

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

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

Plaintiffs

v.

Civil Action No. 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

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

**HEARING REQUESTED**

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Kathleen M. Sullivan (*pro hac vice*)  
Robert Juman (*pro hac vice*)  
Sanford I. Weisburst (*pro hac vice*)  
William B. Adams (*pro hac vice*)  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22<sup>nd</sup> Floor  
New York, New York 10010  
Telephone: (212) 849-7000  
Fax: (212) 849-7100

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

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

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
ARGUMENT .....	2
I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS .....	2
A. Vermont Has Improperly Regulated An Interstate Wholesale Nuclear Plant .....	3
B. Vermont Has Improperly Regulated Based On Preempted Safety Concerns.....	4
C. Defendants Fail To Establish Waiver, Estoppel, Or Laches.....	12
II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM .....	15
III. THE BALANCE OF HARDSHIPS STRONGLY FAVORS PLAINTIFFS .....	19
IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST .....	19
CONCLUSION.....	20
Certificate of Service .....	22

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<i>In re Adelpia Recovery Tr.</i> , 634 F.3d 678 (2d Cir. 2011).....	14
<i>Allen v. Westpoint-Pepperell, Inc.</i> , 11 F.Supp.2d 277 (S.D.N.Y. 1997).....	12
<i>Am. Airlines, Inc. v. Dep’t of Transp.</i> , 202 F.3d 788 (5th Cir. 2000) .....	12
<i>Ass’n of Nat’l Advertisers, Inc. v. FTC</i> , 627 F.2d 1151 (D.C. Cir. 1979).....	12
<i>Cacchillo v. Insmed, Inc.</i> , 638 F.3d 401 (2d Cir. 2011).....	15
<i>Bruesewitz v. Wyeth LLC</i> , 131 S.Ct. 1068 (2011).....	7
<i>Coastal Distrib., LLC v. Town of Babylon</i> , 216 F. App’x 97 (2d Cir. 2007) .....	16
<i>DeRosa v. Nat’l Envelope Corp.</i> , 595 F.3d 99 (2d Cir. 2010).....	14
<i>Empresas Cablevision v. JPMorgan Chase Bank, N.A.</i> , 381 F. App’x 117 (2d Cir. 2010) .....	11
<i>Eng v. Smith</i> , 849 F.2d 80 (2d Cir. 1988).....	2
<i>Gade v. Nat’l Solid Wastes Mgmt. Ass’n</i> , 505 U.S. 88 (1992).....	6
<i>Greater N.Y. Metro. Food Council, Inc. v. Giuliani</i> , 195 F.3d 100 (2d Cir. 1999), <i>abrogated on other grounds by Lorillard Tobacco Co. v. Reilly</i> , 523 U.S. 525 (2001) .....	5
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	6
<i>Kavowras v. N.Y. Times Co.</i> , 328 F.3d 50 (2d Cir. 2003).....	15
<i>Kerr-McGee Chem. Corp. v. City of W. Chicago</i> , 914 F.2d 820 (7th Cir. 1990) .....	5
<i>Long Is. Lighting Co. v. Cnty. of Suffolk</i> , 628 F.Supp. 654 (E.D.N.Y. 1986) .....	5

<i>Mass. Mut. Life Ins. Co. v. Assoc. Dry Goods Corp.</i> , 786 F.Supp. 1403 (N.D. Ind. 1992) .....	16
<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992), <i>superseded on other grounds as stated in</i> <i>Porter v. Nussle</i> , 534 U.S. 516 (2002) .....	12
<i>Me. Yankee Atomic Power Co. v. Bonsey</i> , 107 F.Supp.2d 47 (D. Me. 2000) .....	5, 12
<i>O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft</i> , 389 F.3d 973 (10th Cir. 2004), <i>aff'd and remanded</i> , 546 U.S. 418 (2006) .....	19
<i>Olympic Pipe Line Co. v. City of Seattle</i> , 437 F.3d 872 (9th Cir. 2006) .....	12
<i>Pac. Gas &amp; Elec. Co. v. State Energy Res. Conserv. &amp; Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	<i>passim</i>
<i>Pub. Util. Dist. No. 1 v. FERC</i> , 471 F.3d 1053 (9th Cir. 2006), <i>vacated on other grounds</i> , 547 F.3d 1081 (9th Cir. 2008) .....	3
<i>Saks v. Franklin Covey Co.</i> , 316 F.3d 337 (2d Cir. 2003) .....	12
<i>Salt Water Pond Assocs. v. U.S. Army Corps of Engrs.</i> , 815 F.Supp. 766 (D. Del. 1993) .....	16
<i>Skull Valley Band of Goshute Indians v. Nielson</i> , 376 F.3d 1223 (10th Cir. 2004) .....	5, 6
<i>Ticor Title Ins. Co. v. Cohen</i> , 173 F.3d 63 (2d Cir. 1999) .....	17
<i>U.S. R.R. Ret. Bd. v. Fritz</i> , 449 U.S. 166 (1980) .....	10
<i>United States v. City of N.Y.</i> , 463 F.Supp. 604 (S.D.N.Y. 1978) .....	6
<i>Veltri v. Bldg. Serv. 32B-J Pension Fund</i> , 393 F.3d 318 (2d Cir. 2004) .....	15
<i>Vt. Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1977) .....	3
<i>Welfare Fund v. Bidwell Care Ctr., LLC</i> , No. 10-1859, 2011 WL 1289182 (2d Cir. Apr. 6, 2011) .....	14
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975) .....	11
<i>Wolf v. Reliance Std. Life Ins. Co.</i> , 71 F.3d 444 (1st Cir. 1995) .....	12

**Statutes, Rules, and Regulations**

10 C.F.R. § 51.71(f) .....	4
FRCP 8(c) .....	12
Vt. Stat. Ann. tit. 30, § 9 .....	11
Vt. Stat. ann. tit. 30, § 102 .....	8
Vt. Stat. ann. tit. 30, § 203 .....	8
Vt. Stat. ann. tit. 30, § 231 .....	8
Vt. Stat. ann. tit. 30, § 248 .....	7, 8

