UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC LLC and ENTERGY NUCLEAR OPERATIONS, INC. Plaintiffs, v. PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, as ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD Defendants.	)	Civil Action No. 11-cv-99

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

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INTRODUCTION

ENVY bought Vermont Yankee in 2002 knowing the plant was scheduled to close in 2012. ENVY agreed then that State approval of the sale, including the necessary certificate of public good, would "authorize operation . . . only until March 21, 2012, and thereafter will authorize ENVY and ENO only to decommission" the plant. Ngau Ex. 3 at ¶ 12. Since 2005, ENVY has known that it needed approval from both the Vermont Public Service Board and the Vermont Legislature to operate after March 21, 2012. Yet now, as March 2012 approaches, ENVY claims an urgent need for this Court to enjoin all State authority over whether the plant will continue to operate beyond March 21, 2012—authority ENVY has agreed to all along.

In the Vermont Public Service Board (PSB or Board) proceedings related to the sale, and in subsequent proceedings addressing ENVY's need for additional dry-cask storage and a new certificate of public good (CPG), ENVY has consistently recognized and agreed to State regulatory authority—and specifically acknowledged that it needed State approval to keep operating after March 21, 2012. The Legislature's role in that decision also comes as no surprise; ENVY sought legislative approval for the dry-cask storage that it needed to operate until 2012, and the statute that approved additional storage, Act 74, required further legislative approval for storage of spent fuel generated after March 21, 2012. ENVY made binding commitments during these State proceedings to not assert the preemption claims that are pressed in this suit. The Court should not grant equitable relief that would allow ENVY to avoid, at this late date, its agreements with the State of Vermont.

Indeed, under these circumstances, ENVY cannot make the "clear showing" necessary to justify the "extraordinary and drastic remedy" of a preliminary injunction. *Moore v. Consol. Edison Co. of New York*, 409 F.3d 506, 510 (2d Cir. 2005) (quoting *Mazurek v. Armstrong*, 520

U.S. 968, 972 (1992)). First, ENVY cannot show that it is likely to succeed on the merits of its preemption claims. ENVY in fact waived these claims years ago, and that, coupled with ENVY's past recognition of State authority, is sufficient to defeat ENVY's claim for equitable relief. Further, ENVY's preemption claims are contrary to the Atomic Energy Act, U.S. Supreme Court precedent, and NRC regulations, all of which confirm that states have authority to regulate nuclear power plants for non-safety-related reasons. Vermont has acted within its proper authority in requiring Vermont Yankee (VY) to have a valid CPG—a certificate that State law requires *all* power plants to have if they wish to generate electricity in Vermont.

Second, ENVY cannot show that its alleged irreparable harms—even if they exist—are "actual and imminent." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002). VY's CPG expires on March 21, 2012. There is nothing for the Court to enjoin before that date—indeed, ENVY has not identified any state action that it seeks to enjoin *now*. The alleged harms that ENVY describes are based solely on ENVY's uncertainty regarding the continued operation of VY beyond March 2012. That uncertainty cannot be redressed by an interim, preliminary decision that will be superseded by the Court's final ruling on the merits. For these reasons, ENVY is not entitled to a preliminary injunction.

PRELIMINARY INJUNCTION STANDARD

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." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). The less rigorous "fair ground for litigation" standard is not available here, despite ENVY's claims to the contrary (ECF Doc. 4-1 (Mem.) at

13), because ENVY seeks to stay "government action taken in the public interest pursuant to a statutory or regulatory scheme." *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999). The Second Circuit has long held that parties seeking to enjoin state laws must "meet[] the more rigorous likelihood-of-success standard." *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010); *accord, e.g., Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996). The Second Circuit has applied the more rigorous standard in preemption cases, and there is no basis for ENVY's effort to avoid it. *See, e.g., Metro. Taxicab*, 615 F.3d at 156.[1] The standard set forth in *Winter* governs here.

I. ENVY cannot show a likelihood of success on the merits because the challenged statutes fall squarely within recognized areas of state authority and because ENVY's previous conduct defeats any claim for equitable relief.

ENVY cannot show a likelihood of success on any of its claims for relief. First, the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, does not preempt all state regulatory authority over VY, but rather leaves substantial areas of state authority in place. Second, Vermont has not required ENVY to give below-market rates to Vermont utilities or violated the filed rate doctrine in any way, so ENVY has no claim under the Federal Power Act or the Dormant Commerce Clause. Third, ENVY's past actions, including its agreements with the State and its delay in bringing these claims, defeat ENVY's efforts to obtain injunctive relief from this Court.

A. The challenged statutes fall within recognized areas of state authority and are not preempted by the Atomic Energy Act.

Nearly three decades ago, the Supreme Court held that nuclear power plants are subject to

[1] The Court thus need not address whether the alternate "fair ground for litigation" standard survives *Winter*. *See Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34-38 (2d Cir. 2010) (holding that "fair ground for litigation" standard may be applied in appropriate cases, despite *Winter*). *But see Salinger v. Colting*, 607 F.3d 68, 77-80 & 77 n.7 (2d Cir. 2010) (applying *Winter* standard and noting "no reason" that same test should not apply "with equal force to an injunction in *any* type of case").

"dual regulation," and that states therefore have a role in the licensing and regulation of those facilities. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 211 (1983). In particular, although the federal government has exclusive control over "the radiological safety aspects" of nuclear energy generation, "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at 205. ENVY now asks this Court to strip Vermont and all other states of those powers. This Court should not do so.

Preemption analysis begins with a "presumption against federal preemption of state law," *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 93 (2d Cir. 2006)—a presumption that applies to "all pre-emption cases." *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194 (2009). The Supreme Court has already held that the presumption against preemption applies to state regulation of nuclear power plants. *See Pacific Gas*, 461 U.S. at 206. To meet its "considerable burden" of proving preemption, *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997), ENVY must show that it "was the clear and manifest purpose of Congress" to preempt the challenged state laws. *Wyeth*, 129 S. Ct. at 1194-95. ENVY's effort to shift the burden to Vermont, Mem. 21, is mistaken, because it is ENVY's "burden to show that Congress intended to preclude" the state laws in question. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 86 (1990) (state law "does not lie within the pre-empted field of nuclear safety" unless the party challenging state law provides "evidence of a 'clear and manifest' intent on the part of Congress to pre-empt").

Applying these principles, the Court should reject ENVY's sweeping and unsupported view of federal preemption. As shown below, (1) states retain substantial authority to regulate nuclear power plants; (2) the challenged Vermont laws are a proper exercise of that retained authority;

and (3) ENVY cannot show that Vermont's regulation of VY is a pretext for regulating radiological safety.

1. As recognized by Congress, the Supreme Court, and the NRC, states retain authority to regulate nuclear power plants for non-safety-related reasons.

ENVY's sweeping assertion of federal preemption is contrary to the plain language of savings clauses in the Atomic Energy Act; to the Supreme Court's rulings in *Pacific Gas* and other cases; and to the NRC's express recognition of state regulatory authority.

a. Statutory savings clauses. Although ENVY neither cites nor even mentions them, the Atomic Energy Act includes two savings clauses that preserve state regulatory authority. As these two provisions show, Congress did not intend the Act to supplant the states' traditional role as utility regulators. Section 271 of the Act provides that:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: *Provided*, That this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission.

42 U.S.C. § 2018. And Section 274(k) states that:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k).

The Supreme Court construed these clauses in *Pacific Gas* and concluded that Congress did not intend to occupy the entire field of regulation of nuclear power plants: "Congress, by permitting regulation 'for purposes other than protection against radiation hazards' underscored the distinction drawn in [the Atomic Energy Act of] 1954 between the spheres of activity left respectively to the federal government and the states." 461 U.S. at 210 (citing 42 U.S.C. § 2021(k)).

ENVY's position that the NRC has "exclusive authority" over "the licensing and operation of an existing nuclear power plant," Mem. 2, cannot be reconciled with these statutory savings clauses. The licensing of VY—that is, whether the plant may continue to operate—involves non-preempted issues such as economics, land use, policy questions regarding a state's energy future, and whether a corporation running a nuclear power plant has established itself as a trustworthy business partner. States have authority over these matters so long as they are "regulat[ing] activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k); *accord Pacific Gas*, 461 U.S. at 210.

b. *Pacific Gas* and related precedent. Consistent with these statutory provisions, the Supreme Court has taken a restrained view of the Atomic Energy Act's scope. "[A]s we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other state concerns." *Pacific Gas*, 461 U.S. at 205; *see also id*. (states not required to construct or permit nuclear power plants); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 550 (1977) (state utility commissions determine "need for power"). Indeed, the Supreme Court has never held a state law preempted by the Act—even in cases where regulation indisputably touched on radiological safety matters. *See Pacific Gas*, 461 U.S. at 222-23 (upholding state-imposed moratorium on construction of nuclear facilities until state determines spent fuel can be disposed of in cost-effective manner); *Silkwood*, 464 U.S. at 258 (allowing state tort suit for punitive damages for exposure to radiation from nuclear facility); *English*, 496 U.S. at 88-89 (allowing state tort claim for intentional infliction of emotional distress based on

retaliation by nuclear-facility owner against employee who reported radiological safety concerns).[2]

Pacific Gas is the key precedent in this area, and there the Court upheld state legislation similar to Vermont's statutes. The California law upheld in *Pacific Gas* "condition[ed] the construction of nuclear power plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste." *Pacific Gas*, 461 U.S. at 194-95. Because nuclear wastes "will remain radioactive for thousands of years," a plan for "permanent disposal" was necessary. *Id.* at 196. The Court recognized in *Pacific Gas* that this issue of waste disposal raised both safety and economic concerns. *Id.* As a safety matter, leaks of nuclear waste threaten the environment and endanger human health. From a cost perspective, the lack of sufficient interim storage of nuclear waste in the short-term may lead to shutdowns, causing reliability issues. Similarly, the absence of a long-term "solution to the waste disposal problem may entail significant expenditures, affecting the economic attractiveness of the nuclear option." *Id.* at 197 n.6.

The California law imposed a moratorium on the certification of new nuclear plants until the California Energy Commission "'finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste.'" *Id.* at 198 (quoting Cal. Pub. Res. Code § 25524.2). The Commission's finding then must be reported to the state legislature, which may nullify the finding. *Id.* at 198 n.8.

The Supreme Court concluded that this moratorium was not preempted by federal law. The

[2] The only other time the Supreme Court has been presented with a preemption claim under the Atomic Energy Act was in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). In *Goodyear*, the Court also upheld state law, though it did so without reaching the preemption issue. *Id.* at 182.

Court reasoned that *only* radiological safety regulations are preempted by federal law, and the moratorium was not a radiological safety regulation. The Court emphasized that "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at 205; *see also id.* at 212 ("[S]tates exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like."). The Court also cited with approval an NRC ruling holding that "'States retain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as a lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site.'" *Id.* at 207 n.18 (quoting *In re Consol. Edison Co. of N.Y., Inc.*, 7 NRC 31, 34 (1978)).

ENVY's broad preemption argument cannot be reconciled with either the holding or the reasoning of *Pacific Gas*. *Pacific Gas* recognized that states have authority to regulate nuclear plants with respect to reliability, cost, land use, ratemaking, environmental concerns, the type of generating facilities to be licensed, and the lack of need for additional generating capacity. *Id.* at 205, 207 n.18, 212. And the Court did not limit the states' authority to these specific areas, but instead carefully used non-exclusive language to describe the potential bases for state regulatory authority. *See, e.g., id.* at 205, 212. *Pacific Gas* thus confirms that states retain substantial authority to regulate matters other than radiological safety.

c. NRC interpretations. The NRC itself has repeatedly rejected ENVY's claim that the granting of an NRC license displaces state authority to regulate nuclear power plants. ENVY's renewed operating license from the NRC does not mean that ENVY has a federally guaranteed right to keep operating regardless of state law. The NRC's own regulations acknowledge that a

state ultimately determines whether to allow a relicensed nuclear plant to operate.

In fact, when the NRC adopted its regulations governing license renewal, it said that license renewal alone does *not* allow operation without state approval:

> After the NRC makes its decision based on the safety and environmental considerations, *the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers*. This final decision will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction.

61 Fed. Reg. 28467, 28473 (June 5, 1996) (Statement of Considerations for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses) (emphasis added); *see also* 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.").

More recently, the NRC issued a "Final FAQs for License Renewal," which recognizes state regulatory authority over the continued operations of nuclear power plants:

> 1.2.10. **Who makes the decision to actually continue operating the nuclear power facility during the license renewal period once the license renewal is granted?** It is possible that a license renewal application could satisfy the NRC's safety and environmental reviews *and still not operate*. This is *because the NRC does not have a role in the energy-planning decisions of state regulators* and licensee officials. From the perspective of the applicant and the state regulatory authority, the purpose of renewing a license is to *maintain the availability* of the nuclear facility to meet energy requirements beyond the current term of the facility's license. Thus, *whether the facility will continue to operate is based on factors such as the need for power or other matters within the state's jurisdiction* or the financial interests of the owners.

Kolber Decl. (May 23, 2011) Ex. 1 (NRC, Final Report (March 2006)), at 1-7 (emphasis added); *accord id.* at 1.2.9 (NRC license "one of a number of conditions," and it is up to the "state" and others to decide if operations continue).

