UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs, v. PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD; and CHRISTOPHER RECCHIA, in his official capacity as Commissioner of THE VERMONT DEPARTMENT OF PUBLIC SERVICE, Defendants.	Civil Action No. 5:13-cv-64

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Entergy is asking this Court to intervene in a pending state proceeding and to enjoin a decision of the Vermont Public Service Board *before that decision is even made*. The Court cannot enjoin a hypothetical Board ruling as preempted, and Entergy is not at risk of irreparable harm. The Board's hearing officer has issued a Proposal For Decision ("PFD") (ECF No. 19-2) that recommends granting the requested certificate of public good ("CPG"), and advises that the schedule allows the Board to do so by June 10—Entergy's requested date for a ruling. And Entergy's claim that it must start work on June 11 is wrong. Entergy's Project Manager and sole witness asserting the June 11 deadline previously explained in company emails that, assuming a June 10 CPG issuance date, the project includes *three weeks* of schedule contingency, and Entergy told the Board last year that it could do the same work in less time.

In short, June 11 is an artificial deadline. There is no legal or factual basis for this Court to act now. And, even if the Court could consider Entergy's claims at this time, principles of comity and judicial restraint counsel in favor of allowing the Board to finish its proceeding and issue a decision, particularly given the "no enforcement" representation made by the Attorney General and the Department of Public Service in Defendants' motion to postpone the June 4 hearing ("Mot. to Postpone") (ECF No. 20).[1] The Court should either postpone the hearing

[1] As noted in the motion to postpone the hearing, the Attorney General 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. Mot. to Postpone 2 n.2. The representations made in that filing and in this one are thus made solely on behalf of the Attorney General and the Department. Entergy erroneously asserts that the Attorney General made a previous representation "on [the Board's] behalf" (Entergy's Memorandum in Support of Preliminary Injunction at 17 n.9 ("Ent. Mem.") (ECF No. 9-1)), despite acknowledging that that particular representation was not on the Board's behalf. *See* attached Decl. of Justin E. Kolber, Ex. 7 at 65 (Entergy counsel: "There has not been a position taken by the Board or on behalf of

presently scheduled for June 4 or deny the preliminary injunction, and allow the Board adequate time to issue a final decision on Entergy's pending petition.

This particular case does not have to be litigated, not now and likely not at all. If the Board grants the CPG, even Entergy admits that this case is over. Ent. Mem. 2. The Court should allow the Board proceedings to run their course.

ARGUMENT

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Supreme Court has held that a party seeking a preliminary injunction must show each of the following: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id*. at 20. This is a demanding standard, and even a party that satisfies the standard is not automatically entitled to an injunction. Because it is an "extraordinary remedy," a preliminary injunction is "never awarded as of right." *Id.* at 24.

Entergy cannot meet this standard, and its plea for federal court intervention in advance of a Board decision is unconvincing. First, Entergy cannot show a credible risk of irreparable harm. Indeed, at this point, the likely outcome of the Board proceeding is that the Board will grant the CPG (which the Department of Public Service supports in the generator docket at the Board), and do so by the date Entergy requested. Even if the Board does not rule by June 10,

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the Board with respect to the continued ability of the plant to operate after March 21st."); *id*. at 67 (Entergy counsel: "I perfectly understand . . . the [Board's] position" after Board Chairman explained that the Board does not confer with the Attorney General).

Entergy's claimed absolute need to start construction on June 11 is illusory. And regardless, Entergy does not face any actual or imminent threat of adverse action if it begins the construction project on June 11. Second, given the limited scope of federal preemption under the Atomic Energy Act and the broad range of authority reserved to the states, the CPG statute is not preempted. Because Entergy cannot show an actual conflict between state and federal law, it has no viable claim under the Supremacy Clause. Third, the other *Winter* factors—the balance of equities and the public interest—weigh decisively against Entergy. Lastly, principles of comity and judicial restraint counsel against addressing Entergy's claims before the Board rules.

I. Entergy has not demonstrated that it will suffer irreparable harm if an injunction is not granted by June 11, 2013.

Irreparable harm is cognizable only if it is "actual and imminent," and "not . . . speculative." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002). Entergy claims irreparable harm based on a temporary or permanent shutdown of the entire Vermont Yankee plant if it cannot start construction on the back-up generator by June 11, 2013. *See* Ent. Mem. 18-23. Any claim of irreparable harm fails because: (1) the Board is likely to grant the CPG, and to do so by June 10; (2) the June 11 construction date, according to Entergy's own internal documents, is not a true deadline; and (3) if the Court grants Defendants' motion to postpone the June 4 hearing, the Attorney General and the Department will not take enforcement action against Entergy, based on a lack of a state CPG, for beginning construction of the diesel generator project after June 11—eliminating any possible need for Court intervention at this time.

