UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs	)	
v.	)	Docket No. 1:11-cv-99
PETER SHUMLIN ,in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD, Defendants	)	**HEARING REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Of Counsel:
Kathleen M. Sullivan, Esq.
Robert Juman, Esq.
Sanford I. Weisburst, Esq.
William B. Adams, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Robert B. Hemley, Esq.
Matthew B. Byrne, Esq.
Gravel and Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
rhemley@gravelshea.com
mbyrne@gravelshea.com
(802) 658-0220

Attorneys for Plaintiffs
Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

TABLE OF CONTENTS

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

TABLE OF AUTHORITIES

Page

Cases

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON VERMONT
05402-0369

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Statutes

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Miscellaneous

Plaintiffs Entergy Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENOI") respectfully submit this memorandum of law in support of their motion for a preliminary injunction to preserve the status quo pending the conclusion of this litigation and to prohibit Defendants from forcing cessation of operations at the Vermont Yankee Nuclear Power Station (the "Vermont Yankee Station").

Introduction

This case involves a challenge to Vermont's attempted usurpation of federal authority over continued operation of the Vermont Yankee Station, which is operated by Plaintiff ENOI and owned by Plaintiff ENVY. The federal Nuclear Regulatory Commission ("NRC"), which has exclusive authority over nuclear power plant operation and safety, recently granted the Vermont Yankee Station a renewed license to operate through March 21, 2032. But the State of Vermont claims veto power over that federal judgment, thus turning the Supremacy Clause of the U.S. Constitution on its head.

By this motion, Plaintiffs seek a preliminary injunction preserving the status quo pending the conclusion of this litigation and prohibiting Defendants from taking any action that would force the Vermont Yankee Station to cease operations. Vermont's plan to shut down the Vermont Yankee Station as of March 21, 2012 would inflict a variety of irreparable harms upon ENVY and ENOI. It is already causing attrition of highly trained employees. It would result in losses associated with fuel that must be fabricated in July 2011 and with refueling and maintenance that must be undertaken in or before October 2011. It would require ENVY and ENOI to file a certificate of decommissioning with the NRC that is likely irreversible, costing Plaintiffs twenty years' worth of revenues.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON VERMONT
05402-0369

Vermont's plan to shut down the Vermont Yankee Station would also severely and irreparably harm the public interest. For years, the Vermont Yankee Station has been providing safe, reliable, low-cost power to Vermont and New England. If the plant is shut down, jobs will be lost, electricity prices will rise, the power grid will become less reliable (both inside and outside Vermont), greenhouse gas emissions will increase, and Vermont's tax revenues will decline. By contrast, continued operation of the Vermont Yankee Station pending the resolution of this litigation will impose no significant costs on Defendants or the people of Vermont.

Plaintiffs satisfy each of the prerequisites to a preliminary injunction:

Plaintiffs are likely to prevail on the merits. The federal Atomic Energy Act ("AEA") and Nuclear Waste Policy Act ("NWPA") confer exclusive authority upon the federal government, specifically the NRC, in the fields of (a) the licensing and operation of an existing nuclear power plant, including storage of spent nuclear fuel; and (b) the regulation of any aspect of the radiological safety of a nuclear power plant. In flat contravention of that authoritative federal scheme, Vermont has purported to determine that the Vermont Yankee Station must be shut down on March 21, 2012. Vermont's regulatory actions are preempted for either of two independent reasons.

First, Vermont stands alone among the fifty States in asserting that an already operating and federally licensed nuclear power plant must also have a state license (which Vermont labels a "certificate of public good") in order to continue operations. In purporting to exercise authority to shut down a successfully operating nuclear power plant with an existing federal license extending to 2032, Vermont intrudes impermissibly upon the exclusive authority of the NRC over the licensing and operation of nuclear power plants.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Second, Vermont has repeatedly based its assertion of regulatory authority on radiological safety concerns despite the fact that such concerns are the exclusive province of the federal government. For example, Governor Peter Shumlin commented, in the wake of the NRC's approval of a renewal license, that "I don't think you can convince most Vermonters today … that Vermont's best energy choice is to play Russian Roulette with an aging nuclear power plant." Decl. of Timothy A. Ngau dated Apr. 21, 2011 ("Ngau"), Ex. 1 (Bob Kinzel, *Yankee Owner Tries New Strategy To Win Over Vermonters*, VPR NEWS, Mar. 31, 2011). Nor does Vermont have any non-pretextual basis to justify its plan to shut down the Vermont Yankee Station as rooted in economic, reliability or environmental grounds rather than safety grounds. Even experts commissioned by Vermont have commended the reliability of the plant's operations: "Overall, many station managerial and technical areas meet or exceed industry standards for performance. The station is operated and maintained in a reliable manner." Ngau, Ex. 33 (Nuclear Safety Associates, *Reliability Assessment of the Vermont Yankee Nuclear Facility* (Dec. 22, 2008) (redacted public version)), at 2. And studies commissioned by Vermont and other authorities have found that shutdown of the Vermont Yankee Station would cause Vermont severe economic harms rather than benefits. Shutdown would cause significant job loss, higher electricity prices for Vermont consumers, more greenhouse gas emissions, and diminished local and state tax revenues. It would also have negative consequences for electricity retailers and consumers in other States, because the Vermont Yankee Station is a major wholesale seller of power to retail utilities not just in Vermont, but all across New England. Continued operation of the Vermont Yankee Station, by contrast, would generate significant economic benefit while posing no environmental concerns. For these and other reasons, Plaintiffs are likely to succeed on the merits of their claims.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Plaintiffs will suffer irreparable harm absent a preliminary injunction. The threatened shutdown of the Vermont Yankee Station is already inflicting harm upon Plaintiffs, as several highly skilled employees have recently quit their jobs, and more may do so. Other irreparable harm is on the immediate horizon, including Plaintiffs' need to decide by July 7, 2011 whether to fabricate fuel that is specific to Vermont Yankee Station to enable operation of the plant past March 21, 2012. And the ultimate irreparable harm will occur if Vermont succeeds in forcing Plaintiffs to shut down and begin decommissioning the plant on March 21, 2012, as Plaintiffs will be required by NRC regulation to file a written certification of the permanent cessation of operations, and there is no provision in the regulations for withdrawing such a certificate after it is filed nor any NRC precedent approving a plant's return to operation under such circumstances. In that event, Plaintiffs would lose the revenues from the additional 20 years of operation authorized by the NRC under the renewed license, and would have to bear the substantial costs of prematurely decommissioning the plant without any new revenue from operations.