As shown by these statements, the NRC has recognized state authority over continued operation of nuclear power plants that receive extended (renewed) federal licenses. The NRC has articulated this position repeatedly over the history of the license renewal process.

For instance, when the NRC issued a Generic Environmental Impact Statement (GEIS) for license renewals under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, the NRC acknowledged that individual states make the final determination whether to allow a plant that possesses a renewed NRC license to operate beyond its initial forty years:

> Although a licensee must have a renewed license to operate a plant beyond the term of the existing operating license, *the possession of that license is just one of a number of conditions that must be met for the licensee to continue plant operation during the term of the renewed license. State regulatory agencies and the owners of the plant would ultimately decide whether the plant will continue to operate* based on factors such as need for power or other matters within the State's jurisdiction or the purview of the owners. Economic considerations will play a primary role in the decision made by State regulatory agencies and the owners of the plant.

Kolber Ex. 2 (NUREG-1437, Vol. 1 (May 1996)), at 1.3 (emphasis added). When the NRC has addressed the license renewals for specific nuclear plants, it has repeatedly made similar statements recognizing the authority of state regulators to decide if a plant will continue to operate and to address other matters within state jurisdiction.[3]

Other NRC regulations likewise recognize that state regulation plays a role in determining whether to allow a nuclear power plant to continue operating. *See, e.g.*, 61 Fed. Reg. 28467, 28471 (June 5, 1996) ("[T]he NRC recognizes that the determination of the economic viability of continuing the operation of a nuclear power plant is an issue that should be left to appropriate State regulatory and utility officials."); *id.* at 28473 ("[T]he final decision on whether or not to continue operating the nuclear plant will be made by the utility, *State*, and Federal (non-NRC) decisionmakers." (emphasis added)).

[3] The findings from the GEIS were issued as a final regulation by the NRC and adopted as Table B-1 of Appendix B of Subpart A of 10 C.F.R. Part 51. For a sampling of similar NRC statements in license renewals for other plants, see, *e.g.*, NUREG-1437, Supplement 7 (November 2002) at xv; NUREG-1437, Supplement 8 (December 2002) at 1-8; NUREG-1437, Supplement 14 (January 2004) at xv; NUREG-1437, Supplement 25 (April 2006) at 1-8; NUREG-1437, Supplement 32 (May 2008) at xx and 1-8; NUREG-1437 Supplement 38 (December 2010) at xv, all available at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/.

The NRC specifically reiterated these points in the supplemental NEPA statement for VY's license renewal, again noting that state regulatory agencies "ultimately decide" whether the plant continues to operate, and that "the NRC does not have a role in the energy-planning decisions of State regulators and utility officials as to whether a particular nuclear power plant should continue to operate." Kolber Ex. 3 (NUREG-1437, Supplement 30 (August 2007)), at 1-8, 1-9. And as part of the renewal process, ENVY itself also acknowledged the necessary role of state regulators, by quoting in its renewal application the NRC's statements regarding the role of state regulators. *See* Kolber Ex. 4 (Appendix E to ENVY's License Renewal Application (January 25, 2006)), at 1-1 (need for power assessed "by State, utility, and, where authorized, Federal (other than NRC) decision makers" (quoting GEIS, Vol. 1, at 1-2)).

Thus, the NRC has clearly and expressly rejected the proposition that when it grants a renewed license to operate it has given the plant owner an absolute right to operate the plant. States, not the NRC, make the "ultimate" decision about a plant's continued operation, in light of relevant state considerations. ENVY's renewed federal license in no way abrogates the State's authority to regulate the plant with respect to matters other than radiological safety—matters the NRC has repeatedly recognized are outside its authority.[4]

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

[4] Further, because a renewed NRC license is intended only to "provide an option" to States to have nuclear power, Kolber Ex. 2 at 1-3, ENVY's citations to *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963), and *Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003), are inapposite. Those cases involved efforts by States to impose requirements that the federal license determined to have already been met. Here, by contrast, we have a system of "dual regulation," *Pacific Gas*, 461 U.S. at 211, and Vermont is regulating in areas reserved to it.

These statements by the NRC in the context of relicensing proceedings defeat ENVY's claim that the state regulatory authority recognized in *Pacific Gas* applies only *before* a nuclear power plant is built. The 1983 *Pacific Gas* decision long pre-dated the NRC's relicensing process. If there were any doubt that states retain the same authority in relicensing decisions as before a plant is built, the NRC has eliminated that doubt through its statements, recounted above, explicitly recognizing state authority in the relicensing context. Further, the passage from *Pacific Gas* cited by ENVY, *see* Mem. 7, 15 (quoting *Pacific Gas*, 461 U.S. at 212), does not support ENVY's argument. Vermont is not regulating the construction of a nuclear plant or its day-to-day operations, but rather is weighing in on *whether* the plant operates for an additional twenty years. "The NRC's imprimatur . . . indicates *only* that it is *safe* to proceed with such plants." 461 U.S. at 218 (emphasis added).[5] The decision Vermont faces now of whether VY should operate for another twenty years is closely analogous to what California faced when regulating whether nuclear power would be a part of its energy mix in the future.

If the Court were to accept ENVY's position and hold that states are preempted from considering the economic viability of continuing the operation of a nuclear power plant and the selection of future energy alternatives, then these critical policy matters would not be addressed by state or federal regulators, because the NRC expressly leaves these matters to the states. *E.g.*, 61 Fed. Reg. at 28471 & 28473. The Supreme Court expressed precisely this concern in *Pacific Gas*, deeming it "almost inconceivable" that Congress intended such a regulatory vacuum:

> [The NRC] does not purport to exercise its authority based on economic considerations, 10 CFR § 8.4. . . . [T]he NRC stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety. It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that

[5] For this same reason, Vermont's laws do not have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 496 U.S. at 85.

> Congress intended the states to continue to make these judgments. Any doubt that ratemaking and plant-need questions were to remain in state hands was removed by [the savings clause in] § 271, 42 U.S.C. § 2018 . . . .

461 U.S. at 207-08 (footnote omitted).

The Court accordingly should reject ENVY's effort to broaden the preemptive scope of the Atomic Energy Act far beyond what the NRC views as its statutory jurisdiction. Courts should not "seek[] out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 446 (1960).

2. Vermont's challenged statutes and regulations fall within retained state authority for regulating nuclear power plants.

Given that federal law preempts matters of radiological safety and nothing more, ENVY cannot obtain the injunctive relief it seeks because: (1) its broad and nonspecific requested relief is not available under Fed. R. Civ. Pro. 65(d)(1); (2) the PSB has acted well within proper areas of State authority; and (3) the challenged legislative acts also fall within proper State authority.

a. Impermissible scope of requested injunction. ENVY has asked this Court to "enjoin[] Defendants from enforcing Vermont statutes, regulations, or other laws (including without limitation Act 160, Act 189, and Vt. Stat. Ann. tit. 30, § 248(a)(2)) purporting to regulate the operation and licensing . . . of the Vermont Yankee Station." Compl. 33. ENVY's broad, nonspecific request for relief does not satisfy Fed. R. Civ. Pro. 65(d)(1), which requires that every injunctive order "state its terms specifically." The Second Circuit recently reversed a district court's injunction because it was not "specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *City of N.Y. v. Mickalis Pawn Shop, LLC*, ___ F.3d ___, Nos. 08–4804–cv & 09–1345–cv, 2011 WL 1663427, at *23 (2d Cir. May 4, 2011) (quotation and ellipsis omitted). The Second Circuit emphasized that injunctions must be "narrowly tailored to fit specific legal violations" and may not simply enjoin "illegal conduct" or

"all possible breaches of the law." *Id.* at *24. ENVY's request that the Court enjoin a non-exclusive list of State laws "without limitation," Compl. 33, is contrary to the specificity requirement of Rule 65 and *Mickalis*.

Given the statutes ENVY does cite, particularly Act 160 and Vt. Stat. Ann. tit. 30, § 248(a)(2), ENVY is apparently asking that this Court allow ENVY to continue operating beyond March 21, 2012 without a State CPG.[6] To grant the injunctive relief that ENVY requests, however, the Court would need to invalidate not just two statutes, but *each and every* statute, regulation, contract, and other law that requires ENVY to have a CPG to operate beyond March 21, 2012. At a minimum, that includes:

(1) All state laws (before the challenged Act 74 and Act 160) that require electric generating companies such as ENVY to have a valid, non-expired CPG to operate in this State. *See generally* Vt. Stat. ann. tit. 30, §§ 102, 203, 231, and 248.

(2) The 2002 MOU, PSB Docket No. 6545, ¶ 12 (March 4, 2004).

(3) The 2002 PSB Order, Docket No. 6545, at 159 (Condition 8) (June 13, 2002), as affirmed by the Vermont Supreme Court, *In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 2003 VT 53, 829 A.2d 1284 (2003).

(4) The 2002 CPG, as amended by the 2002 PSB Amended Order, Docket No. 6545, at 17 (July 11, 2002).

(5) The 2006 PSB Order, Docket No. 7082, at 90 (Clause 7) (Apr. 26, 2006).

(6) The 2006 CPG, Docket No. 7082, at 2 (Clause 6) (Apr. 26, 2006).

(7) 2005 Vt. Acts & Resolves No. 74 (Act 74), as codified at 10 V.S.A. §§ 6522(c)(2), 6522(c)(4), and 6522(c)(5).

[6] ENVY also cites Act 189, but as a practical matter that statute is no longer in effect. Act 189 set up a panel to assess the reliability of VY. The panel did its work in 2008 and 2009 and issued a report to the Legislature on March 17, 2009, with some follow-up work in 2010. The State has no current plans to reconvene that panel. Any challenge to the statute is therefore moot. Further, the Court cannot grant retrospective relief, which is barred by the Eleventh Amendment. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (while *prospective* injunctive relief against the State is sometimes available, States have Eleventh Amendment immunity from all claims seeking "retrospective relief").

(8) 2006 Vt. Acts & Resolves No. 160 (Act 160), as codified at 30 V.S.A. § 248(e)(2).

If just one of these laws, contracts, or orders withstands ENVY's preemption challenge, then this Court cannot enjoin the State from enforcing the requirement that ENVY obtain a CPG to operate beyond March 21, 2012. *See Mickalis*, 2011 WL 1663427, at *24.

b. The PSB has jurisdiction to require a CPG. Turning first to items 1-6 of the above list—the various laws, regulations, contracts, and PSB Orders that require ENVY to have a valid, non-expired CPG to operate beyond March 21, 2012—these items fall within the State's authority to regulate VY for reasons unrelated to radiological safety. Vermont law requires *all* electric generators to have a valid, non-expired CPG to operate in this State. *See generally* Vt. Stat. ann. tit. 30, §§ 102, 203, 231, and 248. These laws of general applicability are unrelated to radiological safety and are not preempted. *See supra* Part I.A.1.

Nor can ENVY succeed on a claim that the PSB has applied or will apply these laws in a way that is preempted by the Atomic Energy Act. ENVY has not identified any final PSB Orders in which the PSB has acted in any way for radiological safety reasons. Rather, ENVY notes that in the pending relicensing proceeding the PSB has ordered discovery that ENVY objects to, and that the PSB *might* base a future decision on improper reasons because, according to ENVY, the PSB is "irremediably tainted by the General Assembly's politicization of the process." Compl. ¶ 81. This claim fails for two reasons. First, ENVY's conclusory, unsupported allegation would not survive a motion to dismiss. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (rejecting "naked assertions devoid of further factual enhancement" (quotations omitted)). Vermont law establishes the PSB as an independent, quasi-judicial body with "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction." Vt. Stat. Ann. tit. 30, § 9. "Administrative adjudicators are presumed to be unbiased," and "this presumption can only be rebutted if the party asserting bias makes a

showing of a disqualifying interest, either pecuniary or institutional." *Koam Produce, Inc. v. United States*, 269 Fed. App'x 35, 37 (2d Cir. 2008). "Frivolous allegations regarding congressional pressure *entirely fail to meet this burden*." *Id.* (emphasis added). As in *Koam*, this Court cannot assume that political pressures will lead the PSB to act in an unconstitutional way.

Second, ENVY cannot prevail based on allegations regarding what the PSB might do *in the future*. The Supreme Court has held that"[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). In the nuclear regulatory context, the Seventh Circuit has rejected attempts to "pile one speculation upon another" to conclude that local officials will act in a preempted manner in the future. *Kerr-McGee Chem. Corp. v. City of West Chicago*, 914 F.2d 820, 827 (7th Cir. 1990); *see also id.* (upholding city's "radiation neutral" code and declining plaintiff's request to "unmask the City's true motivation in requiring Kerr-McGee to obtain City approval"); *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 55-56 (D. Me. 2000) (rejecting preemption claim when "[i]t has not been shown at this juncture that the state has acted, or intends to act beyond the scope of its legitimate authority" even where the "plaintiff has reason to be concerned"). Here, ENVY cites no evidence of the PSB's actual encroachment into federally preempted territory, but rather merely speculates "that the PSB or other Vermont authorities *would* attempt to regulate the Vermont Yankee Station" based on impermissible radiological safety concerns. Mem. 29 (emphasis added).