**Other Authorities**

132 F.E.R.C. ¶ 61,047, 2010 WL 2794334 (July 15, 2010) .....	11
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## INTRODUCTION

Defendants fail to refute Plaintiffs' showing of likelihood of success on the merits. Defendants acknowledge (Opp. 8) that the AEA preempts state laws that regulate nuclear power based on radiological safety concerns. And Defendants cannot refute the overwhelming evidence that Vermont's actions toward the VY Station are in fact safety-motivated despite repeated authoritative findings that the Plant is safe.<sup>1</sup> Instead, Defendants attempt three principal end-runs around that evidence. *First*, Defendants assert (*id.*) that Vermont could have relied on non-safety rationales not preempted by *PG&E*—"need, reliability, cost and other related state concerns," *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("*PG&E*"). But they ignore that such rationales are inapposite to a plant like the VY Station, which is not a retail utility subject to state regulation but rather sells power on the interstate wholesale market subject to FERC's exclusive jurisdiction. *Second*, Defendants assert (Opp. 18-19) that the overwhelming evidence of Vermont's safety motivation is irrelevant because this Court's inquiry begins and ends with the text of the statute's purpose preamble. But *PG&E* itself clearly relied on legislative history in determining whether a state law was safety-motivated, 461 U.S. at 213, and if Defendants were correct, a safety-motivated legislature could always avoid preemption simply by scrubbing the term "safety" from the text of its bills—just as Vermont has sought, with many embarrassing gaffes, to do here. *Third*, Defendants proffer new supposed non-safety rationales like "energy diversity," but Vermont did not have these rationales "in mind," *id.* at 215-16, when it enacted or applied the challenged legislation, and a Vermont-regulated utility's recent contract with the Seabrook, New Hampshire nuclear plant, Kee Reply ¶ 16 & Ex. 33, shows that Vermont is not adhering to those rationales even now.

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<sup>1</sup> The NRC, which has exclusive authority over radiological safety, found the Plant safe. Compl., Ex. A. Vermont's own consultants agreed. *See generally* Ngau Exs. 24, 29, 33.

Plaintiffs have also amply demonstrated irreparable harm. The specter of a March 2012 shutdown is causing irreparable harm now, and absent preliminary relief, that harm will only escalate as this case winds toward an October 2011 trial, a decision, and potential appeals. Skilled employees have left their jobs, citing the shutdown, and further such attrition threatens to weaken or shut down the Plant. Plaintiffs are also losing the opportunity to enter into long-term contracts with purchasers skeptical that the Plant (unlike Seabrook) will stay in operation. And Vermont is trying even before March 2012 to hasten the shutdown, including by enacting retaliatory legislation purporting to require Plaintiffs to pay Defendants' costs in this case.

The balance of hardships and public interest also favor preliminary relief. Plaintiffs will earn a Pyrrhic victory if they prevail at trial and on appeal, only to retain a plant with a diminished workforce and a reduced portfolio of business, leading at best to lost revenues (which potentially may not be recoverable from Vermont given sovereign immunity) and at worst to a shutdown that will cause job and revenue loss to the State as well as increased greenhouse gas emissions. On the other hand, Defendants will suffer literally no harm if the Court grants a preliminary injunction to limit Plaintiffs' irreparable harm and preserve the status quo.

## **ARGUMENT**

### **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

As the Court stated at the Rule 16 conference, likelihood of success on preemption is the "primary issue" on this motion. *See* 5/5/11 Tr. 11:15-21 (THE COURT: "[W]e have to get involved with the question of preemption without ultimately deciding it, ... but certainly saying that it is likely you will be successful because of preemption. ... [T]o me, that's the primary issue here."). Plaintiffs need show only that "the probability of [their] prevailing is better than fifty percent." *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988) (quotation omitted).

**A. Vermont Has Improperly Regulated An Interstate Wholesale Nuclear Plant**

Plaintiffs argued (Mem. 14-18) that states are preempted from shutting down an already constructed, operating, and NRC-licensed plant, even for non-safety reasons. Defendants respond (Opp. 6-13) by citing a passage from *PG&E* and NRC statements that suggest that states retain a non-preempted role in re-licensing decisions. But Defendants ignore the crucial distinction between state-regulated *retail* utilities that sell directly to consumers and interstate *wholesalers* like the VY Station—a distinction that renders Defendants’ authorities inapposite.

Defendants rely heavily on *PG&E*’s statement that “‘States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other state concerns.’” Opp. 6 (quoting 461 U.S. at 205). But *PG&E* itself explained that wholesale plants selling into the interstate market are an “exception” to the tradition of retail utilities regulated by states—as to interstate plants, “need” and other economic questions are regulated only by FERC. 461 U.S. at 205-06. Defendants also assert (Opp. 6) that *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550 (1977), recognizes that “state utility commissions determine ‘need for power.’” In fact, *Vt. Yankee* stated that the “need for power” could be determined by either a state commission *or* “similar bodies” depending on the type of plant, and then noted that FERC’s predecessor had so determined for the VY Station, an interstate wholesaler. *Id.* at 550-51; *see also Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053, 1063-64, 1066 (9th Cir. 2006) (describing “massive shift in regulatory jurisdiction from the states to FERC” after *PG&E*), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008); Kee Reply ¶¶ 66-72; Ngau Reply Ex. 67 (*State to Entergy: You’re Wrong and Too Slow to React*, VT DIGGER, May 25, 2011) (According to “Donald Kreis, a law professor at Vermont Law School and former general counsel for the [N.H.] Public Utility Commission,” because the VY

Station is a “merchant plant that sells its electricity on the interstate market, ... it is difficult for the state of Vermont to argue a need to regulate the plant based on economic concerns.”<sup>2</sup>

The NRC too recognizes the distinction between retail utilities and interstate wholesalers. According to the NRC, “[i]n cases of interstate generation ..., Federal Agencies such as the Federal Energy Regulatory Commission (FERC) ... may be involved in making these determinations.” Kolber Ex. 2 ¶ 1.3. Defendants omit key words in quoting (Opp. 9) an NRC regulation describing the “authority of States *or other Federal agencies* to address these issues.” 10 C.F.R. § 51.71(f) n.4 (omitted words emphasized); *accord* Kolber Exs. 2 ¶ 1.3, 3 ¶ 1.4, 4 ¶ 1.0. Thus, there is no “regulatory vacuum” (Opp. 12) on economic concerns: they are decided by FERC and cannot support Defendants’ attempt to evade preemption.

