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.	Docket No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. For radiological safety reasons, the federal Nuclear Regulatory Commission ("NRC") requires all light-water cooled nuclear power plants, including the Vermont Yankee Nuclear Power Station ("VY Station"), to maintain a redundant emergency source of electrical power sufficient to withstand and to recover from a station blackout. 10 C.F.R. § 50.63 ("Station Blackout Rule"). This regulation was adopted under the authority of the federal Atomic Energy Act ("AEA"). By virtue of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the regulation preempts and invalidates any provision of state law that stands as an

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obstacle to compliance with the regulation or otherwise invades the field of federal authority over construction and operation of a nuclear power plant.

2. The only practical way for the VY Station to comply with the Station Blackout Rule after September 1, 2013 is through the installation of an on-site diesel-fired generator. Yet the actions of a Vermont quasi-judicial board have prevented Plaintiffs from acting to ensure compliance with this safety-based regulation.

3. The State of Vermont claims authority to control elements of the construction and operation of a federally licensed nuclear power plant like the VY Station by requiring that every such plant maintain a "certificate of public good" ("CPG") issued following a quasi-judicial proceeding before the Vermont Public Service Board ("PSB" or "Board"). *See* 30 V.S.A. § 248. Further, Vermont claims authority to require a CPG for any "substantial change" of a nuclear facility, *see id.* § 248(a)(2); Vt. Pub. Serv. Bd. R. 5.408; *In re Entergy Nuclear Vt. Yankee, LLC,* Dkt. 6812, 2005 WL 589600, at *3-4 (Vt. Pub. Serv. Bd. Feb. 18, 2005), including modifications dictated by the NRC's safety requirements such as the construction of the diesel-fired generator.

4. Despite the best efforts of Plaintiffs Entergy Nuclear Vermont Yankee, LLC ("ENVY"), and Entergy Nuclear Operations, Inc. ("ENOI," collectively "Plaintiffs" or "Entergy"), to comply with Vermont law by timely petitioning for a CPG to install the station blackout generator needed to satisfy the NRC's requirements, the PSB has to this point failed to adjudicate the petition and issue the CPG. In fact, on April 24, 2013, the PSB's Hearing Officer issued a scheduling order that makes clear that the PSB likely will *not* issue a final decision before the June 11, 2013 date on which Entergy must begin construction of the generator so that it may be fully installed by September 1, 2013. The order could have, but did not, give assurance

that the Board would grant the CPG before June 11, 2013, or even that the Board would issue a final decision (granting or denying the CPG) before that date.

5. Federal and state law are thus in conflict: Whereas the NRC requires Entergy to install a station blackout generator in order to ensure the safety of the VY Station, Vermont has failed to grant Entergy authority to do so in a timely fashion. Accordingly, Vermont's application of its CPG requirement in this instance is preempted. The State cannot prevent Entergy from complying with federal law by refusing to grant it authority to do so. *See Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."). Where, as here, federal and state law are in conflict, "state law must give way." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011).

6. More broadly, the State cannot regulate "the construction and operation of a nuclear plant," a field that Congress has completely occupied by enacting the AEA. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) ("*PG&E*"). Vermont's application of its CPG requirement to Entergy's proposed station blackout generator impermissibly invades that field because the blackout generator is essential to the VY Station's operation. Thus, the CPG requirement would be preempted here even if there were no direct conflict with federal law.

7. By this action, Plaintiffs seek a declaration that Defendants are preempted from applying the state's CPG requirement to prevent Plaintiffs from complying with federal law by constructing the station blackout generator. Plaintiffs also seek preliminary and permanent

injunctive relief prohibiting Vermont officials from enforcing the State's CPG requirement so as to prohibit compliance with federal law.

THE PARTIES

8. Plaintiff ENVY is a limited liability company. ENVY's sole member is another limited liability company named Entergy Nuclear Vermont Investment Company, LLC, which in turn has a sole member named Entergy Nuclear Holding Company #3 (also a limited liability company), which in turn has a sole member named Entergy Nuclear Holding Company. Entergy Nuclear Holding Company is a Delaware corporation that maintains its principal place of business in Texas. ENVY owns the VY Station.

9. Plaintiff ENOI is a Delaware corporation that maintains its principal place of business in Mississippi. ENOI operates the VY Station.

10. Plaintiffs are co-holders of NRC Renewed Facility Operating License No. DPR-28, which authorizes them to own and operate the VY Station until March 21, 2032.

11. Defendant Peter Shumlin is the Governor of the State of Vermont.

12. Defendant William Sorrell is the Attorney General of the State of Vermont.

13. Defendants James Volz, John Burke, and David Coen are the members of the PSB, an agency of the State of Vermont. The PSB is authorized by Vermont law to supervise the rates, quality of service, and overall financial management of Vermont's public utilities: electric, gas, telecommunications, and private water companies. The PSB is also authorized by Vermont law to review the environmental and economic impacts of proposals to purchase energy supply or build new energy facilities; monitor the safety of hydroelectric dams; review rates paid to independent power producers; and oversee the statewide Energy Efficiency Utility.