The balance of hardships tips decidedly in favor of Plaintiffs. Plaintiffs and the public will suffer immediate and irreparable harm from a shutdown of the Vermont Yankee Station, and that harm would not be remedied by an ultimate ruling in Plaintiffs' favor on the merits. By contrast, the State of Vermont will suffer no harm (and indeed will benefit) from continued operation of the plant.

The public interest favors a preliminary injunction. The harm to the public interest from even a temporary shutdown of the Vermont Yankee Station would be significant, immediate, and irreparable. The Vermont Yankee Station employs over 600 people; has the capacity to produce over 600 MW of power each year (compared to the 52 MW capacity of the next largest generator in Vermont); supplies the equivalent of one-third of Vermont's power;

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

supplies power to utilities in other States in the New England region; and has paid taxes and other fees to Vermont of approximately $13 million per year in recent years. According to ISO New England Inc. ("ISO-NE"), the entity responsible for maintaining the reliability of the New England power grid, there would be decreased reliability of the power grid for the entire region if the Vermont Yankee Station were shut down. And as Vermont's own studies conclude, such a shutdown would cause increases in electricity prices (that would disproportionately harm the poorer residents of the State), substantial job losses at the Vermont Yankee Station and at companies facing higher electricity prices, diminished tax revenues, and increased greenhouse gas emissions from traditional power sources unless and until highly speculative sources of "green power" come online.

Accordingly, as explained in more detail below, this Court should grant a preliminary injunction against Defendants that preserves the status quo pending the conclusion of this litigation and that prohibits them from taking actions to shut down operation of the Vermont Yankee Station

Legal and Factual Background

A. The Parties And The Vermont Yankee Station.

Plaintiffs ENVY and ENOI are the owner and operator, respectively, of the Vermont Yankee Station, which is located in Vernon, Vermont. Compl. ¶¶ 1, 13; Decl. of John T. Herron dated Apr. 19, 2011 ("Herron") ¶ 10. The Vermont Yankee Station is a merchant electric plant that sells all of the power it produces at wholesale to utilities in the interstate market; those utilities in turn sell the electricity at retail to end-users. Compl. ¶¶ 41, 48; Decl. of Edward D. Kee dated Apr. 21, 2011 ("Kee") ¶¶ 16-17. The Vermont Yankee Station began operating in

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

1972 pursuant to a 40-year license issued by the Atomic Energy Commission, the predecessor of the NRC. Compl. ¶¶ 43, 49; Herron ¶ 12.

During its four decades of operation, the Vermont Yankee Station has provided substantial benefits to Vermont and the Vermont economy. Through its sales to Vermont utilities, the Vermont Yankee Station supplies the equivalent of approximately one-third of the baseload power consumed in the State. Compl. ¶ 45. The Vermont Yankee Station is one of the largest private employers in the State, directly employing over 600 personnel in many high-skilled technical positions and indirectly employing many others through its purchases from Vermont companies. *Id.* ¶ 44; Herron ¶ 18; Kee ¶ 39. ENVY pays considerable taxes and fees to the Vermont government: ENVY paid $6.71 million in 2010 alone, and over $100 million has been paid with respect to the Vermont Yankee Station since 1972. Kee ¶ 46 & Ex. 13 (Sarah Teachout, Vt. Legis. Joint Fiscal Office Issue Brief, Feb. 2011 Update, at Table 2).

Defendants James Volz, John Burke, and David Coen are the current members of the Public Service Board ("PSB"), which is an administrative agency of the State of Vermont. Compl. ¶ 19. The PSB is authorized by Vermont law to supervise the rates, quality of service, and overall financial management of Vermont's public utilities. *Id.* ¶ 19; Vt. Stat. Ann. tit. 30. Defendant Peter Shumlin is the current Governor of Vermont. *Id.* ¶ 20. Defendant William Sorrell is the current Attorney General of the State of Vermont. *Id.* ¶ 21.

B. The Atomic Energy Act's Preemptive Force.

Federal law centralizes authority to regulate nuclear power plants in the NRC, a federal administrative agency. Under the AEA, the NRC has exclusive jurisdiction to license and relicense the operation of nuclear power plants. While the NRC is authorized to delegate some authority over nuclear generating facilities to individual States (a delegation of authority

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON VERMONT
05402-0369

Vermont has never sought or obtained), it is prohibited from delegating any authority with respect to plant construction or operations:

> No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and *operation* of any production or utilization facility or any uranium enrichment facility.

42 U.S.C. § 2021(c) (emphasis added). Similarly, the NRC has exclusive authority over licensing of spent nuclear fuel ("SNF") storage facilities under the NWPA, 42 U.S.C. §§ 10101-10270. Pursuant to the AEA and the NWPA, "it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1250 (10th Cir. 2004), *cert. denied sub nom. Nielson v. Private Fuel Storage, LLC*, 546 U.S. 1060 (2005); *see also id.* at 1242 ("the Atomic Energy Commission and the NRC have promulgated detailed regulations regarding the operation of nuclear facilities, including the storage of SNF").

As the seminal U.S. Supreme Court decision on preemption in the nuclear energy area makes clear, the grant of exclusive authority to the NRC over plant operation precludes state interference irrespective of the purpose of a state law. That decision upheld, as based on non-preempted reliability grounds, a California statute that barred construction of new nuclear power plants by local utilities pending the development of a permanent solution for storage of SNF, but made clear that a State may not bar the continued operation of an already existing plant, as Vermont attempts to do here:

> [W]e emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with NRC's exclusive authority over plant construction and operation.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 212 (1983) ("*PG&E*") (emphasis added).

As an additional and independent ground for preemption, the AEA precludes (through "field preemption") any state regulation enacted or enforced for the impermissible purpose of the overseeing the radiological safety aspects of nuclear power generation. *See id.* at 212; *Pennsylvania v. Lockheed Martin Corp.*, No. 1:09-CV-0821, 2010 WL 456810, at *19 (M.D. Pa. Feb. 1, 2010) ("[T]he federal government occupies the field of nuclear safety entirely, and this field preemption is all encompassing where that [sic] state statute at issue involves nuclear safety. In other words, if a state statute was enacted with the purpose of protecting against radiation hazards … it is preempted") (quotation omitted); *Conn. Coalition Against Millstone v. Conn. Siting Council*, 942 A.2d 345, 357 (Conn. 2008) ("[A] decision by the council denying certification on the basis of environmental effects caused by radiation hazards actually would conflict with the NRC's regulations expressly authorizing such facilities as a safe method of storing spent nuclear fuel.").