#### **B. Vermont Has Improperly Regulated Based On Preempted Safety Concerns**

Plaintiffs argued as an independent ground for preemption (Mem. 18-26) that the AEA precludes Vermont’s encroachment on the exclusively federal field of “nuclear safety concerns.” *PG&E*, 461 U.S. at 212. Defendants seek to avoid field preemption through a game of semantics, arguing that even a state legislature plainly motivated by safety concerns need only avoid using the word “safety” in a statute’s purpose preamble. Opp. 18-19 (“the object and policy of Act 160 is found in the ‘legislative policy and purposes’ section”). Vermont’s General Assembly has done just that—acting based on perceived safety concerns (however unwarranted) while carefully scrubbing the word “safety” from its statutes under coaching from various advisers to avoid using this magic word. For example, it changed the title of the bill later enacted as Act 189 from “An Act Relating to an Independent *Safety* Assessment of the Vermont

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<sup>2</sup> In theory, other rationales like “environmental unacceptability,” *PG&E*, 461 U.S. at 207 n.18, or “land use,” *id.* at 212, might be invoked as to an interstate wholesaler. But the General Assembly in fact invoked “reliability,” *see infra*, at 9 (discussing Act 189), making any such rationales merely *post hoc* pretexts for safety here. *See infra*, at 10-11; Mem. 24-26.

Yankee Nuclear Facility,” to “An Act Relating to an Independent *Vertical Audit and Reliability* Assessment of the Vermont Yankee Nuclear Facility,” Ngau Reply Ex. 50 (S. 269, Draft No. 4, Feb. 27, 2008) at 1, 12 (emphasis added).<sup>3</sup>

**The legal standard.** *First*, Defendants argue (Opp. 18-19) that inquiry into whether the State had “safety purposes in mind,” *PG&E*, 461 U.S. at 215, begins and ends with the statute’s purpose preamble. *PG&E* itself refutes Defendants’ assertion, as it relied upon a committee report to determine legislative purpose. 461 U.S. at 213-14. Numerous lower courts after *PG&E* also have delved into materials besides the statute’s text to ascertain purpose. *E.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004); *Long Is. Lighting Co. v. Cnty. of Suffolk*, 628 F.Supp. 654, 665-66 (E.D.N.Y. 1986) (cited at Mem. 19 but not in Opp.) (prior efforts by county to assert safety concerns supported inference that county’s current legislation, which did *not* specifically mention safety, was nevertheless safety-motivated). In other preemption contexts too, the Second Circuit has held that a court cannot “blindly accept the articulated purpose of an ordinance for preemption purposes,” but instead will consider “the purpose of the ordinance as a whole.” *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39 (2001). Thus, contrary to Defendants’ view (Opp. 18, 21), legislative purpose, evinced in legislative history and not just text, is the touchstone of AEA preemption.<sup>4</sup>

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<sup>3</sup> Vermont of course may express its views on safety to the NRC or seek review of the NRC’s licensing decisions—as it did in its recently filed petition before the D.C. Circuit. Kolber Ex. 23.

<sup>4</sup> Neither *Kerr-McGee Chem. Corp. v. City of W. Chicago*, 914 F.2d 820 (7th Cir. 1990), nor *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F.Supp.2d 47 (D. Me. 2000) (cited at Opp. 21), supports looking exclusively to statutory text to determine legislative purpose. *Kerr-McGee* declined to speculate whether the city “plans to use the Code to frustrate the NRC licensing program.” 914 F.2d at 827. *Maine Yankee* followed *Kerr-McGee* in similar circumstances. 107 F.Supp.2d at 55-56. Here, by contrast, Plaintiffs rely on a record of the Assembly’s past actions.

*Second*, Defendants argue (Opp. 23 & n.10) that post-enactment legislative materials—here, evidence of legislative purpose “after Acts 74 and 160” (Opp. 23)—are irrelevant. But those materials are highly relevant here because Plaintiffs challenge not only the Assembly’s initial enactment of its CPG role in 2005-06, but also its ongoing exercise of that authority in refusing to authorize a CPG. *Cf. INS v. Chadha*, 462 U.S. 919, 944 (1983) (challenge to ongoing “legislative veto” power); *see United States v. City of N.Y.*, 463 F.Supp. 604, 614 (S.D.N.Y. 1978) (rejecting purported non-safety basis for nuclear reactor certificate denial as “inconsistent with the purpose of the ordinance as intended at the time of its enactment” **and** “contrary to the **application** of the ordinance as exemplified by the City’s decision”) (emphasis added).<sup>5</sup>

*Third*, contrary to Defendants’ assertion (Opp. 21-22), a state may not act based on alleged safety concerns so long as it also has non-safety concerns in mind. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 104-08 (1992) (holding preempted a statute with both a preempted and a non-preempted purpose/effect). *PG&E* does not hold otherwise; Defendants quote only the background section of *PG&E* (Opp. 22 (quoting 461 U.S. at 196-97)) and ignore *PG&E*’s analysis section, which carefully ruled out the possibility that the regulation was motivated even partly by safety concerns, 461 U.S. at 213 (finding that committee described the waste-disposal issue as “largely economic or the result of poor planning, *not* safety related”).