14. Defendant Christopher Recchia is Commissioner of the Vermont Department of Public Service ("DPS"), an agency of the State of Vermont charged with responsibility for supervising and directing the execution of all public utility laws and given authority to bring enforcement and other proceedings on its own motion before the PSB and Vermont courts.

JURISDICTION AND VENUE

15. The Court has subject-matter jurisdiction over the claims asserted in this action pursuant to 28 U.S.C. § 1331 (federal question), as this action involves interpretation of the AEA, 42 U.S.C. § 2011 *et seq.*, the regulations promulgated thereunder, and the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

16. Additionally, the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity) because the Plaintiffs, citizens of Delaware, Mississippi, and Texas, are completely diverse from the Defendants, who, on information and belief, are citizens of Vermont, and because the value of the object of the litigation, an operating nuclear power plant, exceeds $75,000.

17. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391 because, on information and belief, each of the Defendants resides in the State of Vermont. Venue is also properly vested in this Court because the VY Station is located in Vernon, Vermont, and most of the conduct that underlies this action occurred in Vermont.

18. There is a present and actual controversy between the parties.

19. The relief requested is authorized pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), and 28 U.S.C. § 1651(a) (injunctive relief).

SUBSTANTIVE ALLEGATIONS

I. REGULATORY OVERSIGHT OF PRIVATE NUCLEAR REACTORS IN THE UNITED STATES

20. The AEA "stemmed from Congress' belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing. The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors under the strict supervision of the [NRC]." *English v. General Elec. Co.*, 496 U.S. 72, 81 (1990). The AEA "provid[es] for licensing of private construction, ownership and operation of commercial nuclear power reactors for energy production under strict supervision by the [NRC]." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

21. The NRC in turn has established a comprehensive and rigorous licensing process for nuclear facilities. The NRC's licensing process includes, *inter alia*, assessment of the processes to be performed at the facility, the operating procedures, the facility and equipment, the use of the facility, and other technical specifications to ensure that any applicant will comply with all NRC regulations and that such operation will be done in a manner that protects public health and safety.

22. One such NRC requirement is 10 C.F.R. § 50.63, commonly known as the Station Blackout Rule, which requires a nuclear plant like the VY Station to maintain a redundant emergency source of alternating current ("AC") electrical power sufficient to withstand and recover from a "station blackout"—*i.e.*, an emergency in which the station loses the electricity needed to bring the plant to, and maintain it in, a safe shutdown condition. *See also* 10 C.F.R. § 50.2 (defining "station blackout" as a complete loss of AC power from the offsite electrical

system concurrent with the unavailability of the onsite emergency generators). The NRC adopted this requirement as part of a safety-focused regulatory scheme to prevent "core melt and containment failure" in the event of a station blackout. Station Blackout, 53 Fed. Reg. 23,203 (June 21, 1988).

23. Failure to comply with such a regulation could, if not corrected, lead to revocation of the NRC Renewed Facility Operating License, necessitating permanent shutdown of the VY Station for the protection of public health and safety. *See* 10 C.F.R. §§ 2.202(a)(5), 50.100. Failure to comply with an NRC safety regulation could also prompt federal civil and criminal penalties. *See* 42 U.S.C. §§ 2273, 2282; 10 C.F.R. § 50.110.

24. The Station Blackout Rule applies to every nuclear facility that is "licensed to operate," 10 C.F.R. § 50.63(a)(1), and thus the obligation continues at least until the license to operate is terminated through the filing of both a certification of the permanent cessation of operations and certification of the permanent removal of fuel from the reactor vessel. 10 C.F.R. § 50.82(a)(1) (license termination). If these prerequisites for license termination are not satisfied, the Station Blackout Rule will continue to require the VY Station to maintain an alternate AC generator—even if the facility is not generating electricity.

25. Under the AEA, the NRC has "exclusive authority over plant construction and operation," such that any attempt by a state or local government "to regulate the construction or operation of a nuclear power plant . . . would clearly be impermissible . . . even if enacted out of non-safety concerns." *PG&E*, 461 U.S. at 212. States have no traditional authority over the licensing, construction, or operation of nuclear power plants.

II. THE VY STATION

A. Description Of The VY Station And Its Operations

26. The VY Station, the only nuclear power plant constructed or operated in the history of the State of Vermont, has been operating since 1972. During its four decades of operation, the VY Station has provided substantial benefits to Vermont and the Vermont economy. The VY Station employs more than 600 people who live in communities throughout Vermont and the surrounding areas. It creates approximately $93 million in combined direct and indirect annual payroll across the state. The VY Station's ordinary operations emit virtually no regulated air pollutants (such as nitrogen oxides and sulfur dioxides) or greenhouse gases (such as carbon dioxide)

27. The VY Station has consistently operated in compliance with safety standards promulgated and enforced by the NRC.

B. Renewal of The VY Station's Federal License

28. The NRC initially licensed the VY Station to operate for a 40-year term ending March 21, 2012, and federal law provides such a license may be renewed for a 20-year term.

