UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2012 SEP 11 PM 4:10

CLERK

BY _____
DEPUTY CLERK

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs	)	
v.	)	Docket No. 1:12-cv-206
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 MARY N. PETERSON, in her official capacity as the COMMISSIONER OF THE DEPARTMENT OF TAXES OF THE STATE OF VERMONT, Defendants	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1. Plaintiffs, Entergy Nuclear Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENOI") (collectively "Entergy" or "Plaintiffs"), which own and operate, respectively, the Vermont Yankee Nuclear Power Station ("Vermont Yankee Station"), bring this action to obtain a declaration that recent Vermont legislation (the "Legislation") applicable only to Vermont Yankee Station, which requires ENVY to make millions of dollars of additional new payments to the State of Vermont ("State" or "Vermont"), is expressly preempted by a federal statute, and is unconstitutional under several provisions of the United States Constitution. In addition, Entergy seeks an injunction against the imposition, assessment, and

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

collection by defendants Peter Shumlin, Governor of the State of Vermont (the "Governor"), William Sorrell, Attorney General of the State of Vermont, and Mary N. Peterson, Commissioner of the Department of Taxes of the State of Vermont (collectively "Defendants") of the amounts imposed by the Legislation.

2. The preempted and unconstitutional Legislation is the latest action by Vermont officials targeted against the federally licensed Vermont Yankee Station. The Legislation imposes an illegal and burdensome new exaction on this important provider of interstate electric power for the New England region in the wake of this Court's injunction against efforts by the State to shut down the plant.

3. Vermont Yankee Station operates under a federal license from the United States Nuclear Regulatory Commission ("NRC"). Vermont Yankee Station's attempts to renew its state license (known as a "Certificate of Public Good") were blocked by the State, in violation of federal law. Consequently, in April of 2011, Entergy brought an action in this Court seeking to permanently enjoin Vermont officials named as defendants in that action (some of whom are also named as defendants in this action) from pursuing this agenda and shutting down Vermont Yankee Station. (Complaint for Declaratory and Injunctive Relief, *Entergy Nuclear Vermont Yankee, LLC, et al. v. Shumlin, et al.* ("*Entergy I*"), No. 1:11-CV-99 (JGM) (Dist. Vt. Apr. 18, 2011), ECF No. 1.)

4. On January 19, 2012, this Court granted the injunctive relief sought by Entergy because the challenged state laws were preempted by federal laws regulating nuclear energy and

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

violated the United States Constitution. "Decision and Order on the Merits of Plaintiffs' Complaint," *Entergy I*, 838 F. Supp. 2d 183 (Dist. Vt. 2012) ("Merits Decision *Entergy I*").[1]

5. The injunction prevents the State from taking action to "compel Vermont Yankee to shut down . . . because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation," and therefore Vermont Yankee Station continues to operate. Merits Decision *Entergy I*, 838 F. Supp. 2d at 243.[2]

6. Following this Court's issuance of the injunction and expiration of the prior Certificate of Public Good, the Vermont General Assembly ("General Assembly") passed the Legislation to impose a significant new financial burden on ENVY.[3] This burden (the "New Levy"), which takes the form of dramatically increasing (by over 150%) the amount due compared to two prior charges (the "Prior Levy")[4] on the generation of electrical energy that were applicable only to Vermont Yankee Station, was signed into law by the Governor on May

---

[1] The defendants in that case appealed this Court's order and Entergy filed a cross- appeal. Both appeals are currently pending at the Second Circuit. *Entergy Nuclear Vermont Yankee, LLC, et al. v. Shumlin, et al.*, Docket Nos. 12-707-cv(L), 12-791-cv(XAP) (2d Cir.).

[2] Pursuant to Act 160, "when a nuclear plant petitions for continued operation, if the Vermont legislature declines to act, or is unable to pass, for any reason, affirmative legislation approving a certificate of public good (CPG) for continued operation, the plant's petition will remain pending and its current certificate will expire." Merits Decision *Entergy I*, 838 F. Supp. 2d at 189 (citing 2006 Vt. Acts & Resolves No. 204 ("Act 160")).

