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

AMICUS BRIEF OF CONSERVATION LAW FOUNDATION, VERMONT NATURAL RESOURCES COUNCIL, NEW ENGLAND COALITION, AND VERMONT PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF DEFENDANTS—APPELLANTS—CROSS-APPELLEES

SANDRA LEVINE *
Conservation Law Foundation
15 East State Street #4
Montpelier, VT 05602
(802) 223-5992
(802) 223-0060 (facsimilie)

Attorney for Amici Conservation Law Foundation – New England Coalition – Vermont Natural Resources Council – Vermont Public Interest Research Group

June 12, 2012 *(Continued on inside front cover)*

* The following contributed to this brief and are not admitted in this jurisdiction:

JARED MARGOLIS
New England Coalition

JAMEY FIDEL
PAUL BRIERRE
Vermont Natural Resources Council

JAMES DUMONT

Vermont Public Interest Research Group

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amici curiae* Conservation Law Foundation, New England Coalition, Vermont Natural Resources Council and Vermont Public Interest Research Group state that they are all non-profit environmental organizations. None of the Environmental Amici has a parent corporation or subsidiary, or an affiliate that has issued shares or debt securities to the public.

STATEMENT OF INTEREST[1]

Conservation Law Foundation, New England Coalition, Vermont Natural Resources Council and Vermont Public Interest Research Group (Environmental Amici) are nonprofit advocacy organizations that have been significantly involved in the statutory, legislative, and regulatory processes regarding the Vermont Yankee facility for many years. Amici have significant expertise on the issues presented, and are working on behalf of their members to address responsible protection of our environmental resources and the economic effects of power supply decisions affected by use, supply and generation of electric power in Vermont.

Conservation Law Foundation (CLF) is a non-profit, member-driven environmental advocacy organization dedicated to protecting the people, environment and communities of New England. CLF has advocated for a transformation of our energy supply toward greater reliance on clean, renewable energy and energy efficiency. CLF has thousands of members across the Northeast

[1] This brief is filed with the consent of all parties. [Doc. 53]. Pursuant to Fed. R. App. P. 29(c)(5), amici curiae certify that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person – other than the amici curiae or its counsel – contributed money that was intended to fund preparing or submitting the brief.

who use the natural resources directly affected by the region's energy supply. CLF has been actively involved in the regulatory and legislative processes regarding Vermont Yankee for more than a decade.

Vermont Public Interest Group (VPIRG) works to promote and protect the health of Vermont's environment, people, and locally-based economy, and bring the voice of citizens to public policy debates that shape the future of Vermont. VPIRG currently has over 14,000 active supporters. VPIRG's top priority campaign over the past five years has been to promote an energy future based on local renewable energy resources. VPIRG has been involved in the legislative and regulatory processes regarding Vermont Yankee for decades. Over the past five years more than 3,500 Vermont households have played an active role with VPIRG to ensure that the Vermont Yankee reactor is retired on schedule.

Vermont Natural Resources Council (VNRC) is a non-profit, tax-exempt environmental organization with approximately 4,000 members, activists and supporters. VNRC's mission includes advocating before various courts and the legislature for the sustainable planning of Vermont's energy future for the long-term benefit of the citizens and the environment of the State. VNRC has advocated regarding environmental and energy legislation in Vermont and is participating in court and regulatory proceedings regarding Vermont Yankee.

The New England Coalition (NEC) is a non-profit organization with members throughout Vermont and New England. Expressly founded in 1971 to investigate the ramifications of developing nuclear power in New England, NEC provides public education and advocacy regarding nuclear power generation, and sustainable energy alternatives. NEC has a long history of involvement on Vermont Yankee Nuclear Power Station matters before the Vermont Public Service Board, Vermont Legislature, Vermont Environmental Court and the U.S. Nuclear Regulatory Commission. NEC was the only public interest intervenor before the NRC regarding Vermont Yankee License Renewal. NEC participated as *amicus curiae* before the District Court in this matter, and is a party before the PSB regarding Entergy Vermont Yankee's application for continued operation.

SUMMARY OF ARGUMENT

Federal law has long recognized the dual authority of both the states and the federal government regarding nuclear power facilities, leaving all matters except protection against radiation hazards within state authority. The State of Vermont has broad authority to regulate Vermont Yankee for purposes of power planning, and to control the economic, environmental and land-use ramifications of the continued operation of Vermont Yankee. The Vermont Legislature relied on Vermont's traditional authority when it enacted Act 74 and Act 160 with the express intent to continue an existing policy of energy planning with a focus on transitioning to renewable energy resources. The Vermont Legislature's actions were based on matters of traditional state regulatory concern regarding economics, power supply and the trustworthiness of the owners and operators of the state's largest electric generating facility, and are not preempted by federal law.