*Fourth*, Defendants argue (Opp. 4) that Plaintiffs bear the burden of showing that Vermont was motivated by safety concerns, rather than (as Plaintiffs argued (Mem. 21), citing *Skull Valley*, 376 F.3d at 1246) that Defendants bear the burden of showing that Vermont had non-safety concerns in mind. Defendants ignore *Skull Valley* and instead rely on a presumption

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<sup>5</sup> Plaintiffs’ opposition to NEC’s motion to intervene (ECF No. 26 at 13) argued that materials *never* before the legislature are irrelevant. Materials that *were* before the legislature during its ongoing consideration whether to authorize a CPG are clearly relevant.

against preemption referenced by *PG&E*. *Id.* at 206. But that presumption, even if still valid,<sup>6</sup> is inapplicable here. The predicate for the presumption in *PG&E* was that California was regulating a retail utility over which it had traditional authority; by contrast, this case involves an interstate wholesale plant, and states lack any traditional authority “over the need for and pricing of electrical power transmitted in interstate commerce,” *id.* at 206. In any event, *PG&E* found the presumption overcome in holding that the AEA preempts the safety field, *id.* at 212-13; after *PG&E*, it is up to Defendants, not Plaintiffs, to show that this established field preemption does not apply to particular state actions. Finally, even if Plaintiffs bear the burden on likelihood of success, they have carried it.

***Applying the legal standard.*** Defendants portray (Opp. 14-15) Plaintiffs as making an overbroad request to invalidate eight different Vermont enactments/orders. In fact, as several items in Defendants’ list are essentially duplicates, Plaintiffs challenge just three aspects of Vermont authority, the first two involving the Assembly and the third involving PSB:

(1) Act 74 (2005), which requires that Plaintiffs obtain the Assembly’s approval before PSB may grant a CPG for dry-cask storage of spent nuclear fuel (“SNF”) from post-March 2012 operations, and the Assembly’s post-2005 exercise of this authority;

(2) Act 160 (2006), which requires that Plaintiffs obtain the Assembly’s approval before PSB may grant a CPG for post-March 2012 operations, and the Assembly’s post-2006 exercise of this authority; and

(3) PSB’s residual authority, if authorized by the Assembly or if (1) and (2) are invalid, to grant or deny CPGs for storage of post-March 2012 SNF, Vt. Stat. ann. tit. 30, § 248(a)(2), and post-March 2012 operations, 2002 MOU (Ngau Ex. 3).<sup>7</sup>

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<sup>6</sup> Compare *Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068, 1075 (2011) (finding preemption without discussing presumption); *with id.* at 1096 n.15 (dissent) (invoking presumption).

<sup>7</sup> Defendants’ (5) and (6) restate Act 74’s requirement that Plaintiffs obtain the Assembly’s approval before PSB may grant a CPG for storage of SNF from post-March 2012 operations. Defendants’ (3) and (4) restate the requirement in Defendants’ item (2), the 2002 MOU, that Plaintiffs must obtain **from PSB** a CPG regarding post-March 2012 operations. Plaintiffs do not

General Assembly action (1 and 2). The legislative record clearly demonstrates that the Assembly, in and after 2005, has been motivated by safety concerns while intentionally masking those concerns in the statutory text with the code word “reliability.” Such a game of semantics, if not rejected by this Court, would gut AEA field preemption.

On multiple occasions from 2005 through 2008, the Assembly was warned to avoid using the word “safety” in order to escape AEA field preemption:

“[L]et’s find another word for safety.” Ngau Reply Ex. 45 (Statement of the Chair of the Senate Finance Committee (Mar. 2, 2006)).

“I guess the way we would handle this is we would be clear on our report that we’d make a distinction between the safety issues that we are pre-empted from and the other topics that we’re allowed to talk about.” *Id.* (Statement of PSB’s James Volz).

“Remove all references to ‘safety’ to avoid issue of NRC pre-emption. Look at safety only in terms of effect on reliability and economics.” Ngau Reply Ex. 54 (CVA—issues relating to Draft #3 (undated)).

“Just be aware of language that reliability is something to talk about where maybe safety is not. ... What isn’t OK is when you get over to what’s called radiological health and safety and that’s where the cases come down and say, there’s a preemption problem ....” Ngau Reply Ex. 53 (Statement of DPS’s Sarah Hofmann before House Nat. Res. Comm. (Mar. 25, 2008)).

“[E]ven though the state law has the word ‘safety,’ it would not be wise to rely on it in our decisionmaking.” Leg. Briefing by Vermont Law School Professor and former PSB Chair Michael Dworkin, [www.leg.state.vt.us/jfo/vt\\_yankee\\_video.aspx](http://www.leg.state.vt.us/jfo/vt_yankee_video.aspx) (Part 2 Video 1:04:20) (Nov. 19, 2008).

The Assembly, however, tellingly departed from its playbook on several occasions, accidentally referring to its true “safety” motivations only to correct itself by scrubbing references to that term. For example, S. 124 (which ultimately became Act 160), originally included “*safety*” as an objective, Ngau Reply Ex. 43, but that word was deleted (without modifying the substance of the legislation) after PSB’s James Volz (quoted above) cautioned that Vermont was preempted from

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challenge Vt. Stat. ann. tit. 30, §§ 102, 203, 231, or 248 (as to its pre-Act 160 aspects), for these provisions are inapplicable insofar as Act 160 requires the Assembly to issue a new grant of authority to PSB to issue a CPG for post-March 2012 operations.

regulating safety; in response, the Senate committee chair (quoted above) stated, “[L]et’s *find another word for safety*.” Ngau Reply Ex. 45 (emphasis added).<sup>8</sup>

The Assembly’s safety motivation is even more clearly revealed by Act 189, which commissioned the audit that was to guide the Assembly’s discretion in its exercise of its CPG authority under Acts 74 and 160. An early version of S. 269/S. 364 was titled “An Act Relating to an Independent *Safety* Assessment of the Vermont Yankee Nuclear Facility,” before being amended (without modifying the substance of the legislation) to read “An Act Relating to an *Independent Vertical Audit and Reliability* Assessment of the Vermont Yankee Nuclear Facility.” Ngau Reply Ex. 50 at 1, 12 (emphasis added).<sup>9</sup> Then-Senate President Shumlin proclaimed: “We agree that safety is first, that our environment, the health of Vermonters, the importance of not having anything happen at that plant that would affect the health and safety of Vermonters is paramount. . . . If it’s not safe, we don’t want to operate it.” Leg. Briefing, [www.leg.state.vt.us/jfo/vt\\_yankee\\_video.aspx](http://www.leg.state.vt.us/jfo/vt_yankee_video.aspx) (Part 1 Video at 10:34) (Nov. 19, 2008). And the resulting audit—prepared by “Nuclear *Safety* Associates”—plainly reveals a safety focus, analyzing, *inter alia*, the level of “*radiation exposure*,” Ngau Ex. 33 at 17, B-10 (emphasis added), and adequacy of existing “*safety margins*” and “*redundant safety systems*,” *id.* at 91, 110, 130, 195, 215 (emphasis added).