29. On January 27, 2006, Plaintiffs applied to the NRC for a 20-year license extension. This triggered an extensive NRC review of the VY Station, which spanned several years. *See* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/vermont-yankee.html#schedule (description of review of license renewal application).

30. On March 21, 2011, following "the NRC staff's thorough and extensive safety and environmental reviews of the application," the NRC issued a Renewed Facility Operating License for continued operation of the VY Station from March 22, 2012 through March 21, 2032. Thus, the VY Station was fully licensed for operation for another two decades as a matter of federal law.

III. VERMONT'S ASSERTION OF AUTHORITY OVER THE VY STATION

31. Despite Entergy having obtained approval from the federal regulatory agency with exclusive jurisdiction over the construction and operation of nuclear facilities, the State of Vermont has, through legislative, executive, and regulatory action, frequently asserted its authority over the operation of the VY Station.

A. The Sale Of The VY Station In 2002

32. Following its construction and initial licensing, the VY Station was owned by Vermont Yankee Nuclear Power Corporation ("VYNPC"). In 2001, Entergy successfully bid to purchase the plant, and VYPNC and Entergy sought the Board's approval for VYNPC to sell, and for Entergy to own and to operate, the VY Station.

33. The PSB subjected the parties, including Entergy, VYNPC, and others, to a 10-month-long proceeding, including ordering substantial discovery about the sale and holding multiple hearings (Dkt. No. 6545). During that process, Entergy, VYNPC, DPS, and two Vermont distribution utilities signed a Memorandum of Understanding ("MOU") that provided, *inter alia*, that the Board should limit the CPG's term to a period concurrent with the federal license.

34. The MOU contemplated that Entergy could, before the expiration date, apply to the Board for authority to continue operating; indeed, the MOU also contained a revenue-sharing agreement that would take effect only if such authority were granted. On June 13, 2002, the Board issued an order approving the sale and granting Entergy a CPG authorizing it to own and to operate the VY Station that, like the MOU, recognized that Entergy would likely seek to operate the VY Station beyond March 21, 2012. The Vermont Supreme Court affirmed. *In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 2003 VT 53, 175 Vt. 368, 829 A.2d 1284 (2003).

B. Legislative Action Related To Continued Operation

35. After Entergy purchased the VY Station, the Vermont legislature enacted statutes (unforeseeable at the time of the purchase) that deprived the PSB of authority to issue a CPG for post-March 21, 2012 operation of VY Station absent further legislative approval.

36. First, in 2005, the legislature enacted Act 74, 2005 Vt. Acts & Resolves No. 74, which authorized Entergy's construction of a spent-nuclear-fuel ("SNF") storage facility at the VY Station, but required additional legislative approval for storage at the VY Station of SNF derived from post-March 2012 operation. 10 V.S.A. § 6522(c). Because operation of the VY Station entails generation of SNF and storage of the SNF onsite,[1] this provision gave the legislature (rather than just the Board, as had been the case) authority to decide the VY Station's ability to operate past March 21, 2012.

37. In 2006, Act 160 extended the legislature's role from approval of storage of SNF derived from post-March 2012 operation to the VY Station's entire post-March 2012 operation, providing that no CPG could issue from the Board without the legislature's prior approval. 30 V.S.A. § 248(e)(2). The Act required Entergy to submit its petition for a new CPG no less than four years before March 21, 2012. *Id.* § 254(a)(1).

C. Board Proceedings On Continued Operation

38. On March 3, 2008, Entergy filed a petition with the Board "for such approvals from this Board and the Vermont General Assembly as may be required to operate the ... VY Station[] after March 21, 2012." That petition commenced Board Docket 7440. The parties filed initial testimony and rebuttal testimony, and the Board held technical hearings. Briefing was

[1] Although the U.S. Department of Energy ("DOE") is obligated to remove SNF from the VY Station, the DOE has breached that obligation. *See Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC*, 683 F.3d 1330, 1336-38 (Fed. Cir. 2012). As a result, the VY Station must store its SNF onsite until DOE fulfills its obligation.

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completed in August 2009, and by that time, the record contained sufficient evidence to warrant granting this "Operation CPG" for post-March 21, 2012 operation of the VY Station. DPS, the state agency that advocates for the public interest in Board proceedings, explained that, with one exception, the record supported continued operation of the VY Station because such operation would, *inter alia*:

- provide economic benefits to Vermont (so long as the VY Station operates reliably);
- have no undue adverse aesthetic effect if a vegetative buffer around the VY Station is maintained;
- be consistent with Vermont's 20-year electric plan; and
- have no undue adverse effect on existing transmission facilities.

DPS opposed issuance of a new CPG only on the ground that Entergy had not entered into a power purchase agreement ("PPA") to sell the VY Station's power to Vermont utilities at favorable pricing terms.

39. Although the Docket 7440 record was complete, the Vermont statutes discussed above prevented the Board from ruling on Entergy's application for the Operation CPG without legislative approval. The Board held a status conference in October 2009, during which several parties requested that the Board issue an "interim" ruling, but the Board declined to do so and proceedings in Docket 7440 halted.