A. The Board is likely to grant the CPG by June 10, and even if it does not, Entergy faces no imminent threat of harm.

Entergy's claim of harm is speculative and uncertain: "*If* the Board fails to issue a CPG before [June 11], Vermont state law *would* prevent Entergy from commencing construction." Ent. Mem. 11-12 (emphasis added); *see id.* 28 & 23 (noting that the State "could" take action).[2] The fact that Entergy cannot point to a concrete risk of harm is enough to deny the preliminary injunction. But after Entergy filed its motion, the hearing officer released a PFD that recommends *granting* the CPG. The PFD acknowledges Entergy's request for a ruling by June 10, and states that the schedule allows the Board to rule by that date. Entergy is thus asking the Court to enjoin state officials for doing something they have not done and are not likely to do. Entergy therefore cannot show irreparable harm. *See Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999) ("Where a movant is found to be able to wait for the outcome . . . before obtaining preliminary injunctive relief, the irreparable harm he or she faces may not ordinarily be deemed 'imminent' as required to sustain a preliminary injunction.").

Because the State has neither taken nor threatened any enforcement action, nor is there a decision by the Board, this case is distinguishable from those cited by Entergy. *See* Ent. Mem. 19 (citing cases where state law was already decided or in effect); *see also, e.g.*, *Borey* v. *Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) ("[A] mere possibility of irreparable harm is

[2] For example, Entergy claims there is "uncertainty regarding the plant's future operation" that could result in loss of employees. Ent. Mem. 22. This same argument was already rejected by another Court in this same District in the previous case. *See Entergy v. Shumlin*, No. 1:11-cv-99-jgm, 2011 WL 2811317, at **3-4 (D. Vt. July 18, 2011) (*Entergy I*) (Entergy's proof did not show employee attrition as irreparable harm, and court noted that "[u]ncertainties in litigation" and business "dilemmas" are not irreparable harm warranting an injunction); *id.* at *5 (assisting Entergy with its "dilemma" or giving Entergy "a slightly better ability" to assess risks is not a basis for injunctive relief).

insufficient to justify the drastic remedy of a preliminary injunction."). Indeed, Entergy's assertions here are similar to those it made in seeking a preliminary injunction in 2011, which another Court in this District denied. Entergy's claim of irreparable harm there—as here—was based on its mere "dread of future [state] enforcement." *See Entergy I*, 2011 WL 2811317, at *3. The "regulatory certainty" Entergy seeks, Ent. Mem. 24, is not enough to justify a federal-court injunction.

B. Entergy's June 11 date to start construction is not a true deadline.

Entergy's assertion that any delay in the beginning of construction past June 11 will cause it harm is belied by its own documents. Entergy claims that in order to be compliant with NRC regulations as of September 1, 2013, "Entergy determined that construction must begin no later than June 11, 2013"—a proposed schedule of 11 ½ weeks, or 83 days. Decl. of George S. Thomas ¶ 10 (ECF No. 8-3). However, as Mr. Thomas stated in internal Entergy documents, the actual installation schedule is a "60-day period" with "*three weeks of schedule contingency*." *See* Kolber Ex. 1 (ECF No. 20-2) (emphasis added). He assumed a June 10 issuance date for the CPG, and further noted that the diesel generator and switchgear panel are fully functional and tested before shipment, which "should minimize start-up issues and associated schedule risk." *Id.* Another recent internal company project schedule (dated April 29, 2013) shows a timeline of just 58 days. *See* Kolber Ex. 2 at 1-2 (ECF No. 20-3) ("commence field construction activities" on June 10, 2013; "SBO DG equipment in service" on August 7, 2013). Further, the Board hearing officer noted a difference in Entergy's assertions regarding the necessary time, finding that when Entergy originally proposed the project in September 2012, its planned schedule called for

completion in 73 days to meet the then-anticipated deadline of January 1, 2013,[3] compared to an asserted 82 days in its later filing. *See* PFD at 7 n.9.[4]