Thus, ENVY cannot show that it is somehow exempt from the State's CPG requirement or that the PSB's jurisdiction is preempted. As a result, regardless of the constitutionality of legislative acts such as Act 74 and Act 160, ENVY cannot obtain the relief it seeks—operating beyond March 21, 2012—without first obtaining a CPG from the PSB.

c. Acts 74 and 160 are not preempted. The statutes that ENVY challenges—Act 74 and Act 160, both of which allow the Vermont Legislature to determine whether to allow the PSB to issue a CPG for continued operations—also fall within the State's authority. Both of these State laws were enacted for reasons unrelated to radiological safety.

i. Act 74 was passed in response to ENVY's need for additional storage of its spent nuclear fuel to prevent the plant from having to shut down in 2008 (with ENVY introducing the initial version of the bill and lobbying for it), but the final legislation focused on moving Vermont toward a long-term solution to the State's future energy needs by encouraging the development of non-nuclear clean energy. *See* Act 74, § 2 (Findings), as codified at Vt. State. Ann. tit. 10, § 6521 (noting that at some point VY's power "will need to be replaced," that the "transition to the future" will require "investing in renewable energy sources, efficient, combined heat and power facilities, and energy efficiency," and that "there is a need for a clean energy development fund to support investment in clean energy resources in order to permit adequate power supply diversity"). Finding 3 summarizes Act 74's purpose as follows: "The state's future power supply should be diverse, reliable, economically sound, and environmentally sustainable." *Id.* § 6521(3).

Indeed, Act 74 was passed simultaneously with a Memorandum of Understanding (MOU) in which ENVY agreed to fund the development of non-nuclear clean energy. Kolber Ex. 5 (2005 MOU (June 21, 2005)), at 2 ¶ 11. The support of non-nuclear clean energy was key to Act 74's passage. *See* Act 74, § 2 (Findings), as codified at Vt. State. Ann. tit. 10, § 6521; *id.*, as codified at 10 V.S.A. § 6522(b)(4) (requiring "substantial compliance with any memoranda of understanding entered between the state and the applicant" before the PSB can grant a CPG to ENVY); *id.*, as codified at § 6523 (creating clean energy development fund). The Legislature's policy determination in Finding 3—that the "state's future power supply should be diverse,

reliable, economically sound, and environmentally sustainable"—indicates purposes that fall well within the State's regulatory authority. *See Pacific Gas*, 461 U.S. at 205 ("need, reliability, cost"); *id.* at 207 n.18 ("environmental"); *id.* at 212 ("type of facilities" and "land use" matters).

The Act's purpose was not to regulate radiological safety, nor do any of its provisions do so. Rather, the Act specifically notes that all actions taken pursuant to the bill must comply with "any order or requirement of the Nuclear Regulatory Commission." Vt. Stat. Ann. tit. 10, § 6522(c)(2).

ii. Act 160 has an explicit "legislative policy and purposes" section. Act 160, § 1. Similar to the Findings section of Act 74, the "policy and purposes" section of Act 160 notes that the Act furthers "the policy of the state" to evaluate 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.* § 1(a). These matters are also within non-preempted areas of State authority. *See Pacific Gas*, 461 U.S. at 205 ("need" and "cost"); *id. at* 207 n.18 ("environmental"); *id.* at 212 ("type of facilities" and "land use" matters). Thus, as in *Pacific Gas*, Act 160 lies "outside the occupied field of nuclear safety regulation." *Id.* at 216.

ENVY points to one sentence of Act 160 that mentions, amidst a long list of many other issues that should be studied, "public health issues." The reference in a single sentence does not prove that the Legislature's real concern in passing Act 160 was radiological safety, and does not provide a basis for finding the Act preempted, for three reasons. First, a single line from a multisection bill does not define the bill's purposes: "In expounding a statute, we must not be guided by a single sentence . . . , but look to the provisions of the whole law, and to its object and policy." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (quotation omitted). Here, the object and policy of Act 160 is found in the "legislative policy and purposes" section,

not in one line from a later section of the bill. Act 160's passing reference to public health is nothing like the state actions invalidated in *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), and *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984). Those cases involved state actions that—on their face—specifically cited radiological safety concerns in numerous places. *Skull Valley*, 376 F.3d at 1229 (invalidating licensing scheme where "applicant must provide . . . health risk assessments [and] a radiation safety program, . . . demonstrate that the facility 'will not cause or contribute to an increase in mortality, an increase in illness, or pose a present or potential hazard to human health or the environment,'" and pay "'unfunded potential liability'. . . from . . . accidental release"); *County of Suffolk*, 728 F.2d at 59 (holding that "safety concerns *pervade* the complaint" and plaintiffs "specifically refer" to "defects" that "will impair the plant's safety" (emphasis added)).

Second, there are a number of public health issues—entirely unrelated to radiological safety—that fall within the State's regulatory authority over VY. *See* Kolber Ex. 4 at 9-3 to 9-4 (listing State permits required for public health issues like air emissions from diesel generators, drinking water, etc.). Even public health issues unique to nuclear facilities are not automatically matters of radiological safety that fall outside State authority. In fact, the NRC and FEMA welcome State involvement in public health issues like emergency preparedness. *See* 10 C.F.R. § 50.47(a)(2) (looking first to "whether State and local emergency plans are adequate" and implementable to determine whether a license applicant's onsite emergency plans are adequate).[7]

Third, even if ENVY were correct that this one line from Act 160 represented an improper

[7] *See also* NRC, *The Fiscal Year 2012 Department of Energy and Nuclear Regulatory Commission Budget*, at 25 (unofficial transcript of testimony presented to the U.S. House Energy and Commerce Committee) (Mar. 17, 2011), *available at* http://www.nrc.gov/about-nrc/organization/commission/comm-gregory-jaczko/0317nrc-transcript-jaczko.pdf (NRC Chair noting that the NRC "defer[s] to state and local governments" to establish radius in which potassium iodine tablets should be distributed if there is a contamination event).

intrusion by the State into radiological safety issues (which it does not), the remedy would be to remove that one line from Act 160, not to strike down the entire statute as unconstitutional. *See, e.g.*, *Mickalis*, 2011 WL 1663427, at *24 (requiring that injunctive relief be "narrowly tailored").

Further, that Act 74 and Act 160 inserted the Legislature into the process, rather than allowing the PSB to decide on its own whether to issue a CPG, does not invalidate those laws. In *Pacific Gas*, the petitioners likewise argued that California had a public utilities commission that made economic decisions related to nuclear power. The Supreme Court held that the state was "not foreclosed from reaching the same decision through a legislative judgment." *Pacific Gas*, 461 U.S. at 215. The fact that Vermont, like other states, has chosen to require legislative approval for nuclear plants is not a basis for finding preemption. *See id.* (California); Minn. Stat. Ann. § 216B.243 Subd. 3b (requiring approval from legislature and from public utility commission for additional storage of spent fuel when a nuclear plant seeks a license extension).[8]

3. The challenged statutes are not a pretext for regulating safety.

Although the challenged statutes do not regulate or otherwise address radiological safety, ENVY asks this Court to look past the statutory language and find "pretext." The Supreme Court rejected this approach to preemption analysis in *Pacific Gas.* The *Pacific Gas* Court refused to "become embroiled in attempting to ascertain California's true motive" in passing the legislation at issue in that case. 461 U.S. at 216. The Court observed that such an exercise is "often an unsatisfactory venture," since "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.* Instead of engaging in a debate

[8] Because Vermont has only one nuclear power plant, the Legislature's decisions on nuclear power plants necessarily affect ENVY alone, but that does not foreclose the Legislature from regulating nuclear power plants with generally applicable laws. *See, e.g.*, *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 225 n.5 (1949) (holding that a law of general applicability that applies in reality to only one person is valid so long as the classification is rationally related to a legitimate government interest).

over California's "true motive," the Court "accept[ed] California's avowed economic purpose as the rationale" for its state law. *Id.*

The approach taken by the Court in *Pacific Gas* echoes other decisions where the Court has declined to search a legislative record for evidence of bad or impermissible motive. "Inquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968), *cited with approval in Pacific Gas*, 461 U.S. at 216; *accord O'Brien*, 391 U.S. at 383 (if individual statements of legislators made a law unconstitutional, then the statute "could be reenacted in its exact form" based on a "wiser" record); *Daniel*, 336 U.S. at 223 (even if improper motive arguably "obvious from the record," Court refused to "undertake a search for motive in testing constitutionality," and held that "a judiciary must judge by results, not by the varied factors which may have determined legislators' votes"); *see also, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this Court . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." (citing cases)).

Other courts have rejected attempts to find state or local regulations preempted by the Atomic Energy Act based upon an allegedly improper motive. *See Kerr-McGee*, 914 F.2d at 827; *Me. Yankee*, 107 F. Supp. 2d at 55-56. Here, ENVY cites no evidence of the State's actual encroachment into federally preempted territory, but rather merely speculates "that the PSB or other Vermont authorities *would* attempt to regulate the Vermont Yankee Station" based on impermissible radiological safety concerns. Mem. 29 (emphasis added). The Court should decline such speculation. *Kerr-McGee*, 914 F.2d at 827; *Me. Yankee*, 107 F. Supp. 2d at 55-56.

ENVY's reliance on occasional remarks by legislators also presumes, incorrectly, that any safety-related motivation is a sufficient basis to find preemption. That position, however, is

contrary to *Pacific Gas*. The Court expressly recognized in *Pacific Gas* that the challenged California laws represented responses to safety and economic concerns related to nuclear waste:

> There are *both safety and economic aspects* to the nuclear waste issue: first, if not properly stored, nuclear wastes might leak and endanger both the environment and human health; second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor-shutdowns, rendering nuclear energy an unpredictable and uneconomical adventure. *The California laws at issue here are responses to these concerns.*

461 U.S. at 196-97 (emphasis added) (footnote omitted). The Court upheld the statutes based on California's "avowed economic purpose," *id.* at 216, despite the legislature's safety concerns. Thus, even if Vermont's law requiring a CPG for continued operations touched in some way on radiological safety issues (and ENVY has not shown even that to be the case), that does not mean that those laws are preempted, given the legitimate, non-preempted legislative purposes.

This precedent shows that ENVY cannot prevail on a preemption claim by pointing to occasional comments made by individual legislators. Nevertheless, ENVY attempts to buttress its pretext argument with quotes from lawmakers, pointing primarily to recent quotes from Governor Shumlin. But the Governor represents the State of Vermont, and states are expected to—and do in fact—play a role in NRC proceedings involving safety matters. Thus, nothing in the Atomic Energy Act precludes state officials from *discussing* safety matters, or even acting on such concerns in the proper forum (NRC proceedings). It is state *regulation* of radiological safety that is preempted. ENVY cannot attribute any of Governor Shumlin's quotes to actual regulations passed into law—it was Governor Douglas who signed Act 74 and Act 160, and Governor Shumlin *was not Governor or a legislator* when those bills were passed.

Even if ENVY's cited statements were part of the legislative record, they would carry little or no weight. As the Second Circuit has held, "'[w]e . . . eschew[] reliance on the passing comments of one Member, and casual statements from the floor debates.'" *United States v.*

Nelson, 277 F.3d 164, 186-87 (2d Cir. 2002) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)).[9] After all, if *one* legislator could make any legislation affecting nuclear power plants unconstitutional merely by stating that he was voting in favor of it for safety reasons, a single legislator could effectively veto all such legitimate state regulations. That cannot be so.

ENVY's pretext argument is weakened even further by ENVY's repeated citation to statements made years after Acts 74 and 160 were passed. For good reason, the Supreme Court has dismissed reliance on statements made by legislators after a bill passes. *See, e.g.*, *Barber v. Thomas*, 130 S. Ct. 2499, 2507 (2010) ("[W]hatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law." (emphasis original)).[10] Indeed, ENVY itself has acknowledged in another filing in this proceeding that "materials that were not before the Legislature" at the time the Legislature acted "are not probative of the Legislature's purpose and would only support an ex-post rationalization not relevant to any question before the

[9] Thus, the passing comments that then-Senator Peter Welch made regarding Act 74 cannot form a basis for striking that statute as unconstitutional. His comments were made to reporters, not during Senate hearings, and so are not even part of the legislative record. And the quotes must be considered in their context. For instance, ENVY cites Welch saying "[w]e took very, very seriously this question of safety . . . . Safety is not for sale; it cannot be for sale." Mem. 21 n.8 (citing Ngau Ex. 16). But the line immediately above that quote reports that Welch "said the safety of the plant was not impacted" by the bill, Ngau Ex. 16. This context shows that Senator Welch was not suggesting that Act 74 regulated safety, but rather responding to opponents of the Act who believed the law somehow had a negative impact on safety. Welch's statement in fact confirms that safety was not the driving force behind the bill—the bill was for other purposes (*see supra* Part I.A.2.c.i). Safety concerns are left to the NRC, which is why nothing the Legislature did in Act 74 could have—or did—address safety.

[10] *See also, e.g.*, *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1409 (2010) ("Needless to say, this letter does not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes."); *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) ("Congressman Annunzio made his statement not during the legislative process, but *after* the statute became law. It therefore is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently." (emphasis original)).

Court." ECF No. 26 at 13 (Pls.' Memo. Opp. to NEC's Mot. Intervene).