The District Court erred in determining Vermont's legislation is preempted. The Court's decision runs contrary to the well-established dual jurisdiction that Congress enacted regarding nuclear power generation. The District Court decision is premised on an untenable reliance on a small fraction of an incomplete and unreliable record of legislative testimony and fails to adequately examine the effects of the challenged statutes. The District Court's decision eviscerates the State's ability to protect its non-preempted interests, and should be overturned.

FACTUAL BACKGROUND

Since Entergy Nuclear Vermont Yankee (Entergy) purchased the Vermont Yankee facility in 2002, a steady stream of mishaps, misrepresentations and disappointments shattered Vermont's faith and trust in Vermont Yankee and its owners. From the failure to make any contributions to the decommissioning fund, followed by the collapse of the cooling towers in 2007, the proposed "spin off" of the plant to a highly leveraged subsidiary, the false statements to regulators and the broken promises of a power contract that never materialized, Entergy's actions have had what an Entergy executive described as a "corrosive effect" on the relationships needed to maintain a major electric generating facility within the State. JA-588, 959-60, 987, 993-95, 1092.

Despite past support for Vermont Yankee, over the past decade Vermont became increasingly fed up with these disappointments. Rather than take a *laissez faire* attitude and simply accept whatever happened regarding power supply and planning, Vermont continued its pro-active approach that involved careful and thoughtful oversight, planning and regulation of its energy future – an approach that included an "intense concern with their energy efficiency and with renewable energy," JA-184, moving quickly and aggressively on energy efficiency, JA-191,

and increasing the supply of renewable energy to improve the environment and be prepared for the time when contracts for power from Vermont Yankee and other large supplies expired. JA-194.

As scrutiny and concern increased, both Entergy and Vermont Yankee fared poorly, culminating in a Vermont Senate vote in 2010 that rejected the continued operation of Vermont Yankee for an additional twenty years. SA-52. As one of Vermont Yankee's strongest supporters stated on the Senate floor in support of his vote:

> I'll be voting no on the basis of what I know today…. What I know today is that we have a business partner in Entergy that, if it's [sic] board of directors and its management were thoroughly infiltrated by anti-nuclear activists, I do not believe they could have done a better job in destroying their own case. The dissembling, the prevarication, the lack of candor have been striking and there's not enough time to be able to correct that through management changes or through the kinds of things that we had hoped, with time, we could resolve.
>
> The second reason that really propels my vote of no are the financial arrangements that will leave us with a debt-ridden, highly-leveraged company that does not make economic sense….

JA-1576-77.

Rather than remedy this troubled history, Entergy sought, at the eleventh hour, to usurp Vermont law, walk away from its legal obligations, and force Vermont to accept the continued operation of a nuclear facility within its borders.

A. Public Service Board's 2002 Approval of Sale of Vermont Yankee to Entergy

In 2002, Entergy purchased the Vermont Yankee Nuclear Power facility. That purchase followed a request by Entergy to the Vermont Public Service Board (PSB or Board) for a "certificate of public good" allowing Entergy to purchase and operate the facility. SA-8; 30 V.S.A. § 231. Every generator of electricity in Vermont is required to obtain a certificate of public good (CPG). 30 V.S.A. § 231. Although the Board approved the sale, its approval only allowed operation of the plant until March 21, 2012. JA-605. The approval of the sale also required a portion of the proceeds to be set aside to support renewable energy development to begin providing for clean and renewable replacements for Vermont Yankee when it no longer produces power. JA-583, 603.

B. Requirement of Legislative Approval for Storage and Continued Operation

In 2005, the legislature passed Act 74, which allowed a limited expansion of the storage capacity for spent fuel, created the Clean Energy Development Fund to finance transitioning Vermont away from reliance on Vermont Yankee, and requires legislative approval for storage of spent nuclear fuel generated after March 21, 2012. The express statutory purpose of the law was to ensure that Vermont's "future power supply" is "diverse, reliable, economically sound, and environmentally sustainable." 10 V.S.A. § 6521(3).

In 2006, the Vermont Legislature passed Act 160, which requires Legislative approval before the Public Service Board can issue a new "certificate of public good." 30 V.S.A. § 248(e)(2). Act 160 confirmed that "[i]t *remains the policy* of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly…." 2006 Vt. Acts & Resolves No. 160, § 1(a)(emphasis added). The law provides for the Legislature to make its decision based on "*full, open, and informed public deliberation and discussion*." *Id.* (emphasis added). It then clearly states that the "pertinent factors" to be considered include "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.* (emphasis added). Act 160 provides for PSB review of petitions for continued operation of nuclear power facilities in Vermont, but does not allow the PSB to issue a CPG without the Legislature's approval. 30 V.S.A. § 248(e)(2).

