.C. § 1334(b)). New York City's regulation required stores selling tobacco products to post only one form of indoor advertising, a City-designed sign in the form of a tombstone. *See id.* at 103. The

City defended its advertising requirement as motivated by a law enforcement — rather than a public health — purpose. *See id.* at 108. The Court, however, found that it could not "blindly accept the articulated purpose" of the regulation because the legislative design and "effect . . . is clearly to promote health." *Id.*

Therefore, *Greater N.Y.* stands for the uncontroversial proposition that, whatever the stated purpose of a state law, it is preempted if its legislative mandate encroaches on a field occupied by federal law. *See also, e.g.*, *English*, 496 U.S. at 84-85 (state law not motivated by safety concerns would nonetheless be preempted if it intrudes upon that "pre-empted zone" of radiological safety matters); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-08 (1992) (courts may not rely "solely" on a legislature's expressed purpose, but must instead look to whether state law intrudes on a federally occupied field, in which case it is preempted regardless of its purpose); *cf. Perez v. Campbell*, 402 U.S. 637, 649-52 (1971) (state's articulation of non-preempted purpose will not save statute that conflicts with or frustrates the objectives of federal law).[12] As *PG&E* made clear, a statute that prevents a nuclear plant from operating creates no "actual conflict" between

[12] The same was true in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), on which the district court also relied. SA66-67, 78. In *Vango Media*, a local ordinance required certain public health messages about smoking. *See* 34 F.3d at 70. Whether the City was motivated by economic or public health concerns related to smoking, the impact of its regulation was the same: it fell within the preempted area of "educat[ing] the public as to the adverse health risks of smoking." *Id.* at 73.

state and federal law, nor does it "seek to regulate the construction or operation of a nuclear plant." 461 U.S. at 212, 216 n.28.[13] What the law mandated did not encroach on the field of radiological safety even though the consequence of the state law was to produce a moratorium on nuclear power generation in the state.

This Court recently reaffirmed that this is the proper approach to field preemption in *Building Industry Electrical Contractors Ass'n v. City of New York*, — F.3d —, 2012 WL 1563919 (2d Cir. May 4, 2012) ("*BIECA*"), explaining that courts should ignore "allegations about individual officials' motivations in adopting the policy" and "will not search for an impermissible motive where a permissible purpose is apparent." *Id.* at *6. "'[F]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.'" *Id.* (quoting *Northern Ill. Chapter of Associated*

[13] The district court quoted a passage from *Greater N.Y.* and *Gade*, first articulated in *Perez*, stating that "courts cannot 'blindly accept' a challenged statute's 'articulated purpose,' because doing so would enable legislatures to 'nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law.'" SA65; *Perez*, 402 U.S. at 651-52. But in *PG&E*, the Court held that this reasoning from *Perez* did *not* apply, because California's moratorium did not conflict with or frustrate the purpose of federal law. 461 U.S. at 216 n.28. Similarly, a process statute permitting a legislative decision not to allow continued operation of a plant does not intrude on the preempted field, so there is no question, as in *Perez* and *Greater N.Y.*, of a state attempting to salvage a law preempted on its face by pointing to a legitimate purpose.

Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005)); *see also Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 n.12 (11th Cir. 2001) (finding that a city's alleged "hostile motivation" for enacting the challenged laws is irrelevant so long as there is "no frustration of the federal objective"); *cf. Kuhne v. Cohen & Slamowitz, LLP*, 579 F.3d 189, 193 (2d Cir. 2009) (noting that "the clearest indicator of legislative intent is the statutory text" (quotation omitted)).