A reasonable construction and installation schedule for the diesel generator project as proposed by Entergy is around 8 ½ weeks, including contingency and other factors. *See* attached Decl. of Robert Kischko ¶ 7. As noted above, Entergy asserts that it needs 11 ½ weeks, including "three weeks of schedule contingency." Kolber Ex. 1. Without factoring for delays and contingency, and if everything went as expected, the project could reasonably be completed in just 7 weeks (assuming a typical 40-hour 5-day workweek). Kischko Decl. ¶ 6. Further, there are numerous ways to shorten schedules and contingencies when needed on an expedited basis. *Id.* ¶ 8. For example, using a 10-hour workday at 6 days per week, absent any delays, could result in completion of the backup generator in just over 4 ½ weeks. *Id.* ¶ 9. Even under Entergy's timeframe, 11 ½ weeks could be shortened by 17% (or two weeks) simply by adding a sixth workday per week; seven work days per week results in completion in just over 8 weeks. *Id.* ¶ 10. Thus, Entergy does not face the "Hobson's choice" of either starting construction on June

[3] When the project was pushed back even later, Entergy's detailed "Project Schedule" (dated October 11, 2012 and subtitled "No Surprises") planned for completion in 66 days. *See* Kolber Ex. 3 (ECF No. 20-4) ("commence field construction activities" on December 17, 2012; "SBO DG equipment in service" on February 21, 2013).

[4] In its May 23, 2013 Opposition to Defendants' Motion to Postpone ("Ent. Opp.") (ECF No. 21), nearly a month after filing its original motion for preliminary injunction, Entergy provided a new construction schedule, changing some of the component construction activities or needed completion times, and described its past schedules as either "erroneous" or "insufficient" (Ent. Opp. 8) or as having issues that "had not been fully addressed" (Thomas Supp. Decl. ¶ 5 (ECF No. 21-1)). Entergy would have the Court accept its latest iteration of the schedule as the basis to issue a preliminary injunction premised on a finding that it must start construction on June 11, and not a day later.

11 without the CPG (and facing possible regulatory consequences) or having to shut down the plant for some period of time after September 1, if construction does not begin on June 11.

Moreover, even if some delay in construction raises the risk that Entergy will not have a diesel generator operational by September 1, Entergy has other options: for instance, it could use a temporary mobile generator for an interim period until the diesel generator is complete. Indeed, Entergy acknowledges such a temporary measure is possible. Ent. Mem. 19-20. In fact, Entergy developed that exact contingency plan in the event that "a CPG has not been issued" and "ISO-NE approves Vernon Hydro's removal from the Blackstart Program on a specified date." Kolber Ex. 4 (ECF No. 20-5). "If that occurred, the *preferred* approach to comply with 10 CFR 50.63 would be to install a temporary diesel generator." *Id.* (emphasis added). Entergy then developed a project schedule showing a 14-day period "to install [a temporary] Trailer Mounted SBO Generator." Kolber Ex. 5 (ECF No. 20-6). Entergy even planned for a shorter contingency, where rental backup generators would be available within one week "of our being notified that the existing power source is no longer going to be available." Kolber Ex. 6 (ECF No. 20-7). Entergy is thus incorrect in its claim that "it would be left unable to maintain continued compliance with the NRC's Station Blackout Rule" if it does not begin installing a permanent onsite diesel generator by June 11. Ent. Mem. 18.

C. Allowing Entergy to begin construction extinguishes any remaining threat of irreparable harm.

By separate motion, the State has moved to postpone the preliminary injunction hearing to June 14 or a date after June 10. *See* Mot. to Postpone. In that motion, the Attorney General and the Department of Public Service have represented that if the Court grants the stay, the Attorney General and the Department will not take any enforcement action against Entergy,

based on a lack of a state CPG, for starting construction of the diesel generator project after June 10. The "no enforcement" period would last until the Board rules and, if necessary, the Court reschedules the hearing and rules on Entergy's motion for a preliminary injunction. This representation removes any remaining uncertainty claimed by Entergy to cause irreparable harm based on a future failure of the Board to issue a decision by June 10.[5]

II. Entergy cannot show a substantial likelihood of success on its claim of preemption, because the CPG statute is not preempted, and any other relief Entergy seeks is not available under the Supremacy Clause.

Entergy does not have a persuasive claim of federal preemption. To begin with, federal preemption under the Atomic Energy Act is limited, and leaves substantial room for states to regulate non-safety aspects of nuclear plants. Entergy thus cannot prevail on its claim that the CPG statute is preempted here. And because Entergy cannot show an actual conflict between state and federal law, it has no viable claim under the Supremacy Clause. Its claim is also barred by sovereign immunity.

A. The scope of preemption under the Atomic Energy Act is limited and leaves ample room for state regulation of nuclear plants.

