UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.,	:	
Plaintiffs,	:	
v.	:	Docket No. 1:11-cv-99 (jgm)
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; and JAMES VOLZ, JOHN BURKE and DAVID COEN, in their official capacities as MEMBERS of THE VERMONT PUBLIC SERVICE BOARD,	:	
Defendants.	:	

MEMORANDUM AND ORDER ON
PLAINTIFFS' EXPEDITED MOTION
FOR AN INJUNCTION PENDING APPEAL
(Doc. 190)

Plaintiffs Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. have filed an expedited motion for injunction pending appeal (Doc. 190) under Federal Rule of Civil Procedure 62(c) and Rule 8(a)(1) of the Federal Rules of Appellate Procedure.

In a January 19, 2012 Decision and Order on the Merits of Plaintiffs' Complaint ("Merits Decision"), this Court held that "radiological safety concerns were the primary motivating force for enacting Act 74, in particular for the requirement for affirmative legislative approval for spent fuel storage after March 21, 2012." Merits Decision at 81 (Doc. 181). The Court, considering the challenged provisions of Act 74 on their face, invalidated as preempted the sentence within subsection 6522(c)(4) which provided: "Storage of spent fuel derived from

the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter." Vt. Stat. Ann. tit. 10, § 6522(c)(4); Merits Decision at 99. The Court also noted, "there are no other provisions in Chapter 157 that require General Assembly approval for storage within already constructed facilities," see Merits Decision at 21, and subsection 6522(c)(4) "appears to be the only provision in Chapter 157 which requires approval of any kind to store fuel beyond March 21, 2012." Id. at 79 n.27. The Court did not invalidate or enjoin enforcement of subsection 6522(c)(2), which did not appear to the Court to have any continuing effect on fuel storage after March 21, 2012.

Defendants, however, have represented in a recent March 8, 2012 filing with this Court that the Vermont Attorney General's position is that subsection 6522(c)(2) is "relevant to Entergy's post-March 21, 2012 operations." (Doc. 202 at 5 & n.2.) They also represent that the Public Service Board's authority "over the CPG process as it relates to storage of spent fuel" has not been held preempted. Id. at 10. The Attorney General's position is that subsection 6522(c)(2), on its face, "does not restrict the Board's authority to consider Entergy's petition for a renewed CPG for storage of spent fuel at Vermont Yankee" and "is one of the provisions that requires Entergy to seek a renewed CPG from the PSB for storage of fuel derived from operations after March 21, 2012." Id.

On February 27, 2012, Entergy filed a Notice of Cross-Appeal to the United States Court of Appeals for the Second Circuit (Doc. 189), appealing this Court's final judgment. Entergy represents that in the absence of Rule 60(b) relief declaring subsections 6522(c)(2) and (c)(5) preempted by the Atomic Energy Act, as requested in a Rule 60(b) Motion for Relief from Judgment (Doc. 193), also filed February 27, 2012, contemporaneously with the Motion for

Injunction Pending Appeal (Doc. 190), Plaintiffs intend to argue to the Second Circuit that subsections 6522(c)(2) and (c)(5) of title 10 of the Vermont Statutes should have been invalidated as preempted by the Atomic Energy Act. Plaintiffs also seek other relief this Court did not grant.

Rule 62(c) provides, in relevant part, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Before issuing an injunction pending appeal, a court will consider: "(1) whether the [injunction] applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent [an injunction]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." See Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In considering these, the "degree to which a factor must be present varies with the strength of the other factors." In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007).

Given the representations by counsel for Defendants that the Vermont Attorney General interprets subsection 6522(c)(2), on its face, as giving the Public Service Board continuing authority under Act 74 to consider the question of fuel storage after March 21, 2012, and given this Court's ruling that Act 74 was enacted with a preempted purpose, Entergy has made a strong showing that it is likely to succeed on the merits of its cross-appeal that subsection 6522(c)(2) should also have been invalidated as preempted on its face because it had both a preempted purpose and effect. Second, Defendants have taken the position the Board has authority to

conduct proceedings regarding a CPG for spent fuel storage under Act 74. Absent an injunction pending appeal, Plaintiffs would be irreparably harmed if the Board exercised such authority and conducted proceedings under a preempted law. Furthermore, a denial of authorization to store fuel, on the basis of statutory provisions that this Court has held were enacted with a preempted purpose, would force Vermont Yankee to shut down, depriving Plaintiffs of revenues and leading to the loss of vital employees without the ability to recover from Defendants, who enjoy sovereign immunity. Courts have held that the destruction of a business – even where monetary compensation is possible – constitutes irreparable harm. Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc., 749 F.2d 124, 125-26 (2d Cir. 1984) (per curiam). Third, an injunction pending appeal will preserve the status quo until the Second Circuit can decide the merits of the appeal and cross-appeal, and imposes no additional burden on Defendants. Finally, the public interest in preserving the status quo pending final resolution of this dispute supports an injunction pending appeal. Entergy has made a strong showing that a limited injunction pending appeal is "necessary to preserve the status quo pending an appeal." Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 564-65 (2d Cir. 1991) (finding district court had jurisdiction to issue injunction preserving the status quo pending appeal, even though notice of appeal had been filed).

Both Entergy and Vermont's Attorney General, through counsel, have represented to the Court their position that Vt. Stat. Ann. tit. 3, § 814(b) provides that a license subject to an agency's notice and hearing requirements does not expire until a final determination on the merits of an application for renewal has been made. Entergy is concerned that subsection 6522(c)(5) may be construed to override section 814(b). The Attorney General has represented

to the Court, however, 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. (Doc. 202 at 11, 15.) Given this representation, the Court does not see the need to consider at this time Entergy's request for an injunction pending appeal barring the enforcement of subsection 6522(c)(5).

Therefore, Defendants are enjoined, pending the appeal of the Court's final judgment and Merits Decision to the Second Circuit, from addressing the storage of spent fuel under the authority of Vermont Statutes Annotated, title 10, subsection 6522(c)(2) and from bringing an enforcement action, or taking other action, to enforce subsection 6522(c)(2) to compel Vermont Yankee to shut down because the "cumulative total amount of spent fuel stored at Vermont Yankee" exceeds "the amount derived from the operation of the facility up to, but not beyond, March 21, 2012."

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 19th day of March, 2012.

/s/ J. Garvan Murtha
Hon. J. Garvan Murtha
United States District Judge