3. The district court looked to legislative history on the belief that the "burden shifts to the Defendants" to establish a *lack* of preemptive purpose "where it is evident the statute was motivated, even in part, by an impermissible purpose." SA68. Based on its concern that certain legislators may have been motivated, at least in part, by radiological safety concerns, the district court believed it "would be remiss if it failed to evaluate the purposes behind Vermont's enactments 'as a whole.'" *Id.* The court accordingly placed the burden on Vermont to prove that Act 160 would have passed "absent this radiological safety motivation." SA75. Instead of looking to the statutory text, the court sifted through and weighed an incomplete legislative history, and decided that it was "insufficient" to demonstrate that Act 160 still would have passed but-for radiological safety concerns. *Id.*

The district court failed to identify *any* preemption precedent employing such a burden-shifting framework, instead impermissibly importing legal standards

from discrimination and Establishment Clause doctrine. A bedrock principle of preemption, however, is that courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *PG&E*, 461 U.S. at 206 (quotation omitted). There is no burden-shifting in this context — indeed, *PG&E* refused to shift the burden to the State of California even though the plaintiffs pointed to legislative history that evidenced a concern for radiological safety. *Id.* at 215-16 & nn.27-28.

The district court relied on *McCreary County v. ACLU*, 545 U.S. 844 (2005), an Establishment Clause case, as support for its reliance on legislative history instead of statutory text. SA73-74. The Establishment Clause's test for discerning the "official purpose" for religious displays in public places, 545 U.S. at 861, has no bearing on a preemption analysis under the AEA. The First and Fourteenth Amendments protect individual liberties against government overreach. Courts are expected to engage in searching scrutiny of suspect government action to protect individuals' religious freedom or prevent invidious discrimination. Preemption analysis, however, differs markedly from this civil rights framework. Preemption addresses the allocation of power between federal and state law, and rests on *congressional* intent to displace state law. As this Court's decision in *BIECA* confirms, a hunt for "impermissible motive" under *state law* is unwarranted in a

preemption case. 2012 WL 1563919, at *6; *accord PG&E*, 461 U.S. at 216. Consistent with the presumption against preemption, when courts police the line between state and federal authority, they are obligated to preserve state authority to the fullest extent permitted by a statute's savings clause. Whatever role an inquiry into legislative "motive" may have in other contexts, it has no place here. *E.g.*, *BIECA*, 2012 WL 1563919, at *6.[14]

4. The district court was troubled by the lack of reviewability of any legislative decision under Act 160 not to approve the continued operation of Vermont Yankee. SA71-72. But in this regard, Act 160 is in substance no different from a state moratorium on nuclear power plants, such as that upheld in *PG&E*. A legislative decision not to lift the moratorium to permit the construction of a particular nuclear plant is no more reviewable than the Vermont Senate's bipartisan 26 to 4 vote not to grant Entergy the authorization it needed under Act 160 to proceed with its CPG renewal application before the Board.

[14] Even if followed here, *McCreary* does not call for searching legislative history for statements that suggest a purpose contrary to the purpose set forth in statutory text. The claimed secular purposes that the Court rejected in *McCreary* were "litigating position[s]" argued by the county's lawyers, not part of a statute. 545 U.S. at 871. The Court in fact disclaimed "any judicial psychoanalysis of a drafter's heart of hearts" as part of the purpose inquiry, *id.* at 862, and did not base its finding on comments gleaned from legislative hearings and the like. Rather, the Court pointed to the county's earlier official resolution and display of the Ten Commandments — just a few months before the challenged display — which were overtly sectarian. *Id.* at 870-72.

In all events, the district court's reasoning sounds in due process concerns, not preemption. And Entergy has not asserted a due process claim under federal or state law.

D. Even if Analyzing the Legislative History of Act 160 Were Permissible, the District Court Improperly Weighed the Relevant History

Even if legislative history has some relevance here — and it does not — the district court's analysis is still flawed. The court concluded that radiological safety was the "primary motivation" of the Legislature as a whole based on bits and pieces of Act 160's legislative history. SA74, 77. In doing so, it gave excessive weight to a small sliver of statements in the legislative history, failing to recognize their place in the larger context of recorded and unrecorded legislative history.