Here, the federal government, through its license renewal proceeding, has determined that the Vermont Yankee Station is permitted to operate until March 21, 2032. Compl., Ex. A. The NRC's authorization process, which began when ENVY and ENOI filed their renewal application on January 27, 2006, involved an extensive federal review, including a comprehensive environmental review under the National Environmental Policy Act, 42 U.S.C. § 4321, *et. seq.* On March 21, 2011, at the conclusion of this "thorough and extensive safety and environmental revie[w] of the application," Ngau, Ex. 2 (Press Release, NRC, *NRC Will Renew Vermont Yankee Operating License For An Additional 20 Years* (Mar. 10, 2011)), NRC issued

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

the Vermont Yankee Station a renewal license authorizing operation of the Vermont Yankee Station through March 21, 2032. Compl., Ex. A.

C. Vermont's Assertion Of Regulatory Authority Over Operation Of The Vermont Yankee Station.

In 2002, the joint venture of Vermont utilities that originally built and operated the Vermont Yankee Station conducted an auction to sell the Vermont Yankee Station, and ENVY won the bidding. Compl. ¶ 51. Vermont's PSB asserted jurisdiction to approve the sale. *Id.* ¶¶ 51-52. Plaintiffs, in the interest of proceeding amicably with the State, cooperated with this process and entered into a Memorandum of Understanding ("MOU") with a separate Vermont agency, the Department of Public Service ("DPS"), the state executive agency that represents the public interest in energy-related matters. *Id.* ¶ 53; Ngau, Ex. 3 (Memorandum of Understanding between ENVY, Vermont Yankee Nuclear Power Corp., Central Vermont Public Service Corp., Green Mountain Power Corp., and Vt. DPS (Mar. 4, 2002)). Pursuant to the MOU, DPS agreed to support the sale and to allow ENVY to use the "SAFSTOR" method of decommissioning the Vermont Yankee Station in the event of a shutdown (rather than the more costly "DECON" method). ENVY in turn acknowledged the "jurisdiction" of the PSB under then "current law" to decide whether to grant or deny approval for continued plant operation after March 21, 2012, and agreed not to challenge that jurisdiction as federally preempted. Compl. ¶ 55; Ngau, Ex. 3 at 2-3, 6.

At the time the sale was approved in 2002, Vermont law prohibited construction of a facility for storage of SNF without a CPG granted by the General Assembly, *see* Vt. Stat. Ann. tit. 10, § 6501 *et seq.*, but granted a specific exemption to "any temporary storage by Vermont Yankee Nuclear Power Corporation of spent nuclear fuel elements or other radioactive waste at its present site." Vt. Stat. Ann. tit. 10, § 6505. In 2004, the Office of Vermont's Attorney

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

General issued an Opinion that this exemption was owner-specific, not site-specific, such that the Vermont Yankee Station, now owned by ENVY, did not come within the exemption. Letter from Office of the Attorney General to Peter Welch, President Pro Tempore of the Vermont Senate, 2004 WL 1737093, at *4 (Apr. 30, 2004). This development concerned Plaintiffs because the federal government was defaulting on its commitment to remove SNF from the site and existing SNF storage space was expected to reach full capacity in Fall 2008, making it urgent to construct new dry SNF storage. Ngau, Ex. 4 (Vt. Pub. Serv. Bd., Dkt. No. 7082, Order (Apr. 26, 2006)), at 4 & n.4.

Given Plaintiffs' need to obtain the General Assembly's approval for construction of new SNF storage, Plaintiffs acceded to an arrangement, enacted in Act 74 of the 2005-2006 legislative session, under which the General Assembly authorized the PSB to issue a CPG for the new SNF storage on condition that Plaintiffs return to the General Assembly for approval to store any SNF derived from post-March 21, 2012 operations. Act 74 (June 21, 2005), codified at Vt. Stat. Ann. tit. 10, § 6522.[1] Act 74 thus effectively required legislative approval for the Vermont Yankee Station's operation beyond the term of the CPG that the PSB had issued in 2002. Because the 2002 MOU had required only the approval of the PSB, the insertion of the General Assembly into the approval process fundamentally modified the MOU, for the PSB must issue reasoned decisions based on evidence and its expertise, subject to judicial review by the Vermont Supreme Court, while the General Assembly is a political body that may act for unsupported, unstated, or arbitrary reasons.

---

[1] After passage of Act 74, Plaintiffs petitioned the PSB for a CPG to build the new SNF storage, and such a CPG was granted in 2006, subject to the requirement in Act 74 that Plaintiffs obtain legislative approval before storing any SNF derived from post-March 21, 2012 operations. Ngau, Ex. 4.

In 2006, Vermont further, and even more directly, repudiated the MOU by taking from the PSB the authority to authorize post-2012 operation of the Vermont Yankee Station and instead granting that authority to the Vermont General Assembly. Under the 2006 Act, the PSB is prohibited from awarding a new CPG to the Vermont Yankee Station for operations after March 21, 2012 unless the General Assembly first "approves":

> No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.

Vt. Stat. Ann. tit. 30, § 248(e)(2). The 2006 Act explicitly references, as a factor relevant to the General Assembly's determination whether to authorize the PSB to issue a CPG. "analysis of … public health issues." *Id.* § 254(b)(2)(B).[2]

Defendant Shumlin and other elected Vermont officials have made clear that they intend, under this state regulatory regime, to shut down operation of the Vermont Yankee Station as of

[2] To the extent Plaintiffs' representatives made any positive statements about the 2006 Act, they must be viewed against the backdrop that, under the 2004 Attorney General Opinion, and then under the 2005 Act, Plaintiffs were already required to obtain legislative approval that had not been contemplated at the time of the 2002 MOU. Given those pre-2006 developments, Plaintiffs had an interest in seeking legislative approval only once. *See* Ngau, Ex. 5 (Louis Porter, *House to Streamline Vermont Yankee Process*, RUTLAND HERALD & TIMES ARGUS, Apr. 28, 2006) ("Entergy does not object to coming before lawmakers again before gaining permission to keep running, but the company does not want to make more than one trip to Montpelier, Spokesman Brian Cosgrove said."); Ngau, Ex. 6 (*Douglas Signs Bill Giving Lawmakers Say in Nuke's Future*, RUTLAND HERALD & TIMES ARGUS, May 21, 2006) (reporting that Plaintiffs' spokesman stated that the law "sets out a process that isn't overly complicated").