Another key post-2005-06 example that again reveals Vermont’s motivating concern with safety is the Senate’s February 2010 vote against authorizing PSB to grant a CPG. After Plaintiffs confirmed a tritium leak in early January 2010, then-Senate President Shumlin rushed a February vote on the future of the VY Station over the objections of Senators who complained

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<sup>8</sup> Safety also motivated Act 74. *E.g.*, Ngau Reply Ex. 35 (Testimony before House Nat. Res. Comm. (Feb. 15, 2005)) (“[I]t’s about . . . what’s the safest way to have that fuel in the pool[?]”).

<sup>9</sup> S. 269 and S. 364 are the same bill. *See* Ngau Reply Ex. 55 (hearings for “S.269/S.364”).

about the lack of a deliberative process. *See* Ngau Reply Ex. 62 (Terri Hallenbeck, *Yankee Vote Set Next Week*, BURLINGTON FREE PRESS, Feb. 17, 2010). The vote was preceded by a DPS Commissioner’s testimony that “the question of ... what do we have on the site and what sort of **public health and safety issues** do we need to address is sort of **priority one**.” Ngau Reply Ex. 57 (emphasis added). The vote was held in such haste that the Senate had not yet received the supplemental report that it had requested, which concluded that Plaintiffs’ response was “timely, appropriate, and planned effectively” and did not change the original audit’s conclusion that the Plant is reliable and capable of operating for another twenty years. Ngau Ex. 29 at 94-95.

In addition to this direct evidence of the Assembly’s safety motivation, Plaintiffs anticipated and refuted (Mem. 21-26) several potential non-safety rationales. One set of non-safety rationales—economic concerns—is exclusively within FERC’s jurisdiction in the case of an interstate wholesaler like the VY Station and thus is not available here. *See* Point I.A., *supra*. In any event, the VY Station *is* reliable, as the audit and supplement found and as ISO-NE similarly found from the perspective of the New England grid. *See* ¶ 66 & Ex. 18 at 3.

Perhaps recognizing that a reliability rationale is untenable, Defendants assert as an alternative non-safety rationale the creation of “an energy future that is more ‘diverse’ and involves a better ‘choice of power sources.’” Opp. 24. While this rationale was mentioned in Acts 74 and 160, it is entirely absent from the record of the Assembly’s post-Act 160 conduct. Rather, 2008’s Act 189 employed the term “reliability” and did not once mention diversity of the energy supply, and 2010’s S. 289 record likewise does not include a single mention of diversity concerns. *See supra*, at 9-10. Defendants may not hypothesize (Opp. 24) what the Assembly **could have** reasonably concluded as under ordinary rational-basis review, *see, e.g., U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980), for AEA preemption looks to what a legislature

*actually* had “in mind” at the time, *PG&E*, 461 U.S. at 215. Even if it were appropriate for Defendants to supplement the post-2006 record with a *post hoc* “energy diversity” rationale, such a rationale does not support shutting down the VY Station. If Vermont wishes to promote energy diversity, it may require local retail utilities to buy power from non-nuclear wholesalers, *see* 132 FERC ¶ 61,047, 2010 WL 2794334 (July 15, 2010) (upholding similar California requirement), or offer tax incentives for the purchase of non-nuclear power, or subsidize non-nuclear power. But none of these measures is precluded by allowing the Plant to operate, nor directly advanced by withdrawing the Plant from the diversity of power sources on the national power grid. And any supposed “energy diversity” rationale is belied by a Vermont-regulated utility’s recent entry into a long-term contract to buy power from the Seabrook nuclear plant. Kee Reply ¶ 16.

PSB action (3). In the event that Acts 74 and 160 are invalidated and PSB is thereby “re-authorized” to decide whether to issue a CPG, Plaintiffs seek (Mem. 14; Compl. ¶ 81) injunctive and declaratory relief preventing PSB from relying on preempted safety concerns within NRC’s exclusive jurisdiction or preempted economic concerns within FERC’s exclusive jurisdiction. Defendants respond (Opp. 15-16) that it is premature to conclude that PSB’s process would be tainted by the Assembly’s improper motivations. But even if PSB were the neutral arbiter envisioned by Vermont law, Vt. Stat. Ann. tit. 30, § 9, and required by the Constitution, *Withrow v. Larkin*, 421 U.S. 35 (1975), that would not diminish Plaintiff’s showing that the *Assembly’s* actions are preempted and that PSB is barred from improper safety or economic considerations going forward. *Empresas Cablevision v. JPMorgan Chase Bank, N.A.*, 381 F. App’x 117 (2d Cir. 2010) (summary order) (upholding injunction but remanding for narrower scope). In any event, the record demonstrates that PSB is already tainted by preempted motivations; its

members are appointed by anti-VY Station Governor Shumlin, and they serve for a fixed term after which they may be re-appointed by Governor Shumlin; and former PSB Chair Dworkin and current PSB Chair Volz assisted the Assembly in disguising its safety-related motivations for exercising its ongoing CPG authority pursuant to Act 160. *See supra*, at 8; Ngau Reply Ex. 34 (Testimony of DPS’s Sarah Hofmann that “talking about aesthetics” of dry-cask SNF storage rather than about its safety “would be totally acceptable ... at the Public Service Board”). A party need not pursue an administrative remedy where the “body is shown to be biased or has otherwise predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992), *superseded on other grounds by statute as stated in Porter v. Nussle*, 534 U.S. 516 (2002); *see also Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979) (similar).