The district court's analysis of the legislative history captures only a small fraction of the entire debate surrounding Act 160. The court identified a few dozen comments from the legislative record, nearly all from committee hearings involving a handful of legislators who were reviewing preliminary drafts of the bill that did not pass. Only 16 legislators participated in the committees of jurisdiction and only five of those can be identified in these excerpts — out of 156 legislators who voted on Act 160. These statements comprise a tiny percentage of the total recorded testimony on the Act and cannot reasonably be attributed to the scores of legislators who neither made nor heard them. Further, some of the comments on

which the court relied were taken out of context,[15] and many were actually questions about the bounds of jurisdiction. SA28-29. The court also ignored legislators' statements supporting the avowed purpose of the Act in implementing Vermont's "energy policy" and the need for the Legislature to have a "central role" in deciding Vermont's "energy future." JA1300-01, 1303, 1305, 1308-09, 1373. Far from providing what the court termed "overwhelming evidence" that the Act was "grounded in radiological safety concerns," SA77, the recorded history demonstrates that legislators recognized and accepted that "[s]afety is the pure duty of the NRC to determine." JA1300.

Moreover, much of Act 160's legislative history went *unrecorded*, and the recorded history itself is materially incomplete. Vermont has a part-time, citizen legislature, and its informal process is marked by public involvement and an open exchange of information and views from a wide range of constituents. As with other jurisdictions, the "rough and tumble of the legislative process," *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006), extends beyond the floor and

[15] For instance, the court described a comment in a committee hearing about "three-headed turtles and sterile sheep" as showing the legislature intended to "consider" a "broader range" of issues. SA75. In fact, the state senator was saying that the legislature had a "broader range of ability" to "listen to" those concerns and give people "the ability to be heard." JA1683-84. She did not say those concerns would influence the outcome. *See id.* ("[W]e can make our own decision.").

the committee room. Hallway conversations and agreements struck in office meetings may be as crucial as anything recorded in a hearing. *See* JA214, 1118.

The Legislature does not produce "authoritative" committee reports (or any formal committee reports). *Cf. Zuber v. Allen*, 396 U.S. 168, 186 (1969) (noting that committee reports arguably "represent[] the considered and collective understanding of those [legislators] involved in drafting and studying proposed legislation"). Committee hearings are generally recorded, but some are missing or incomplete, and the recordings can be difficult to follow, with unidentified speakers and inaudible content. Moreover, what transpires in a committee is heard only by the handful of legislators present. The transcribed and excerpted legislative appendix Entergy created for trial was never seen by the legislators voting on Act 160.

While an *entire* legislative chamber may at least be present for floor debates, even floor statements "reflect at best the understanding of individual [legislators]," *id.*, not statements endorsed or voted upon by that entire chamber. And in Vermont, the floor debates are not recorded in the House. If the legislative history were considered at all in a preemption analysis, the House floor debates would be important here because they were the only instance in which legislators voted on "strike-all" amendments that replaced the entire text of the bill that became Act 160. H.J. 1378-84 (Apr. 27, 2006), *available at*

http://www.leg.state.vt.us/docs/2006/journal/HJ060427.htm. The district court's cherry-picking from the incomplete legislative record for favorable snippets was erroneous, therefore, and should be reversed. *Cf., e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." (quotation omitted)).

II. THE DISTRICT COURT ERRED IN ISSUING AN INJUNCTION UNDER THE DORMANT COMMERCE CLAUSE

A. The District Court Applied the Wrong Legal Standard in Entering the Permanent Injunction

1. A federal court can impose the drastic remedy of permanently enjoining state officials only to prevent an "*ongoing* violation of federal law," *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007), or an "'actual and imminent' threat" of such a violation, *Brooks v. Giuliani*, 84 F.3d 1454, 1468 (2d Cir. 1996). The district court found only "evidence of *intent* to condition continued operation on the demonstration of some marked 'economic benefit' or 'incremental value' . . . in the form of below-wholesale-market long-term power purchase agreements for Vermont utilities." SA88 (emphasis added). But mere "intent" — unless it is turned into action or the imminent threat thereof — cannot support an injunction. *See, e.g., Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (governmental officials' "intent" to violate law was "an insufficient

basis for the entry of an injunction"). The court simply lacked any basis for an injunction grounded on any violation of the Constitution.[16]

