

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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

Docket No: 1:11-CV-99

v.)

PETER SHUMLIN, Governor of the State of Vermont;)
WILLIAM SORRELL, Attorney General of the State of)
Vermont; and JAMES VOLZ, JOHN BURKE, and)
DAVID COEN, members of the Vermont Public Service)
Board,)
Defendants)

_____)

**POST-TRIAL MEMORANDUM OF LAW OF CONSERVATION LAW
FOUNDATION AND VERMONT PUBLIC INTEREST RESEARCH GROUP**

The Conservation Law Foundation and Vermont Public Interest Research Group, amici curiae in the above-captioned proceeding, submit this post-trial memorandum of law in support of the Defendants’ opposition to the Plaintiffs’ request for relief. No person other than the amici curiae or their members contributed money that was intended to fund preparing or submitting this memorandum.

Amici expressly incorporate by reference their previous memoranda (Doc. 44 and Doc. 153) submitted to the Court respectively on May 31, 2011 and September 2, 2011.

I. PLAINTIFFS FABRICATIONS IGNORE REALITY

Since Plaintiffs purchased the Vermont Yankee facility in 2002, Vermont experienced a steady stream of mishaps, misrepresentations, and disappointments shattering its faith and trust in Vermont Yankee and its owners. Beginning with the above-market power contract in 2002 and the failure to make any contributions to the decommissioning fund followed by the non-safety collapse of the cooling towers in 2007, the proposed “spin off” of the plant to a highly leveraged subsidiary, the false statements to regulators and the broken promises of a power contract that never materialized, Plaintiffs actions have had a continued “corrosive effect” on Vermont and the relationships needed to maintain a major electric generating facility within the State. (Def. Exh. 1251).

The testimony of Plaintiffs’ own executive directly disputes Plaintiffs’ lawyer’s revisionist history. (Def. Exh. 1379). In a memo to Entergy’s president, Curtis Hebert specifically refers to the “corrosive effect” of Entergy’s actions and recounts the myriad of state regulated reasons why even the Company’s “staunchest allies” lost faith. (Def. Exh. 1251). Rather than accept responsibility for their own misdeeds, Plaintiffs fabricate reasons the Court should force Vermont to keep this tired, old plant open.

Despite Plaintiffs incantations of “safety, safety, safety” the reality for the past years is that Plaintiffs repeatedly broke promises and are untrustworthy. While Plaintiffs conflate safety with virtually any action ever taken, the reality is that the small handful of references to safety in the legislative history are taken out of context and uniformly fail to demonstrate that legislative decisions impermissibly treaded on the preempted matters of “radiological health and safety.”

II. VERMONT'S LEGISLATIVE PURPOSE IS CLEAR AND UNASSAILED

Like most Vermonters, the Vermont Legislature says what it means and means what it says. In 2005, the legislature passed Act 74 which allowed a limited expansion of the storage capacity for spent fuel, and began transitioning Vermont away from reliance on Vermont Yankee. The express statutory purpose of the law was to ensure that Vermont's "future power supply" is "diverse, reliable, economically sound, and environmentally sustainable." 10 V.S.A. § 6521(3).

In 2006, the Vermont Legislature passed Act 160 confirming that "[i]t *remains the policy* of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly...." 2006 Vt. Acts & Resolves No. 160, § 1(a)(emphasis added). The law provides for the Legislature to make its decision based on "*full, open, and informed public deliberation and discussion.*" *Id.* (emphasis added). It then clearly states that the "pertinent factors" to be considered include "the state's *need for power, the economics and environmental impacts* of long-term storage of nuclear waste, and *choice of power sources* among various alternatives." *Id.* (emphasis added).

The purposes of the statutes could not be clearer and are expressly set forth in the acts themselves. Neither the statutes nor the express legislative purpose mentions or regulates radiological health and safety. 10 V.S.A. § 6521; 2006 Vt. Acts & Resolves No. 160, § 1(a). The statutes clearly state their avowed purposes, which must be honored. *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (*PG&E*) (accepting California statute's "avowed economic purpose" and refusing to inquire further into legislative motive). To counter the clear, avowed purposes, Plaintiffs provide only convoluted

legal speculation. It is telling that it took Plaintiffs' lawyer nearly four hours to present this tortured legal theory. A clear legislative purpose does not take four hours to explain.

Rather than accept what Vermonters say they mean at face value, Plaintiffs first attempt to impose an unstated motive of "radiological health and safety" on the entirety of the Vermont Legislature. (Doc. 144 at 3–14). Then through sheer repetition, Plaintiffs attempt to magnify that fabricated motive and claim it permeates all of the Legislature's, the Governor's and the Public Service Board's actions. *Id.*

Plaintiffs' convoluted and long-winded theory ignores Plaintiffs own misdeeds and fails to undermine the clearly stated legislative purposes.

