STATE OF VERMONT
PUBLIC SERVICE BOARD

Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their certificate of public good and other approvals required under 30 V.S.A. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent nuclear fuel	)	Docket No. 7862

MOTION FOR DECLARATORY RULING PRESCRIBING SCOPE OF PROCEEDING

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy VY"), owner and operator of the Vermont Yankee Nuclear Power Station ("VY Station"), respectfully move for a declaratory ruling prescribing the considerations upon which the Public Service Board ("Board") may rely, consistent with federal law, in deciding the Amended Petition in this docket. Entergy VY acknowledges the Board's suggestion, in its March 29, 2012 Order in Docket No. 7440, at 8, that it may wish to defer ruling on such issues until the parties attempt to introduce specific evidence and testimony in this proceeding. Even aside from the possibility of a declaratory *ruling* by the Board at the outset of this proceeding, however, Entergy VY respectfully submits this motion so that the Board and all parties are *on notice* at the outset of this proceeding of Entergy VY's positions on federal preemption and federal law.

Introduction

The proceedings in Docket No. 7862 on Entergy VY's Amended Petition follow a January 19, 2012 decision by the United States District Court for the District of Vermont ("District Court Decision") delineating the bounds of state authority in the regulation of nuclear

power plants and confirming the broad scope of federal preemption in this area.[1] While the specific relief ordered by the District Court Decision mainly concerned invalidating enactments of the Vermont General Assembly that were found preempted by federal law, the District Court Decision's rationale concerns the line between federal and state authority in regulation of nuclear power plants, and thus it applies squarely to this Board's authority as an agency of a state. In addition to its rulings regarding federal preemption in the nuclear area, the District Court Decision also ruled that a state is precluded by the Dormant Commerce Clause of the U.S. Constitution from conditioning a state license to operate an interstate wholesale generating plant upon the plant's agreement to a below-market power purchase agreement ("PPA") with that state's utilities. That ruling too applies to the Board's authority.

Argument

I. The Scope Of AEA Preemption

The Atomic Energy Act ("AEA") preempts state regulation of a nuclear power plant for the purpose of regulating nuclear safety as "the federal government has occupied the entire field of nuclear safety concerns." *Pac. Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 212 (1983) ("*PG&E*"). As explained below, this preemption applies not only to state regulations that expressly invoke nuclear safety, but also to those that focus on non-safety consequences of nuclear safety concerns and those that use a non-safety rationale as a pretext for a safety rationale. To avoid AEA field preemption, a Board ruling must be exclusively based upon an independent, non-safety rationale that provides a factually justifiable basis *for shutting down the plant.* And even then, if the Board's ruling adversely affects the

[1] Copies of the District Court Decision, and the related judgment, are attached hereto as Exhibits A and B.

plant's safety, it would be preempted under AEA conflict preemption. Entergy VY discusses these principles in detail below.

A. Consideration Of Radiological Safety Is The Exclusive Province Of The Federal Government And The Nuclear Regulatory Commission

As the District Court Decision explained, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." District Court Decision 62 (quoting *PG&E*, 461 U.S. at 212-13). Any state regulation of a nuclear plant "grounded in safety concerns falls squarely within the prohibited field." *PG&E*, 461 U.S. at 213. Similarly, even aside from the state's purpose, a state may not "regulate the construction or operation of a nuclear powerplant." *Id.* at 212 ("It would clearly be impermissible for [a state] to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless conflict with the NRC's exclusive authority over plant construction and operation."). For example, the Federal Circuit recently found that Vermont's requirement that Entergy VY make payments into the Clean Energy Development Fund was likely preempted, *inter alia*, because it "could have a 'direct and substantial effect' on decisions concerning radiological safety." *Vt. Yankee Nuclear Power Corp. v. United States*, -- F.3d --, 2012 WL 212681311999, at *11-12 (Fed. Cir. June 13, 2012) ("It would not be inaccurate to characterize the [Clean Energy Development Fund] fee as a form of blackmail for the state approval of the [dry fuel storage facility] construction. ... [T]he requirement to pay money into the Clean Energy Development Fund could have a 'direct and substantial effect' on decisions concerning radiological safety.").