The federal Atomic Energy Act provides for dual regulation of nuclear plants by federal and state governments. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208, 211 (1983) ("*PG&E*"). The Act gives the federal government

[5] In its Opposition to Defendants' Motion to Postpone, Entergy discounts the representation made by the Attorney General and the Department and speculates about future actions the Public Service Board may take. Ent. Opp. 9-11. Entergy's fear of hypothetical future regulatory action does not justify a preliminary injunction that enjoins the Board in advance of its decision. The potential harm Entergy identifies is not only speculative, but would occur, if at all, long after June 10. If the Board took any of the actions Entergy identifies, Entergy could litigate its preemption claim as a defense at that time. There is no need for emergency injunctive relief now.

exclusive authority to regulate "the radiological safety aspects involved in the construction and operation of a nuclear plant." *Id.* at 205. Congress did not, however, displace the states' "traditional responsibility" to determine "questions of need, reliability, cost and other related state concerns." *Id.*; *see also English v. General Elec. Co.*, 496 U.S. 72, 81-83 (1990). The Act 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).

Entergy's assertion that the U.S. Nuclear Regulatory Commission ("NRC") "has exclusive jurisdiction to license the operation of nuclear power plants" (Ent. Mem. 3) is incorrect. As the Supreme Court has explained, while the federal government "maintains complete control of the safety and 'nuclear' aspects of energy generation," the states retain their "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking and the like." *PG&E*, 461 U.S. at 212. In *PG&E*, the Supreme Court upheld California's moratorium that effectively barred construction of *any* nuclear plant. Indeed, the NRC has explicitly and repeatedly acknowledged that its own jurisdiction is limited and that states have broad authority to regulate nuclear plants with respect to matters other than radiological safety. *See, e.g.*, 61 Fed. Reg. 28,467, 28,473 (June 5, 1996) (acknowledging role of States and other regulators in deciding whether nuclear plants continue to operate, "based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction"); 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.").

Other courts have also recognized the legitimate state role in regulating non-radiological aspects of nuclear plants. *See Kerr-McGee Chem. Corp. v. City of West Chicago*, 914 F.2d 820, 826-27 (7th Cir. 1990) (city not precluded from addressing "such matters as erosion, run-off, dust, and sediment," so long as city "does not directly interfere with the regulation of radiological hazards"; city may reject aspects of proposal if they do not directly involve radiation hazards and "are not selected for scrutiny by the City merely to delay or frustrate the project as a whole"); *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 55-56 (D. Me. 2000) (state may require planned spent nuclear fuel storage site to "comply with state requirements that do not impermissibly infringe on radiological, operational, construction, or safety issues, such as, for example, aesthetic landscaping requirements, or flood or soil erosion control measures").

Entergy's request for a CPG for the diesel generator illustrates how this system of dual regulation works in practice. The NRC has not mandated that Entergy install a diesel generator. What the NRC requires is that Vermont Yankee have an "alternate ac power source" that satisfies the NRC's station blackout rule. *See* 10 C.F.R. § 50.63. As Entergy acknowledges, that requirement may be met in different ways, one of which is installing a diesel generator at Vermont Yankee. Although the NRC has exclusive authority to decide whether Entergy has satisfied the requirement in 10 C.F.R. § 50.63, the State may review and regulate matters *not* considered by the NRC—for example, land use, aesthetics, and environmental impacts associated with construction. Indeed, the State has ample regulatory room, consistent with the Atomic Energy Act's framework of dual regulation, to scrutinize Entergy's specific proposal to install a diesel generator and to review aspects of the project unrelated to radiological safety.

The State accomplishes its regulatory review (in part) through the CPG process. Under Vermont law, a person constructing a new electric generating facility or substantially modifying an existing facility must obtain a CPG from the Public Service Board. *See* Vt. Stat. Ann. tit. 30, § 248(a)(2); Vt. Pub. Serv. Bd. R. 5.408. To grant a CPG, the Board must find that the proposal "will promote the general good of the state" and must address specific statutory criteria. Vt. Stat. Ann. tit. 30, § 248(a)(2), (b). Nothing in federal law preempts Vermont from applying this regulatory framework to Entergy's request to construct and install a fixed diesel generator at Vermont Yankee.

B. The CPG requirement is not preempted on its face or as applied to Entergy's proposal to install a diesel generator.

Entergy does not argue, nor could it, that Vermont's CPG requirement is preempted on its face or as applied to Vermont Yankee generally. *PG&E* squarely holds that States have authority to decide whether to license nuclear plants. 461 U.S. at 228 ("States may refuse to issue certificates of public convenience and necessity for individual nuclear power plants. They may establish siting and land use requirements for nuclear plants that are more stringent than those of the NRC."). Entergy must have a CPG to operate in Vermont, and it must—like any generator—obtain a new or amended CPG for any substantial change to Vermont Yankee.

With respect to the diesel generator project, Entergy's preemption claim fails. Neither conflict nor field preemption apply here.