[3] The Legislation includes Sections 57 and 58 of House Bill 782 (2012), which is codified at 2011 Vt. Acts & Resolves No. 143 ("Act 143").

[4] The two charges constituting the Prior Levy were imposed by Vt. Stat. Ann. tit. 32 §§ 8661 and 5402a. The first charge is colloquially known as the Electrical Energy Tax ("EET"). The second charge was colloquially known as the Electric Generating Plant Education Property Tax ("EGPEPT"). Both charges were formulated in basically the same manner and were based upon the electrical energy output of Vermont Yankee Station. Sections 57 and 58 of Act 143 repealed the EGPEPT in its entirety and modified Vt. Stat. Ann. tit. 32 § 8661 so as to greatly increase the amount of EET due, as described below. The New Levy thus consists solely of the greatly increased EET.

15, 2012. The New Levy, which is estimated to be over $12 million per year, applies only to Vermont Yankee Station and not to any other generator of electricity.

7. In various public statements, the General Assembly has explicitly claimed that it conceived the New Levy to replace payments previously made by Entergy pursuant to various contracts with Vermont that are no longer in force. Members of the General Assembly have described the previous payments as a quid pro quo for favorable state regulatory action. Indeed, as further set forth below, another federal court has described certain of those payments as "blackmail" by the State. *Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC*, 683 F.3d 1330, 1345 (Fed. Cir. 2012). Now the State seeks to replace these amounts by imposing what it labels a "tax" on a single Vermont taxpayer, Entergy. As such, Defendants improperly seek to continue the expired contractual payments – this time without providing any consideration in return.

8. Vermont law provides no procedure by which Entergy can either challenge or seek prospective review of the New Levy on the grounds asserted herein. Nor does Vermont law provide any procedure by which Entergy can obtain a refund once the New Levy is paid.

9. Entergy now brings this action to obtain this Court's review of this latest attack on Vermont Yankee Station on the grounds that the New Levy is a violation of Entergy's constitutional rights and is preempted by federal law.

Parties

10. Plaintiff ENVY is a limited liability company. ENVY's sole member is another limited liability company named Entergy Nuclear Vermont Investment Company, LLC, which in turn has a sole member named Entergy Nuclear Holding Company #3, LLC (also a limited liability company), which in turn has a sole member named Entergy Nuclear Holding Company.

Entergy Nuclear Holding Company is a corporation that is incorporated in Delaware and maintains its principal place of business in Texas.

11. Plaintiff ENOI is a corporation that is incorporated in Delaware and maintains its principal place of business in Mississippi.

12. Defendant Mary N. Peterson is the current Commissioner of the Vermont Department of Taxes.

13. Defendant Peter Shumlin is the current Governor of the State of Vermont.

14. Defendant William Sorrell is the current Attorney General of the State of Vermont.

Jurisdiction and Venue

15. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) because this action involves the interpretation of 15 U.S.C. § 391 (preempting state taxation of electrical power that discriminates against interstate commerce), and the Supremacy, Equal Protection, Commerce, and Contract Clauses of the United States Constitution (U.S. Const. art. VI, cl. 2; art. I, § 8, cl. 3; art. 1 § 10 cl. 1; amend. XIV § 1).

16. Additionally, the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) because the Plaintiffs, citizens of Delaware, Mississippi, and Texas, are completely diverse from the Defendants, citizens of Vermont, and the matter in controversy exceeds $75,000.

17. This Court is the proper venue pursuant to 28 U.S.C. § 1391 because each of the Defendants resides in Vermont, Vermont Yankee Station is located in Vermont, and most of the conduct that underlies this action occurred in Vermont.

18. There is a present and actual controversy between the parties.

19. The relief requested is authorized pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), 28 U.S.C. § 1651(a) (injunctive relief), and 42 U.S.C. § 1983 (declaratory and injunctive relief).

Substantive Allegations

20. Vermont Yankee Station, located in Vernon, Vermont, is one of New England's largest suppliers of electric energy. Its capacity of over 600 megawatts of power is almost 12 times the capacity of the next largest generator in the State. It employs over 600 people. In addition to the ordinary Vermont taxes that the Plaintiffs are subject to (e.g., sales and income taxes), Plaintiffs are subject to various Vermont fees.