In making its "pretext" argument, ENVY places undue weight on its conclusory assertion that the legitimate state purposes set forth in Act 74 and Act 160 are "so implausible as to be necessarily pretextual." Mem. 23. As discussed in detail, *supra* Part I.A.2.c, Act 74 and Act 160 were passed for legitimate purposes well within the State's authority. While ENVY argues against "[a]ny economic justification Vermont might offer," Mem. 22, and provides a one-sided list of "negative economic and environmental effects" that it alleges would occur if VY cannot continue operating, *id.* at 24, ENVY provides *no* counter to, for instance, Act 74's reference to the need for a "diverse" power supply, Act 74, § 1 (Finding 3), or Act 160's reference to the "choice of power sources," Act 160, § 1(a). Nor could ENVY counter those points. The Legislature could reasonably believe that a 2012 closure of VY might create a more immediate incentive for alternative energy sources to come online faster, thereby creating an energy future that is more "diverse" and involves a better "choice of power sources." *See, e.g.*, Kee Ex. 9 (discussing "Green" scenario). Regardless of whether ENVY agrees with that conclusion, and—importantly—regardless of whether that conclusion is ultimately *correct*, such a rationale is certainly not "so implausible as to be necessarily pretextual." Mem. 23. *Cf., e.g.*, *Palmer v. Ticcione*, 576 F.2d 459, 465 (2d Cir. 1978) ("[F]ederal courts should not second guess the wisdom or propriety of such legislative resolutions as long as they are rationally based.").[11]

[11] To the extent that ENVY might try to find pretext in S.289, the 2010 bill that—had it passed—would have allowed ENVY to proceed with seeking a CPG from the Board for continued operations, that bill is not law and therefore cannot be challenged. Further, as in *Kerr-McGee*, this bill is "radiation neutral," 914 F.2d at 827, and does not disclose (or even hint at) any attempt to regulate matters of radiological safety. Rather, S.289 was focused on matters within the State's regulatory authority, including planning the State's energy future, S.289 (2010), § 1(d), and giving electric utilities enough "time to develop and obtain renewable or other alternative electric energy sources" in the event that VY closes in 2012, *id.* § 1(e).

B. ENVY's Federal Power Act and Dormant Commerce Clause claims lack merit.

ENVY's Federal Power Act and Dormant Commerce Clause arguments do not support its claim for a preliminary injunction, for three principal reasons. First, because Vermont has not conditioned approval of a CPG on ENVY giving below-market rates to Vermont utilities, there is no case or controversy underlying these claims. Second, ENVY's market-based FERC tariff does not mandate any particular rate, so there is no basis to ENVY's argument under the filed-rate doctrine. Third, even if these claims were plausible—and they are not—they do not support ENVY's broad request for injunctive relief.

1. Vermont has not conditioned approval of a CPG on ENVY giving below-market rates to Vermont utilities.

To invoke the power of this Court, ENVY must allege a claim that is not "abstract," "conjectural," or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). Here, ENVY alleges that Vermont would violate the Federal Power Act and the Commerce Clause by "forc[ing] ENVY to sell wholesale power" to Vermont retail utilities "at below market prices" as a condition of renewal of the VY CPG. Compl. ¶¶ 102-105; 109-111. But this claim is hypothetical, not real. ENVY cannot identify any provision of state law that requires ENVY to sell power to Vermont utilities at below-market rates. While Vermont's challenged statutes required the Legislature and the PSB to determine whether continued operation of VY beyond March 21, 2012 would "promote the general welfare," no provision of Vermont law expressly authorizes, much less requires, the State to condition a CPG on ENVY's agreement to sell wholesale power at favorable rates to in-state retail utilities. The Court should not adjudicate the constitutionality of something the State has not done. *See, e.g.*, *PPL Montana*,

LLC v. State, 229 P.3d 421, 449 (Mont. 2010) (refusing to entertain argument that State's bidding process was preempted by FERC's exclusive jurisdiction over such matters when "the fact is that the State has never resorted to such a process").

ENVY rests its constitutional challenge not on any statutory language, but on newspaper accounts of statements made by one state legislator and a letter to ENVY by two state legislators (both more than two years ago). Compl. ¶¶ 82-84; Mem. 12.[12] Even if these statements were part of the legislative record, they would carry little weight. *See supra* Part I.A.3. ENVY also points to a two-year-old newspaper account of a statement by a member of the staff of the Department of Public Service (DPS), Compl. ¶ 85—but DPS has no power under Vermont law to grant or deny ENVY a CPG. These statements fall far short of meeting ENVY's heavy burden to establish the unconstitutionality of statutes that on their face say nothing at all about power rates.

Given the absence of any mention of rates in the relevant statutes, it is not surprising that ENVY alleges only that "Vermont officials have further stated that they *might* condition any favorable exercise of the State's supposed licensing authority upon the wholesale sale of power generated by the Vermont Yankee Station to Vermont retail utilities at preferential rates compared to rates charged to non-Vermont retail utilities." Compl. ¶ 10. (emphasis added). The bare possibility that Vermont might seek to impose such a condition does not suffice to make out

[12] ENVY's Memorandum cites to: (1) a 2009 newspaper article quoting then-Senate President Pro Tem Shumlin as saying the Senate would not vote to relicense the plant "unless Vermonters are getting a great deal"; and (2) a 2009 letter from Senator Shumlin and Speaker of the House Shap Smith to ENVY suggesting that, without a power purchase agreement to look at, "it would be nearly impossible for the legislature to make a judgment on the continued operation of the plant before we adjourn." Mem. 12 n.3. These statements, even if they could be attributed to the Legislature as a whole, evince little more than a hope that ENVY would do what it had voluntarily agreed to do in 2002. *See* Compl. ¶ 53 (describing 2002 MOU with DPS).

an actual controversy. *See, e.g.*, *Lyons*, 461 U.S. at 108 (finding that speculation about future police misconduct did not establish a case or controversy surrounding lawfulness of police department policies). ENVY's claims under the Federal Power Act and Commerce Clause are insufficient to make out a justiciable controversy, much less a plausible claim for relief.

2. ENVY has not made out a violation of the filed rate doctrine.

There is no merit to ENVY's argument that Vermont's actions threaten to violate the filed rate doctrine. *See* Mem. 30-32. The crux of the filed rate doctrine is that where wholesale sellers of electricity have a tariff rate on file with FERC, such tariff rates must be given effect by state authorities. *See, e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-67 (1986). ENVY suggests that a state requirement to sell power to Vermont utilities at "below-market rates" would violate the filed rate doctrine because "[s]uch lower rates would necessarily be different from—and thus conflict with—the existing market-based rates that Entergy has negotiated without interference from the State pursuant to the market-based tariff filed with FERC." Mem. 32.

The absence of *any* state rate mandate aside, ENVY's market-based rate tariff on file with FERC itself does not dictate any specific "market rate." Rather, the entire purpose of the tariff is to provide ENVY and buyers the flexibility to negotiate a rate acceptable to both parties on a case-by-case basis. The tariff says only that sales "shall be made at rates established by agreement between the purchaser and Entergy Nuclear VY."[13] Because the tariff does not specify any particular "market rate," there is no such thing as a "below-market" rate from a tariff standpoint. Whatever rates ENVY might agree to in a wholesale power contract between ENVY

[13] Kolber Ex. 27 (ENVY's Market-Based Rate Tariff, Second Revised Volume No. 1 (June 24, 2010)), at § 2; Kolber Ex. 28 (FERC, *PECO Energy Co., et al.*, Dkt. No. ER10-1143-000 *et al.* (July 28, 2010)) (FERC unpublished letter order accepting ENVY's submitted tariff).

and Vermont utilities cannot "conflict" with the FERC tariff, even if the rates are different from rates ENVY negotiates elsewhere, because ENVY's tariff does not mandate any particular rate.

Also, anything the State or utilities do by way of executing purchase power agreements *must* be approved by FERC, ensuring Vermont's laws do not "impair[] the federal superintendence of the field." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

3. Even if ENVY's claims were plausible—and they are not—they do not support ENVY's request for broad injunctive relief.

Even if ENVY's claims under the Federal Power Act and the Commerce Clause had merit, they would not justify the broad injunctive relief sought by ENVY. At most, even if those claims were valid, ENVY would be entitled to an order enjoining the State from requiring a below-market contract. Instead, ENVY asks the Court to enjoin the State from taking any actions that would require VY to have a CPG before it could operate beyond March 21, 2012. As discussed *supra* Part I.A.1, states have authority to deny the relicensing of a utility, including a nuclear one, for reasons other than concerns about radiological safety. ENVY's requested injunction would not merely bar the State from mandating ENVY's execution of favorable contracts with in-state utilities; it would bar Vermont from taking action that is not preempted by federal law. The Court cannot grant ENVY the relief it seeks based upon any alleged violation of the Federal Power Act or the Commerce Clause. *See, e.g.*, *Mickalis*, 2011 WL 1663427, at *24 (injunctive relief must be "narrowly tailored to fit specific legal violations").

C. ENVY's previous conduct, including its agreement to the 2002 MOU and its delay in bringing these claims, defeats its request for equitable relief.

The Second Circuit has held that "equitable considerations" can "dictate denial of injunctive relief." *New Era Pubs. Intern., ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989). Here, the equitable doctrines of waiver, estoppel, and laches bar injunctive relief.

Beginning nearly ten years ago, ENVY acknowledged repeatedly that Vermont has a role in determining whether to allow VY to run beyond March 21, 2012, and represented to State officials, including the PSB, that it would not do what it is doing here—challenge the State's authority to regulate VY. ENVY's conduct and representations in multiple proceedings demonstrate that ENVY's preemption challenges are barred by the equitable doctrines of waiver, estoppel, and laches.

In 2002, when ENVY sought permission from the PSB to purchase VY, ENVY signed an MOU with the DPS. In that MOU, ENVY:

> expressly and irrevocably agree[d]: (a) that the Board has jurisdiction under current law to grant or deny approval of operation of the [VY facility] beyond March 21, 2012 and (b) to waive any claim each may have that federal law preempts the jurisdiction of the Board to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the . . . CPG[s] to allow operation of the [VY facility] after March 21, 2012, or to decline to so renew, amend or extend.

Ngau Ex. 3 at 6 ¶ 12. ENVY also agreed that "this [MOU] is governed by Vermont law and any disputes arising under this [MOU] shall be decided by the Board." *Id.* ¶ 16(1). The PSB adopted the 2002 MOU in its final Order granting ENVY approval to purchase the VY station, and the PSB expressly relied upon the provisions of the MOU in doing so. Ngau Ex. 20 at 158 ¶ 3. The Vermont Supreme Court affirmed the PSB's Order in its entirety, at ENVY's request. Kolber Ex. 6 (ENVY's Br. (Jan. 21, 2003)), at 25; *In re Proposed Sale of Vt. Yankee*, 829 A.2d at 1289.

In 2004, ENVY sought and received approval from the PSB for an uprate to allow ENVY to increase production by roughly 20 percent. During those proceedings, the Board Chair asked an ENVY representative whether there would be enough room to store the additional spent nuclear fuel that would be created by the uprate. Kolber Ex. 7 (Vt. Pub. Serv. Bd., Dkt. No. 6812, Tr. (Jan. 15, 2004)), at 86. ENVY said that it would need to build dry-cask storage units to allow it to operate beyond 2007 or 2008, and explicitly agreed to seek State approval before building

those units. *Id.* at 89.

In 2005, ENVY sought State approval to build dry-cask storage units. ENVY's current challenge to Act 74 is ironic, as ENVY *proposed* and lobbied for the bill that ultimately became Act 74. Hinkley Ex. F (Letter from John Hollar to Rep. Dostis (Mar. 10, 2005)) ("Attached is Entergy's proposal for dry fuel storage legislation."); Kolber Ex. 8 (Jay Thayer Leg. Test. (Feb. 23, 2005)), at Track 1 (emphasizing "urgency" for bill and ENVY's "need" for it to continue operations until 2012). The Legislature allowed ENVY to seek a CPG to build enough storage units to last through 2012, including capacity for a "full core offload or any order or requirement of the Nuclear Regulatory Commission," Vt. Stat. Ann. tit. 10 § 6522(c)(2), but specified that ENVY would need legislative approval before it could store "spent fuel derived from the operation of Vermont Yankee after March 21, 2012," *id.* § 6522(c)(4).[14]

In conjunction with Act 74, ENVY executed another MOU with DPS in 2005, again agreeing "that it will not file an action or petition based on or otherwise seek, claim, defend, or rely on the doctrine of federal preemption to prevent enforcement of its express obligations under this MOU." Kolber Ex. 5 at ¶ 12.

More recently, in the relicensing docket at the PSB, ENVY submitted its petition in March 2008 and once more acknowledged the PSB's jurisdiction to issue a CPG for operation beyond

[14] Although ENVY might argue that its requested version of the bill did not explicitly require legislative approval for storage of spent fuel derived from post-March 21, 2012 operations, the effect of ENVY's proposed bill was precisely the same. ENVY's proposed bill sought permission to build only "twelve" dry-cask units. Hinkley Ex. F. ENVY described its proposal as follows: "six containers that would be necessary to continue to operate through the life of the current license through 2012" and "a need for an additional six containers to start that decommissioning process, to off-load the core, the fuel core. And so that's where the number twelve is derived." Kolber Ex. 8 (John Hollar Leg. Test. (Mar. 18, 2005)), at Track 2. Thus, even under its proposed version of Act 74, ENVY would have had to return to the Legislature to get approval for storing spent fuel derived from post-March 21, 2012 operations. *Id.* at Track 3 (ENVY representative noting that: "The current issue does not go beyond 2012. We're simply looking for what we need to be able to operate the plant through 2012.").