C. Public Service Board Review of Petition for Continued Operation

During 2008 and 2009, following a request by Entergy for Board approval, the Public Service Board undertook proceedings to consider whether it should grant a new CPG to allow operation of the facility after March 21, 2012. JA-935. During this proceeding, an Entergy executive provided inaccurate statements regarding underground piping at the Vermont Yankee facility. JA-230-31. The

Entergy witness' misleading statements, made under oath, called into question not only the actual costs of decommissioning the Vermont Yankee station, but the veracity of the Vermont Yankee management as well. JA-959-60.

D. Vermont Senate Vote in 2010

Following the news of the inaccurate information, the public and the Vermont Legislature lost faith in the ability of Entergy to responsibly manage the facility. JA-231, 959-63. A proposal to spin off ownership of the plant to a new entity was received very skeptically by legislators who were concerned that it would leave Vermonters with an unfunded decommissioning risk. JA-230. Entergy's Executive Vice President described a "deeply negative public opinion on Entergy and VY" in early 2010. JA-960. As Entergy noted, even its most ardent supporters lost faith in Entergy. JA-959. In February, 2010, the Vermont Senate declined to approve a bill allowing continued operation of Vermont Yankee after March 21, 2012. SA-52.

E. Entergy's Lawsuit

Failing to remedy their many shortcomings, Entergy brought this suit in April 2011, more than one year after the Vermont Senate vote, more than three years after Entergy's request of the Public Service Board for a new certificate of

public good allowing continued operation, and more than five years after enactment of the Vermont statutes requiring legislative approval, claiming Vermont law is preempted by federal law.

ARGUMENT

I. The Court Erred in Determining Vermont's Actions are Preempted by Federal Law.

The Vermont Legislature's actions were based on matters of traditional state regulatory concern regarding economics, power supply and the trustworthiness of the owners and operators of the state's largest electric generating facility and are not preempted by federal law. Federal law has long recognized the dual authority of both the states and the federal government regarding nuclear power facilities, leaving all matters except protection against radiation hazards within state authority. *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 205, 212 (1983)*(PG&E)*.

The Atomic Energy Act (AEA) sets forth the scope and purpose of federal regulation of nuclear power. 42 U.S.C. § 2011 et seq.; *PG&E* 461 U.S. at 205, 212. The AEA includes savings clauses that preserve the authority of states to regulate nuclear power plants for any purpose other than radiological safety. Specifically, section 274(k) of the Act states:

> 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.

42 U.S.C. § 2021(k).[2]

[2] *See also*, 42 U.S.C. § 2018.

A. Authority to Regulate Vermont Yankee for Purposes of Power Planning

Vermont has broad authority to regulate Vermont Yankee for purposes of power planning. The Nuclear Regulatory Commission's interpretations of the AEA, as it relates to relicensing, confirm state authority over nuclear facilities for the purpose of energy planning. The NRC acknowledged, in its supplemental NEPA statement for the facility's license renewal, 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*."[3] JA-802 (emphasis added). Congress is well aware of the NRC's position that states may exercise their energy planning authority and not allow a nuclear power plant to continue operating beyond the term of its existing state license. It is clear that Congress accepts this regulatory consequence of dual federal and state jurisdiction. *See Pennsylvania v. Lockheed Martin Corp.*, 684 F.Supp.2d 564, 588 (M.D.Pa. 2010) citing *Silkwood,* 464 U.S. at 256 (Congress "quite willing to accept" the regulatory consequence of nuclear facilities being liable for damages if they do not conform to state standards). Thus, Vermont has the authority to regulate Entergy's

---

[3] The NRC's interpretations of the AEA are entitled to substantial deference. *See, e.g., Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 58-59 (2d Cir. 2004) (*Chevron* deference appropriate for formal agency adjudications and notice-and-comment rulemaking, and for less formal agency statements under defined circumstances).

plant, including making the final decision for energy planning purposes on whether to grant approval of a certificate of public good.

The Supreme Court confirmed that the Act's savings clauses set up a framework for dual regulation of nuclear power plants by the federal government and states in which such facilities are located. *PG&E,* 461 U.S. at 211. The Court emphasized tha "States exercise their traditional authority over the need for additional generating capacity, *the type of generating facilities to be licensed*, land use, ratemaking, and the like." *Id*. at 212 (emphasis added).[4]

A state may refuse to license the construction and operation of a nuclear facility even if that facility has already received NRC approval. *PG&E,* 461 U.S. at 205. Entergy must obtain separate approvals from both the NRC and the State. Just as Vermont had the authority to refuse to issue a CPG for the operation of the Vermont Yankee facility in 1972, it has the same authority to do so today.[5]

---

[4] *See also PG&E*, 461 U.S. at 205 (emphasis added) ("Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point require the States to construct *or authorize nuclear power plants* or prohibit the States from deciding, *as an absolute or conditional matter*, not to permit the construction of any further reactors."); *id*. at 216 (emphasis added) ("it is clear that the *States have been allowed to retain authority* over the need for electrical generating facilities *easily sufficient to permit a State so inclined to halt the construction of new nuclear power plants by refusing on economic grounds to issue certificates of public convenience* in individual proceedings.").