This case bears little resemblance to *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), in which the state's utility commission issued an order barring a plant from selling power to utilities in other states. *Id.* at 335-36 & n.2, 339. That order created legal obligations and went beyond mere intent. Here, by contrast, the district court concluded only that unspecified state officials *might* violate the dormant Commerce Clause in the future, without suggesting that such a violation was either ongoing or imminent. The court's application of the wrong legal standard warrants vacating the injunction. *See Otokoyama Co. v. Wine of Japan Imp., Inc.*, 175 F.3d 266, 270 (2d Cir. 1999).

2. Because the district court can only enjoin ongoing or imminently threatened violations, it cannot enjoin state officials lacking authority under state law to commit the violations in question. Here, neither Vermont's attorney general nor its governor had the ability to condition renewal of a CPG on anything. Such was the case while Acts 160 and 74 were in effect, because both statutes conferred authority on the *Legislature* — no members of which are defendants in this action

[16] Entergy seeks reimbursement from the State of Vermont for more than $4.62 million in attorney's fees based on the district court's erroneous dormant Commerce Clause injunction under 42 U.S.C. §§ 1983 and 1988. *See* D.E. 184. The parties stipulated and the district court agreed to defer consideration of Entergy's fee request until the conclusion of this appeal.

— not on the offices of the governor or attorney general. *Cf.*, *e.g.*, *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (vacating injunction as to governor who had neither authority nor a "specific duty" to enforce a statute challenged as unconstitutional). Their inability to do so is even more apparent if, as the district court held, Acts 160 and 74 are preempted in whole or in part, leaving only the Board with authority over the renewal of Entergy's CPG.[17]

B. Even Under the Erroneous Legal Standard the District Court Applied, There Was No Evidence That the Board Possessed an Intent To Violate the Dormant Commerce Clause

The district court lacked any factual basis to conclude that any defendant had violated or intended to violate the dormant Commerce Clause by requiring Entergy to provide power at "below-wholesale-market" rates. SA101. Nothing in the record suggests that the Board imposed such a condition on Entergy or even threatened to do so. This Court has "not hesitated, on numerous occasions, to invalidate injunctions for lack of adequate findings." *Alleyne v. New York State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008). It should do so here.

1. The district court enjoined the Board — the only defendant capable of imposing conditions on the renewal of Entergy's CPG — but did not identify any

[17] If the Court upholds Act 160, the dormant Commerce Clause injunction should be vacated as moot. With Act 160 in place, no defendant, including the Board, has authority today to approve or condition Vermont Yankee's continued operations.

specific action taken by the Board or evidence of the Board's intent to violate the Constitution. Instead, the court pointed to prefiled testimony and briefing that the DPS submitted to the Board in 2009. But the DPS appears as a *litigant* before the Board,[18] SA89-91, and the filings the court cited were in a docket that is no longer active, *see supra* note 7. In addition, the court pointed to statements and letters from two legislators, none of which contained any indication or speculation as to the Board's intent to do anything.[19]

The district court's inability to identify any evidence of the Board's intent is unsurprising. The Board is an independent, quasi-judicial body with "the powers of a court of record," Vt. Stat. Ann. tit. 30, § 9, and it is free to reach a different conclusion than that advocated by the DPS in an adversarial proceeding. Moreover, the Board acts as a court and, like a court, does not forecast its decisions. It has not imposed any conditions for approval of Entergy's new CPG application, nor has it threatened to do so.