1. No conflict preemption. "[T]o obtain declaratory or injunctive relief under the Supremacy Clause, a party seeking such relief must first establish a conflict between state and federal law." *Springfield Hospital v. Hoffman*, No. 09-cv-00254-cr, 2010 WL 3322716, at *14 (D. Vt. Apr. 9, 2010), *aff'd*, 488 Fed. Appx. 534, 2012 WL 5935559 (2d Cir. Nov. 28, 2012). A

conflict exists, for purposes of preemption, only where "compliance with both federal and state regulations is a physical impossibility," or "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citations and quotations omitted).

Entergy contends that the CPG requirement is "preempted as applied in this instance because it directly conflicts with the NRC's requirement that the VY station have a blackout generator." Ent. Mem. 13. But the supposed conflict Entergy describes does not exist. The Board has not denied Entergy's application for a CPG and it remains poised to act in advance of Entergy's artificial deadline. The mere fact that Entergy's CPG application is still pending does not create a conflict between state and federal law.

Furthermore, as explained above, there is no NRC requirement that Vermont Yankee "have a blackout generator"—the agency provides flexibility to nuclear plant operators bound by the station blackout rule. Entergy has complied with the NRC rule for years by using a different backup power source. Entergy's choice of one alternative among those available does not create a federal mandate. The NRC has not even approved Entergy's choice of a diesel generator to replace the Vernon dam as a backup power source. Kolber Ex. 10 (NRC letter noting that Entergy submitted a license amendment request for the diesel generator in December 2012 and that, as of April 8, 2013, the NRC is still "reviewing the information provided" and has requested additional information). The Board's review of Entergy's chosen means of complying with its federal obligation does not interfere with federal law. Vermont Yankee—under its past and current owner—has operated for forty years as a generating facility licensed by the NRC and

governed by Vermont's CPG requirement. The Board has repeatedly granted CPGs for Vermont Yankee, including for matters where the Board's jurisdiction overlaps with the NRC's authority.[6]

This case is nothing like *Long Island Lighting Co. v. City of Suffolk*, 628 F. Supp. 654 (E.D.N.Y. 1986) (*LILCO*), which Entergy cites. Ent. Mem. 15. In *LILCO*, the city made it a crime to participate in the NRC-mandated testing of an evacuation plan. That brought the city's ordinance into direct conflict with NRC requirements. In contrast, the CPG statute merely requires Entergy to work through the state administrative process to obtain a state license. Nothing in the statute or rule conflicts with federal law.

2. No field preemption. For similar reasons, Entergy's claim of field preemption also fails. To begin, Entergy mistakenly argues that the proposed diesel generator is a "federally required radiological safety system." Ent. Mem. 16. It is not, according to Entergy's own license amendment application to the NRC. *See* Kolber Ex. 14 at 2 ("The SBO DG and its auxiliary equipment will not be classified as Class 1E [safety systems], nor will it be designed to meet Class 1E safety system requirements."); *id.* at 18 (discussing the precedence of NRC approving "the use of non safety-related [diesel generator] as the AAC power source" at other nuclear plants). Again, the NRC has not specifically mandated the diesel generator that Entergy proposes to install. It has not even approved the generator. Entergy has chosen one possible option for satisfying an NRC requirement for a backup power source. Given the availability of alternatives, the State has authority to consider non-preempted matters related to a significant construction

[6] *See* Kolber Ex. 11 (Board granted CPG to build a parking lot that was needed for NRC security barrier compliance); Kolber Ex. 12 (Board granted CPG to construct fence required to meet NRC deadline); Kolber Ex. 13 at 335-36 (Entergy witness admitting the PSB granted various approvals for modifications at the plant, and that "the company never said that the State didn't have authority over a particular thing that the company wanted to do at the plant").

project at the plant, including land use, aesthetics, and environmental impacts. Indeed, by all indications, that is precisely what the Board intends to do. *See* PFD at 14-26 (hearing officer's analysis of criteria, including orderly development of the region, need for service, system stability and reliability, economic benefit, aesthetics, historic sites, air and water purity, the natural environment, outstanding resource waters, greenhouse gas impacts, water pollution, headwaters, waste disposal, water conservation, floodways, streams, shorelines, wetlands, water supply, soil erosion, local transportation systems, educational and municipal services, natural areas, necessary wildlife habitat and endangered species, public investments, resource planning, and energy planning); *id.* at 37 (hearing officer's conclusion after this analysis that CPG should be issued). In similar circumstances, the Seventh Circuit recognized state jurisdiction over matters such as "erosion, run-off, dust, and sediment," so long as it "does not directly interfere with the regulation of radiological hazards." *Kerr-McGee*, 914 F.2d at 826-27. And the district court in *Maine Yankee* also recognized that the state may impose appropriate land use and environmental requirements. 107 F. Supp. 2d at 55-56.