[5] Vermont's traditional authority is in no way diminished because Act 160 assigned it to the Legislature. *Id*. at 215 ("a State is not foreclosed from reaching the same decision through a legislative judgment").

Vermont has the authority not to approve the continued operation of Vermont Yankee after March 21, 2012. *Id*.

1. Focused on Energy Planning and Transitioning Vermont's Power Supply to Renewable Resources, the Legislature's Enactments are not Preempted.

The Vermont Legislature relied on Vermont's traditional authority when it enacted Act 74 and Act 160 with the express intent to continue an existing policy of energy planning with a focus on transitioning to renewable energy resources.[6]

Act 74 finds that the State needs to make a smooth transition to a diverse, reliable, economically sound and environmentally sustainable power supply.[7] 10 V.S.A. § 6521. The goal of increasing development of new sustainable power sources continues the Legislature's policy of providing significant support for renewable resources and accelerating investment in renewable projects. *Id*. Act 74 also created the Clean Energy Development Fund and directed that the specific "purposes of the fund shall be to promote the development and deployment of cost-

---

[6] Nuclear power is expressly excluded from the definition of renewable energy. 30 V.S.A. § 8002(2).

[7] It is worth noting that Act 74 was enacted within two weeks of Act 208 (titled "The Vermont Energy Security and Reliability Act") which required the Department of Public Service and the Legislature's joint energy committee to develop and implement "a comprehensive statewide public engagement process on energy planning, focused on electric energy supply choices facing the state beginning in 2012." 2005 Acts & Resolves No. 208, § 2.

effective and environmentally sustainable electric power resources,…primarily with respect to renewable energy resources, and the use of combined heat and power technologies." 10 V.S.A. § 6523(c).

Continuing the focus on energy planning expressed in Act 74, Act 160's first finding states that "[i]t *remains* the policy of the state" to allow operation of a nuclear power plant in Vermont only with approval of the General Assembly after full deliberation of pertinent factors, including the "*choice of power sources among various alternatives*." 2006 Acts & Resolves No. 160 § 1 (Legislative Policy and Purpose) (emphasis added).

The Supreme Court left no doubt how courts should interpret the language in Acts 74 and 160, emphasizing, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted). The Court further directed "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Id. at 254. Accordingly, this Court should end its inquiry here and hold that these statutes are not preempted because they unambiguously authorize the Legislature to decide whether to approve the continued operation of Vermont Yankee for energy planning purposes – a legitimate, non-preempted basis for regulation.

2. Act 74 and Act 160 are part of the Vermont Legislature's Larger Energy Planning Efforts

During the past decade, the Vermont Legislature passed numerous statutes to transition Vermont's energy portfolio towards greater reliance on renewable energy resources. Two examples of these energy planning goals are Act 45 of 2009 and Act 47 of 2011, although there are many other examples of the Legislature's consistent priority to promote renewable energy.[8]

Act 45 (titled "Vermont Energy Act of 2009") established standard pricing for electric power that was to be set at a level required to *provide incentive for the rapid development of renewable energy*. 2009 Acts & Resolves No. 45 § 4 (emphasis added).[9] Act 45 also required that federal stimulus funds be deposited in the Clean Energy Development Fund (CEDF) to finance thermal energy and geothermal projects, *id*. at § 5, and that the Agency of Natural Resources (ANR) consider applications for environmentally responsible commercial wind

[8] *See e.g.* 2006 Acts & resolves No. 208 (mandates public engagement process focused on the State's energy supply choices starting in 2012, amends CPG for hydro, and expands use of Clean Energy Fund for line upgrades to facilitate power generated by farms, bio-fuels and biomass); 2008 Acts & Resolves No. 209 (renewable energy from methane digesters); and 2008 Acts & Resolves No. 92 (sets goal of 25% renewable energy by 2017); *see also* Appellants' Brief fn.2.