D. The U.S. District Court's Judgment Invalidating The Vermont Statutes, Subsequent Board Proceedings, And Related Litigation

40. The Vermont legislature failed to issue the legislative approval required by Acts 74 and 160, despite Entergy's efforts to work amicably to obtain such approval. Accordingly, Entergy filed suit in April 2011 in this Court against the Board members, the Governor, and the

Attorney General, seeking, *inter alia*, to invalidate the legislative-approval requirements of Act 74 and Act 160 as preempted by the AEA.

41. Following a three-day bench trial, this Court entered a declaratory judgment and permanent injunctive relief holding the challenged state statutory provisions preempted and thus unenforceable. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 242-43 (D. Vt. 2012), *cross-appeals pending*, Nos. 12-707-cv(L), 12-791-cv(XAP) (2d Cir.).[2] The Court reached this holding based on "overwhelming evidence in the legislative record that Act 160 was grounded in radiological safety concerns and the concomitant desire to empower the legislature to act on those concerns in deciding the question of Vermont Yankee's continued operation." *Id.* at 230; *see also id.* at 231 ("The legislative history shows Act 74, including the provision that storage of spent nuclear fuel derived from post-March 21, 2012 operations requires legislative approval, is grounded in the legislature's radiological safety concerns.").

42. After this Court invalidated the Vermont statutes that had barred the Board from issuing a decision on Entergy's CPG petition, Entergy promptly moved on January 31, 2012 for a final decision by the Board in Docket 7440. The Board denied Entergy's motion and ordered Entergy to file an amended petition in a new docket. The Board explained that Docket 7440 contained evidence preempted from consideration under this Court's ruling and evidence that

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[2] The Court also found that defendants had sought to impose on Entergy (as a condition for granting a new CPG) a requirement to enter into a below-market PPA with Vermont utilities, and that such a demand violates the Dormant Commerce Clause; the Court enjoined defendants from imposing this condition in the future. *Entergy Nuclear*, 838 F. Supp. 2d at 239, 243. And the Court rejected the defendants' affirmative defenses, finding that Entergy did not unduly delay in bringing suit. *Id.* at 239-42.

The Court did not hold preempted 10 V.S.A. § 6522(c)(2), a provision limiting SNF storage, because the Court did not view it as having continuing effect after March 21, 2012. *See id.* at 232-33. But after the PSB Defendants subsequently took the position that the provision did purport to give it authority over spent fuel, Entergy filed a cross-appeal of the denial of relief

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had become stale over time. Entergy complied by filing an amended petition, which commenced Docket 7862. Proceedings in that docket are underway and briefing is scheduled to conclude on August 26, 2013, with a decision to follow at some point thereafter.

43. Even though the Board had yet to decide Entergy's petition for the Operation CPG as of March 19, 2012, the Board found that Entergy's continued operation of the VY Station during the time that petition is pending (the "Interim Period") violates two of its prior orders and a provision of Entergy's existing CPG. Although Vermont's statutes include a timely renewal licensing provision under which the VY Station continues to operate, 3 V.S.A. § 814(b), the Board ruled (contrary to the state Attorney General's representation to this Court on the Board members' behalf[3]) that its orders and CPG either overrode or fell outside the scope of Section 814(b). The Board's order held that Entergy's continued operation of the VY Station during the Interim Period violates Vermont law. Entergy has appealed this ruling to the Vermont Supreme Court and continues to operate the VY Station. *In re Petition of Entergy Nuclear Vermont Yankee, LLC, appeal docketed*, No. 2013-042 (Vt. Jan. 29, 2013).[4]

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with respect to that section. Entergy also sought, and this Court granted, an injunction pending appeal against enforcement of § 6522(c)(2), which the Court viewed as likely preempted.

[3] Entergy's motion for an injunction pending appeal against enforcement of § 6522(c)(2) had also sought a more general order preventing shutdown of the VY Station pending a decision on Entergy's petition for the Operation CPG. In response, the Attorney General, on behalf of all defendants in that case—*including the Board members*—represented (consistent with this Court's assumption) that Section 814(b) allows operation during the Interim Period. Based on this representation, the Court found it unnecessary to clarify the scope of its previous injunction. *See* Mem. & Order, ECF No. 209, at 4-5, *Entergy Nuclear*, 838 F. Supp. 2d 183 (D. Vt. Mar. 19, 2012) (No. 11-cv-99) ("The Attorney General has represented to the Court ... that its position is that 'Entergy may continue to operate under the terms of its current CPGs while its CPG petition remains pending at the Board' and does not take the position Vermont Yankee must close after March 21, 2012, while its petition for a renewed CPG remains pending before the Public Service Board. Given this representation, the Court does not see the need to consider at this time Entergy's request for an injunction pending appeal....") (citation omitted).