Indeed, Entergy has not disputed that the State has regulatory authority over aspects of the proposed construction project for the generator. In a hearing addressing this CPG petition, Entergy's counsel disclaimed any argument that the Board was entirely preempted (Kolber Ex. 15 at 32-34) and advised that "it is not our position that there is no role at all for the Public Service Board" (*id*. at 34). Similarly, in its memorandum supporting its request for a preliminary injunction, Entergy did not dispute that "Vermont has some reasonable authority to regulate the station blackout generator's location, its potential aesthetic impacts, and the like." Ent. Mem. 13 n.7; *id.* at 16 (not disputing that the State "may have some authority over the location and

appearance of the generator"); *see also* PFD at 14-26 (analyzing numerous economic, planning, environmental, and other impacts that fall solely within state authority).

Entergy tries to change position on this issue in its recently filed Opposition to Defendants' Motion to Postpone. There, Entergy argues for the first time that the CPG statute is an "ongoing violation of federal law" as applied to the diesel generator proposal. Ent. Opp. 12. Entergy's new position cannot be squared with its statements to the Public Service Board or, for that matter, with its decision to request a CPG from the Board in the first place. If Entergy in fact believed the Board had "no authority to adjudicate" this issue (Ent. Opp. 12), it should not have requested a CPG and accepted the Board's role in that process.

Entergy's acknowledgement that the Board has a "role" in reviewing the CPG petition for the diesel generator (Kolber Ex. 15 at 34) is binding, legally correct, and fatal to its preemption claim. The statute and rule do nothing more than require what Entergy concedes is permissible—state administrative review of the generator project. Because Entergy cannot point to a state law that conflicts with federal law, its preemption claim fails.

C. The Board's supposed "delay" in acting on Entergy's CPG petition does not create a conflict.

Entergy's preemption claim is not primarily directed at the CPG statute. Rather, Entergy's preemption allegations are largely based on its perception of the Board's actions in reviewing the CPG petition. Entergy describes the procedural history in detail and claims that the Board's actions have been "unusual" and "slow." Ent. Mem. 8-12.[7] Entergy complains about

[7] The subsection (j) process of 248 still requires thorough review of 21 applicable state criteria and can extend over a period of months, and indeed that thorough review is precisely what the hearing officer has done in the PFD issued on Entergy's CPG request here. PFD at 14-26; *see also, e.g.*, Kolber Ex. 16 (granting CPG under 248(j) to Central Vermont Public Service

what it views as the Board's "inaction" (Ent. Mem. 15 n.8) and asserts repeatedly—and with no factual support—that the Board's not-yet-issued decision will be pretextual (*id.* at 13 n.7, 16-17). The "obstacle" Entergy identifies is not a statute or rule, but what it deems a "failure" by the Board "timely to determine Entergy's application." *Id.* at 1. Entergy's request for relief is likewise directed at the actions of the Board and other Defendants. Entergy seeks an injunction "barring Defendants from taking any action to prevent Entergy from commencing construction of the proposed station blackout generator on June 11, 2013." *Id.* at 29.

Entergy's claim of undue delay (Ent. Mem. 1-2) is not only factually mistaken, but insufficient for federal preemption. Absent a conflict between state and federal law, the relief Entergy seeks is not available under the Supremacy Clause. *See, e.g.*, *Springfield Hospital*, 2010 WL 3322716, at *14.[8] To have a "viable claim under the Supremacy Clause," Entergy must identify some "state law or regulation" that conflicts with, and thus is preempted by, federal law. *Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 730 (5th Cir. 2009). Because the Supremacy Clause "'is not a source of any federal rights,'" federal courts—including this Court—have repeatedly refused to consider claims that the actions of state officials are preempted by federal law. *See id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105-07 (1989)); *Springfield Hospital*, 2010 WL 3322716, at *14 (claim that state

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to repair a substation in 19-page decision one year after the petitioner's filing); Kolber Ex. 17 (granting Entergy a 248(j) CPG to use a modular office 6 months after petition filing); Kolber Ex. 18 (granting 248(j) CPG to Vermont Technical College in 25-page decision 4 ½ months after petition filing).