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[18] Although the DPS is a state agency, state actions do not violate the dormant Commerce Clause if they are "not translated into any difference in the substance of regulations imposed." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 655 (1994). This is particularly true when all that the DPS has done is filed briefs advocating that the Board take a particular position. *See Worcestor County Trust Co. v. Riley*, 302 U.S. 292, 298-300 (1937) (Eleventh Amendment bars challenges to state officials' advocacy positions in judicial proceedings).

[19] Although Peter Shumlin was one of those legislators, and is now governor, the governor is being sued in his official capacity, not his personal capacity, so his statements as a legislator are irrelevant to the propriety of enjoining any defendant here.

2. Until the Board acts to impose a condition that can be alleged to violate the dormant Commerce Clause, Entergy's claim is unripe because it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted); *see Connecticut v. Duncan*, 612 F.3d 107, 114 (2d Cir. 2010) (complaint seeking an injunction unripe where agency "has taken no final action" and "perhaps further administrative proceedings . . . would render such final action unnecessary").[20]

Entergy will suffer no harm or hardship in waiting for its claim to ripen. Entergy has every opportunity to present its arguments to the Board and to make other arguments (as it has already done) for why the Board should not impose any requirements regarding power agreements with Vermont utilities. If the Board imposes such conditions, Entergy may seek judicial review. *See, e.g.*, *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1107 (D.C. Cir. 2011) ("When and if relief is denied, [the plaintiff] will be able to seek judicial review . . . ."); *Worth v.*

[20] The Fifth Circuit's decision in *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 491 (5th Cir. 1986), is illustrative. In *Middle South*, the plaintiffs alleged a violation of the dormant Commerce Clause if the City of New Orleans exercised a purchase option. In anticipation of exercising its option, the City had created a new agency, proposed and passed a voter referendum, filed lawsuits, and created a task force that "recommend[ed] that the City exercise its option." *Id.* at 489-91. The court held that the complaint was nevertheless unripe until the City "actually votes to exercise the purchase option." *Id.* at 491.

Jackson, 451 F.3d 854, 862 (D.C. Cir. 2006) ("Such a disposition might give us pause if it would burden [plaintiff] unduly, but he remains free to challenge [the agency's actions] should they ever actually affect him. He just needs to wait.").

The Board's actions since the district court issued its ruling confirm that Entergy's dormant Commerce Clause claim was not ripe and, therefore, that no injunction should have issued. *Cf. Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974) ("[S]ince ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern."). Since the district court ruled, the Board effectively closed its previous docket and opened a new docket to consider Entergy's petition for a CPG for continued operations. *See supra* note 7. The Board will take new evidence and hear new arguments from the parties, and it is unlikely to act until late 2013. The injunction should be vacated and Entergy's claim found unripe because, in this new proceeding, "[i]t is just not possible for a litigant to prove in advance" that the process will yield "any particular result." *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990).

3. The district court's injunction is also flawed because it restrains a quasi-judicial state agency rather than a private actor, thereby violating principles of comity and federalism, as well as the limits imposed on suits against state

officials by *Ex Parte Young*.[21] *See Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986) ("[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." (quotation omitted)).

Consistent with the dormant Commerce Clause, a state may "regulate the sale of [products] within its borders," and indeed it "may seek low prices for its residents." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986). What a state may not do is discriminate against interstate commerce by regulating "commerce occurring wholly outside [a] State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989). The burden rests on a challenger to produce "substantial evidence of an actual discriminatory effect" on interstate commerce. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007).

The district court now looms above the expert state agency's proceedings pertaining to Entergy's CPG renewal, and the vagaries of the court's "below-wholesale-market" rate standard (described below) threaten to allow Entergy to interfere with that process. The injunction thus raises the specter of a federal court exercising "continuous supervision" over the state agency. *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974). Indeed, this concern is not hypothetical: Entergy has

[21] Because questions of Eleventh Amendment immunity are jurisdictional, they "can be raised at any stage of the proceedings." *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998).

already filed motions with the district court seeking (and receiving) the court's intervention in response to a letter that the Board's docket clerk sent to the parties. D.E. 190-196.