III. LEGISLATIVE EXCERPTS FAIL TO SHOW A SAFETY PURPOSE

Plaintiffs' lengthy legislative appendix, characterized with excruciating speculation during Plaintiffs' nearly four hour long closing argument, fails to demonstrate the Vermont Legislature impermissibly treaded on preempted matters of "radiological health and safety." Comments were routinely presented out of context, unconnected to Legislative outputs, and show the Legislature's very responsible efforts to ensure its actions fall well within its authority.

A. Out of Context

Plaintiffs' mislead the court by presenting very limited excerpts from legislative hearings that are taken out of context. For example, in the excerpt from then-Senator Peter Welch that "safety is not for sale" fails to recognize that as a Senator he is responding to the concerns of his constituency and providing assurances that the actions taken as the Vermont Legislature on matters regarding economics will not negatively affect safety. (Pl. Exh. 124). Then-Senator Welch states clearly he relied on the expert testimony of former Vermont Public Service Board Chairman Richard Cowart, "a person who had significant background in regulatory matters

involving all our utilities, including Vermont Yankee.” *Id.* Then-Senator Welch looked to and relied on the expert advice, made decisions based on economics and matters within the state’s authority and then assured his colleagues and his constituents that their economic actions will not negatively affect safety.

Excerpted testimony of Mr. Shadis discussing safety concerns (Pl. Exh. 119B) fails to include the comment from the Committee Chairman that follows where he stops Mr. Shadis and recognizes that the matters he is discussing are regulated by the Nuclear Regulatory Commission. Specifically, Chairman Klein states: “Okay. What I’m wondering, what I’m wondering about is where is the NRC in all of these discussions? I thought they were the trump card when it came to safety.” (Doc.143-2 at 130). Notably, the statute fails to include the recommendation regarding safety requested by Mr. Shadis.

Similarly, statements from Senator Cummings show the purpose of a broad examination and not that the Legislature’s action was based on radiological health and safety. Regarding Act 160, Senator Cummings stated: “... [W]e can *listen to* three-headed turtles and sterile sheep.” (Pl. Exh. 135)(emphasis added). A full reading of this comment shows that her concern is to give “the folks that think perhaps they don’t get heard at the board level, the ability to be heard by their elected representatives.” *Id.* This is a comment extolling the foundation of democracy and the legislative process by recognizing the need to give people “the ability to be heard.” *Id.* To twist this comment into something that shows an illegitimate outcome defies democracy and the legislative process.

B. Unconnected to Legislative Action

In providing the court with a cacophony of legislative excerpts, the Plaintiffs failed to link the testimony provided with the actual actions of the Vermont Legislature. Merely

providing what Peter Bradford referred to as a “cacophony” of inputs does not prove an illegitimate output. As Peter Bradford eloquently testified in explaining decision-making processes from his vast experience: “[s]o the fact that you have this cacophony of ostensibly preempted inputs and an unpreempted output, doesn't mean that somebody's dealing in pretexts or trickery, it means the product worked, and the prohibited beginning became an accessible end. That's not trickery, that's legislation.” (Tr. 9/13/11 at 495-96).

Similarly, the safety measures discussed in Mr. Shadis’s testimony (Pl. Exh. 119B) are entirely absent from the final output of the legislation. This is why, as Mr. Bradford explained, outputs matter more than inputs. The matters raised by Mr. Shadis were not part of the final legislation. The court cannot consider these as somehow infecting or invalidating the final legislative outcome.

C. Understanding Scope of Authority

Most of the excerpted testimony that discusses “safety” does so from experts who are carefully advising the Legislature on the scope of its authority. The testimony from former Public Service Board Chairman Richard Cowart, or from Chairman Volz or Public Advocate Sarah Hofmann demonstrate the care the Legislature took to be well informed about the scope of its authority and make sure that it acted well within it.

IV. REGULATION OF NON-PREEMPTED MATTERS BY THE STATE

Plaintiffs’ broad claims of preemption belie past Vermont Public Service Board (Board) action. Prior Board decisions clearly demonstrate how economics, reliability, and power supply matters are reviewed by state authorities and do not tread on preempted matters.

In the Board proceeding regarding the proposed sale of the facility to Plaintiffs in 2002, the Board addressed its authority to approve a Certificate of Public Good (CPG) contingent upon returning excess decommissioning funds to Vermont ratepayers. *Investigation into General Order No. 45*, Docket 6545, Order of 7/11/02 at 11. The Board stated: “Our conclusion has an adequate and independent basis in our determination as to what is necessary and consistent with the general good of the state [F]or Entergy to operate lawfully it must comply with all the terms of its CPG....” *Id.* at 15. The Board showed unequivocally how state regulation of Vermont Yankee’s decommissioning fund is an economic matter separate from either FERC or NRC rules, and that the terms of Entergy’s CPG have the force of law.