March 21, 2012, as well as the need for legislative approval. Kolber Ex. 9 (Vt. Pub. Serv. Bd., Dkt. No. 7440, ENVY Petition (Mar. 3, 2008)), at 2 ¶ 4; *see also* Kolber Ex. 10 (ENVY "Issues Document" provided to Vermont General Assembly (Mar. 6, 2009)), at 21 (PSB decides "the question" of license renewal).

Indeed, in March 2010, ENVY testified in another federal court that it was fully aware, at the time of sale in 2002, of *all* of the foregoing state approvals as requirements for ENVY to "do business in Vermont":

> Entergy during the sale case made a commitment to the Vermont Public Service Board to work with the Board's certificate of public good process to receive approval from the State for the power uprate, dry fuel storage and license renewal.

Kolber Ex. 11 (*Entergy Nuclear Vt. Yankee, LLC v. United States* (*ENVY v. U.S.*), 95 Fed. Cl. 160 (2010), *appeal pending*, Nos. 2011-5033, -5034, -5042 (Fed. Cir. filed Dec. 13, 2010), Tr. (Mar. 29, 2010)), at 140-43.[15]

In short, ENVY has expressly agreed and acknowledged in numerous proceedings that the State of Vermont has a say in whether VY continues to operate beyond March 21, 2012. In its filings before this Court, ENVY now asserts that Vermont has no say in whether VY can operate beyond March 21, 2012. This about-face warrants denying preliminary equitable relief.

1. ENVY has waived its preemption claims.

ENVY entered into a binding agreement in the 2002 MOU, incorporated into a final PSB Order, that waives ENVY's preemption claim and requires ENVY to assert any claims about the

[15] In *ENVY v. U.S.*, ENVY and the former owner of VY have both sought damages from the U.S. Department of Energy for expenses incurred as a result of the Department's failure to comply with its contractual obligation to remove spent nuclear fuel from VY by 1998. The trial court ordered the Department to reimburse ENVY for the costs ENVY incurred in abiding by the State's approval processes, after ENVY explicitly argued that the State had *not* gone beyond its jurisdiction in 2005 when it passed Act 74. *See ENVY v. U.S.*, 95 Fed. Cl. at 189; Kolber Ex. 11 at 115-16. An appeal is pending.

2002 MOU (including its claim that the State "repudiated" the MOU) before the PSB.

"[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation omitted). Preemption challenges are waivable. *E.g.*, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003); *see also Wolf v. Reliance Std. Life Ins. Co.*, 71 F.3d 444, 448 (1st Cir. 1995) (same; discussing exceptions not applicable here). Parties may agree to waive preemption. *E.g.*, *Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277, 283 (S.D.N.Y. 1997).[16]

ENVY irrevocably waived its right to challenge, based on federal preemption, the State's jurisdiction to issue or deny a CPG. Ngau Ex. 3 at 6 ¶ 12. Under Vermont law, which governs the interpretation of the MOU, *id.* ¶ 16(1), "[t]he cardinal principle in the construction of any contract is to give effect to the true intention of the parties." *In re Cronan*, 563 A.2d 1316, 1317 (Vt. 1989). ENVY's intent to waive its right to argue preemption could not have been clearer:

- "ENVY and ENO have *expressly and irrevocably agreed* to waive any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law." Kolber Ex. 12 (Vt. Pub. Serv. Bd., Dkt. No. 6545, ENVY's Proposal for Decision (May 9, 2002)), at 18 (emphasis added).

- ENVY "has committed to seeking approval from the Board of any extension of its NRC license to own and operate the plant … and *irrevocably agree[s] to waive* any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law." Kolber Ex. 13 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Prefiled Rebuttal Testimony of Connie Wells (Feb. 25, 2002)), at 7-8 (emphasis added).

- "ENVY entered into the MOU intending to comply with the commitments made there, thus waiving any preemption arguments it may have *now or in the future*." Kolber Ex. 14 (Vt. Pub. Serv. Bd., Dkt. No. 6545, ENVY's Mem. in Opp'n (July 9, 2002)), at 6 (emphasis added).

- "Moreover, given the circumstances in which the commitment has been made to the

[16] Because waiver is specific to the party waiving the claim, ENVY's waiver would, of course, not prevent another party, such as NRC, from potentially raising a preemption claim. The NRC is not a party to these proceedings, and has, in fact, repeatedly recognized the role of states in relicensing nuclear power plants. *See supra* Section I(A)(1)(c).

> Board, ENVY believes it would be *bound as a contractual matter* to seek Board approval for life extension." Kolber Ex. 15 (Vt. Pub. Serv. Bd., Dkt. No. 6545, ENVY's Initial Br. (May 9, 2002)), at 14 (emphasis added).

ENVY's waiver was not limited to the Board's jurisdiction. *See Johnson v. Tuttle*, 187 A. 515, 518 (Vt. 1936) ("The right waived is gone forever, and cannot be recalled or reclaimed. This is so, though the position of the party in whose favor the waiver operates may have changed." (citations omitted)). Waiver encompasses "all conflicts foreseeable at the time" an agreement is made. *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998); *see also, e.g.*, *Tolliver v. Christina Sch. Dist.*, 564 F. Supp. 2d 312, 316 (D. Del. 2008) ("A contract is to be kept even if . . . circumstances have made the contract more burdensome or less desirable than anticipated." (citations omitted)). Here, the parties knew in 2002 that the PSB is a creature of statute, whose jurisdiction can be changed at any time by the Legislature. Indeed, in light of the parties' awareness at that time of *Pacific Gas*, Mem. 29, the General Assembly's insertion into the approval process was foreseeable at that time. *See Pacific Gas*, 461 U.S. at 215 (recognizing that legislature was free to insert itself into process normally reserved for public utility commission).

ENVY's conduct over the last nine years supports enforcing the waiver as to any challenges against the Board and against the role given to the Legislature pursuant to Act 74 and Act 160. "[T]here is no surer way to find out" the intent of the parties to a contract "than to see what they have done." *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 119 (2d Cir. 2010) (quotation omitted).

ENVY's conduct with regard to Act 74 is particularly telling. As discussed earlier, ENVY *proposed* and lobbied for the bill that ultimately became Act 74. Hinkley Ex. F; Kolber Ex. 8 at Track 1. ENVY hailed its passage as "'good news' for the plant and the employees who ran it,

because, otherwise, the plant could not have continued to operate." Kolber Ex. 16 (*ENVY v. U.S.*, ENVY's Post Tr. Br. (May 20, 2010)), at 21 (quoting former ENVY Vice President Jay Thayer). And ENVY recently represented to the Court of Federal Claims that "[i]n the Certificate of Public Good process over the years, the State of Vermont had focused on requirements 'which do not intrude on the federal government's regulation of nuclear plants from a safety and a radiological standpoint. *They're different than the federal requirements*.'" *Id.* at 22 (emphasis added) (quoting former ENVY Vice President Jay Thayer); *accord* Kolber Ex. 17 (*ENVY v. U.S.*, ENVY's Post Tr. Reply Br. (June 25, 2010)), at 18.[17]

The same holds true for Act 160. In 2006 and 2010, ENVY testified numerous times before the Legislature. ENVY never claimed that the insertion of the General Assembly into the license renewal repudiated the 2002 MOU; only that Act 160 was unnecessary because ENVY was already bound (by the 2002 MOU) and committed to the State's regulatory processes already in place, including PSB review and legislative approval under Act 74. *See* Kolber Ex. 8 (Gerry Morris Leg. Test. (Mar. 2, 2006)), at Track 4 ("We feel this [Act 160] is redundant."). ENVY's Vice President of Government Relations expressly stated that: "you already have . . . a sound regulatory process already in place for deciding the future of Vermont Yankee. . . . make no mistake, we are also firm believers in the state and regulatory processes in place." *Id.* at Track 5.

Thus, until the filing of this lawsuit, ENVY's conduct since 2002 has been entirely consistent with the understanding that the waiver from the 2002 MOU applied to the preemption claims ENVY now brings before this Court. "The parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent." *Ocean Transp. Line, Inc. v. Am. Phil. Fiber Indus., Inc.*, 743 F.2d 85, 91 (2d Cir. 1984).

[17] *See also* Kolber Ex. 16 at 17; *id.* at 2 (emphasizing that the record failed to demonstrate that it "would have been reasonable" to litigate whether the State was preempted from passing Act 74).

Further, the State is not attempting to expand its jurisdiction into exclusive federal areas, *see* Mem. 28-29, by holding ENVY to the voluntary and unequivocal waiver it agreed to nearly ten years ago. Indeed, neither the Legislature nor any State agency has claimed that the waiver gave the PSB or the Legislature the right to regulate in preempted areas of radiological safety, and as discussed above, *supra* Part I.A & B, the State in fact has not entered the preempted field of radiological safety. All parties understood that the 2002 MOU was not "creat[ing] jurisdiction" (Mem. 28), or overstepping the State's proper authority as clarified by *Pacific Gas*. ENVY's own briefing in 2002 confirms this:

> *Just as the Board has the authority to issue a CPG* under 30 V.S.A. §231 to ENVY and ENO in connection with ENVY's ownership and ENO's operation of the VY Station, *so it may conduct a similar review in the context of a request to extend/renew the CPGs beyond the current license term. See Pacific Gas & Elec. v. State Energy Resources Conservation and Dev. Comm.,* 461 U.S. 190, 205 (1983) ("States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.")

Kolber Ex. 15 at 13-14 (emphasis added).

Finally, ENVY cannot avoid the consequences of its bargain with the State by claiming repudiation, and, if it wishes to press such a claim, it agreed to do so before the PSB. ENVY's argument disregards the fact that the DPS fully performed its obligations under the MOU. The DPS supported the sale of VY to ENVY in the PSB sale proceeding, and the sale was approved. ENVY cannot plausibly describe the DPS or the State's conduct as repudiation when ENVY got the benefit that it contracted for. Further, the 2002 MOU contains a broad forum selection clause explicitly requiring the PSB to decide all disputes thereunder. Ngau Ex. 3 at 7 ¶ 16(1) ("[A]ny disputes arising under this Memorandum of Understanding *shall be decided by the Board*." (emphasis added)); *see Chase Commercial Corp. v. Barton*, 571 A.2d 682, 684 (Vt. 1990) ("There can be no doubt that forum selection clauses are prima facie enforceable in Vermont.");

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (same); *see also* Kolber Ex. 15 at 24 (acknowledging PSB's authority to "take action to enforce the MOU and to ultimately revoke the CPG if ENVY and ENO do not comply"). Thus, if ENVY believes that it should be "released" from the 2002 MOU because the State "repudiated" it, ENVY must raise that issue with the PSB, not this Court. Ngau Ex. 3 at 7 ¶ 16(1).[18]

ENVY "cannot claim the benefit of statutes and afterwards assail their validity." *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917). Yet that is precisely what ENVY attempts here. ENVY has benefitted from the PSB's rulings and from Act 74 for years. In particular, ENVY has gained untold profits from the PSB's approval of the sale of VY to ENVY in 2002 and from the PSB's decision to allow ENVY to have a 20 percent uprate in 2004. More importantly, in both of those proceedings, ENVY touted its commitment to seek future State approvals and its explicit waiver of preemption, and on that basis convinced the PSB to rely on ENVY's representations and reject challenges raised by opponents that were worried that ENVY would one day go back on its word. ENVY cannot now go back on its word because it is concerned about the exercise of State jurisdiction that it expressly promised to honor.

2. ENVY is estopped from asserting its preemption claims.

ENVY's preemption challenges are barred by judicial and equitable estoppel. As the Second Circuit recently clarified, "[a]lthough those doctrines have somewhat different purposes and

[18] Additionally, any such claim would need to be decided as a matter of state contract law, because ENVY also agreed that the MOU is "governed by Vermont law," Ngau Ex. 3 at 7 ¶ 16(1), but the Eleventh Amendment bars a state-law claim like breach of contract or repudiation from being raised against the State in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (holding that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State" from which the State is "protected by the Eleventh Amendment"). This rule applies to contract claims, *see, e.g.*, *Garcia v. Lemaster*, 439 F.3d 1215, 1219 n.7 (10th Cir. 2006), "regardless of the relief sought," *Kirwin v. N.Y. State Office of Mental Health*, 665 F. Supp. 1034, 1039 (E.D.N.Y. 1987).

applications, in each case the party who is to be estopped . . . must have asserted a fact or claim, or made a promise, that another party relied on, that a court relied on, or that a court adjudicated and then later attempted to take a contradictory stance in that or another proceeding." *Republic of Ecuador v. Chevron Corp.*, ___ F.3d ___, 2011 WL 905118, at *8 (2d Cir. 2011) (citations omitted). That is precisely the situation here.