[4] The New England Coalition, a Vermont-based non-profit organization, filed a separate, original action in the Vermont Supreme Court (pursuant to 30 V.S.A. § 15) seeking an injunction

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E. Additional Board Proceedings On Entergy's Separate Petition For A Diesel-Driven Station Blackout Electric Generator

44. As a licensed and operational nuclear facility, the VY Station is subject to the NRC's regulations, including the Station Blackout Rule found in 10 C.F.R. § 50.63, which requires that the VY Station maintain an alternative emergency AC source of electrical power (called an "alternative AC source") sufficient to withstand and recover from a station blackout.

45. Entergy's current alternative AC source of emergency power, the Vernon Hydro Station (owned and operated by TransCanada), will not be available beginning September 1, 2013, forcing Entergy to seek alternative means of satisfying the NRC's Station Blackout Rule by that date. Some explanation of why the Vernon Hydro Station will soon be unavailable is necessary.

46. The Vernon Hydro Station has served for many years as part of an SO-New England ("ISO-NE")[5] regional program, "Black Start," under which certain generators are called upon to re-energize the regional electrical system after a system-wide blackout.

47. While the NRC does not specifically require that an offsite § 50.63 alternative AC power source be a member of a Black Start program to satisfy the Station Blackout Rule, participation in Black Start provides assurances of the resource's control, availability, and reliability in the event of a system-wide blackout that enable a Black Start resource to satisfy the

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to enforce the Board's interpretation of its orders and CPG, so as to prevent Entergy from continuing to operate the VY Station during the Interim Period. The Court found "no grounds to grant equitable relief" and therefore dismissed the complaint. *In re Investigation into General Order No. 45*, --- A.3d ---, 2013 VT 24.

[5] New England's wholesale electricity markets are operated by ISO-NE under the regulatory oversight of the Federal Energy Regulatory Commission. ISO-NE coordinates its operation of the New England region with neighboring regions overseen by different operators. As of 2010, New England's power system served 14 million people and included more than 350 generators, 8,000 miles of high-voltage transmission lines, and 13 interconnections with systems in New York and Canada.

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requirements of the NRC's Station Blackout Rule. For instance, NRC Regulatory Guide 1.155 explains that location, accessibility, and ability to start independently should be considered when selecting an offsite § 50.63 source, while ISO-NE requires Black Start generators to be capable of starting without outside electrical supply and to be located strategically within the transmission system. The NRC's approval of the Vernon Hydro Station as an acceptable station blackout generator was clearly based on its status as a Black Start generator.

48. As a result of changes by ISO-NE to the Black Start program that took effect beginning on March 12, 2012, however, the Vernon Hydro Station will no longer be a Black Start generator and will no longer qualify to serve as the VY Station's alternate AC source, beginning on September 1, 2013. Further, TransCanada has declined to enter into an independent contractual arrangement with Entergy to serve as the VY Station's blackout energy provider. As a result, the Vernon Hydro Station will no longer be available as the VY Station's alternative AC source beginning September 1, 2013.[6]

49. To remain in compliance with the Station Blackout Rule, Entergy must have in place an alternative AC power supply on or before the date on which the Vernon Hydro Station becomes unavailable. Entergy promptly evaluated alternative AC power sources after learning that the Vernon Hydro Station would no longer be available. After full consideration of several alternatives, Entergy determined that the only viable solution to ensure compliance with the Station Blackout Rule is to install a new diesel-fired backup generator on-site at the VY Station. DPS agreed that a CPG for the project should issue.

[6] It initially appeared to Entergy that the Vernon Hydro Station could elect to remove itself from the Black Start program as early as January 1, 2013. TransCanada since has provided assurances that the station will likely remain in the Black Start program until September 1, 2013.

50. Entergy selected a secure location within the existing plant site for the proposed installation of the station blackout generator. Entergy chose this location, in part, because it would have the least impact on area aesthetics. The site is located between two existing buildings, both taller than the proposed station blackout generator. Visibility is expected to be limited to, at most, the vents at the top of the generator enclosure. Any aesthetic impact of the project also will be diminished by the larger industrial landscape. The proposed installation site will comprise only a small percentage of the total VY Station complex. The site is also well situated to take advantage of existing electrical interconnection points, which will minimize construction impact.

51. Similarly the proposed installation of the station blackout generator would have limited impact on the environment. The natural environment of the proposed installation site already had been developed by construction of plant buildings, and is relatively flat from the grading associated with that earlier construction. The installation will not result in any undue water or air pollution. Construction activities are not expected to produce a significant amount of dust due to the soil type, size, and location of the installation, as well as the techniques that will be used for excavation. Noise from the installation and operation of the station blackout generator will not be unduly adverse because it should not exceed noise levels associated with normal plant operations. Other than a small, unnamed intermittent-stream-drainage channel that will not be impacted, there are no streams or river shorelines near the proposed installation site. Installation and operation of the station blackout generator will not result in adverse impacts to any recreational, cultural, historic, or scenic resources in the region.

52. The new diesel generator is intended to be run only in case of a blackout emergency as well as for routine testing and maintenance totaling about 24 hours per year.

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Emergency generators that operate for fewer than 100 hours per year are not considered significant sources of air pollution under Vermont Air Pollution Control Regulations. The expected annual fuel consumption is approximately 2,000 gallons, which would not cause any undue adverse impact to natural resources or the environment, or have any significant regional greenhouse gas impacts.