### C. Defendants Fail To Establish Waiver, Estoppel, Or Laches

**Waiver.** Relying on the 2002 MOU, Defendants argue (Opp. 31-36) that Plaintiffs waived a federal preemption challenge to Vermont law. But they ignore Plaintiffs’ authorities holding that a private party may not waive federal preemption because “[p]reemption is a power of the federal government, not an individual right of a third party that the party can ‘waive.’” *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 883-84 (9th Cir. 2006) (cited at Mem. 29-30); *accord Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 811-12 (5th Cir. 2000); *Me. Yankee Atomic Power Co.*, 107 F.Supp.2d at 50 (similar).<sup>10</sup> They also ignore that PSB itself has recognized this principle as to waiver and estoppel. Mem. 28-29 & n.12 (citing Ngau Ex. 19 at

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<sup>10</sup> Defendants rely (Opp. 32) on three ERISA cases to contend that preemption challenges are waivable, but each is unique to the ERISA context and inapplicable here. *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (ERISA preemption is an affirmative defense in benefits-due actions that may be waived if not timely pleaded under FRCP 8(c)); *accord Wolf v. Reliance Std. Life Ins. Co.*, 71 F.3d 444, 446 (1st Cir. 1995); *Allen v. Westpoint-Pepperell, Inc.*, 11 F.Supp.2d 277, 283 (S.D.N.Y. 1997). Here, there is no issue of waiver based on litigation conduct, nor any need for solicitude toward individual litigants who might be harmed by sophisticated defendants’ belated invocation of preemption within an already-filed litigation.

21 n.24, 28, 46-47). Accordingly, even accepting *arguendo* Defendants' characterization of the 2002 MOU, any waiver is unenforceable.

But even if Plaintiffs' ability to assert AEA preemption were waivable, Plaintiffs did not waive their current challenge in the 2002 MOU.<sup>11</sup> The 2002 MOU spoke only to then "current law" ("the **Board** has jurisdiction under *current law* to grant or deny approval of operation of the VYNPS beyond March 21, 2012"), and purported to waive only Plaintiffs' ability to "claim ... that federal law preempts the jurisdiction of the **Board**." Ngau Ex. 3 ¶ 12 (emphasis added). The 2002 MOU does not purport to waive any challenge to the law as changed by the *Assembly's* Acts 74 and 160 or the *Assembly's* refusal to authorize a CPG. Defendants' argument that Acts 74 and 160 were foreseeable at the time of the 2002 MOU (Opp. 33) is factually incorrect, *see supra*, n.11, but in any event irrelevant given the MOU's plain text.

Just as the Assembly's post-2002 actions fall outside the 2002 MOU's waiver provision, they fall outside its clause requiring resolution of disputes "under" the MOU by PSB. Ngau Ex. 3 ¶ 16(1). Defendants do not disagree, arguing (Opp. 35-36) that this clause applies only to the extent Plaintiffs argue that Vermont repudiated the 2002 MOU. But Plaintiffs' challenge to

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<sup>11</sup> The 2005 MOU waiver is inapposite to Plaintiffs' claims because it purported to waive only Plaintiffs' ability to assert preemption "to prevent enforcement of its express obligations under this MOU," Kolber Ex. 5 ¶ 12; the 2005 MOU did not address what would happen if Plaintiffs wanted to operate the VY Station beyond March 2012. Defendants' assertion that Plaintiffs "lobbied for" Act 74 (Opp. 30, 33-34) omits that, between the 2002 MOU and 2005, the Attorney General opined in 2004 that Plaintiffs did not qualify for the statutory exemption granted to the previous VY Station owner for SNF storage, forcing Plaintiffs to go to the Assembly (Mem. 9-10). Even if Plaintiffs' proposal of language could somehow be viewed as support for Act 74 (or Act 160), the proposed language did not prevent Plaintiffs from asserting a preemption challenge in the future if an amicable resolution could not be reached.

the Assembly's actions does not rest on repudiation, and Plaintiffs' principal challenge to PSB's authority is that the Assembly's post-2002 actions have tainted any PSB process.<sup>12</sup>

**Judicial Estoppel.** PSB itself has recognized that "principles of estoppel" cannot allow a state to intrude into federally preempted areas. *Ngau Ex. 19* at 21 n.24, 28. In any event, Defendants fail to show, as required for judicial estoppel, that "(1) plaintiffs adopted a factual position clearly inconsistent with [their] earlier position; (2) the prior position was adopted in some way by the court in the earlier proceeding; and (3) plaintiffs would derive an unfair advantage against defendants in asserting the inconsistent statements." *Welfare Fund v. Bidwell Care Ctr., LLC*, No. 10-1859, 2011 WL 1289182, at \*3 (2d Cir. Apr. 6, 2011) (summary order) (quotations omitted). *First*, Plaintiffs' statements to PSB that they "would not challenge the PSB's regulatory authority and specifically would not bring a preemption challenge" (Opp. 38) are not factual representations, but statements of intent based on then-existing circumstances.<sup>13</sup> *Second*, Plaintiffs' present position is not inconsistent with their prior statements because the circumstances changed when the Assembly arrogated to itself authority over CPG issuance and relied increasingly on safety. *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010) ("context of the statements" made them "reconcilable"). *Third*, Plaintiffs' position poses no risk of unfairness or "inconsistent results," as no other tribunal has addressed this dispute. *In re Adelpia Recovery Tr.*, 634 F.3d 678, 696 (2d Cir. 2011).

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<sup>12</sup> In any event, there is no dispute *under* the 2002 MOU or need to interpret it regarding the principle that the PSB may not act from safety concerns; that principle is clear both from *PG&E*, 461 U.S. at 212, and the PSB's own (lip-service) statements, *see* Mem. 28.

<sup>13</sup> In the Court of Federal Claims (*see* Opp. 39), Plaintiffs never took a yes-or-no position on preemption; rather, Plaintiffs explained that the issue was not "cut and dry" and that Plaintiffs acted reasonably in choosing to proceed amicably with Vermont rather than litigate given the time pressures and Plaintiffs' other interactions with Vermont. *Kolber Ex. 17* at 18.

**Equitable estoppel.** Equitable “estoppel arises if (i) the [plaintiff] made a definite misrepresentation of fact, and had reason to believe that the [defendant] would rely on it; and (ii) the [defendant] reasonably relied on that misrepresentation to his detriment.” *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 56 (2d Cir. 2003) (quotations omitted). Plaintiffs did not make any misrepresentation, nor could Defendants have reasonably relied on Plaintiffs’ pre-2005 statements given the Assembly’s passage of Acts 74 and 160 and its increasing focus on safety.