As explained above, since 2002 ENVY has made a series of promises and assertions, before the PSB, the Court of Federal Claims, and the Vermont Legislature, that it would not challenge the State's authority to determine whether to extend its CPG beyond March 2012. The State has relied on those representations by, for instance, supporting the sale of VY to ENVY in 2002; the PSB relied on them in approving the 2002 sale, the 2004 uprate, and the 2005 fuel storage CPG; and the Court of Federal Claims relied on them in ruling in ENVY's favor in ENVY's ongoing litigation against the Department of Energy. Accordingly, ENVY is judicially and equitably estopped from now arguing that the State has no authority over VY's continued operation.

a. Judicial estoppel is applicable, and even necessary, to prevent injustice from ENVY's reversal of its long-held positions. *See In re Adelphia Recovery Trust*, 634 F.3d 678, 695 (2d Cir. 2011) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (quotation omitted)). As the Supreme Court explained, the doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotations omitted). The Court noted three factors that "typically inform" the decision to apply judicial estoppel: (1) whether

the party's later position is "clearly inconsistent" with its prior position; (2) whether the party succeeded in persuading a court to adopt its earlier position; and (3) whether the party would gain an unfair benefit, or the opposing party would suffer an unfair detriment, absent estoppel. *Id.* at 750-51; *accord In re Adelphia*, 634 F.3d at 695-96 (applying judicial estoppel).

ENVY's current claims are inconsistent with the positions it has taken before the PSB starting in 2002 and continuing over the years since. ENVY consistently averred, in briefs and testimony, that it would not challenge the PSB's regulatory authority and specifically would not bring a preemption challenge. *See, e.g.*, Kolber Ex. 12 at 18; Kolber Ex. 13 at 7-8. In particular, ENVY's briefing and representations to the PSB back in 2002 expressly recognized it would be estopped from seeking the relief it now seeks:

> "The commitment is being made *with the understanding that the Board will rely on it* in reaching a decision whether to grant the requested CPG. Given the Board's reliance, *ENVY would be estopped from arguing in the future* that the Board did not have authority *to extend the CPG*." Kolber Ex. 15 at 13-14 (emphasis supplied).

> "I can tell you you heard from witness Kansler, Keuter and Wells that *Entergy is making commitments to the Board as a condition of getting the CPG* that they are seeking here, *and it will stand by those commitments* where it has made a commitment." Kolber Ex. 18 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Tr. (July 2, 2002)), at 59-60 (emphasis supplied).

> "The Board and the Department—if Entergy violates any conditions of the CPG or the MOU, they have recourse against the company. You have the right to haul us in and take away the CPG if it's significant enough." Kolber Ex. 18 at 60 (ENVY counsel).

Indeed, when other parties in the 2002 PSB docket questioned whether ENVY would later argue preemption, ENVY pushed back in the strongest possible terms:

> For NECNP to suggest that ENVY would make specific agreements in the MOU, ask the Board to rely on those agreements and approve the transaction, and then try to back out of those agreements by arguing preemption is an unwarranted and unsupported attack on the integrity of this company and of its representatives who negotiated the MOU and supported it before the Board.

Kolber Ex. 14 at 3.

In fact, the PSB did "expressly rely" on ENVY's "binding contractual commitment" (agreeing to PSB jurisdiction over relicensing and waiving preemption) when the PSB approved the sale of VY to ENVY. Ngau Ex. 20 at 81-82; *see also* Kolber Ex. 19 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Order (July 11, 2002)), at 25 ("Therefore, with regard to the terms of the MOU, the Board has no question as to Entergy's position. Entergy signed the MOU, testified as to Entergy's intent to support its terms, and at oral argument on July 2, 2002, reiterated its commitment to the MOU."). Further, in affirming the PSB's Order, the Vermont Supreme Court noted it was relying on "the present facts," including "the circumstances [ENVY] presented to the PSB." *In re Proposed Sale of Vt. Yankee*, 829 A.2d at 1288.

ENVY's current stance also contradicts its position that the Court of Federal Claims relied on in *Entergy Nuclear Vt. Yankee*, 95 Fed. Cl. 160. There, ENVY maintained that the Vermont Legislature had not exceeded its jurisdictional bounds, and that in any event, ENVY had decided as a business matter to agree to the State's conditions, from the 2002 sale all the way through relicensing. *See* Kolber Ex. 11 at 142-43; *see also id.* at 116. Though an appeal in pending, ENVY obtained a favorable ruling: citing ENVY's testimony, the court awarded ENVY significant damages, including around $10 million related to the cost of the State's approval processes. *Entergy Nuclear Vt. Yankee*, 95 Fed. Cl. at 189 ("Given its ongoing relationship with the State…, ENVY's decision not to challenge the State . . . was reasonable under the circumstances.").

Despite ENVY's explicit representations that it would not "walk away from the commitments it has made to the Board and the Department," Kolber Ex. 14 at 3, ENVY now seeks to do so. The purpose of judicial estoppel is to prevent precisely this type of action. *See, e.g.*, *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)

("[Plaintiff's] prior representation in the Massachusetts state court that it would not prosecute the state antitrust count and its subsequent repudiation of that intention . . . warrants application of judicial estoppel.").

ENVY's position reversal, if accepted by this Court, would: (1) give ENVY an unfair advantage by allowing ENVY to avoid its obligations while enjoying the *full* benefits of the 2002 MOU and PSB Order; and (2) create the possibility of inconsistent results, given that the PSB, the Vermont Supreme Court, and the Court of Federal Claims have all made decisions based upon the ENVY's representations recounted above. Judicial estoppel therefore applies.

b. Equitable estoppel bars ENVY from making its current preemption claims given its previous positions and representations to the State. "Under federal law, a party may be estopped from pursuing a claim . . . where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely upon it; 2) and the other party reasonably relies upon it; 3) to her detriment." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001).

Regarding the first element, it is "immaterial" whether ENVY may have believed at the time that its statements were true. *Id.* at 726. All that matters is that ENVY's representations turned out to be untrue. As discussed in detail above, ENVY made numerous representations to the PSB and to the Legislature that it would not operate beyond March 21, 2012, unless it had State authority to do so. *E.g.*, Kolber Ex. 26 (Vt. Pub. Serv. Bd., Dkt. No. 7082, Tr. (Feb. 6, 2006)), at 13-14. Again, ENVY proposed the bill that ultimately became Act 74, Hinkley Ex. F, and acknowledged at that time the General Assembly's role in determining whether VY would operate past March 2012. *See, e.g.*, Kolber Ex. 8 (John Hollar Leg. Test. (Mar. 18, 2005)), at Track 6 ("In our view the legislature needs to be involved in that future decision about

Vermont's energy mix . . . . The legislature needs to be part of that discussion."); *Id.* at Track 3. Nor did ENVY question the Legislature's authority to approve VY's continued operation in the context of Act 160. *Id.* at Track 4 (stating only that Act 160 was redundant to the Legislature's approval in Act 74).

The second and third elements of equitable estoppel are also met here. As discussed above, the PSB reasonably relied on the statements ENVY made during the 2002, 2004, and 2005 proceedings, and the Legislature reasonably relied on ENVY's statements when it passed Act 74. It would now be detrimental to the PSB and the Legislature to deprive them of a say in whether VY operates beyond March 21, 2012. This suffices to estop ENVY. *See Gravel & Shea v. White Current Corp.*, 752 A.2d 19, 23 (Vt. 2000) ("Based on its conduct, defendant is estopped from now attempting to avoid the contractual obligation . . . .").

In sum, ENVY made clear its commitment to abide by state jurisdiction (over non-radiological safety matters) throughout a nearly ten-year course of dealing with the State and in judicial tribunals. The State and those tribunals relied on ENVY's consistent positions and representations. Estoppel (and its underlying principles of fair dealing, good faith, and justice) applies here to prevent ENVY from reversing its position to the detriment of the Defendants and the tribunals that have relied on its past representations.

3. Laches bar ENVY from asserting its preemption claims.

As noted above, ENVY received the benefit of the PSB's approval, and Vermont laws, for years. If ENVY actually believed that Vermont was improperly regulating VY's operations throughout these proceedings, it should have brought those claims promptly. Its failure to do so has been another form of commitment that the State has relied on, while in the interim ENVY continued to profit from its State-approved operation of the plant. To allow ENVY's preemption

challenges now would prejudice the State. *See, e.g.*, *Allens Creek/Corbetts Glen Pres. Grp., Inc. v. West*, 2 Fed. App'x 162, 164 (2d Cir. 2001) ("The equitable defense of laches bars an equitable claim where the plaintiff has unreasonably and inexcusably delayed, resulting in prejudice to the defendant."); *Petition of Vt. Elec. Co-op., Inc.*, 687 A.2d 883, 884-85 (Vt. 1994).

ENVY has no excuse for its delay in challenging the PSB's jurisdiction. *See, e.g.*, *id.* at 885 ("A six-year delay before asserting procedural violations is patently unreasonable."). In fact, ENVY explicitly recognized it had the opportunity to raise a preemption challenge in "federal court or in another state court" in 2002 and decided instead that the PSB was the proper forum for that issue. Kolber Ex. 20 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Tr. (Oct. 31, 2001)), at 66.

Similarly, ENVY does not have an excuse for its delay in challenging Act 74. Soon after that law was passed, ENVY had a concrete and ripe claim because it spent millions of dollars complying with Act 74, including contributions to the clean energy development fund and expenses for extensive proceedings before the PSB. *See, e.g.*, *Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 410-11 (8th Cir. 1985) ("It can hardly be doubted that a controversy sufficiently concrete for judicial review exists when the proceeding sought to be enjoined is already in progress."). Further, ENVY's current claims are not contingent on the status of VY's NRC license; it did not have to wait to obtain its NRC license renewal before bringing this action. *See, e.g.*, *Skull Valley*, 376 F.3d at 1237-39 (challenge to state law regulating facility ripe for judicial review before facility is licensed by NRC).

ENVY cannot now claim that all of these laws and regulations—passed years ago and which ENVY agreed to and complied with—are unconstitutional. *See Bergner v. State*, 141 A.2d 253, 255 (Conn. Super. 1958) ("Anyone who claims that a statute is unconstitutional, as an invasion of rights secured to him should raise the question at the earliest opportunity, and he may waive

his constitutional rights by taking part, without objection, in judicial proceedings otherwise unconstitutional as against him." (quotations omitted)). Simply put, ENVY made a deliberate choice when it purchased VY (and reiterated several times since) to accept State regulation and to agree that State approval was necessary for operation after March 21, 2012. *See* Kolber Ex. 11 at 142-43. ENVY received the full benefit of its agreements with the State for years, without legal challenge, and has no excuse for why it did not raise its claims earlier.

Applying laches is appropriate because the State has been prejudiced by ENVY's inexcusable delay. The PSB expressly relied on ENVY's commitments and representations in approving ENVY's various CPGs. The State did likewise in passing the legislative acts. Further, the State has continued to abide by the terms of the 2002 MOU, and worked with ENVY in various proceedings. At no time before this lawsuit did ENVY raise these issues in the appropriate forums, though its claims stem from actions taken by the PSB in 2002 and by the Legislature in 2005 and 2006. ENVY claims that it is not getting what it bargained for in the 2002 MOU because it fully expected to receive a new CPG in 2012. But Vermont has consistently made clear to ENVY that any approvals it received from the State did not create a right to operate Vermont Yankee beyond March 21, 2012. *See, e.g.*, Kolber Ex. 21 (Vt. Pub. Serv. Bd., Dkt. No. 6545, 2002 CPG (June 13, 2002)), at 1 (noting CPG would "expire on March 21, 2012"); Kolber Ex. 22 (Vt. Pub. Serv. Bd., Dkt. No. 7082, 2006 CPG (Apr. 26, 2006)) ¶ 6 ("[CPG] shall not confer any expectation . . . to continued operation of [VY] following the expiration of its current operating license on March 21, 2012.").

* * * *

The equitable principles of waiver, estoppel, and laches stand as defenses to ENVY's claims and provide a further reason why ENVY is not likely to succeed on the merits. In addition, these equitable considerations defeat ENVY's request for an award of equitable relief, particularly the

extraordinary remedy of a preliminary injunction.

II. ENVY will not suffer irreparable harm if preliminary relief is denied.

ENVY cannot show that it will suffer irreparable harm if it does not obtain a preliminary injunction. Irreparable harm is cognizable only if it is "actual and imminent." *Kamerling*, 295 F.3d at 214. ENVY's harms are not. First, the alleged harms identified by ENVY flow from uncertainty about VY's future operations, and that uncertainty cannot be resolved by a preliminary ruling in advance of a final decision. Second, ENVY's undue delay in pursuing its claims weighs against a finding of irreparable harm. Third, ENVY's specific allegations of harm are unpersuasive.[19]

A. A preliminary ruling will not decide if VY may operate after March 21, 2012, and thus would not redress the harm alleged by ENVY.

ENVY alleges harm based on uncertainty about ENVY's future operations. Granting the requested preliminary injunction cannot, however, eliminate the uncertainty that drives ENVY's alleged irreparable harms. Only a decision on the merits can do that. And this case is on track to move quickly to a decision on the merits before March 2012—at the May 5, 2011 scheduling conference, the Court indicated that the trial on the merits will be scheduled in the first part of October or the latter part of September, and the parties agreed. The Court's final decision after trial will resolve whether ENVY can operate after March 21, 2012.