[9] Act 45 expresses the Legislature's energy planning purposes using language from Act 74. Act 45 provides in relevant part, "[t]he purposes of the fund shall be to promote the development and deployment of cost-effective and environmentally sustainable electric power… *primarily with respect to renewable energy resources,* and the use of combined heat and power technologies." 2009 Acts & Resolves No. 45, § 5, amending 10 V.S.A. § 6523(c) (emphasis added).

development on state lands. *Id*. at § 8. In addition, Act 47 (titled "An Act Relating to the Vermont Energy Act of 2011") established a baseload renewable power portfolio requirement to be met by an existing biomass plant, 2011 Acts & Resolves No. 47, § 11, and amended existing law to allow municipalities to create property-assessed clean energy (PACE) districts to fund efficiency and renewable energy improvements. *Id*. at §§ 18a-18j.

The Legislature's actions on energy planning and shifting to renewable energy development responded to support from constituents, including community energy groups and town coordinators (approximately 100 at the time Act 47 was passed) for developing energy plans designed to facilitate the growth of renewable energy resources. Furthermore, stakeholder support was also informed by the published results of a deliberative poll conducted by Vermont's Department of Public Service in 2007, which showed that a majority of Vermonters overwhelmingly expressed their support for expanding renewable development projects in Vermont. Docket Entry from District Court proceeding at 152.

Testimony from experienced regulators explained the State's long-term energy planning goals and Vermont's legitimate interest in implementing those goals through legislation, demonstrating that Act 74 and Act 160 are part of the ongoing legislative effort to rapidly transition the State to greater reliance on economically and environmentally sustainable energy sources.

Dr. William Steinhurst has decades of experience working with the Vermont Department of Public Service, planning for Vermont's transition to renewable resources. JA-183-184. He worked on long range planning for the state's electricity system, JA-184, including preparation of the State's five year electric plans, JA-184. Dr. Steinhurst testified that the Legislature had an intense concern with energy efficiency and renewable energy. JA-184. The 2005 Vermont Electric Plan, issued the same year as Act 74 was enacted, included goals for ensuring reliable, economical, environmentally sound and sustainable energy. JA-191, 1020. Based on his experience working with the Legislature, Dr. Steinhurst explained that a legislator would have a reasonable concern that approving a new CPG for Vermont Yankee would conflict with Vermont's goal of developing a sustainable energy supply because the plant's large energy output would take up space in the electric system that could be occupied by renewable energy. JA-194.

Mr. Bradford, a former chair of the Maine Public Utilities Commission, JA-247, a former member of the Nuclear Regulatory Commission, JA-248, and a former chair of the New York Public Service Commission, JA-250, testified that the State has a legitimate interest in, *inter alia*, energy planning, promoting renewable energy resources, and the economic and environmental impacts of storage of nuclear waste. JA-259-260. The D.C. Circuit Court of Appeals recently confirmed this interest stating: "[t]he lack of progress on a permanent repository

has caused considerable uncertainty regarding the environmental effects of temporary SNF [spent nuclear fuel] storage and the reasonableness of continuing to license and relicense nuclear reactors." *New York et al. v. NRC*, No. 11-1045, slip op. at 5 (D.C. Cir. June 8, 2012).

The Legislature's track record shows that the Vermont Legislature has been passing energy legislation for years in response to constituents' strong support for transitioning to renewable energy. Vermont engaged in the legitimate exercise of its traditional authority over power planning, including the future use of nuclear power plants. Vermont's purposes, including planning, economics and reliability, are not only plausible, but show how the General Assembly has been preparing for the eventual closure of Vermont Yankee, whether in 2012 or thereafter, by enacting legislation, including Act 74 and Act 160, to assure that Vermont will be able to timely transition to an economical and environmentally sustainable energy supply.

A proper and thorough examination of the express purposes of the challenged statutes, as well as the established track record of the Legislature, demonstrates the laws are not preempted because they focus on transitioning Vermont towards renewable and sustainable energy resources.

B. The District Court's Decision Eviscerates Dual Jurisdiction

Rather than accept the Vermont Legislature's avowed purposes in enacting Acts 74 and 160, the Court imposed the unstated motive of "radiological health and safety" on the entirety of the Vermont Legislature's actions. SA-74. This runs contrary to the Supreme Court's decision in *PG&E*, wherein the Court recognized the inherent safety implications of spent nuclear fuel storage, but held California's statute prohibiting the construction of nuclear plants due to fuel-storage concerns, based California's "avowed economic purpose as the rationale for enacting" the legislation. *PG&E,* 461 U.S. at 216.[10] As with the California statute upheld in *PG&E*, Acts 74 and 160 pertain to non-preempted state concerns and are facially valid. The District Court's attempt to ascertain an impermissible legislative motive from cherry-picked statements must be disregarded.