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

March 21, 2012, for reasons of radiological safety. For example, in the wake of the NRC's recent announcement that it was granting the 20-year license renewal to the Vermont Yankee Station, Governor Shumlin stated: "'Given the serious radioactive tritium leaks and the recent tritium test results, the source of which has yet to be determined, and other almost weekly problems occurring at this facility, I remain convinced that it is not in the public good for the plant to remain open beyond its scheduled closing in 2012." Ngau, Ex. 7 (*Vt. Yankee Gets Federal License Renewal*, TIMES ARGUS (Montpelier-Barre, Vt.), Mar. 11, 2011).

Vermont officials have also indicated that, to the extent the Vermont General Assembly considers authorizing the PSB to issue a new CPG, it will condition such action on ENVY agreeing to sell power to Vermont utilities at rates below those authorized by the Federal Energy Regulatory Commission ("FERC") for the interstate wholesale market into which ENVY sells it power.[3]

On February 23, 2010, the Vermont Senate considered several measures that would have permitted the PSB to move ahead with deciding whether to issue a new CPG for the Vermont Yankee Station. Compl. ¶ 79. Each of these measures was defeated. *Id.*

The PSB has been holding hearings and collecting evidence that could be relevant to its determination whether to issue a CPG, should the General Assembly authorize it to do so, and numerous studies commissioned by Vermont have explained that the State will suffer negative effects if the plant is shut down. Kee ¶ 36; Kee, Exs. 6-7, 9-14. Under the 2006 Act, however,

---

[3] *See, e.g.*, Ngau, Ex. 8 (Stephanie Kraft, *Vermont, ENVY Square Off*, VALLEY ADVOCATE (Northampton, Mass.), Jan. 22, 2009) (quoting then-Vermont Senate President, and now Governor, Peter Shumlin as saying, "There's no way we're going to vote to re-license the plant unless Vermonters are getting a great deal."); *see also* Ngau, Ex. 9 (Letter from Sen. Peter Shumlin and Rep. Shapleigh Smith to Jay Thayer, ENVY (Feb. 9, 2009)) ("Accordingly, if ENVY and ENO are unable ... to provide the General Assembly with a power purchase agreement between the parties, it will be nearly impossible for the legislature to make a judgment on the continued operation of the plant before we adjourn ....").

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

the PSB may not issue the CPG without legislative approval, and such approval appears unforthcoming. Vermont's congressional delegation, for example, assumed that the State would succeed in shutting down the Vermont Yankee Station when it recently wrote to the NRC Chairman to request that, *upon shutdown* on March 21, 2012, ENVY should be required to employ the "DECON" decommissioning method rather than the far less costly "SAFSTOR" method that is authorized by federal law and that Vermont explicitly agreed in the 2002 MOU that ENVY could use in the event of a shutdown. Ngau, Ex. 10 (Letter from Sen. Patrick Leahy, Sen. Bernard Sanders, and Rep. Peter Welch, members of Vermont's congressional delegation, to Gregory B. Jaczko, Chairman of the NRC (Feb. 28, 2011)).

Argument

A party seeking a preliminary injunction must show "'(a) irreparable harm and (b) either (1) likelihood of success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)) (emphasis added); *see also id.* at 38 (holding that this standard has not been altered by Supreme Court precedent). Where there is a "serious question" going to the merits, a district court may grant a preliminary injunction even if it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, so long as "the balance of hardships tips decidedly" in the

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

movant's favor. *See, e.g.*, *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 815-19 (2d Cir. 1979) (*per curiam*).[4]

As explained below, Plaintiffs are likely to succeed on the merits (and *a fortiori* can demonstrate serious questions on the merits); Plaintiffs face irreparable harm absent a preliminary injunction; Plaintiffs will endure substantially more hardship if a preliminary injunction is not granted than Defendants will endure if a preliminary injunction is granted; and the public interest favors granting a preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Likely To Succeed On Their Claim That The Challenged Vermont Laws Are Preempted Under The Atomic Energy Act And Nuclear Waste Policy Act.

Plaintiffs are likely to succeed on either of two independent bases for finding Vermont's effort to assert control over the operation and safety of the Vermont Yankee Station preempted by the AEA and NWPA—whether exercised by the PSB alone as before the 2006 Act, or by the PSB and the Vermont legislature after that Act. *First*, the AEA and NWPA preempt a state from shutting down, particularly through a purported state licensing requirement, an already constructed and operational nuclear power plant that, like the Vermont Yankee Station, has been

[4] To be sure, the Second Circuit has held that the "serious question going to the merits" prong is unavailable in cases where an injunction is sought against governmental action that is purportedly taken in the public interest. *See, e.g., Cnty. of Nassau v. Levitt*, 524 F.3d 408, 414 (2d Cir. 2008). With one exception, however, those published decisions have not involved a situation where the movant claims, as here, that a state or local governmental action is preempted by a federal governmental power. In the one exception, *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010), the Court assumed without discussion that the "serious question going to the merits" prong was unavailable, *id.* at 156, but this statement was *dicta* because the Court found that the more demanding prong of "likelihood of success on the merits" was satisfied, *id.* at 158.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

licensed by the NRC. *Second*, the AEA preempts a state from regulating any aspect of nuclear power based on safety concerns.

1. Vermont Is Preempted From Shutting Down The Operation Of An Existing, Federally Licensed Nuclear Power Plant.

In *PG&E*, the Supreme Court's seminal decision on AEA preemption, the Court acknowledged the NRC's exclusive authority over nuclear power plant operation. There, the Court upheld against preemption challenge a California statute barring construction of *new* nuclear power plants by local utilities until California's 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." 461 U.S. at 198 (quotation omitted). But the Court distinguished between a State's regulation of the development of *new* nuclear power plants by local utilities, as in the California statute, and a State's regulation, as here, of the operation of an *existing* nuclear power plant:

> At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.