**Laches.** “A party asserting the equitable defense of laches must establish both plaintiff’s unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay.” *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004) (quotation omitted). Defendants fail to do so. *First*, it was reasonable for Plaintiffs to wait to file this action until the VY Station received NRC license renewal and Plaintiffs exhausted their efforts at good-faith negotiations with Governor Shumlin, which they pursued unsuccessfully as recently as March 30, 2011. Herron Reply ¶ 22. Moreover, if Plaintiffs had filed suit before NRC renewal, Defendants likely would have argued that Plaintiffs’ claims were not ripe. *Cacchillo v. Insmmed, Inc.*, 638 F.3d 401, 405 (2d Cir. 2011) (“A claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”) (quotation omitted). *Second*, while Defendants assert that they relied on “ENVY’s commitments and representations in approving ENVY’s various CPGs” and in “passing the legislative acts” (Opp. 43), they never explain how such reliance caused them harm. In fact, *see* Mem. 46-59; *infra*, at 19-20, Vermont’s citizens benefit substantially from the Plant’s operation.

## **II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM**

**Losses from uncertainty.** Defendants argue (Opp. 44), without citation, that Plaintiffs’ motion should be denied because, even with a preliminary injunction, there will remain some uncertainty regarding the Court’s final decision. But uncertainty about the future of the Plant—

which will continue to exist long after trial until all appeals are concluded—favors the *grant* of a preliminary injunction, not its denial. The uncertainty is causing Plaintiffs harm *today* that can be ameliorated, even if not eliminated, by a preliminary injunction: Employees are leaving the Plant *now*; long-term power contracts are being entered into (or not) *today*.

These interim harms strongly warrant preliminary relief. In *Salt Water Pond Assocs. v. U.S. Army Corps of Engrs.*, 815 F.Supp. 766 (D. Del. 1993), for example, the court issued a preliminary injunction based on a finding that the Corps of Engineers (“COE”) “probably” lacked authority to issue an order (which would not take effect for 60 days) conditioning a permit for development of land upon the requirement that the developer refill excavated ponds. *Id.* at 770-71, 784. Addressing irreparable harm, the court noted that, as a result of the COE’s improper assertion of jurisdiction, prospective buyers and builders and lenders would be scared away from the project, threatening termination of the entire project (and unrecoverable damages in light of sovereign immunity) even though COE’s refilling order was not yet in effect. *Id.* at 771, 784-85. Here, as in *Salt Water Pond*, a preliminary injunction order finding that Plaintiffs will likely prove that the Vermont scheme is preempted will greatly reduce irreparable harm to the VY Station’s current ability to retain employees and enter into long-term power contracts, even though the shutdown will not take effect until March 2012. *See also Coastal Distrib., LLC v. Town of Babylon*, 216 F. App’x 97 (2d Cir. 2007) (summary order) (affirming preliminary injunction where “Coastal’s relationship with its customers could be permanently harmed by Coastal’s inability to assure customers that its business will be ongoing”); *Mass. Mut. Life Ins. Co. v. Assoc. Dry Goods Corp.*, 786 F.Supp. 1403, 1415 (N.D. Ind. 1992) (“MassMutual may continue to suffer losses even during the life of the preliminary injunction it seeks. Nonetheless, ... MassMutual will suffer immeasurable damages without the preliminary injunction.”).

**Loss of skilled workforce.** Plaintiffs demonstrated (Mem. 35-38) that the looming shutdown is causing skilled employees to leave their jobs. Defendants do not deny that workers are leaving in significant part due to uncertainty about the Plant's future. *See* Herron ¶ 27; Herron Reply ¶¶ 9, 11. Instead, Defendants argue (Opp. 46-49) that the attrition rate is neither high nor harmful. But they ignore that (1) past staffing attrition information does not reflect the ability to maintain adequate future staffing, Herron Reply ¶¶ 2-3; (2) particular areas like Operations and Operations Training, where departing employees have years of experience and NRC licenses unique to the Plant, are especially hard hit, *id.*; *see Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999) (loss of employees with "unique services"); (3) the "pipeline" of new hires, Hinckley ¶ 6, replaces only lower-level positions and will only fill planned departures through normal attrition, Herron Reply ¶¶ 3-9; (4) the Plant's non-retirement attrition rate for 2010 was 7.0%, *id.* ¶ 10, more than three times higher than the 2% industry average upon which Defendants rely (Opp. 48-49); and (5) without a preliminary injunction, shutdown preparations may have to begin before this Fall's trial, further hastening departures of employees essential to keep the Plant operating, Herron Reply ¶¶ 13-21, and jeopardizing the Plant's ability to continue operating until March 2012 in compliance with NRC safety requirements, *id.* ¶ 9.

**Outage planning.** Even with the tentatively scheduled October 2011 trial, there will not be a final decision before the October 2011 outage for replacing one-third of the fuel at the VY Station. Plaintiffs cannot forego the October 2011 outage without suffering massive and irreparable losses. Herron ¶¶ 43-47.<sup>14</sup> Defendants argue that such harms do not count because

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<sup>14</sup> Plaintiffs initially explained (Mem. 40; *see also* Herron ¶ 39) that the decision on one aspect of the outage, fuel fabrication, had to be made by July 7. Since the opening memorandum was filed, the fuel fabricator offered (and Plaintiffs will accept) to extend that date to July 22 or 23, 2011. Herron Reply ¶¶ 23-26. The extension does not defer the need to make other decisions in preparation for the October 2011 outage, some as early as July 2011. Herron Reply ¶ 26.

the outage is just a “business decisio[n].” Opp. 50. But the fact that it is a business decision does not negate the harm involved: Plaintiffs currently face the Hobson’s choice of devoting tens of millions of dollars to the outage before knowing whether the plant will be permitted to operate, or deciding not to implement the outage, which would force a permanent shutdown even if Plaintiffs ultimately prevail. Defendants also incorrectly suggest (Opp. 51) that the Plant can be shut down without certifying that it is permanently ceasing operations. But even if such an option were practical, which it is not economically (*see* Herron ¶¶ 43-45), it is not permissible for the VY Station to simply stay on “standby” after March 2012. Under the 2002 MOU, the VY Station must decommission if no new CPG is issued. Ngau Ex. 3 ¶ 12.