The District Court not only relied on the legislative record in direct contradiction to the *PG&E* decision, it did so without establishing the context of those statements. The District Court cited several instances wherein the legislature discussed safety, yet provided no indication of the purpose of these statements, or how these discussions influenced the legislation. As the State argued in its Brief, when considering Act 74, some legislators asked questions about the safety of dry-

[10] The District Court even noted that "[a]s a general matter, the Pacific Gas Court recognized '[t]here are both safety and economic aspects to the nuclear waste issue.'" SA-62 (citing *PG&E* at 196).

cask storage or raised concerns about Entergy's plan to store spent fuel; however, these recorded comments involved only a handful of legislators, with many others explicitly acknowledging that safety issues were preempted by the federal government. *See* Appellants' Brief at 15-16.

Herein lies the danger of the District Court's ruling. The District Court erroneously determined that "even if an allegedly preempted statute is enacted with multiple purposes, some permissible, others impermissible, the impermissible purposes will doom the statute and it will be preempted." SA- 65. The Court found an impermissible purpose based only on cherry-picked statements in the legislative record that used the word "safety." This provides an easy means for anyone opposed to legislation focused on regulating the non-preempted aspects of nuclear power generation to defeat such legislation. By inserting into the legislative record a discussion of safety, opponents or legislators could provide fodder for a claim of impermissible purpose, even where, as here, the statutes themselves regulate non-preempted matters well within the purview of state authority. This would have a chilling effect on the open, informal legislative process in Vermont.

The result is an evisceration of the dual jurisdiction that Congress intended, making it impossible for states to regulate power supply, economic, land use and environmental concerns that are only within the states' purview, since the NRC

does not regulate in these fields.[11] The economic and environmental concerns inherent in power production (nuclear or otherwise) are intertwined with issues of plant reliability, and the District Court's ruling would open the door to transforming any legitimate purpose into a pretext for safety. The District Court erred in invalidating statutes based on tenuous safety-related concerns – even when those concerns were clearly not the basis for the regulation, and the State's avowed interest is valid. This untenable result must be overturned to preserve the states' legitimate ability to regulate the non-preempted implications of nuclear plant operations and conduct appropriate power supply planning.

C. Untrustworthiness of Entergy

The District Court failed to understand the corrosive effect of Vermont Yankee's misrepresentations on the State of Vermont. In 2008 and 2009, Entergy representatives claimed there were no underground pipes at the VY station carrying radionuclides, but subsequently admitted that such pipes did exist, and that they had leaked radioactive contaminants into the groundwater – a public trust resource in Vermont. JA-987-88; 10 V.S.A. § 1390. These statements, made to the

[11] The reliability of the plant is central to the environmental and economic concerns of the State in deciding whether it is in Vermont's best interests to allow continued operation. NRC Chairman Nils Diaz has stated that "NRC regulations and its oversight process focus on ensuring nuclear safety, whether the facility is operating at power or shut down. *The NRC's statutory authority does not extend to regulating the reliability of electrical generation.*" JA-971 (emphasis added).

legislature as well as under oath before the PSB, were entirely incorrect and misleading. JA-984-85.

The Public Oversight Panel, in its July 2010 Supplemental Report to the Vermont Legislature, characterized the tritium leak event as an "organization-wide breakdown" and found that "the cultural norms that allowed personnel to perpetuate misstatements for 12-months are endemic throughout the Vermont Yankee organization." JA-996. The Panel concluded that the misrepresentations regarding the presence of underground piping by Entergy officials "amplifies the Panel's earlier concern that there is a lack of a questioning attitude within [Entergy's] organization and corporate structure." *Id*.

As Entergy Executive Vice President Curtis Hebert acknowledged, the misleading testimony regarding the underground pipes had a "corrosive effect" on Entergy's relationship with Vermont, and even the plant's strongest supporter, former Governor James Douglas, "had lost confidence in Entergy and VY." JA-959. Entergy's attempt to spinoff the plant into a new corporate entity, Enexus, was seen "as a ploy by Entergy to shed decommissioning risk and ultimately stick Vermont taxpayers with the cost of decommissioning." *Id.* These events evidence the untrustworthiness and lack of credibility in Entergy management that precluded the Vermont Legislature from affirming a continued business relationship with Entergy.

Vermont statutes are filled with standards allowing for penalties or denying or revoking a license based on misrepresentation of material information. *See, e.g.* 30 V.S.A. § 30(e)(utilities); 16 V.S.A. § 1698(1)(f)(teachers license); 26 V.S.A. § 2296(a)(1)(real estate brokers); 23 V.S.A. § 3008(a)(2)(fuel dealers); 24 V.S.A. § 4455(telecommunications facility); 26 V.S.A. § 1736(b)(5)(physician's assistant); 26 V.S.A. § 2051(3)(pharmacist); 8 V.S.A. § 2758(a)(7)(banks); 26 V.S.A. § 2598(b)(3)(land surveyors). These statutes show the Vermont Legislature's longstanding commitment to refuse doing business with untrustworthy entities. If land surveyors, teachers, real estate brokers and pharmacists can lose or be denied a license for making a material misrepresentation, no less can be required of nuclear facility operators.