Id. at 212 (emphasis added). The Court reiterated the distinction between new and existing nuclear power plants in its recognition that "the states have been allowed to retain authority over the need for electrical generating facilities [which is] easily sufficient to permit a state so inclined to halt the construction of *new nuclear plants* by refusing on economic grounds to issue certificates of public convenience in individual proceedings." *Id.* at 216 (emphasis added); *see also id.* at 222 ("Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-à-vis a fossil fuel plant *should be built*.") (emphasis added).

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Although the Supreme Court in *PG&E* did not have occasion to apply its rule to a nuclear plant that was operating or was being constructed (because the California statute at issue concerned plants as to which construction had not yet commenced), the Second Circuit has done so in the context of a plant, Shoreham, whose construction was nearly complete. In *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984), the Second Circuit addressed an effort by Suffolk County to require "an independent physical inspection of Shoreham and an injunction against commencement of Shoreham's operation pending final disposition of [the county's suit]." *Id.* at 59. The Circuit held that "[t]o grant either of these actions would plainly intrude on areas of exclusive NRC jurisdiction" because, "[p]ursuant to 42 U.S.C. § 2021(c)(1), the NRC retains responsibility to regulate 'the construction and operation of any production or utilization facility.'" *Id.* (quoting 42 U.S.C. § 2021(c)(1)). The Circuit further explained that, under *PG&E*, "a court ordered inspection, whether it be for safety or non-safety purposes, would obviously invade the NRC's exclusive regulatory province … [and] *an injunction that even temporarily shuts down the Shoreham facility would infringe on the NRC's authority over construction and operation*." *Id.* at 60 (emphasis added).

In a subsequent litigation over the Shoreham plant, the district court granted a preliminary injunction against enforcement of a Suffolk County statute criminally proscribing a federally required test of the plant's emergency preparedness; in doing so, the court again emphasized the distinction between a state's authority over whether to commence construction of a new nuclear power plant and a state's authority over operation of a completed nuclear power plant:

> The California statute at issue in *Pacific Gas & Electric* bears little resemblance to the statute under consideration here.... *Pacific Gas & Electric* dealt with pre-construction regulation of nuclear power plants and the disposal of nuclear by-products. In this case, by

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

> contrast, the County is opposing a federally-sponsored test of LILCO's RERP [*i.e.*, radiological emergency response plan] after the Shoreham facility has been completed. The pre-construction moratorium litigated in *Pacific Gas & Electric* fell within the state sphere of authority.

Long Island Lighting Co. v. Cnty. of Suffolk, 628 F. Supp. 654, 666 (E.D.N.Y. 1986).

The *Long Island Lighting Company* decisions apply *a fortiori* here because the Vermont Yankee Station not only has been constructed, but has been operating for almost forty years. For good reason, no State has ever attempted, as Vermont has done here, to shut down an already-operating nuclear power plant that has a NRC license—particularly through a purported requirement that the plant obtain a state license in addition to its NRC license. *See* Ngau, Ex. 11 (Sharif Abdel Kouddous, *Vermont Gov. Fights to Close Vermont Yankee*, DEMOCRACY NOW!, Mar. 15, 2011) (quoting Governor Shumlin as stating: "We're the only state in the country that's taken power into our own hands and said that, without an affirmative vote from the state legislature, the Public Service Board cannot issue a certificate of public good to legally operate a plant for another 20 years. Now, the Senate has spoken, 26 to four, saying, no, it's not in Vermont's best interest to run an aging, leaking nuclear power plant."); Ngau, Ex. 12 (Alan Wirzbicki, *Vermont's Unique Nuclear Power Veto*. BOSTON GLOBE, Mar. 23, 2011) (similar).

Courts addressing such attempts in other contexts have routinely found them preempted. *See, e.g.*, *Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963) ("A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State's licensing board a virtual power of review over the federal determination ...") (quotation omitted); *Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003) (holding preempted a state law that "completely exclude[d] the plaintiffs from conducting their federally-licensed tour boat businesses").

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

Plaintiffs thus are likely to succeed on their argument that Vermont's unprecedented regulatory approach is preempted by the AEA. Similarly, to the extent Vermont seeks effectively to shut down the plant by denying it a state license to store SNF derived from post-March 21, 2012 operations, Vermont's action is preempted by both the AEA and the NWPA. *See Skull Valley Band*, 376 F.3d at 1250 ("Under the federal licensing scheme …, it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility.").[5]

2. Vermont Is Preempted From Shutting Down A Nuclear Power Plant Based On Radiological Safety Concerns.

A second and independent basis for likelihood of success on the merits of the AEA preemption claim is *PG&E*'s holding that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 461 U.S. at 212.[6] Vermont's attempt to regulate the radiological safety of a nuclear power plant is thus preempted whether or not "it conflicts with federal law." *Id.* The Court further explained that, under this field preemption analysis, "it is necessary to determine whether there is a non-safety rationale" for the state's statute or regulation. *Id.* at 213.

---

[5] The facts of *PG&E* were different from those in *Skull Valley Band* or the instant case because neither construction nor operation of the plant(s) had yet commenced in *PG&E*. Accordingly, the State's traditional authority over what type of power generation to develop, which in *PG&E* allowed California to decide against pursuing new nuclear power plants because of economic concerns regarding the storage of SNF, did not apply in *Skull Valley Band*, where the nuclear power was already underway and the question was how to treat SNF (a question that, under the AEA and NWPA, is exclusively within the federal government's province).

[6] The exceptions are "the opportunity to enter into agreements with the NRC under [AEA] § 274(c)"; regulation of "radioactive air pollutants from nuclear plants [under the] Clean Air Act Amendments of 1977, § 122"; and imposition of "certain siting and land-use requirements for nuclear plants." *PG&E*, 461 U.S. at 212 n.25. The firs exception is inapplicable because Vermont is not an "agreement" state, and the second two exceptions are likewise inapplicable here.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

In *PG&E*, unlike here, there was such a non-safety rationale because California contemporaneously justified its statute by stating that, "[w]ithout a permanent means of disposal [of SNF], the nuclear waste problem could become critical leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors." *Id.* at 213-14. California took care specifically to explain that "[w]aste disposal *safety* … is not directly addressed by the bills, which ask only that a method [of waste disposal] be chosen and accepted by the federal government." *Id.* at 214 (emphasis and second alteration in original).