These principles are based not only on the Supremacy Clause, but on Congress's assessment that federal authorities have more expertise than state authorities in this area. As the District Court explained, "Congress' decision to foreclose 'states from conditioning the operation

of nuclear plants on compliance with state-imposed safety standards' and otherwise 'regulating the safety aspects of nuclear development' is based on 'its belief that the [federal Nuclear Regulatory] Commission was more qualified to determine what type of safety standards should be enacted in this complex area.'" District Court Decision 57 (quoting *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 250-51 (1984)).

Under these principles, the Board has no jurisdiction to consider nuclear safety concerns and may not rely upon any evidence regarding nuclear safety concerns in ruling upon Entergy VY's CPG application. Nor can the Board merely "'find another word for safety.'" District Court Decision 75. The Board should declare that any evidence on the safe operation of the VY Station is beyond the scope of these proceedings and that any decision will not rely on matters related to nuclear safety or operation or construction of a nuclear plant.

B. <u>The AEA Preempts Consideration Of The Inevitable Consequences Of Nuclear Safety Concerns</u>

The District Court Decision also made clear that this Board may not avoid infringing upon the federal government's exclusive authority over nuclear safety by pointing to non-preempted consequences that inevitably follow from the preempted concern. District Court Decision 67; *see, e.g.*, *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994) (holding preempted a statute purporting to regulate the economic consequences flowing from smoking). Thus, for instance, the Board may not consider evidence concerning the economic consequences that inevitably flow from concerns relating to radiological health and safety: "It is a truism that almost all matters touching on matters of public concern have an associated economic impact on society. But such economic concern does not displace a local government's primary interest—whether it be public safety, the common good, or in this case public health." *Vango Media, Inc.*, 34 F.3d at 73. Any concerns about radiological health and safety at a nuclear power plant have

inevitable economic consequences—for example, it may be necessary to reduce temporarily the plant's power output to address a safety issue, and the output reduction inevitably will have an economic effect—but this economic impact does not convert an impermissible area of regulation into a permissible one. Similarly, there may be concerns that a nuclear accident (or the fear of a nuclear accident) will affect tourism in the region—but this consequential concern does not justify regulation of the nuclear power plant. *Vango Media* and the District Court Decision, among other precedents, prohibit use of such reasoning. As a result, this Board may not avoid preemption by pointing to non-preempted consequences that inevitably follow from the preempted concern.

Under these principles, the Board has no jurisdiction to consider non-safety consequences that inevitably follow from nuclear safety concerns and may not rely upon any evidence regarding such inevitable consequences in ruling upon Entergy VY's CPG application. The Board should declare that such evidence is beyond the scope of these proceedings and will not be relied upon in any decision.

C. <u>The AEA Preempts Reliance Upon Objectively Implausible Reasons</u>

A court may not "blindly accept" an articulated purpose because doing so would enable state regulation to "'nullify nearly all unwanted federal legislation.'" *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 106 (1992)) (striking down city ordinance after finding stated purpose was not the motivation for the enactment but rather that the ordinance was based on preempted concerns); *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39 (2001). Thus, state regulation may not be based on a stated rationale that is objectively implausible. Put another way, for a stated non-safety rationale against continued operation to withstand scrutiny, it must be a factually plausible reason *for shutting down the*

plant. District Court Decision 68 (explaining that, in *PG&E*, "the economic purpose professed in the legislative history was plausibly served by the moratorium at issue").

These principles are especially applicable in this case because Entergy VY actually holds a federally-issued license authorizing it to "operate" the VY Station until 2032. As a result, the Board's considerations must be confined to reasonable limitations justified by the state's non-nuclear safety authority and may not wholly interfere with Entergy VY's exercise of its right to operate the VY Station under the federal license. *See, e.g.*, *Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963) (explaining that 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); *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1192-94 (9th Cir. 2007) (state may not completely ban federally licensed activity, but may impose reasonable limitations within its police power).