The false testimony that Entergy officials provided under oath calls into question Entergy's ability and willingness to meet its legal obligations. The Vermont Legislature acted well within traditional state authority in 2010 to refuse continued operation for a nuclear facility based on the misrepresentations and untrustworthiness of the owner and operator.

D. Proper exercise of Legislative Authority

The Vermont Legislature properly exercised its authority over Vermont Yankee. Matters regarding utility and power supply oversight and planning are shared between the Vermont Legislature and the Public Service Board. See 30

V.S.A. §§ 203, 209 (Board jurisdiction); § 218c (least cost utility planning); § 248 (electric and gas facilities and investments); § 8001 *et seq* (renewable energy supply). It is well settled law that the Vermont Public Service Board only has "such powers as are expressly conferred upon it by the Legislature." *Trybulski v. Bellows Falls Hydro-Electric Corp*., 112 Vt. 1, 7 (1941). As established by the Vermont Legislature, the Board has the authority to grant or deny a certificate of public good to any electric generating facility in Vermont. 30 V.S.A. § 231. The broad standard applied by the Board and set in statute is whether the facility will "promote the general good of the state." *Id.* This links the operation of the facility to the broader public good. In making these determinations, the Board exercises a legislative function, and acts in place of the Legislature with the authority delegated to it by the Legislature. *Auclair v. Vermont Elec. Power Co., Inc.*, 133 Vt. 22, 26, 329 A.2d 641, 644 (1974); *In re UPC Vermont Wind, LLC*, 2009 VT 19, 185 Vt. 296, 299, 969 A.2d 144, 147 (2009). That authority is the Legislature's, and it is the Legislature that has the prerogative to keep or delegate its authority. *Vermont Educ. Buildings Fin. Agency v. Mann*, 127 Vt. 262, 267, 247 A.2d 68, 72 (1968) (while the legislature cannot transfer its "supreme legislative power to enact laws," it may give an agency wide discretion "in the manner and method for the execution of statutes validly adopted").

Once delegated, the Legislature has the authority to remove entirely, limit, or jointly exercise that authority. *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 476 (D.C. Cir. 1982) *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 (1983) ; *Mead v. Arnell*, 117 Idaho 660, 673, 791 P.2d 410, 423 (1990). Since the Board only has the authority that the Legislature gives it, the Legislature itself must have the authority to step in and take back, or jointly exercise oversight with the Board. *Duquesne Light Co. v. Barash,* 488 U.S. 299, 313 (1989).

In Vermont, joint Legislative and Board oversight of utilities and Vermont Yankee is long standing. (JA-184-85, 194). Long before Act 160, the Vermont Legislature passed 30 V.S.A. § 248(e)(1) in 1977, which requires the approval of the Vermont Legislature before the Board issues a certificate of public good for the construction of a nuclear energy generating plant within the state. Act 160 merely confirmed that "[i]t *remains the policy* of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly…." 2006 Acts & Resolves No. 160, § 1(a)(emphasis added). The United States Supreme Court in *PG&E* recognized that the action taken to stop construction of a nuclear facility in California could be taken by the legislature or by an administrative agency acting with powers delegated to it by the legislature.

PG&E 461 U.S. at 215 (state not foreclosed from reaching same decision through legislative judgment as could be reached on a case-by-case basis through public utilities commission proceedings).

Simply because the Vermont Legislature brought back within its own purview a portion of the authority it previously delegated to the Board, it did not change the scope or reach of that authority. It simply changed the entity that would exercise the authority. Just as the Board can and has reviewed many aspects of Vermont Yankee's operation and how its ownership, financing, waste storage and power production comports with the general good of the state, so too can and has the Vermont Legislature. The actions taken by the Vermont Legislature in passing Act 160 and Act 74, and the later Senate vote denying continued operation of Vermont Yankee, are the same valid exercises of legislative authority based on the same sound matters of state concern of economics, power supply and the trustworthiness of the owners as has been exercised by the Board since the Vermont Yankee facility was first approved in the 1960s. See *In re Vermont Nuclear Power Corporation*, 86 PUR 3d 337, Vt.PSB Docket 3445 at 2-3(Sept 30, 1970)(describing history of Vermont Yankee approvals).