53. To be confident that the station blackout diesel generator can be constructed, tested, and operational by September 1, 2013 (the date on which the Vernon Hydro Station will cease to be available), Entergy must as a practical matter begin construction by June 11, 2013. In addition to the physical construction elements, such as excavating, pouring, curing, and grading a concrete pad, Entergy also must install the generator, integrated fuel tank base, and other components and then interconnect the generator with the VY Station.

F. Board Proceedings On Entergy's Petition For A CPG For The Diesel-Fired Station Blackout Electric Generator

54. The Board has interpreted 30 V.S.A. § 248(a)(2) to require a new or amended CPG for any substantial modification of an existing electrical generating facility. *See In re Entergy Nuclear Vt. Yankee, LLC*, 2005 WL 589600, at *3-4 ("Vermont law requires that companies, such as Entergy, constructing ***or modifying*** a generating facility within the state of Vermont obtain approval from the Board prior to site preparation or construction.") (citing 30 V.S.A. § 248(a)(2)) (emphasis added); Vt. Pub. Serv. Bd. R. 5.408. Therefore, Entergy was required by state law to obtain a CPG for construction of the new station blackout generator it planned to construct on the VY Station site to comply with the NRC's requirements.

55. Entergy promptly began the process of obtaining a CPG for the diesel-fired station blackout generator from the Board by providing a 45-day advanced pre-filing notice of the proposed project and intention to file a petition for a CPG to local planning commissions on

July 24, 2012. *See* 30 V.S.A. § 248(f). From the beginning, Entergy made clear its view that federal law preempts the PSB from denying a CPG, but also expressed its willingness in good faith to seek the CPG from the PSB for review of the generator with respect to any issues not within the exclusive jurisdiction of the NRC.

56. On September 7, 2012, Entergy petitioned the Board for issuance of a new CPG to construct and install a station blackout generator. Entergy's petition invoked 30 V.S.A. § 248(j), which provides an expedited CPG procedure for projects that have minor impacts, "limited size and scope," and "do[] not raise a significant issue with respect to the substantive criteria" for issuing a CPG. A Section 248(j) petition requires, among other things, that the Board issue a notice and request for public comments prior to issuing a decision. Entergy asked the Board to proceed with that step and to handle the petition in expedited fashion in order to complete the proceeding by October 19, 2012—leaving enough time to complete construction before the then-anticipated loss of the Vernon Hydro Station as an available power source on January 1, 2013. On September 18, 2012, Entergy followed up with an additional letter to the Board requesting docketing and expedited resolution of the proceeding.

57. The Board has not, however, afforded Entergy's petition the ordinary schedule followed in Section 248(j) cases, in which the petition is promptly docketed, the notice and request for comments promptly issued, and a decision promptly rendered by the Board. Instead, the Board took several unusual steps that produced delay, including imposing preconditions to the Board's consideration of the petition before even docketing the September 7, 2012 petition, and failing to issue public notice of the petition until February 15, 2013. It was not until April 24, 2013, after Entergy had advised the Board by letter on April 15, 2013 that it would file this Complaint by April 25, 2013, that the Board's Hearing Officer finally issued a scheduling order

for a proposal for decision on the CPG petition; but that schedule makes it unlikely that the Board will grant the CPG before June 11, 2013. The timeline of the petition and the Board's consideration of it is described in detail below.

58. Instead of issuing public notice as required by 30 V.S.A. § 248(j), on September 20, 2012 the Board instead wrote to the parties in Docket 7862 (Entergy's pending petition for the Operation CPG), requesting comments on several questions relating to Entergy's continued operation of the VY Station after March 21, 2012—the subject of the dispute now pending before the Vermont Supreme Court. *See supra* ¶ 43.

59. Entergy, DPS, and the Conservation Law Foundation timely responded to the Board's request, but the Board did not enter an order opening a proceeding for review of the generator petition, Docket 7964, until December 27, 2012, nearly four months after the petition was filed. Defendant Coen dissented from the order opening an investigation, taking the position that the Board should not even consider the question whether Entergy should be permitted to install a station blackout generator until Entergy either ceases to operate the VY Station or receives the Operation CPG for which it has petitioned.

60. Entergy, along with the other interested parties, attended a prehearing conference on January 17, 2013, during which all parties agreed that the Board's consideration of the CPG petition would not recognize Entergy's right to operate the VY Station after March 21, 2013 or otherwise supersede the decision of the Board in Docket 7862, the petition for the Operation CPG.

61. In the early months of 2013, two parties from Docket 7862, New England Coalition ("NEC") and Vermont Public Interest Research Group ("VPIRG"), filed motions to intervene in Docket 7964, expressly for the purpose of opposing Entergy's petition. In NEC's

concurrent motion to consolidate, and VPIRG's subsequent support of the motion to consolidate, both parties made clear their intention to block Entergy's efforts to comply with the NRC regulation in a timely fashion by urging the Board either to delay the proceeding until final resolution of Dockets 7862 and 7440, including all appeals, or to consolidate the station blackout generator docket (Dkt. No. 7964) with the larger docket on the Operation CPG (Dkt. No. 7862).