By contrast, where other state or local regulations have sought to regulate nuclear power plants for reasons of radiological safety, lower courts in cases since *PG&E* have not hesitated to find those efforts preempted. In *Long Island Lighting Company*, for example, the Second Circuit held that the County's lawsuit seeking to halt operations of a nuclear plant was preempted because the complaint "appears, at least in some respects, to be motivated by safety concerns … [insofar as] some paragraphs specifically refer to the ill effects defendants' alleged misdeeds might have on the public health, safety and welfare." 728 F.2d at 59. In the other *Long Island Lighting Company* case before the Eastern District of New York, the court found that prior efforts by the county to assert safety concerns supported the inference (for purposes of the company's pursuit of a preliminary injunction) that the County's current legislation, which did *not* specifically mention safety, was nevertheless motivated by safety concerns. 628 F. Supp. at 665-66; *see also, e.g.*, *Me. Yankee Atomic Power Co. v. Me. Pub. Util. Comm'n*, 581 A.2d 799, 806 (Me. 1990) (state statute preempted because it invoked "public health" and "safety" as legislative purposes); *Skull Valley Band*, 376 F.3d at 1246 (holding similar state statutes preempted and also noting that, "unlike the state officials in *Pacific Gas*, the Utah officials here

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

have failed to offer evidence that the provision allowing a county to ban SNF transportation and storage is supported by a non-safety rationale").

Similarly here, the statutory text, the statements of legislators, and the records of administrative proceedings confirm that Vermont's regulatory approach is motivated impermissibly by safety concerns. The 2006 Act, in re-allocating authority to issue a CPG from the PSB to the General Assembly, explicitly requires that "public health issues" be included in studies informing the legislature's future decision whether to authorize the PSB to issue a CPG. Vt. Stat. Ann. tit. 30, § 254(b)(2)(B); *see also id.* § 254(c) (in acting on a petition for a CPG, PSB must consider "the general and specific issues that the studies are required to address"). The 2008 Act likewise expressly mentions "safety" in requiring an audit that will address the question: "Have any repairs, maintenance, or modifications impacted the original design of the redundant safety systems? Are all systems still 'single failure proof?'" 2008 Vt. Acts & Resolves No. 189, § 4(10).[7]

Vermont officials have frequently explained these regulatory measures as motivated by concerns that the Vermont Yankee Station is unsafe. For example, just after the NRC announced that it would renew the Vermont Yankee Station's federal license through March 21, 2032, Governor Shumlin stated: "'Given the serious radioactive tritium leaks and the recent tritium test results, the source of which has yet to be determined, and other almost weekly problems occurring at this facility, I remain convinced that it is not in the public good for the plant to remain open beyond its scheduled closing in 2012." Ngau, Ex. 7; *see also* Ngau, Ex. 1 ("I don't

[7] Such mentions of "safety" would likely be even more prevalent in the statutory text and elsewhere had the legislators not been warned by a law professor from Vermont Law School that "it would not be wise to rely on [safety]" for fear of triggering AEA preemption. Entergy Nuclear/Vermont Yankee – Legislative Briefing, http://www.leg.state.vt.us/jfo/vt_yankee_video.aspx (Part 2 Video at 1:04:20) (Nov. 19, 2008).

think you can convince most Vermonters today … that Vermont's best energy choice is to play Russian Roulette with an aging nuclear power plant."); Ngau, Ex. 13 (Bob Audette, *Vt. Legislators Seek Radiation Rule Review*, BRATTLEBORO REFORMER, Nov. 14, 2008) (quoting then-President Pro Tempore Peter Shumlin as saying that "[s]afety is our top concern").[8]

Vermont may attempt to distance itself from these safety-focused statements and to propose a *post hoc* non-safety rationale. Although it is Vermont's, not Plaintiffs', burden to articulate and justify a non-safety rationale, *see Skull Valley Band*, 376 F.3d at 1246 ("[T]he Utah officials here have failed to offer evidence that the provision … is supported by a non-safety rationale."), any such rationale is unsupportable and thus should be viewed as a pretext for Vermont's true safety motivation.

To begin with, Vermont cannot plausibly assert a non-safety economic justification for shutting down the Vermont Yankee Station as Vermont has no "traditional" sphere of utility-

---

[8] The Governor's reaction to the tritium leak, and his focus on preempted safety issues, is also made clear by his statements six months earlier, as a political candidate, that "I have been saying for some time that the radioactive leaks at Vermont Yankee could be the largest man-made environmental crisis that Vermont has ever seen . . . . Unless Entergy Louisiana is held accountable for this disaster, it could cost Vermonters millions of dollars and put the health and safety of thousands at risk." Ngau, Ex. 14 (*Yankee Becomes Big Issue in Governor's Race; Shumlin Addresses Leaks*, TIMES ARGUS (Montpelier-Barre, Vt.), Oct. 11, 2010). Other public statements reinforce the fact that Vermont officials' attempts to regulate the Vermont Yankee Station are motivated by safety concerns. In connection with Vermont's attempt to regulate the Vermont Yankee Station's storage of SNF, then-Senate President Peter Welch, D-Windsor, stated that "[t]he first concern of the Legislature is safety and safety is not for sale." Ngau Ex. 15 (*PSB Asked to Hold off on Yankee Ruling*, Times Argus (Montpelier-Barre, Vt.), Mar. 10, 2005). Similarly, when Vermont ultimately did "allow" the Vermont Yankee station to apply to the state legislature for permission to store SNF on-site, Mr. Welch commented that "[w]e took very, very seriously this question of safety . . . . Safety is not for sale; it cannot be for sale." Ngau, Ex. 16 (Louis Porter, *Yankee 'Dry Cask' Bill Is Approved in Senate*, TIMES ARGUS (Montpelier-Barre, Vt.), June 4, 2005). Discussing the Senate bill that would ultimately become Act 160, Representative Steve Darrow, D-Dummerston and Representative Sarah Edwards, P-Brattleboro, wrote an op-ed article stating that the law would allow for studies that would include examination of "[l]ong-term environmental, economic and *public health risks* related to dry cask storage and decommissioning options." Ngau, Ex. 17 (*Bill Sets Stage for Public Debate on Yankee*, TIMES ARGUS (Montpelier-Barre, Vt.), May 28, 2006) (emphasis added).