E. Vermont's Actions Fall within Traditional Police Power of the State

The District Court not only erred in departing from Supreme Court precedent governing preemption under the AEA, Appellants' Brief at 28-47, but also erred in departing from the established principle of preemption analysis that "where Congress legislates 'in a field which the States have traditionally occupied… we start with the assumption that the historic police power of the States [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of the Congress." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1208 (3d ed. 2000)(quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1946). This test "looks to the nature of the subject regulated rather than to the character of the federal regulatory scheme." *Id*. The authority of the states to choose or not choose power sources and regulation of the economics and reliability of these sources, are within the traditional "police powers" of the states. *PG&E*, 461 U.S. at 205, 207 & n.18, 212.

The two Acts condemned by the District Court fall within these traditional areas. Appellants' Brief at 31-35. The clear and manifest intent of Congress was *not* to regulate in these areas, which have been traditionally policed by the states. 42 U.S.C. §§ 2018, 2021(k); Appellants' Brief at 4-5. The District Court erred as a matter of law with its decision running contrary to the well-established dual jurisdiction that Congress enacted regarding nuclear power generation.

F. No Substantial and Direct Effects on Federal Act.

The District Court erred in failing to evaluate the effect of Vermont's statutes in determining their validity. Where a state statute itself articulates an intent that falls outside the boundaries of state authority, the role of the courts is simple – declare the law preempted. Where a statute expresses an intent that falls within those boundaries, the role of the courts is not to attempt to ferret out "actual" intent, but to examine the *effects* of the challenged statute. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992) (need to look to effects of the law to determine validity); TRIBE, *supra*, at 1177, 1181 & n.10 (a court that disregards Congressional disclaimer of intent to preempt "is illegitimately disregarding the source of its authority and… pursuing a fundamentally lawless path."). A "direct and substantial effect" interfering with the purpose of the federal scheme must be shown. *Id. See also English v. General Electric Co.*, 496 U.S. 72, 85 (1990) ("direct and substantial effect"); TRIBE, *supra*, at 1187-88 n.41, 1206 n.10, 1209; Appellants' Brief at 40.

On this basis, the Supreme Court upheld a jury verdict against a nuclear plant operator for harming an employee through exposure to radiation even though the operator complied at all times with federal radiation standards, and the verdict meant that state law imposed a tougher standard than the AEA. Tort law is a traditional area of state regulation, which Congress did not intend to preempt, and

its application to nuclear plant operations would not impose substantial and direct harm to the federal regulatory scheme. *Silkwood v. KerrMcGee Corp*., 464 U.S. 238 (1984); *English*, 496 U.S. at 86 (radiation-based injuries affect nuclear employers' decisions about radiological safety, however that effect is not substantial and direct enough to trigger preemption); TRIBE, *supra,* at 1189, 1209. Similarly, the effect of allowing state tort law to impose damages upon nuclear operators who retaliate against employees who have blown the whistle on federal safety violations will affect nuclear plant operation, but not in a direct and substantial manner sufficient to be preempted within the intent of Congress in adopting the Act. *English*, 496 U.S. at 85.

Appellees in this case failed to prove a direct and substantial effect on the federal regulatory scheme, and the District Court did not find such an effect. The District Court's ruling includes a caption addressing the "effect" of Act 160, but concludes only that Act 160 had the effect of permitting the Vermont Legislature to effectively deny Entergy's petition to renew its CPG by taking no action. SA-71-73. The court made no findings establishing that denial of a CPG petition had any effect on decisions concerning radiological safety by nuclear plant operators. *Id*. Instead, quoting snippets of the legislative history, the District Court addressed only the intent of a few legislators. SA-74-76.

Similarly, the decision contains a caption on the "effect" of Act 74, SA-78-81, but explicitly acknowledges that it is determining "effect" by examining "intent," and again, includes no findings of direct and substantial impact on the purposes of the Act. The District Court failed to apply the legal standard of demonstrating how the effects of the challenged statutes conflict with federal objectives. Since the challenged statutes do not have the effect of regulating radiological safety, the district court's order should be reversed.

CONCLUSION

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

Respectfully submitted,

/s/Sandra Levine Esq.
Sandra Levine, Esq.
Conservation Law Foundation
15 East State Street, Suite 4(
Montpelier, VT 05602
(802)-223-5992
(802)-223-0060 (facsimile)

Attorney for Amici Conservation Law Foundation – New England Coalition – Vermont Natural Resources Council – Vermont Public Interest Research Group

CERTIFICATE OF COMPLIANCE WITH F.R.A.P 32

I, Sandra Levine, hereby certify pursuant to F.R.A.P 32(a)(7) that, according to the word-count feature of Microsoft Word, the foregoing appellate brief contains 6,721 words (exclusive of the table of contents, table of authorities, and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in set in F. R. A. P. 29(d).

/s/Sandra Levine Esq.
Sandra Levine

Counsel for Conservation Law Foundation