C. The District Court Misunderstood Interstate Power Markets and, Therefore, Misconstrued the Limited Evidence on Which It Relied

1. Even aside from the fact that the district court's injunction is based on contingent future events that may never occur, the injunction itself is based on a mistaken understanding of how wholesale markets for electricity operate. Entergy, like many sellers of energy, sells power on interstate markets under tariffs that authorize them to sell power at "market-based rates," defined as the rate agreed upon between a willing seller and buyer.[22] In this context, the "market rate" varies with each contract, and one cannot meaningfully describe a rate agreed upon by two parties as "below" market. Moreover, long-term contracts — at issue here — involve bargaining by two parties over prices, terms, and conditions set today based on estimates of what the market price will be years from now. The district court misunderstood the functioning of interstate power markets, misconstrued the limited evidence on which it relied, and therefore imposed conditions on the Board that are unworkable.

[22] *See, e.g.*, Order Authorizing Acquisition of Securities, *EAM Nelson Holding, LLC*, 138 FERC ¶ 62,281 (2012).

As the Supreme Court has explained, "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Power is bought and sold on interstate markets in a wide variety of ways, including on spot and ancillary markets, as well as pursuant to long-term contracts. *See Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 538-39 (2008); *Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *Boston Edison Co. v. FERC*, 856 F.2d 361, 366-67 (1st Cir. 1998). Yet the district court's injunction reviews rates in isolation, requiring a comparison of the rate at which Vermont Yankee "sell[s] power to Vermont utilities" and the "rates . . . available to wholesale customers in other states." SA101. One cannot compare the rates in two energy contracts and decide that one is "below" the other in any meaningful sense without comparing all of the terms and conditions associated with those rates. Such comparisons, moreover, are properly reserved to expert agencies, not district courts.

2. The conclusions the district court drew from the evidence on which it relied in entering the injunction reflect this misunderstanding of interstate power markets. At most, the evidence the court cited — DPS testimony and statements by two legislators — showed an interest in getting a "good deal" for Vermonters. SA52. A state should not be required to refrain from hard bargaining to avoid

running afoul of the dormant Commerce Clause, which is meant to "protect[ ] the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978).

For example, the DPS urged that Entergy be required to provide "'favorable terms *relative to alternatives*.'" SA90 (emphasis added) (quoting David Lamont's testimony for the DPS). Seeking low prices for nuclear power "relative to alternatives" — that is, power generated in other ways — is not the same as seeking prices below the market price for nuclear power or below the costs that Entergy incurs in producing that power. Rather, it is consistent with the state's ability to "seek low prices for its residents" without violating the dormant Commerce Clause. *Brown-Forman*, 476 U.S. at 582.

3. It is perfectly legitimate and constitutional for state officials (including the DPS and the Legislature) to push for a good deal. Indeed, states have long looked to questions of need and economic benefit as part of the licensing of in-state facilities, and this motivation is contemplated as permissible under the AEA. *See PG&E*, 461 U.S. at 205 (noting that "need," "cost," and "economic feasibility" of nuclear power facilities are permissible areas of state regulation).

Entergy conceded at trial that it provides benefits to state residents through long-term power-purchase agreements in New York and Michigan, *see* JA169-71, and it has touted such agreements and the "price of power" as worthy of

consideration in legislative decisions regarding Vermont Yankee, JA1224. *See also* JA1249 (Entergy employee testimony: "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."). With respect to the power-purchase agreement negotiations with Vermont utilities, Entergy admitted that these negotiations encompassed a wide range of non-price factors, and that no one from the State of Vermont told Entergy what to charge. JA171-75. Thus, even if some legislators expressed an "intent" to obtain a good deal or "'economic benefit'" for Vermonters, SA88, the district court's injunction on this basis rests on a misunderstanding of the permissible scope of state authority under the dormant Commerce Clause.