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

related authority over the Vermont Yankee Station as did California over the local retail utilities regulated by the statute at issue in *PG&E* or as New York did in the *Long Island Lighting Company* cases.[9] That is because, unlike local utilities traditionally regulated by state governments, the Vermont Yankee Station is not a local retail utility that supplies electricity to consumers, but rather a supplier of power to the wholesale interstate market. Compl. ¶¶ 11, 41, 48; Kee ¶¶ 16, 18. As *PG&E* explained, the "economic aspects of electrical generation have been regulated for many years and in great detail by the states," but subject to the important "exception of the broad authority of [FERC] over the need for and pricing of electrical power transmitted in interstate commerce." 461 U.S. at 205-06 (citations omitted).

Any economic justification Vermont might offer to regulate a wholesale power generator, as opposed to a retail utility, is thus precluded by federal law, which has deregulated electricity generation and centralized wholesale rate-making authority in FERC since *PG&E* was decided. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), *aff'd sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (*per curiam*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). "When combined with federal preemption law, one crucial aspect of these energy market regulatory reforms has been 'a massive shift in regulatory jurisdiction from the states to FERC.'" *Pub. Util. Dist. No. 1 of Snohomish Cty. Wash. v. FERC*, 471 F.3d 1053, 1066 (9th Cir. 2006), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008); *see also id.* at 1067 ("Although state regulators formerly took an

[9] Plaintiffs do not contend that the AEA preempts generally applicable state laws in traditional areas like tax law and tort law so long as such laws do not have a "direct and substantial effect" on nuclear plants. *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

extremely active role so as to ensure the just and reasonable retail power rates, FERC has exclusive jurisdiction over the wholesale rates that now drive the electric power market ....").

Moreover, even if Vermont did have some traditional utility-related authority to regulate the Vermont Yankee Station (it does not), its efforts are preempted because any non-safety rationale that Vermont might assert is so implausible as to be necessarily pretextual for safety-related concerns, especially when viewed in conjunction with the explicit statements by Vermont legislators and its current governor invoking safety as a motivating rationale. That is because a shutdown of the Vermont Yankee Station would have negative, not beneficial, economic effects on Vermont and the surrounding region. As Vermont's own former Governor Douglas stated in 2009:

> [W]e must not lose sight of the fact that Vermont Yankee provides a source of power with relatively low carbon emissions ... and it currently provides approximately one-third of the state's power. ... Vermont Yankee supports the region with over 600 high paying jobs, helping to infuse money into the local, state and regional economies, as well as additional tax revenue for the state. The Clean Energy Development Fund receives millions of dollars each year from Entergy to fund renewable projects throughout the state. In addition to local impacts, Vermont Yankee is responsible for providing power to neighboring states through the regional grid.

Ngau, Ex. 18 (Letter from Gov. James H. Douglas, Governor of the State of Vermont, to Hon. Donald G. Milne, Clerk of the Vermont House of Representatives (May 22, 2009)), at 3-4. More specifically, studies commissioned by Vermont itself have found that the economic and environmental impacts of shutting down the Vermont Yankee Station in March 2012 would be negative and substantial. ISO-NE has reached similar conclusions about the negative effects a shutdown would have on other surrounding States.

As explained in more detail in Points II-IV, *infra*, these negative economic and environmental effects would include:

Higher electricity prices in Vermont. According to a March 2010 report commissioned by the Vermont General Assembly, shutdown of the Vermont Yankee Station will lead to higher retail power costs in Vermont relative to a "Green" scenario in which Vermont simultaneously and aggressively promotes green power sources to replace the more than 600 MW capacity of the Vermont Yankee Station. "Retail power bills in the Green scenario are generally higher than most other scenarios in the initial 5+ years." Kee, Ex. 9 (Econ. & Policy Res., Inc. *et al.*, *Consensus Economic and Fiscal Impact Analyses Associated with the Future of the Vermont Yankee Power Plant—Executive Summary* (March 2010) ("Consensus Study")), at 10; *see also* Kee ¶¶ 47-62.

Increased unreliability of electricity supply. The Vermont Yankee Station does not sell its power directly to Vermont retail consumers, but rather sells the power into the interstate wholesale market, in which utilities purchase the power and then sell it at retail to end users. ISO-NE recently found that "potential thermal overloads and voltage violations … generally (but not always) tend to be more widespread and severe without Vermont Yankee." Kee, Ex. 23 (ISO-NE, *Summary of Vermont/New Hampshire Transmission System 2010 Needs Assessment*, Feb. 17, 2011), at 3; *see also* Kee ¶¶ 63-69 (discussing out-of-state impacts of closing the Vermont Yankee Station), ¶ 69 (discussing ISO-NE's briefing of the Vermont Senate on the "overloads" in Massachusetts and New Hampshire that would follow from closing the Vermont Yankee Station).

Substantial job loss. The Consensus Study compares scenarios with and without the Vermont Yankee Station in future years and finds that there will be approximately 1,000 fewer

RAVEL AND SHEA
A PROFESSIONAL CORPORATION
O. BOX 369
URLINGTON, VERMONT
5402-0369

jobs without the Vermont Yankee Station, as well as additional "[s]econdary indirect and induced economic impacts" in terms of jobs in the community that serve the current employees of the Vermont Yankee Station. Kee, Ex. 9 at 8, 10.[10] Although the report predicts that, if Vermont simultaneously adopts aggressive policies promoting green power, new jobs would be created to replace the lost jobs, *id.* at 10, that prediction is speculative and in any event contemplates job losses between 2015 and 2020 as compared to a scenario in which the Vermont Yankee Station continues to operate, *id.* at 9. A study commissioned by Vermont's own DPS concerning the proposed CPG to allow operation of the Vermont Yankee Station for an additional 20 years estimates that that between 1,064.9 and 1,844.2 full-time job equivalents per year (averaged over the 20 year license renewal period) would be gained if the Vermont Yankee Station operated during the license renewal period. Kee, Ex. 7 (GDS Assocs., Inc., *Report to the Vermont Department of Public Service on the Vermont Yankee License Renewal* (Feb. 27, 2009) ("GDS Study")), at 11-4 & 11-5; *see also* Kee ¶¶ 38-41 (concluding that closure of the Vermont Yankee Station would result in a significant loss of jobs).