Additionally, the VY Station's status as an exempt wholesale generator ("EWG") that sells power on the interstate wholesale market, as distinguished from a state-regulated retail utility that sells power only within the state, limits the bases that the Board may offer as plausible reasons to shut down the VY Station. As the District Court Decision explained, "[w]hile [EWG] status has not entirely displaced state regulation, the range of issues subject to state regulation may have narrowed." District Court Decision 71; *see also PG&E*, 461 U.S. at 205-06 (while the "economic aspects of electrical generation have been regulated for many years and in great detail by the states," such regulation is subject to the important "exception of the broad authority of the [Federal Energy Regulatory Commission] over the need for and pricing of electrical power transmitted in interstate commerce") (citations omitted).

Applying these principles to some of the supposedly non-safety rationales that may be invoked by the parties in this proceeding, several such rationales are not plausible as grounds to deny a CPG and shut down the VY Station. In general, any such rationales must be judged and applied in the same way as they would be in the case of a *non-nuclear* EWG of the same size at the same location as the VY Station.

System Reliability. The goal of reliable electric service for customers is in no way furthered by shutting the VY Station down and may not serve as a basis for the Board's decision denying a CPG. As an initial matter, as to an EWG such as the VY Station, which operates in the interstate New England grid, system reliability is the responsibility of FERC and its delegate ISO-New England. Putting that aside, the VY Station's continued operation, even assuming *arguendo* it is not essential to preserve system reliability, certainly does not *harm* system reliability. Analysis relying upon this factor, "system stability and reliability," 30 V.S.A. § 248(b)(3), thus does not plausibly justify shutting down the VY Station. Moreover, because the VY Station is an EWG, the Board has no authority to consider the "need for present and future demand for service," *id.* § 248(b)(2), because any lack of need is answered by purchasing power from other sources, not from shutting down the VY Station and depriving neighboring states of the opportunity to purchase its power.

Economics and a Power Purchase Agreement. The Board may not rely upon an "economic" rationale as a plausible reason for shutting the VY Station down because state authority over the economics of state-regulated retail utilities has no bearing on an EWG that sells power on the interstate market, as opposed to a retail utility regulated by the State. Continued operation of the VY Station does not interfere in any way with the ability of retail utilities to make purchases from other power sources, Vermont's retail utilities do not own or

operate the VY Station, and neither they nor their customers are under any obligation to buy power from the VY Station or to bear the costs of its operation. Moreover, the District Court Decision specifically enjoined denial of a CPG because of the lack of a favorable PPA between Entergy VY and Vermont utilities. As explained *infra*, any decision relying on the lack of a favorable PPA is preempted. Therefore, 30 V.S.A. § 248(b)(4), requiring an "economic benefit to the state and its residents," additionally may not be relied upon to the extent the latter is interpreted as requiring a favorable PPA, or any PPA at all (as distinguished from tax revenues and positive employment impact, both of which provide strong bases for finding that operation of the VY Station does confer an economic benefit to Vermont).

Energy Diversity. The Board may not rely upon any stated energy diversity rationale as a plausible justification for a Board order denying Entergy VY a CPG. Energy diversity does not justify shutting down the VY Station, it may only justify a decision not to purchase power from it (which in fact has been the status quo since the contractual arrangements with the Vermont utilities expired on March 21, 2012). Further, any desire by Vermont to diversify the sources of electrical supply used by Vermont retail utilities to supply electricity to Vermont customers is not even plausible in the abstract, given that the Board recently approved the entry by several Vermont utilities into long-term contracts to buy power from the Seabrook, New Hampshire nuclear plant. *E.g.*, Docket No. 7742, *Pet. of Green Mountain Power Corp. requesting a certificate of public good, pursuant to 30 V.S.A. Section 248, for the purchase of electricity from NextEra Energy Seabrook, LLC from 2012 through 2034*, Order of 11/4/2011 at 16-17. For these reasons, any purported lack of "compliance with the [State's] electric energy plan," 30 V.S.A. § 248(b)(7), may not serve as a basis for denying Entergy VY a CPG.

Plant Reliability. Any concern about plant reliability may not serve as a plausible justification for denying the VY Station a CPG for continued operation. Again, as an initial matter, this rationale is not even plausible in the abstract—as Entergy VY will show in these proceedings, the VY Station is reliable, which Vermont's own studies, including the audit and supplemental audit commissioned by the General Assembly, found. Moreover, plant reliability is certainly not plausible as a rationale for shutting down the VY Station. Rather, if the VY Station is unreliable, the logical response (if it were a retail utility rather than an EWG) would be to keep it operating and make it more reliable or (because it is an EWG) to purchase power from other sources (as, again, Vermont utilities have been doing since March 21, 2012).[2] Additionally, as discussed above, the Board may not consider plant reliability issues that are a consequence of safety concerns, under federal precedent such as *Vango Media*.