ENVY has not identified an alleged harm that would be redressed by a preliminary, as opposed to final, ruling. With regard to refueling, for instance, whether or not this Court issues a preliminary injunction, ENVY still has to decide whether to order a refueling assembly without

[19] ENVY's claimed irreparable harm also fails because its NRC license renewal is invalid. The NRC license failed to include the required state-issued section 401 water quality certification and is the subject of a pending appeal to the D.C. Circuit. Kolber Ex. 23 (*Vt. Dept. of Pub. Serv. v. U.S. NRC, petition for review filed* (D.C. Cir. May 19, 2011)); Kolber Ex. 24 (*New England Coalition v. U.S. NRC, petition for review filed* (D.C. Cir. May 20, 2011)).

knowing whether the plant will continue to run past March 2012. The same reasoning applies to ENVY's claims about alleged employee attrition. In his declaration, Mr. Herron states that "[t]he *uncertainty over whether Vermont Yankee Station will be able to continue to operate beyond March 2012* is creating increasingly serious challenges." Herron ¶ 21 (emphasis added). Any uncertainty that is affecting employees will not be removed or addressed by a preliminary injunction, particularly when the case schedule contemplates a decision on the merits before March 21, 2012. And the same is true for potential power purchasers: a preliminary ruling would not give certainty about VY's future operations, and thus would not change the fact that uncertainty will play a role for potential buyers in ENVY's power purchase agreements. *See* Parker Dec. ¶ 23. Because these alleged irreparable harms will remain even if the Court grants the requested relief, ENVY cannot show that it will suffer irreparable harm if it fails to obtain a preliminary injunction.

B. ENVY delayed in asserting its claims.

ENVY's decision to wait until April 2011 to raise claims that were available to it as early as 2002 cuts strongly against finding irreparable harm here. ENVY asserts that the 2002 MOU and three Vermont statutes, enacted in 2005, 2006, and 2008, are all preempted under the Atomic Energy Act. These claims were ripe and should have been brought years ago. *See supra* Part I.C.3.

ENVY made a business decision about when to file this lawsuit. Because its decision has created the alleged exigency, it negates ENVY's claim of irreparable harm. "Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756

F.2d 273, 276 (2d Cir. 1985); *see also Majorica, S.A. v. R.H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir. 1985) ("Lack of diligence, *standing alone*, may . . . preclude the granting of preliminary injunctive relief." (emphasis added)). ENVY's failure to bring its claims years ago "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Citibank, N.A.*, 756 F.2d at 277.

C. ENVY's specific allegations of harm are unpersuasive.

ENVY's allegations regarding attrition, refueling, the possible costs of a temporary shutdown, and power purchase contracts are insufficient to prove irreparable harm.

1. ENVY's staffing levels are above company internal budgeted levels and attrition is in line with expectations for an industry with an aging workforce.

ENVY has asserted it is suffering irreparable harm because "numerous skilled employees . . . have recently left their jobs because of their concern that the Vermont Yankee Station may be shut down as of March 21, 2012," and as that date approaches, the loss of employees "threatens the ability of the [plant] to operate." Mem. 35. ENVY's claim fails because: (1) internal company documents show staffing at the plant at a high level, above its own internal budgeted levels in 2010 and 2011, and for the most recent reported periods in 2011 the staffing status is reported in "good" shape; and (2) even accepting the attrition data submitted with ENVY's injunction papers, the data does not show a significant increase in attrition, let alone a "major disruption" of the business, and the plant attrition numbers are in line with overall industry expectations for nuclear power plants.

a. Attrition is not unusually high and staffing levels are appropriate. The Second Circuit has held that a "[m]ajor disruption" of business may qualify as irreparable harm when it is "of such magnitude as to threaten the viability" of the business. *Petereit v. S.B. Thomas, Inc*, 63 F.3d 1169, 1186 (2d Cir. 1995). ENVY has not shown that the current loss of labor will threaten

its business or even be a "[m]ajor disruption." *Id.*; *see also, e.g.*, *Lafayette Beverage Distrib., Inc. v. Anheuser-Busch, Inc.*, 545 F. Supp. 1137, 1151 (N.D. Ind. 1982) (no irreparable injury for termination of distributorship where lost products constituted only 28% of sales).

ENVY's internal documents show current staffing at the plant is "good" and above its internal budgeted levels. Far from experiencing a "major disruption" of its business because of staffing and attrition problems, ENVY has maintained its staffing at VY above its own internal budgeted levels and has consistently indicated to the State, before this lawsuit, that it was not experiencing any unusual attrition at the plant. Management Review Meeting (MRM) materials from ENVY, created and used by ENVY to track and manage staffing and attrition at VY, show that VY had more staff at the plant in 2010 and through April 2011 (the last reported period in the ENVY documents) than its total budgeted positions. Hinkley Decl. (May 22, 2011) ¶ 7. Tellingly, the two most recent MRM reports characterize the status of staffing at the plant as "good." *Id*.

This picture is consistent with statements by ENVY personnel at meetings, where the company has said that it was managing attrition and was not experiencing any unusual attrition at VY. Hinkley ¶ 6. Further, company personnel have consistently stated that they are doing a good job of training employees and maintaining the "pipeline" (planned training of personnel for positions) including for essential plant personnel. *Id*. ENVY's records thus do not show a major disruption of its business, or even any problems, with staffing or attrition at VY.

b. ENVY has not shown a major disruption of its business. Even accepting ENVY's numbers on recent plant attrition, its submission falls far short of showing a major disruption of ENVY's business. ENVY's sole evidence on this issue is the declaration of John Herron of ENVY, in which he reports that the average attrition rate for 2008-2009 (defined by him as the

"percentage of employees who left the plant to work elsewhere") was approximately 6.1% when a CPG with Vermont "appeared to be progressing on track," that the attrition rate for 2010 was approximately 8.4%, and that for the first part of 2011 he expects the rate to be at least 8.4%. Herron ¶ 24. This reported increase does not constitute a "major disruption" of ENVY's business for three reasons.

First, the reported increase, even on its face, is fairly modest given the size of the workforce at VY. Using the company budget number for 2010 of approximately 615 employees, the difference between attrition rates of 8.4% and 6.1% is only approximately 14 employees, far from a significant exodus.

Second, Mr. Herron does not differentiate between attrition of critical skilled employees and other employees. ENVY's own representations show that staffing for critical positions is appropriate. As noted above, ENVY personnel have consistently stated that they were doing a good job of training employees and maintaining the training "pipeline" at VY, including for essential plant personnel. Hinkley ¶ 6. Further, the NRC requires ENVY, like all nuclear plants, to maintain sufficient levels of certain categories of employees to meet specific NRC criteria for operations. ENVY has consistently stated that its operations staffing has satisfied the NRC regulatory requirements for licensed positions at the VY plant. *Id*. ¶ 13.

Third, the attrition rate at VY is in line with the overall expectations for the industry. In general, the nuclear industry's workforce is aging and all nuclear power facilities, including VY, face the challenge of higher attrition because of that fact. *Id*. ¶ 14. The Nuclear Energy Institute (NEI), the nuclear industry association, has reported:

> NEI's 2009 nuclear work force survey indicated that 38 percent or 21,600 current nuclear utility employees will be eligible to retire within five years (2009 to 2014). In addition, the industry continues to experience non-retirement attrition, which over the same five-year period may require replacement of an additional 10% of the nuclear utility work

force or 6,000 workers.

Id. Using the NEI information, one would expect attrition of approximately 9.6% per year (38% / 5 years = 7.6% plus 10% /5 years = 2%). The reported attrition rate at VY of 8.4% is lower than 9.6%, confirming that the current numbers are in line with industry expectations. Further, ENVY's internal documents show that in 2007 (well before the uncertainty cited by Mr. Herron) VY's attrition rate was 11.4%, well above the 8.4% attrition level for which ENVY now complains. *Id.* ¶ 14.

2. The fact that ENVY must decide in July whether to refuel is not irreparable harm.

ENVY's assertion that it faces irreparable harm with regard to a decision of whether to refuel VY to continue operations beyond March 21, 2012, is flawed for several reasons: (1) the refueling decision is a business risk that ENVY assumed when it bought VY and agreed to a CPG that expired in March 2012—much like the risk that any regulated entity may face in having to make business decisions before a regulatory body decides whether to issue a renewed permit or license; (2) ENVY can choose not to refuel without shutting the plan permanently; and (3) ENVY is not entitled to a preliminary injunction merely to inform its business decisions.

a. Refueling is a business decision based on a risk known and agreed to by ENVY. The refueling decision and the costs associated with it are not irreparable harm, but rather are a business decision with a risk that ENVY agreed to when it purchased the plant and accepted a CPG that expired in March 2012. As ENVY argues, it has known about the refueling for a long time. The refueling comes every 18 months and must be planned. ENVY knew (or should have known) that it would face uncertainty about relicensing and might have to make a decision about whether to refuel before it had secured a new license. The 2002 MOU contains no provision that ENVY would know whether to refuel before obtaining a new license. The risk is similar to that

which any regulated entity potentially faces when business decisions must be made before a regulatory body decides to issue a new license or permit, and certainly not something that warrants "extraordinary" relief in the form of a preliminary injunction. *Moore*, 409 F.3d at 510.

b. ENVY does not have to refuel to avoid a permanent shutdown. ENVY's assertion that if it decides not to refuel this fall, it will have to "permanently shut down" the plant and will lose 20 years of operations even if it were to ultimately win the litigation (Herron ¶ 46) is unfounded. As explained below, ENVY can choose to not operate the plant on a temporary basis and it does not have to file a certificate of permanent cessation until it decides to shut down the plant permanently. *See infra* Part II.C.3.b.

c. ENVY is not entitled to a preliminary injunction merely to inform its business decisions. ENVY has not said whether, without a preliminary injunction, it will or will not refuel. Rather, ENVY says that a preliminary injunction will make the refueling decision less "difficult"—that "without knowing whether the plant will be able to continue to operate for the duration of this litigation, it is extremely difficult for ENVY to determine whether to make the financial commitments." Herron ¶ 38. But a preliminary injunction is not meant to provide more information to a party about the possible outcome of the litigation. It is warranted only as "extraordinary" relief, *Moore*, 409 F.3d at 510, to avert "actual and imminent" irreparable harm before a decision on the merits, *Kamerling*, 295 F.3d at 214. Even if a preliminary ruling would assist ENVY in weighing its options, that is not a proper basis for granting a preliminary injunction.

3. ENVY's claims about monetary losses from a temporary shutdown fail to show irreparable harm.

While ENVY claims that it will suffer irreparable monetary harm if the plant is shut down in March 2012, because the shutdown may be permanent, that claim fails for two reasons: (1) the

alleged irreparable harm is expressly based on the asserted effect of a possible shutdown of the plant as of March 2012, and such effect, even if it were to occur, is not a relevant consideration to the preliminary injunction motion; and (2) ENVY is wrong that if the plant shuts down on March 21, 2012, ENVY would be forced to certify that it is permanently ceasing operation.

a. Alleged harm from closing the plant on March 21, 2012 is not relevant in this preliminary proceeding. ENVY claims that it may suffer irreparable harm "[i]f, absent a preliminary injunction, Vermont is permitted to shut down the Vermont Yankee Station on March 21, 2012." Mem. 42. As discussed above, the threat of irreparable harm must be "actual and imminent," and "not . . . speculative." *Kamerling*, 295 F.3d at 214. Given that a preliminary injunction by definition is limited in duration and *cannot extend beyond a ruling on the merits*, and given that this case is expedited and the Court has set a schedule that will allow it to decide the merits before March 21, 2012, any harms related to the asserted effects of a March 2012 shutdown are, on their face, "speculative" and therefore do not constitute irreparable harm. *Id.*

b. NRC requires a certificate of permanent cessation of operations only when the operator determines it will permanently cease operations. NRC regulations require ENVY to submit a certification of cessation of operations when "the licensee [ENVY] has determined to permanently cease operations." 10 C.F.R. § 50.82(a)(1)(i). If ENVY is actively pursuing legal options to continue operating VY beyond March 21, 2012, then ENVY has not "determined" to permanently cease operations and need not file a certification, even if operations have in fact ceased. And if ENVY decides to permanently cease operations, it would have up to two years after it made that determination to submit its decommissioning plan for VY and could not begin decommissioning activities until 90 days after submittal of its decommissioning plan. *See* 10 C.F.R. §§ 50.82(a)(4)-(5).

ENVY could also pursue other relief from the NRC if it ceases operations at VY while pursuing its claims in this litigation. *See, e.g.*, 10 C.F.R. § 50.12(a) (authorizing exemptions from non-safety-related regulatory requirements in situations that would arguably apply here).[20] Further, ENVY itself recognizes that NRC regulations allow for "a possible withdrawal of the certification 'on a case-by-case basis.'" Mem. 42 (citing 10 C.F.R. § 50.82(a)(1)(i)). Thus, again, ENVY's alleged irreparable harm is speculative, not actual and imminent.