[8] The Supremacy Clause is the sole source of Entergy's cause of action. Ent. Compl. ¶¶ 1, 15, 74 (ECF No. 1). Entergy has not asserted a claim directly under the Atomic Energy Act, nor could it. "The general enforcement provision of the AEA, 42 U.S.C. § 2271, expressly precludes private judicial enforcement of the Act . . . ." *Suffolk County v. Long Island Lighting Co.*, 728 F.2d 52, 59 (2d Cir. 1984).

officials did not comply with federal law in implementing Medicaid payment methodology did not arise under the Supremacy Clause), *aff'd*, 488 Fed. Appx. at 535 (plaintiff "failed to plead that a Vermont law conflicts with a federal law"); *Peruta v. City of Hartford*, No. 3:09-cv-1946, 2012 WL 3656366, at *13 (D. Conn. Aug. 24, 2012) (plaintiff's claim that City failed to comply with MUTCD guidelines for traffic signs did not state a claim under Supremacy Clause; plaintiff did not "identify a conflict between state and federal law").

Entergy is not without an adequate forum to assert preemption at the appropriate time if necessary. If state officials in the future pursue an enforcement action against Entergy for constructing the generator without a CPG, Entergy could assert preemption as a possible defense in that action. Absent an identified conflict between state and federal law, however, Entergy cannot seek relief under the Supremacy Clause directed at the conduct of state officials.

D. Entergy's claims are barred by sovereign immunity.

Not only has Entergy failed to state a viable preemption claim, but the relief it seeks is barred by sovereign immunity. A federal court can impose the drastic remedy of 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). Here, however, Entergy is concerned that the Board *might* deny the CPG (despite the Department of Public Service's filings *in support of* Entergy, and a PFD that recommends granting the CPG) and that *if* the CPG is denied, some state official *might* seek to prevent Entergy from constructing the generator. Speculation upon speculation does not add up to an actual and imminent threat that an identified state official will violate federal law. *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"). Likewise, Entergy's vague implication that the Board has not properly handled its petition amounts to nothing more than a disagreement over the application of state law, and cannot be addressed here. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-100 (1984) (*Ex Parte Young* actions limited to federal law).

Sovereign immunity bars Entergy's claim.

III. The other *Winter* factors weigh against granting preliminary relief.

In addition to likelihood of success on the merits and irreparable harm, the Supreme Court's decision in *Winter* requires a party seeking injunctive relief to show "that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. at 20. Entergy cannot do so.

A. The balance of equities does not favor granting an injunction.

Entergy greatly exaggerates its interest in receiving a preliminary injunction and simultaneously downplays the State's interest in avoiding such an injunction. Sandwiched between Entergy's various arguments about how the sky will fall if this Court does not act immediately to enjoin the State (a list of alleged harms that are all hypothetical at best) is a candid concession from Entergy that its interest in a preliminary injunction may only be to avoid alleged "irreparable loss of *regulatory certainty*." Ent. Mem. 24 (emphasis added). Even assuming that "regulatory certainty" could somehow be weighed in a balancing of equities, it has no weight here because Entergy has no regulatory certainty regarding continued operations.

In contrast to Entergy's alleged lack of "regulatory certainty," the State has real interests in protecting the role that the federal government has reserved for the states in regulating all non-preempted aspects of nuclear power plants. Indeed, if this Court were to remove the State role over the non-preempted aspects of a diesel generator, it would create the very type of "regulatory

vacuum" that the U.S. Supreme Court has said should not exist. *PG&E*, 461 U.S. at 208. The State Defendants have a further interest in not being subject to intervention by federal court and the threat of contempt if enjoined by a federal court *before the Board has even issued a ruling*. This latter interest not only tips the equities in favor of the State, but, as discussed earlier, requires that this Court stay its hand because the State Defendants have sovereign immunity from being enjoined by a federal court when they have not yet acted and there is thus no *ongoing* violation of federal law. *See supra* Part II.D.

B. A preliminary injunction would not serve the public interest.

Entergy also cannot meet its burden of showing that the requested injunction would serve the public interest. *Winter*, 555 U.S. at 20. Indeed, it disserves the public interest for this Court to expend valuable resources addressing a hypothetical situation that may never occur. As for the four specific claims that Entergy makes regarding the public interest, those arguments are either hypothetical, exaggerated, or both.

To begin, Entergy cannot seriously contend that a federal court injunction is required to "avert[] a core melt and containment failure." Ent. Mem. 26 (quotation omitted). Entergy is well aware that the NRC will not allow it to operate Vermont Yankee in a dangerous manner.