III. THE DISTRICT COURT ERRONEOUSLY FOUND ACT 74 PREEMPTED ON THE BASIS OF LEGISLATIVE HISTORY

If the Court concludes that Act 160 is not preempted, the Court need not address the district court's rulings regarding Act 74. Rather, the Court should vacate the judgment entered by the district court with respect to both Act 160 *and* Act 74, because Entergy's Act 74 claim would be moot and nonjusticiable. *Cf. New York City Employees' Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992) ("[T]he usual procedure when a civil case becomes moot on appeal is to vacate the judgment below and remand with directions to dismiss . . . .").

As long as Act 160 remains in force, Entergy is not aggrieved by Act 74. The Vermont Legislature has not given the approval that Act 160 requires for Vermont Yankee's continued operations past the date (March 21, 2012) it was originally set to close. Absent action by the Vermont Legislature, Entergy cannot receive a CPG for continued operations beyond that date. Act 74 thus causes no discrete injury to Entergy, and the Court should vacate the district court's declaratory and injunctive relief directed at Act 74. *See, e.g.*, *Rhodes v. Judiscak*, 676 F.3d 931, 933 (10th Cir. 2012) ("A case becomes moot when a plaintiff no longer suffers 'actual injury that can be redressed by a favorable judicial decision.'" (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983))). For the same reasons, the Court should vacate the injunction pending appeal issued by the district court as to section 6522(c)(2) of the Act.

If the Court does address Act 74, it should reverse the district court's holding because it committed the same error in analyzing Act 74 as it did with respect to Act 160. The court below improperly canvassed legislative history and relied on snippets of statements rather than adhering to the statutory text. In so doing, the court misunderstood the context of the larger debate taking place as to Vermont's energy future.

Act 74 is grounded in non-preempted purposes that are set forth in the statutory text and address the State's energy policy and goal of transitioning to

renewable energy sources. *See, e.g.*, Vt. Stat. Ann. tit. 10, § 6521 (explaining that "[t]he state's future power supply should be diverse, reliable, economically sound, and environmentally sustainable," and that "there is a great value in investing in renewable energy sources, efficient, combined heat and power facilities, and energy efficiency"). Those reasons explain why the Legislature decided to require further legislative approval for Entergy's continued operations after March 21, 2012 and they provide no basis for holding the statute preempted.

The Court's conclusion that the Legislature's *actual* intent was radiological safety is particularly untenable given that Entergy itself proposed and lobbied for the legislation that became Act 74 — a law that allowed Entergy to obtain a CPG for dry-cask storage on-site. Before there was any legislative action, Vermont's attorney general had opined that existing law — specifically portions of Chapter 157 of Title 10 not challenged in this lawsuit — did not allow that storage without legislative approval, meaning that as a practical matter, Entergy would have had to cease operations as early as 2007 or 2008. Rather than challenging that interpretation of state law in state court, Entergy sought legislative approval for its planned dry-cask storage. JA865-67, 224.

Against this background, the district court's concern that legislators spoke too often about the safety of dry-cask storage makes no sense. Whatever legislators may have said in hearings and debates about risks associated with spent fuel

storage, a majority ended up voting to approve the storage facility at the plant that permitted Vermont Yankee to *continue* operating. The Legislature did not question the NRC's authority regarding the storage of spent nuclear fuel; the statute in fact calls for compliance with "any order or requirement" of the NRC. Vt. Stat. Ann. tit. 10, § 6522(c)(2). If legislators thought that storage of spent fuel was unsafe, and if they meant to find some way to close the plant because of this concern, they could have voted not to approve the storage facility at all.

CONCLUSION

The district court's judgment should be reversed, the permanent injunction vacated, and the injunction pending appeal dissolved.