4. ENVY's claims concerning electricity sale contracts are too speculative to constitute irreparable harm.

ENVY's argument regarding long-term contracts has two key flaws. *See generally* Parker Decl. (May 23, 2011) ¶¶ 15-23. First, as explained above, a preliminary ruling would not change the fact that potential power purchasers will view the plant's future as uncertain while litigation and regulatory proceedings regarding continued operations are pending. *See id.* ¶ 23. Second, ENVY's assumption that greater exposure to the short-term energy market will cause a monetary loss is speculative. Mr. Kee is only able to opine that ENVY will be exposed to "higher risk from volatile short-term electricity market prices (if unable to enter into agreements), Kee ¶ 21, not that ENVY's exposure to short-term prices will necessarily result in a monetary loss, Parker ¶ 21. Indeed, it is possible that short-term prices may exceed long-term contract prices at any given time because buyers in the short-term market cannot require a discount from sellers in exchange for shielding the sellers from price uncertainty, as a buyer can in the context of a long-term contract. *Id.* These alleged losses are not simply "difficult to quantify," Mem. at 45; they are speculative and cannot support a claim of irreparable harm.[21]

[20] The NRC has previously granted exemptions allowing delays in complying with NRC regulations. *E.g.*, 76 Fed. Reg. 3927, 3927-3929 (Jan. 21, 2011).

[21] The price difference between the recently rejected agreement between VEC and ENVY and the most recent agreement between Hydro-Quebec and Vermont utilities does not support

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

In addition to likelihood of success on the merits and irreparable harm, *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." *Winter*, 129 S. Ct. at 374. ENVY cannot make either showing here.

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

ENVY adopts an erroneous view of the status quo in arguing that the "balance of hardships" weighs in its favor. In fact, ENVY seeks to alter, not maintain, the status quo by obtaining an order from this Court that Vermont cannot enforce its laws and administrative determinations. Put simply, the status quo is that the plant's CPG allows it to run until March 21, 2012. This lawsuit asks this Court to declare that Vermont has no authority to enforce that CPG, as well as the challenged State laws. Given that ENVY's claims fly in the face of its long course of dealing with the State, including its past promises and representations that it would not argue that the State's authority is preempted, *see supra* Part I.C, the equities weigh against this attempt to alter the status quo. Further, ENVY's hardship argument is undercut by the fact that the plant is free to operate until March 21, 2012, and the Court has set a schedule that will allow it to decide the merits well before then.

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

ENVY cannot meet its burden of showing that granting the requested injunction would serve the public interest. *Winter*, 129 S. Ct. at 374. As a threshold matter, the relief sought by ENVY—"a preliminary injunction that prohibits Vermont officials from shutting down VY during the pendency of this action," Mem. 46-47—would last *only* until this Court's ruling on

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ENVY's claim here because differences between Hydro-Quebec and ENVY preclude a straight dollar-for-dollar comparison. *See* Parker ¶¶ 17-20.

the merits, and the Court has set a schedule that will allow for a decision before March 2012. Further, the "public interest" prong of the *Winter* test is not a factor in determining the merits of the claims themselves.

More importantly, none of the alleged negative impacts withstands scrutiny. As explained below, in many instances the materials ENVY relies on contain assumptions or limitations that undercut its position. Each public interest claim is addressed briefly below, with fuller explanations in the Declarations of Seth Parker and Robert Stein.

1. Loss of jobs

While current jobs at the plant will be lost upon shutdown, the net effect on employment in the region over time is unclear. ENVY's analysis does not account for the fact that the plant would have to be replaced with other power resources, and, depending on how that is accomplished, it could create substantial new employment. *See* Parker ¶¶ 30-37. For instance, ENVY focused on the Consensus Study's "Shutdown Scenario," which does not account for replacement resources, in concluding that jobs would be lost. *See* Kee ¶¶ 40-41 & Ex. 9. Other scenarios considered in the Consensus Study, however, showed job creation. Parker ¶¶ 34-36. For instance, the Green Scenario "[p]rovides, on average, comparable employment levels relative to the VY Relicense scenario during the first decade of the analytic period and then rapidly outpaces the VY Relicense scenario over the final 17 years. Annual employment differentials relative to the VY Relicense case exceed 2,600 jobs by the end of the forecast horizon in 2040." Kee Exh. 9 at 9-10. The other study ENVY relies on, the IBEW Study, Kee Ex. 6, also overlooks the impact of different replacement scenarios. Parker ¶ 33.

2. Lower tax revenue

ENVY's analysis does not take into account the mitigating impact on tax revenue of

measures taken to replace VY's generating capacity. For instance, the Green Scenario in the Consensus Study indicates that, after a period of negative impacts on revenue, the impact on revenue eventually turns positive. *See* Kee Ex. 9 at 12; Parker ¶ 39. Further, the Vermont Legislature recently enacted a law calling for economic development in southeastern Vermont in the event of a shutdown—an additional mitigating factor not addressed in the materials on which ENVY relies. *See* H.287, § 65(2) (2011 Sess.) ("H.287"), *available at* http://www.leg.state.vt.us/docs/2012/bills/Passed/H-287.pdf (last visited May 23, 2011).

3. Higher power prices

ENVY's conclusions regarding the impact of a shutdown on power prices are inaccurate and incomplete. First, they rely on the Consensus Study's qualified statement that "the retail power bill is *likely* to be higher in the event of a plant closure," though, as ENVY recognizes, that study did not attempt to quantify the increase. Mem. 52 (emphasis added). And the Consensus Study offers a range of replacement scenarios, including one in which retail power bills are higher for the first five years and then "substantially lower in the out years." Kee Ex. 9 at 10. The Consensus Study is also out of date because, since the study group convened in 2008, actual prices available in the next three years in the market and forecasted prices beyond that time have dropped substantially. ENVY's brief does not acknowledge this change.

Second, ENVY relies on the Axelrod Study to conclude that end-user prices would increase. Kee ¶ 49. That study assumed that VY power would be replaced by an equal amount of electricity from a more-expensive gas-fired combined cycle gas turbine (CCGT) plant. Parker ¶ 41. That assumption is flawed because, under the approach used by the Independent System Operator of the New England grid (ISO-NE) for setting market power prices, power from a CCGT plant cannot be substituted unit-for-unit for VY, as the Axelrod Study does. *Id.* ¶¶ 41-43.

Further, the Axelrod Study assumed an unrealistically high levelized cost of power from the CCGT plant, further skewing the impact the Study found on prices. *Id.* ¶ 44.

In addition, ISO-NE's summary of its most recent forward capacity auction does not "confirm," Kee ¶ 55, that a shutdown would result in higher wholesale prices. Rather, ISO-NE has made clear that there is a range of generation, transmission, and demand-side alternatives to the continued operation of VY. Parker ¶ 46 & Kee Ex. 18. While ISO-NE noted that "[a]ll these options will come at an additional cost," Kee Ex. 18 at 2, additional cost does not necessarily imply that wholesale electricity prices will increase over time. For instance, energy efficiency typically has an upfront cost followed by a reduction in energy consumption, which lowers market clearing prices for all users. Parker ¶ 46; Kee Ex. 9 at 10 (Green Scenario).

Nor is it clear that retiring VY would lead to higher prices in power purchase agreements. The GDS Study relied on by Mr. Kee considers a range of possible replacement portfolios for VY, *see* Kee Ex. 7, § 12.6 at 12-20 to 12-27, some of which would yield a lower levelized cost of replacement power. Parker ¶¶ 47-48. Further, ENVY's argument assumes that Vermont utilities will be unable to secure long-term prices comparable to, or less than, those recently offered by ENVY, an assumption for which ENVY provides no basis.

Mr. Kee also points to costs of transmission upgrades resulting from closure of VY as a reason for higher electricity prices. Kee ¶¶ 59-60. However, ENVY fails to point out that ISO-NE's 2020 VT/NH Needs Assessment makes clear that the transmission upgrades are needed "even with Vermont Yankee in operation." Parker ¶ 51 (quoting Kee Ex. 19).

Finally, Mr. Kee claims that Vermont would lose income from the Regional Greenhouse Gas Initiative (RGGI) because, if VY retires, "the result would be higher carbon emissions in Vermont." Kee ¶ 62. However, Vermont's annual allotment of RGGI allowances will be the

same with or without VY, and Vermont can continue to sell the same number of allowances even if its mix of generation resources changes. Parker ¶¶ 53-55. Thus, Vermont's RGGI revenues will not decrease if VY shuts down.

4. Lower electrical system reliability

ENVY's argument that, without VY, the reliability of the New England electrical system will suffer rests on a highly selective reading of recent ISO-NE studies and an incomplete picture of ISO-NE's planning and operational processes. While the removal of a large generator from an electrical system will increase the efforts needed for system reliability to some degree in the short term, ISO-NE will still be able to maintain the required grid reliability standards. *See generally* Stein Decl. (May 23, 2011) ¶¶ 1-3, 12-13; Parker ¶¶ 56-59. In short, the grid will still be reliable without VY.

The ISO-NE planning process is extremely conservative, simulating situations in which the grid is under severe stress at times of very high load. Stein ¶ 16. These situations have a low probability of occurring, but planning for them is nevertheless appropriate and required in light of ISO-NE's role in determining whether existing resources are adequate to maintain reliability standards. *See id.* ¶ 14-22 (explaining steps in planning process, including analyzing whether system can meet very high peak load demands with multiple failures of critical generators and other grid elements). The potential reliability issues stressed by ENVY, *see* Mem. 54-55; Kee ¶¶ 66-69, occurred only in the part of the study known as the N-1-1 analysis, which assumes a very high peak load plus the simultaneous loss of service of VY, the other two most critical generators, and the next two most critical grid elements—a highly improbable combination of circumstances. Stein ¶ 23.

ENVY's assertion that ISO "would need [to] take dramatic and expensive steps" to maintain

reliability without VY, Mem. 54, is unsupported. It is true that ISO-NE rejected ENVY's bid last summer to delist—that is, to be released from any obligation to supply capacity to the grid for the year beginning June 1, 2013. Nevertheless, rejection of ENVY's delist bid gives ISO an option to accept the delist bid up until one year before the beginning of the year in question—in this case, by June 1, 2012 (because the most recent auction was for capacity beginning June 1, 2013). Stein ¶¶ 25-28; Kee Ex. 25a at 11. Therefore, it is not accurate to state that ISO-NE has determined "that its planning through May 2014 includes having Vermont Yankee" in operation, Mem. 53, because ISO-NE could decide, up until June 1, 2012, to accept the delist bid.

Further, ISO-NE made that decision before recent operational planning efforts. Because ISO-NE's analysis showed potential reliability issues in the extreme N-1-1 case, ISO-NE must now identify operational solutions. Stein ¶ 29. ISO-NE routinely does operational studies that look one-to-two summers ahead (summer being the highest load conditions) and consider a broad range of operational "quick fixes"—solutions that can be implemented to ensure system reliability in the one-to-two year time-frame of the study. *Id.* ¶ 30. ISO-NE has now identified operational solutions that can be in service by June 2012 that will maintain reliability through the summers of 2012 and 2013. *Id.* ¶ 31. The operational studies that yielded these solutions used ISO's strict planning criteria, including the very high peak loads combined with loss of multiple critical grid elements. *Id.* ISO-NE determined that, with relatively minor substation upgrades, the system will be reliable even in the extreme "N-1-1" case. *Id.* ISO-NE did determine that in the N-1-1 case, some load would have to be disconnected in order to allow for system reconfigurations necessary to maintain reliability if yet another critical element were lost from the N-1-1 scenario (yielding N-1-1-1). *Id.* The likelihood of the N-1-1 case, let alone N-1-1-1, actually happening is extremely low. In other words, ISO-NE has now identified feasible steps

that can be taken in the near-term to maintain its strict reliability standards with VY out of service.

In sum, ENVY's claim that the grid will be less reliable without VY does not line up with the evidence and falls well short of showing harm to the public interest. Its argument overlooks the ISO-NE planning process and the severe and unlikely set of circumstances in which ISO-NE concluded that reliability issues would arise. It also fails to account for ISO-NE's operational study process, which has identified feasible, near-term measures to insure reliability in a post-VY grid.

5. ENVY's remaining public interest concerns would arise, if at all, only after shutdown.

Any impacts of a shutdown on greenhouse gas emissions, other environmental factors, charitable contributions, and the local economy would be felt only after a shutdown in March 2012. Therefore, none of these factors support granting a preliminary injunction now.

With respect to greenhouse gas emissions, as explained above, the Axelrod Study did not factor in the economic dispatch method of deploying electricity generation resources. As a result, it is not a fair comparison to simply replace VY's emissions with those of a gas-fired CCGT plant on a unit-for-unit basis, as the Axelrod Study did. Parker ¶ 60. Additionally, ENVY takes as a given that nuclear is a low-emission method of power generation. In fact, many steps in the nuclear fuel cycle produce substantial greenhouse gases—for instance, the milling, conversion, and enrichment of uranium ore each employ mostly fossil-fuel-based electricity. *See, e.g.*, Kolber Ex. 25 (Kristin Shrader-Frechette, *Greenhouse Gas Emissions and Nuclear Energy*, 1 Modern Energy Review 58 (2009)), at 58-59 & nn.19-24. Much of the analysis that concludes that nuclear power is low in greenhouse gases "trims" these steps and others from the nuclear fuel cycle, yielding an artificially low emissions estimate. *Id.*

Finally, the State of Vermont has already laid the groundwork to avoid the kind of community and economic dislocation that resulted when Maine Yankee and Yankee Rowe closed. In this past legislative session, the General Assembly passed a bill providing funding for the "Southeast Vermont Economic Development Strategy" (SeVEDS), to prepare for the economic shift that will occur upon closure of Vermont Yankee." H.287, § 65(2).

CONCLUSION

For these reasons, ENVY's motion for a preliminary injunction should be denied.

Dated May 23, 2011, at Montpelier, Vermont.

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