As for the other three factors Entergy points to—(1) that a shutdown would injure the local economy and tax base (*id.* at 26-27); (2) that a shutdown would increase power prices and decrease grid reliability (*id.* at 27); and (3) that a shutdown would increase greenhouse gas emissions (*id.* at 28)—these are all dependent on a hypothetical shutdown and thus irrelevant here. As shown by Entergy's reliance on its Public Service Board filings, these broader questions about the alleged benefits of Vermont Yankee's continued operation are being weighed by the

Board as it decides whether to grant a new CPG for Vermont Yankee. This Court should not intrude on the Board's state-law role to decide the "public good" for Vermont.

Further, even if these factors were somehow relevant, Entergy greatly exaggerates them. Entergy's claim that a shutdown would injure the local economy and tax base (*id.* at 26-27) relies on economic analyses that are demonstrably flawed. *See generally* Kolber Ex. 19 & Kolber Ex. 20. The State's energy plan, which calls for replacing nonrenewable sources of energy generation like Vermont Yankee with renewable sources of energy, will in fact lead to a net *gain* in employment of as much as 11,500 jobs within ten years. Kolber Ex. 21 at 7. And Entergy greatly exaggerates its claim that a shutdown would increase power prices and decrease grid reliability. Ent. Mem. 27. Any increase in power prices from Vermont Yankee's closure would be "*de minimis*," and the facility "is not needed for reliability" of the grid. Kolber Ex. 22 at 2-3. Finally, Entergy's claim that a shutdown would increase greenhouse gas emissions (Ent. Mem. 28) is questionable. In fact, many steps in the nuclear fuel cycle produce greenhouse gases—for instance, the milling, conversion, and enrichment of uranium ore—employ mostly fossil-fuel-based electricity. *See, e.g.*, Kolber Ex. 23 at 58-59 & nn.19-24. And regardless, the State's energy policy prioritizes the long-term benefits of moving toward renewables even if it leads to a slight short-term increase in greenhouse gas emissions. *See, e.g.*, Kolber Ex. 24 at 21.

IV. In the absence of a ruling from the Board, principles of comity and federalism counsel against intervention by this Court.

Essentially, Entergy argues that the State may not apply the CPG statute in a way that prevents Entergy from satisfying the NRC's blackout rule. But at this point, the Board has not ruled on the CPG petition, so the application of the CPG statute to Entergy's proposed construction project is uncertain and unknown. Rather than addressing federal constitutional

claims that may vanish within a few days, this Court should allow the state tribunal to decide state-law questions that will likely avoid unnecessary further litigation.

As the Second Circuit recently noted, "principles of federalism and comity instruct us to leave unresolved questions of state law to the states where those questions concern the state's interest in the administration of its government." *S. New England Tel. Co. v. Comcast Phone of Conn., Inc.*, No. 11-2332-cv, 2013 WL 1810837, at *6 (2d Cir. May 1, 2013) (quotation omitted). Indeed, this case squarely presents the serious federalism concerns that underlie the abstention doctrines. The Second Circuit has held that "*Pullman* abstention is appropriate in cases where a controlling issue of state law is uncertain." *Catlin v. Ambach*, 820 F.2d 588, 591 (2d Cir. 1987); *accord, e.g.*, *Osterweil v. Bartlett*, 706 F.3d 139, 145 (2d Cir. 2013) (O'Connor, J. (Ret.)) (where state defendant disputes whether state law actually imposes the requirement that plaintiff is challenging, it is "a case that involves unsettled state law issues preliminary to consideration of a federal constitutional question" and thus "falls within the heartland of *Pullman* abstention" (quotation omitted)).

The principles that underlie *Pullman* abstention and related doctrines provide strong support for postponing this Court's ruling until after the Board rules. One reason that federal courts abstain is to avoid unnecessary litigation and particularly unnecessary litigation of constitutional questions. *See, e.g.*, *Catlin*, 820 F.2d at 591 (courts should abstain under *Pullman* when "the dispute concerns the applicability of a challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation" (quotation and alteration marks omitted)); *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 646 (2d Cir. 2009) (abstention may be appropriate where addressing the merits "may encompass matters as to which there is no real

case or controversy"); *Nicholson v. Scoppetta*, 344 F.3d 154, 170 (2d Cir. 2003) (federal courts "must avoid unnecessary constitutional adjudication"; if a state proceeding "could conceivably" render the constitutional issue moot, "it is hard to understand in what sense our constitutional decision is 'necessary'"); *West v. Village of Morrisville*, 728 F.2d 130, 134 (2d Cir. 1984) ("[W]here there are complicated issues of unresolved federal constitutional law that may well be mooted by a state court determination of equally complex and unresolved issues of state law, federal court abstention is appropriate.").

CONCLUSION

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

Dated: May 24, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: Robert B. Hemley, Matthew B. Byrne, Sanford I. Weisburst, Robert C. Juman, and Kathleen M. Sullivan.

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