Decline in state and local tax revenues. In 2009, taxes and fees paid to Vermont on account of the Vermont Yankee Station totaled approximately $13.4 million; in 2010, $13.8 million. *See* Kee, Ex. 13 at Table 2. With the plant shut down, this amount will drop to zero in 2013. *Id.* Although Vermont's state and local governments provide certain services to the Vermont Yankee Station whose cost might be avoided were the plant shut down, these cost savings do not nearly offset the loss in state and local tax revenues from the Vermont Yankee Station. *See* Kee ¶ 43 & Ex. 7 at 11-12. The GDS Study further estimated that the positive economic impact of continued operation of the Vermont Yankee Station for the license renewal

[10] This number of lost jobs appears to include the over 600 current employees at the Vermont Yankee Station. *See* Herron ¶ 18.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

period would be an annual average of between $76.5 million per year and $255.1 million per year over the period from 2012 to 2032. Kee, Ex. 7 at 11-4; *see also* Kee ¶¶ 42-46 (compiling data regarding decreased revenue for Vermont from the early closure of the Vermont Yankee Station).

Increase in greenhouse gas emissions. As Governor Douglas explained, "Vermont Yankee provides a source of power with relatively low carbon emissions, thus helping to limit our greenhouse gas emissions." Ngau, Ex. 18 at 2. If the Vermont Yankee Station is shut down, the gap in supply will have to be filled with fossil fuel sources, resulting in substantially higher greenhouse gas emissions. Kee, Ex. 10 (Howard J. Axelrod, Energy Strategies, Inc., *An Independent Assessment of the Environmental and Economic Impacts Associated with the Closing of the Vermont Yankee Nuclear Plant* (Mar. 13, 2009 update)), at 21. Although it is possible that non-nuclear green power sources will *eventually* bridge the gap, that will occur (if at all) only years in the future. *See, e.g.* Kee ¶¶ 74-77 (compiling studies on the effect on greenhouse gas emissions of a shutdown of the Vermont Yankee Station).

In short, no non-safety rationale that Vermont might assert is plausible. This provides strong corroboration of the explicit statements by Vermont's officials that their intended shutdown of the Vermont Yankee Station is motivated by impermissibly preempted safety concerns. Accordingly, Plaintiffs are likely to succeed on this second, independent ground for AEA preemption.

3. ENVY Has Not Waived Its Right To Assert Federal Preemption Under The 2002 MOU.

Defendants might argue that Plaintiffs are precluded by paragraph 12 of the 2002 MOU from asserting that federal law preempts Vermont's efforts to shut down an operating, federally licensed nuclear power plant. *See supra*, at 8-9 (describing the 2002 MOU). This argument

fails, however, because any such waiver is inapplicable in current circumstances. Moreover, Vermont has breached its own commitments under the MOU so as to release ENVY from any purported waiver of its ability to raise preemption. *See Rioux v. Ryegate Brick Co.*, 47 A. 406, 408 (Vt. 1900) ("[A]s the defendants' breach went to the essence of the contract, it operated as an external condition subsequent, and entitled the plaintiff to be discharged from further performance on its part."); *Brown v. Windham Ne. Supervisory Union*, No. 2:05-CV-329, 2006 WL 2548198, at *6 (D. Vt. Aug. 31, 2006) ("A breach of contract by one party may entitle the other party to be discharged from further performance."). Here, as previously, Vermont has "attempt[ed] to go back on its commitments." Ngau, Ex. 18.[11]

Specifically, the MOU does not preclude Plaintiffs from asserting the preemption claims in this lawsuit, because:

First, the 2002 MOU provides that ENVY "waive[s] any claim … that federal law preempts the jurisdiction of the *[Public Service] Board* to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the [CPG] to allow operation of the [Vermont Yankee Station] after March 21, 2012, or to decline to so renew, amend or extend." Ngau, Ex. 3 at 6 (emphasis added). As the italicized words make clear, the MOU was expressly premised on the assumption that it was the PSB and not the General Assembly that would make the renewal decision. But in the 2005 and 2006 Acts, Vermont took the renewal decision away from the PSB, an administrative agency, and instead placed it in the hands of the Vermont General Assembly—a political body with no technical expertise or

[11] As an additional example, the MOU provides that demonstration of ENVY's and ENOI's ability to fund decommissioning "may include the implementation of SAFESTOR [sic] or other forms of delayed decommissioning," Ngau, Ex. 3 at 5, but Vermont's federal Congressional delegation recently urged that, in the event of a shutdown, ENVY and ENOI be required to employ the DECON (immediate decommissioning) method, which is substantially more costly than the SAFSTOR method. Ngau, Ex. 10.

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369

experience making technical decisions in the field. This re-allocation of power fundamentally alters the agreement made in the MOU. The PSB has "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; the PSB has expertise in matters of electricity and power generation; the PSB holds hearings and takes evidence; and the PSB's decisions may be appealed to the Vermont Supreme Court, *id.* § 14, even if they are reviewed with some level of deference, *see, e.g.*, *In re UPC Vt. Wind, LLC*, 969 A.2d 144, 147 (Vt. 2009). By contrast, the Vermont General Assembly must deal with a wide range of issues beyond state energy policy during legislative sessions spanning only a few months, and thus its members are constrained in their ability to master the complex issues associated with nuclear power. Moreover, the General Assembly is a purely political body that could deprive ENVY and ENOI of the authority to operate the Vermont Yankee Station for unsupported, unstated, or arbitrary reasons. ENVY and ENOI never consented to forego a preemption challenge to the purported jurisdiction of the General Assembly, as opposed to the PSB, to shut down an operating and federally licensed nuclear power plant.

Second, Paragraph 12 of the MOU could not reasonably have been intended to preclude the assertion of all preemption claims by Plaintiffs. As the PSB itself explicitly acknowledged in its order approving the sale of the Vermont Yankee Station to ENVY, the PSB is was preempted from exercising authority in those areas "within the purview of the Nuclear Regulatory Commission," Ngau. Ex. 20 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Order (June 13, 2002)), at 15 n.25, and its authority was "limited to issues associated with the manner in which Vermont meets its energy needs," *id.* at 118, 128. Moreover, Vermont's DPS, which sought that provision, was a party to another case in which the PSB, shortly before the 2002 MOU's execution, had stated that, where its scope of authority was limited by federal law, its "jurisdiction cannot be created

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
P. O. BOX 369
BURLINGTON, VERMONT
05402-0369