Board decisions also show how responsible state oversight involves matters of economics, reliability, and land use and are not preempted. In 2006, the Board addressed the management of spent nuclear fuel and its authority to regulate Entergy’s financial ability to manage spent nuclear fuel. *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06. The Board stated:

The Atomic Energy Act has been interpreted so as to preempt states from becoming involved in the field of nuclear safety, certainly. However, it cannot automatically be interpreted to preempt states from regulating land use or from measures states may undertake to ensure what a state considers acceptable land use.... The financial assurances do not relate solely to safety, but also to whether the project might have land use or financial implications for the state.

Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 65.

These Board decisions show that Plaintiffs’ exaggerated claims of preemption must be rejected. The economic and other traditional state regulatory matters are not

preempted and play an important role in responsible oversight of nuclear generation facilities. The Vermont Legislature's actions manage the same economic, reliability, power supply and land use impacts and are not preempted.

V. DEFERENCE FOR LEGISLATURE'S STATEMENTS OF PURPOSE

Plaintiffs misplace reliance on cases involving *individual* rights in attempting to shift a burden of proof to the Defendants. Plaintiffs have failed plain and simple to meet their burden of proof. They have the identical access to the legislative records as the Defendants. They make no claim that Vermont somehow transgressed Entergy's individual constitutional rights. The cases relied on by Plaintiffs fail to support their claims.

In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 865 n.13 (2005), the Supreme Court recognized that state and local legislatures receive greater deference in areas of economic legislation than in cases implicating the Establishment Clause. The Court stated: "While heightened deference to legislatures is appropriate for the review of economic legislation, an approach that credits *any* valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment." *Id.* (emphasis added).

Similarly, Entergy misplaces its reliance on the burden-shifting framework outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Those cases also address individual rights (Equal Protection and Free Speech) where a court may be permitted to inquire into the government's motive. As the Supreme Court recently noted: "When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the

skepticism due respect for legislative choices demands.” *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2333 (2010)(footnote omitted). There is no question the legislation challenged in this case involves economic concerns. As such, the court should accept the Legislature’s stated purpose.¹

Plaintiffs attempt to apply a burden on the state that no court has ever applied in an Atomic Energy Act preemption case. As recognized in preemption cases, the burden of proof remains on the Plaintiffs to “show that Congress intended to preclude” the state law in question. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Plaintiffs have failed to meet their burden of proof and cannot prevail.

VI. THE COURT SHOULD REJECT ANY RELIEF AS TO VERMONT PUBLIC SERVICE BOARD ACTION

Plaintiffs have not demonstrated they are entitled to any relief as to Vermont Public Service Board proceedings. Amici’s request for intervention (Doc. 28) and reply to Plaintiffs’ response (Doc. 37) show Amici’s active and integral involvement in those proceedings. Hearings in the Certificate of Public Good proceeding (VT PSB Docket 7440) extended over ten hearing days during the spring of 2009. The documents, evidence and pleadings occupy thousands of pages. More than 30 witnesses presented testimony and 235 exhibits were admitted by the Board on a wide range of economic, land use, power supply and reliability issues. The evidence in this case is now outdated by more than two years. Once this present court case is decided, the Board will need to determine what, if any action, it needs to take going forward.

¹ Plaintiffs erroneously claim *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), presents a burden shifting applicable to a preemption case. In *Skull Valley* the court found the state “failed to offer evidence” that the state law in question was supported by a non-safety rationale, and thus its defense failed. *Id.* at 1246. Here, Vermont offers substantial evidence demonstrating that the challenged statutes address and regulate matters apart from radiological health and safety.

Any decision by this Court interfering with or directing action of the Public Service Board interferes with Amici's rights as a party in the Board proceedings. Parties in the Board proceedings, who have expended hundreds of hours and spent money on experts and attorneys, have a right to protect their interests. *See In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991)(intervention to protect institutional and member interests). Refraining from issuing any order affecting the Board proceedings allows Amici and other parties to address and protect their interests in the Board proceedings.

Plaintiffs have presented no evidence that the Board is not capable or authorized to comport its proceedings to any order this Court issues. As Amici have been denied intervention in this case and have been unable to present evidence in this case to protect their interests in the Board proceeding, this Court should refrain from issuing any order that grants the Plaintiffs any relief as to the Board proceedings.

VII. CONCLUSION

For the foregoing reasons, the Court should deny the relief requested by Plaintiffs and confirm that Vermont's laws and actions regarding the Vermont Yankee nuclear power facility are constitutional and not preempted by federal law.

Respectfully submitted,

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