Fair Partner. This Board also may not consider whether Entergy VY is a "fair partner" in the abstract. Instead, the Board at most may ask whether Entergy VY is a "fair partner [with regard to a permitted state basis for state regulation of a nuclear plant]." In other words, the Board may not ask whether Entergy VY is a fair partner with regard to nuclear safety, or a fair partner with regard to addressing nuclear safety issues, or a fair partner with regard to the consequences of nuclear safety concerns, or a fair partner with regard to a matter that is a pretext for nuclear safety, as explained above. Further, as with the other purportedly non-safety rationales discussed in this section, the "fair partner [with regard to a permitted state basis for

[2] Although the VY Station's reliability may potentially affect Vermont's benefit from the Revenue Sharing Agreement, the regulatory relevance of that effect is limited to the economic benefit criterion of 30 V.S.A. § 248(b)(4), a factor the Board may consider in determining whether the general good of the state standard of 30 V.S.A. § 231(a) is met. That criterion does not require any particular type of economic benefit, and Entergy VY will demonstrate in this proceeding that the criterion is amply satisfied by other sources of benefit, including, *inter alia*, taxes paid by Entergy VY to the State and by Entergy VY's employment of over 600 persons at the VY Station (together with multiplier effects from that employment). In addition, shutting down the VY Station would not address any concern about Revenue Sharing Agreement proceeds being diminished by poor reliability; a shutdown would eliminate any such proceeds altogether.

state regulation of a nuclear plant]" standard must provide a factually plausible reason to shut down the VY Station (as opposed, for example, to choosing not to purchase power from Entergy VY). This must take into account that the Board, when previously faced with *non-nuclear* entities that were claimed to be untrustworthy partners, did not revoke or fail to renew their CPGs.[3]

Financial Soundness. Just as the Board may not apply a "fair partner" criterion in the abstract, but only with regard to a non-preempted, objectively plausible basis for shutting the plant down, the Board may not apply a "financial soundness" criterion in the abstract.

D. The Board May Not Avoid Preemption By Relying On A Safety-Related Reason As One Among Many Reasons

Federal preemption may not be avoided simply by articulating a purpose other than or in addition to a preempted purpose. District Court Decision 67, 77-78 (citing *Gade*, 505 U.S. at 104-07). This limit on state authority applies in the nuclear power context. *See* District Court Decision 65-66; *Cnty. of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 58-59 (2d Cir. 1984) (interpreting *PG&E* as holding that a State "could not even consider the safety aspects" of a nuclear power plant, and proceeding to hold that a lawsuit seeking to halt operations of a nuclear plant was preempted because "[t]he complaint appears, at least in some respects, to be motivated by safety concerns"); *Long Island Lighting Co. v. Cnty. of Suffolk*, 628 F. Supp. 654, 665-66 (E.D.N.Y. 1986) (finding preempted a law motivated by opposition to a nuclear facility "on the basis of a perceived radiological hazard"); *see also United States v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001) (state conditions on amounts of "radioactivity" and "radionuclides" that

[3] *E.g.*, Docket No. 7044, *Pet. of City of Burlington d/b/a Burlington Telecom for a certificate of public good to operate a cable system in the City of Burlington, Vermont (In Re: Amended Petition to amend Condition No. 17 of CPG related to completion of system build-out and to grant temporary relief from limitation in Condition No. 60 of CPG on financing operations)*, Order of 10/8/2010 at 30 ("Based on the number, magnitude and duration of Burlington Telecom's admitted violations of Condition 60 of its CPG, the words 'wanton disregard,' as commonly understood, are an appropriate characterization of Burlington Telecom's behavior").