62. On February 7, 2013, Entergy wrote another letter to the Board, noting that Entergy had satisfied all of the Board's requests to that point, and therefore requesting that the determination of the merits of the CPG petition proceed "without further delay." The Board did not respond to this letter, but issued an order that same day stating that "[t]he remainder of the schedule will be determined following the receipt of comments about whether the petition involves significant issues" under Vermont law.

63. On February 15, 2013—more than a week after the Board's order concerning the schedule and five months after Entergy filed its petition—the Board issued the notice and request for comments required by 30 V.S.A. § 248(j)(2). The notice directed that comments on the "significant issues" question be submitted by March 15, 2013. On March 15, 2013, DPS and the Town of Vernon filed comments recommending that the petition for a CPG be granted.

64. On March 1, 2013, Entergy again wrote to the Board regarding the schedule for resolving the petition. Defendant Volz, Chairman of the Board, had indicated during a February hearing in Docket 7862 (the Operation CPG proceeding) that the Board intended the two dockets to proceed simultaneously. Entergy's March 1, 2013 letter pointed out that such a schedule would prevent commencement of the construction of the station blackout generator in time for installation to be complete by September 1, 2013, as 10 C.F.R. § 50.63 requires. Entergy

therefore requested that the Board set a schedule that would allow issuance of a CPG by June 10, 2013.

65. On March 12, 2013, the Board issued an order granting NEC's and VPIRG's motions to intervene. In that order, the Board stated that the "petition is now being processed based . . . on the assumption that any CPG issued in this docket [7964] will not become effective unless and until the Docket 7862 CPG is granted." The Board went on to assert that, while it is "cognizant of [Entergy's] concerns about the timing" of the petition's resolution, those concerns "do not supercede [sic] the statutory and regulatory process under which this petition must be considered."

66. The Board finally addressed Entergy's March 1, 2013 request for clarification when, on March 22, 2013, it entered an order denying NEC's motion to consolidate the proceedings. In that order, the Board stated that it had not ordered that the proceedings' schedules be aligned, but it did not enter a scheduling order.

67. On March 26, 2013, the Board directed the parties to respond to a series of questions on the merits of the petition; the parties filed responses on April 12, 2013. The Board also ordered a second round of comments and objections, to be completed by April 22. No additional comments were filed.

68. On April 15, 2013, Entergy sent a letter to the Board advising of Entergy's intention to file this action in federal court no later than April 25, 2013, and further stating that Entergy would dismiss the action if and when a CPG is granted for the generator before June 11, 2013.

69. On April 24, 2013, the Board's Hearing Officer issued an order "conclud[ing] that it is now appropriate for the parties to address the questions the Board posed in its December 27

Order [opening an investigation]." The order set a deadline of May 6, 2013 for initial briefing with reply briefs due on May 13, 2013. The order indicated that the Hearing Officer likely would issue a "proposal for decision" "later in May." The order could have, but did not, provide assurance that the Board would grant the CPG before June 11, 2013, or even that the Board would issue a final decision (granting or denying the CPG) before June 11, 2013.

70. The blackout generator CPG petition has now been pending before the Board for more than seven months. By way of contrast, a petition (like Entergy's) that is properly filed under 30 V.S.A. § 248(j) is ordinarily fully adjudicated within approximately three months of filing.

71. Indeed, the Board's April 24, 2013 order provides additional indications of the unusual manner in which the Board has treated Entergy's petition. In a typical case under Section 248(j), the petition is not assigned to a Hearing Officer for issuance of a proposal for decision. Rather than having this extra step in the process, the Board rules directly on the petition, thereby allowing a final decision to issue more quickly. Once a proposal for decision issues, however, parties typically are provided a ten- or fifteen-day period during which they may submit comments on the proposal for decision. *See* 3 V.S.A. § 811. Parties also may request oral argument. *Id.*

72. The slow pace of the proceedings strongly suggests that, even if the Board issues a favorable ruling, it will not do so prior to June 11, 2013 (the day on which Entergy must begin construction in order to be confident that the blackout generator can be installed, tested, and operational by September 1, 2013). If the Board fails to issue a CPG before that date and Entergy complies with state law, state law will force Entergy into noncompliance with the controlling NRC regulations.

CLAIMS FOR RELIEF

COUNT I
ATOMIC ENERGY ACT CONFLICT PREEMPTION
(DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF)

73. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 72 as if fully set forth herein.

74. Congress has vested the NRC, through the AEA, with exclusive jurisdiction over the licensing, operation, and construction of nuclear power facilities. NRC regulations validly promulgated pursuant to this jurisdiction are the "supreme Law of the Land," U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, such regulations preempt and invalidate any provision of state law with which they conflict.

75. The NRC has validly promulgated a regulation, 10 C.F.R. § 50.63, that requires the VY Station to maintain a redundant emergency source of electrical power sufficient to withstand and recover from a "station blackout."