Respectfully submitted,

/s/ *David C. Frederick*

WILLIAM H. SORRELL
Attorney General for the State of Vermont
SCOT L. KLINE
BRIDGET C. ASAY
KYLE H. LANDIS-MARINELLO
Assistant Attorneys General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
WILLIAM J. RINNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Attorneys for Defendants – Appellants – Cross-Appellees
Peter Shumlin, William Sorrell, James Volz, John Burke and David Coen

June 4, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,983 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ *David C. Frederick*
David C. Frederick

June 4, 2012

ADDENDUM

Statutes and Regulations

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United States Code

42 U.S.C. § 2018. Agency jurisdiction

Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: *Provided*, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission.

42 U.S.C. § 2021. Cooperation with States

(a) Purpose

It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

* * *

(k) State regulation of activities for certain purposes

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

Code of Federal Regulations

10 C.F.R. § 51.71. Draft environmental impact statement—contents

(a) Scope. The draft environmental impact statement will be prepared in accordance with the scope decided upon in the scoping process required by §§ 51.26 and 51.29. As appropriate and to the extent required by the scope, the draft statement will address the topics in paragraphs (b), (c), (d) and (e) of this section and the matters specified in §§ 51.45, 51.50, 51.51, 51.52, 51.53, 51.54, 51.61 and 51.62.

* * *

(f) Preliminary recommendation. The draft environmental impact statement normally will include a preliminary recommendation by the NRC staff respecting the proposed action. This preliminary recommendation will be based on the information and analysis described in paragraphs (a) through (d) of this section and §§ 51.75, 51.76, 51.80, 51.85, and 51.95, as appropriate, and will be reached after considering the environmental effects of the proposed action and reasonable alternatives [FN4] and, except for supplemental environmental impact statements for the operating license renewal stage prepared pursuant to § 51.95(c), after weighing the costs and benefits of the proposed action. In lieu of a recommendation, the NRC staff may indicate in the draft statement that two or more alternatives remain under consideration.

[FN4] The consideration of reasonable alternatives to a proposed action involving nuclear power reactors (e.g., alternative energy sources) is intended to assist the NRC in meeting its NEPA obligations and does not preclude any State authority from making separate determinations with respect to these alternatives and in no way preempts, displaces, or affects the authority of States or other Federal agencies to address these issues.

* * *

Federal Register

Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996) (codified at 10 C.F.R. pt. 51)

[*28,467] AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations regarding environmental protection regulations for domestic licensing and related regulatory functions to establish new requirements for the environmental review of applications to renew the operating licenses of nuclear power plants. The amendment defines those environmental impacts for which a generic analysis has been performed that will be adopted in plant-specific reviews for license renewal and those environmental impacts for which plant-specific analyses are to be performed.

* * *

[*28,472] The purpose and need for the proposed action (renewal of an operating license) is to provide an option that allows for power generation capability beyond the term of a current nuclear power plant operating license to meet future system generating needs, as such needs may be determined by State, utility, and, where authorized, Federal (other than NRC) decisionmakers.

* * *

The decision standard would be used by NRC to determine whether, from an environmental perspective, it is **[*28,473]** reasonable to renew the operating license and allow State and utility decisionmakers the option of considering a currently operating nuclear power plant as an alternative for meeting future energy needs.

* * *

After the NRC makes its decision based on the safety and environmental considerations, the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers. This final decision will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction. The NRC has no authority or regulatory control over the ultimate selection of future energy alternatives. Likewise, the NRC has no regulatory power to ensure that environmentally superior energy alternatives are used in the future. Given the absence of the NRC's authority in the general area of energy planning, the NRC's rejection of a license renewal application based on the existence of a single superior alternative does not guarantee that such an alternative will be used. In fact, it is conceivable that the rejection of a license renewal application by the NRC in favor of an individual alternative may lead to the implementation of another alternative that has even greater environmental impacts than the proposed action, license renewal.

* * *