Department of Energy may place in its landfill were preempted where they were intended "to protect human health and the environment"); *Me. Yankee Atomic Power Co. v. Me. Pub. Utils. Comm'n*, 581 A.2d 799, 806 (Me. 1990) (state statute preempted because it invoked "public health" and "safety," among other purposes). The District Court explained that "state regulation could not avoid preemption 'simply because the regulation serves several objectives rather than one.'" District Court Decision 67 (quoting *Gade*, 505 U.S. at 104-07). Thus, any decision to shut down the VY Station must be justified by an independent, factually plausible non-safety rationale that stands wholly separate and apart from any nuclear safety-related concerns. The Board may not rely on that rationale in conjunction with other rationales that are preempted.

E. Even Regulation Within A State's Permissible Authority Will Be Preempted If It Conflicts With NRC Regulations Or Adversely Affects Safety

Finally, state regulation also will be preempted if it conflicts with federal regulation. *See PG&E*, 461 U.S. at 204 ("[S]tate law is preempted to the extent that it actually conflicts with federal law."); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1250 (10th Cir. 2004) (finding invalid under conflict preemption analysis Utah's unfunded liability restrictions on SNF storage operators because they diverged from the NRC's regulations on SNF). Any conditions imposed by a Board order or contained in a CPG—no matter the underlying justification—must not have an adverse effect on nuclear safety or conflict with federal regulations concerning nuclear power plants.

II. The VY Station's Status As An Exempt Merchant Wholesale Generator Further Restricts The Permissible Grounds For Imposing Conditions On A CPG

As noted *supra*, at 8, in connection with the plausibility of certain supposedly non-safety reasons as grounds for shutting down the VY Station, to the extent the State or intervenors seek to condition issuance of a CPG on Entergy VY's agreement to give in-state Vermont utilities preferential power prices better than would be offered to any other arms' length market

participant, the District Court determined that any such condition violates the Dormant Commerce Clause's presumptive ban on discrimination against out-of-state commerce, and it thus enjoined denial of a CPG on such a ground. District Court Decision 86-93.

To the extent the evidence demonstrates that Entergy VY has not entered into a PPA with Vermont utilities with below-market pricing, the Board is constrained from using the absence of such a PPA as a basis for denying Entergy VY a new CPG. The Board therefore should issue a declaratory ruling to such effect.

CONCLUSION

The Board should issue a declaratory ruling limiting the scope of the proceedings as explained above.

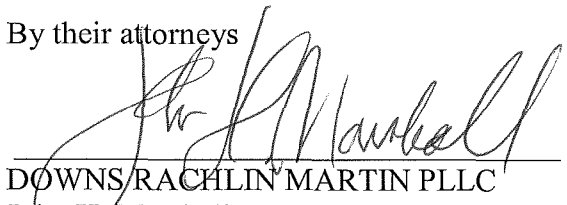
St. Johnsbury, Vermont.

June 21, 2012

Respectfully submitted,

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

By their attorneys



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United States District Court
District of Vermont

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.,	:	
Plaintiffs,	:	**JUDGMENT IN A CIVIL CASE**
v.	:	CASE NUMBER: 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.	:	

_____**Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Decision and Order on the Merits of Plaintiff's Complaint (Doc. No. 181) filed January 19, 2012, the Court orders the following:

A. Declaratory Judgment

For the reasons stated supra in Sections II, III.A-B, this Court declares:

1. Act 160, which enacted sections 248(e)(2), 248(m) and 254 in title 30 of the Vermont Statutes, is preempted by the Atomic Energy Act; and

2. A single provision within section 6522(c)(4) of title 10 of the Vermont Statutes, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," is preempted by the Atomic Energy Act.

For the reasons stated supra in Section III.C:

The preemption challenge to Act 189 is moot.

For the reasons stated supra in Section IV:

The Court declines to hold any state action under the challenged enactments is preempted under the Federal Power Act.

B. Permanent Injunctive Relief

1. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.

2. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing the single provision within section 6522(c)(4) of title 10, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down or to prevent storage of spent nuclear fuel after March 21, 2012 because it failed to obtain legislative approval (under the same preempted provision) for a Certificate of Public Good for storage of spent fuel, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.

3. Defendants are permanently enjoined, as prohibited by the dormant Commerce Clause, from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states.

JEFFREY S. EATON
Clerk

Date: January 20, 2012

/s/ Kathleen Korstange
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 1/20/2012