76. The only practical way for Entergy to fulfill this requirement after September 1, 2013 is to construct and install a diesel-powered station blackout generator on site.

77. Vermont law purports to prohibit construction of such a generator in the absence of a CPG. Despite Entergy's timely and good-faith attempt to comply with this CPG requirement, the Board has failed to issue a decision on Entergy's application and appears unlikely to grant the application before June 11, 2013.

78. Vermont law, as applied here, thus currently prohibits construction and installation of a station blackout generator that Entergy must construct and install to meet federal requirements. Absent declaratory and injunctive relief, Entergy will be in the untenable position of being out of compliance with either the state or federal regulatory scheme.

79. Vermont law is in direct conflict with the NRC's regulation, and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Any such provision of state law is preempted by federal law and invalid pursuant to the Supremacy Clause.

80. The present risk that the Board will fail to issue a CPG to construct the station blackout generator before June 11, 2013 has immediate adverse consequences for Entergy by forcing it not to comply with either state law or the NRC's federal requirements. Violation of either set of regulations would subject Entergy to civil and criminal sanctions and other harms, some of which are irreparable.

81. Thus, an actual controversy exists between Plaintiffs and Defendants concerning whether federal law preempts Vermont, through the PSB, from stopping or otherwise interfering (including by imposing conditions that amount to interference) with the construction of a federally mandated station blackout generator at VY Station.

82. Plaintiffs are entitled to a declaration that Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, is preempted and invalid to the extent it would deny Entergy authority to begin construction of the station blackout generator on June 11, 2013, to complete such construction by September 1, 2013, or to operate it as required thereafter, because any such provision of state law conflicts with federal law.

83. Plaintiffs are also entitled to preliminary and permanent injunctions barring Defendants from enforcing any provision of Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, so as to prevent Entergy from beginning construction of the station blackout generator on June 11, 2013, completing such construction by September 1, 2013, or operating the generator as required thereafter.

COUNT II
ATOMIC ENERGY ACT FIELD PREEMPTION
(DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF)

84. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 83 as if fully set forth herein.

85. The NRC's requirement that the VY Station maintain a station blackout generator is a regulation of the plant's operation. This requirement is also an aspect of the NRC's comprehensive regulation of the field of radiological safety.

86. Vermont's attempts to regulate the VY Station and frustrate Entergy's compliance with NRC regulation are preempted because they intrude on the NRC's exclusive jurisdiction over regulation of nuclear plant operation and/or construction and are preempted pursuant to the Supremacy Clause.

87. Vermont's refusal to authorize construction of the station blackout generator (including by way of a refusal to adjudicate Entergy's petition) is further preempted and unenforceable because it is an aspect of the state's long-running campaign to force the VY Station to shut down by any means necessary because of radiological safety concerns. Vermont lacks authority to regulate a nuclear power plant on the basis of such concerns, and it has no genuine, non-preempted state interest in preventing construction of the blackout generator. Any proffered justification for refusing to grant the blackout generator CPG is merely a pretext, and is not "genuinely responsive" to a valid object of state regulation. *See Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 146 (2d Cir. 2006).

88. Plaintiffs are entitled to a declaration that Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, is preempted and invalid to the extent it would deny Entergy all authority to begin construction of the station blackout generator

on June 11, 2013, to complete such construction by September 1, 2013, or to operate it as required thereafter, because any such provision of state law impermissibly invades the field of regulation based on nuclear safety concerns.

89. Plaintiffs are entitled to preliminary and permanent injunctions barring Defendants from enforcing any provision of Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, so as to prevent Entergy from beginning construction of the station blackout generator on June 11, 2013, completing such construction by September 1, 2013, or operating the blackout generator as required thereafter.

PRAYER FOR RELIEF

In light of the foregoing, Plaintiffs respectfully pray that this Court:

A. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, that federal law preempts any Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, that would deny Entergy authority to begin construction of the proposed station blackout generator on June 11, 2013, to complete construction by September 1, 2013, or to operate it thereafter as needed to comply with the NRC's requirements;

B. Issue preliminary and permanent injunctions, pursuant to 28 U.S.C. § 1651(a) and Rule 65 of the Federal Rules of Civil Procedure, enjoining Defendants from enforcing any provision of Vermont law, including without limitation 30 V.S.A. § 248(a)(2) and Vt. Pub. Serv. Bd. R. 5.408, so as to prevent Entergy from beginning construction of the station blackout generator on June 11, 2013, completing such construction by September 1, 2013, or operating the generator thereafter as needed to comply with the NRC's requirements;

C. Award such other relief available under the law that may be considered appropriate under the circumstances, including other fees and costs of this action to the extent allowed by the law.

Dated: April 25, 2013

Respectfully submitted,

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

By their attorneys,

Robert B. Hemley
Matthew B. Byrne
GRAVEL & SHEA PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
Telephone: (802) 658-0220
Fax: (802) 658-1456

Of Counsel:

Kathleen M. Sullivan
Robert Juman
Sanford I. Weisburst
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10036
Telephone: (212) 849-7000
Fax: (212) 849-7100