***Electricity contracts.*** The uncertainty Vermont has created is also harming Plaintiffs’ ***current*** ability to enter into long-term power-supply contracts. Contrary to Defendants’ suggestion (Opp. 52), the problem is not speculative. For example, in early May 2011, one of Vermont’s main power retailers notified its customers that the company had not signed an agreement for the Plant’s energy “because we need confidence that Vermont Yankee will operate before we make a commitment to buy power from it.” Kee Reply ¶ 16 & Ex. 34. Thereafter, on May 24, 2011, the same retailer announced a 23-year deal with New Hampshire’s Seabrook nuclear plant. Kee Reply ¶ 16 & Ex. 33. As a result, Vermont’s residents are still buying nuclear power—they are just buying it from someone else. Defendants’ only response is to speculate (Opp. 52) that Plaintiffs might benefit from being shut out of the long-term power market if energy prices decline—a chance Plaintiffs are not required to take. Kee Reply ¶ 17.

***State actions before March 2012.*** Since the filing of the motion for preliminary injunction, Vermont has threatened new irreparable harm. On May 25, 2011, Governor Shumlin signed a new law, without obtaining advice on its constitutionality, Ngau Reply Ex. 66, requiring

Plaintiffs to pay Defendants' costs in this case. Absent a preliminary injunction, the Assembly could well take additional steps before March 2012 to make it more difficult, if not impossible, for Plaintiffs to operate the plant and/or pursue this case. Indeed, several entities have asked PSB to shut down the Plant immediately, Ngau Reply Exs. 63, 64, the Governor has created an unprecedented "Reliability Oversight Committee," Compl. ¶ 76, and a legislator has proposed criminal sanctions, Ngau Reply Ex. 65.

*Delay.* Defendants are incorrect (Opp. 45-46) regarding undue delay. *See supra*, at 15.

### **III. THE BALANCE OF HARDSHIPS STRONGLY FAVORS PLAINTIFFS**

Because Vermont's actions are already causing Plaintiffs irreparable harm and a premature shutdown would likely be irreversible, while Defendants would suffer no harm from preserving the status quo, the balance of hardships tips heavily toward Plaintiffs. Mem. 42-44. Defendants describe (Opp. 53) the status quo as enforcement of Vermont's scheme. But "[t]he status quo is not defined by the parties' existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights." *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 981 (10th Cir. 2004) (quotation omitted), *aff'd and remanded*, 546 U.S. 418 (2006).

### **IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST**

Defendants do not dispute that a shutdown will cause job losses, reduce tax revenues, and diminish electrical system reliability. They merely suggest (Opp. 54-60) that those harms might eventually be mitigated when unidentified future "replacement resources" make up for lost jobs, unspecified future "measures" replace those tax revenues, and ISO-NE makes supposed future adaptations to maintain grid reliability. But the issue is not whether, with time, money, and effort, the public can overcome such undisputed harms, but rather whether such harms will occur

in the first place. Here, the harms are clear; the only uncertainty is when and what might be done to address them. Defendants fail to dispel that uncertainty. *See* Kee Reply ¶¶ 7-46.

Defendants quibble with studies that demonstrate the public harms from a shutdown, but do not identify any studies that reached opposite conclusions or found that continued operation of the Plant would create any public harm. For example, Defendants criticize Plaintiffs' reliance on the Consensus Study's conclusion that energy prices are "likely" to be higher (Opp. 55), when Defendants' own experts similarly qualify their conclusions.<sup>15</sup>

Defendants err in suggesting (Opp. 59-60) that public interest concerns would arise only after a shutdown. According to the Chair of the Vernon Selectboard, the uncertainty surrounding the Plant's future is having very real effects on Vernon today, including that the town is unable effectively to plan its budget given uncertain tax revenues and property valuations, Courtemanche ¶ 2, effects that will worsen in the imminent future with a decline in the local real-estate market, *id.* ¶ 3. Vernon should not become another Rowe, Massachusetts before Plaintiffs' claims can be finally adjudicated.

### **CONCLUSION**

The Motion for Preliminary Injunction should be granted.

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<sup>15</sup> Defendants' suggestion (Opp. 55-56) that a shutdown would eliminate thermal water discharge, Parker ¶ 61, is simply incorrect, *see* Kee Reply ¶ 63; Kee Ex. 7 at 9-52.

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Respectfully submitted,

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

By their attorneys,

s/ Robert B. Hemley

Robert B. Hemley

Matthew B. Byrne

GRAVEL & SHEA

76 St. Paul Street, 7th Floor

P.O. Box 369

Burlington, VT 05402-0369

Telephone: (802) 658-0220

Fax: (802) 658-1456

s/ Kathleen M. Sullivan

Kathleen M. Sullivan (*pro hac vice*)

Robert Juman (*pro hac vice*)

Sanford I. Weisburst (*pro hac vice*)

William B. Adams (*pro hac vice*)

QUINN EMANUEL URQUHART

& SULLIVAN, LLP

51 Madison Avenue, 22nd Floor

New York, New York 10010

Telephone: (212) 849-7000

Fax: (212) 849-7100

**Certificate of Service**

I, Kathleen M. Sullivan, hereby certify that on May 31, 2011, I electronically filed the foregoing Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Preliminary Injunction and supporting declarations (with exhibits) with the Clerk of the Court of the United States District Court for the District of Vermont by using the CM/ECF system and that they are available for viewing and downloading from the ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel for Defendants:

Bridget C. Asay, Esq.  
Michael N. Donofrio, Esq.  
Scot L. Kline, Esq.  
Kyle H. Landis-Marinello, Esq.

s/ Kathleen M. Sullivan  
Kathleen M. Sullivan  
(admitted *pro hac vice*)  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22nd Floor  
New York, New York 10010  
Telephone: (212) 849-7000  
Fax: (212) 849-7100

*Attorney for Plaintiffs*