21. During the period 2003 through 2012, pursuant to certain contracts between Entergy and the State, Entergy made payments totaling over $30 million, over half of which were earmarked for the Clean Energy Development Fund ("CEDF"), which was established by the General Assembly to receive and dispense funds from Entergy for the development and deployment of renewable energy and alternatives to nuclear energy.

22. Vermont Yankee Station sells the power it generates on the wholesale interstate market. Since March 21, 2012, the date on which Vermont Yankee Station's Certificate of Public Good expired, Vermont Yankee Station has sold power exclusively to out-of-state consumers because Vermont's utilities no longer purchase power from Entergy.

Background On Vermont Yankee Station And Entergy's Agreements With Vermont Agencies Regarding Its Operation

23. Vermont Yankee Station began operating in 1972 pursuant to a 40-year license issued by the Atomic Energy Commission, the predecessor of the NRC. Vermont Yankee

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

Station was originally owned by Vermont Yankee Nuclear Power Corporation ("VYNPC"), a joint venture including certain Vermont retail utilities.

24. In 2001, VYNPC invited bids for Vermont Yankee Station at auction. Entergy successfully bid to acquire the plant and participated in ten-month-long proceedings before the Vermont Public Service Board ("PSB"), requesting a Certificate of Public Good to own and operate the plant.

25. On June 13, 2002, the PSB approved the sale of Vermont Yankee Station to Entergy.

26. In its order approving the sale, the PSB found that "Vermont utilities had obtained a power purchase agreement through 2012 for approximately 55 percent of Vermont Yankee Station's output, under a formula which ensured Vermonters rates lower than the estimated operating costs over the remaining license term." Merits Decision *Entergy I*, 838 F. Supp. 2d at 192, 200.

27. ENVY is authorized by the Federal Energy Regulatory Commission ("FERC") to sell power into the ISO New England interstate market at market-based rates. "ISO New England is a non-profit independent system operator, regulated by FERC, which administers New England's wholesale electricity markets." Merits Decision *Entergy I*, 838 F. Supp. 2d at 192.

28. On February 21, 2003, Entergy sought approval from the PSB to modify Vermont Yankee Station to increase the power output by up to 20 percent ("Uprate").

29. On or about November 2003, as part of its effort to obtain approval for the Uprate, Entergy entered into a Memorandum of Understanding with the Vermont Department of Public Service ("DPS"), "under which [DPS] agree[d] to support the power uprate and Entergy commit[ted] to pay approximately $6 million of payments to the state of Vermont and establish

some protection for ratepayers in the event that the uprate reduce[d] the reliability of Vermont Yankee" (the "2003 MOU").[5] Merits Decision *Entergy I*, 838 F. Supp. 2d at 193. Entergy's payments under the 2003 MOU have totaled over $15 million.

30. On March 15, 2004, the PSB approved the Uprate.

31. Although the United States Department of Energy ("DOE") had agreed, in a Standard Contract pursuant to 42 U.S.C. § 10222, to remove the spent nuclear fuel produced by Vermont Yankee Station, the DOE breached its obligations under the contract and failed to accept and remove the spent nuclear fuel. *See Vt. Yankee Nuclear Power Corp. v. United States*, 683 F.3d 1330, 1336 (Fed. Cir. 2012). Accordingly, Entergy was forced to make alternate arrangements to store the spent nuclear fuel on-site until such time as the DOE removes it in accordance with the Standard Contract.

32. Consequently, on March 10, 2005, Entergy proposed legislation to the General Assembly for the limited purpose of permitting it to seek approval from the PSB to construct a dry fuel storage facility for spent nuclear fuel at Vermont Yankee Station.

33. On June 21, 2005, the governor signed into law Act 74, which added sections 6521, 6522, and 6523 to title 10 of the Vermont Statutes. Section 6522 authorized Vermont Yankee Station to seek approval from the PSB to construct a dry fuel storage facility. 2005 Vt. Acts & Resolves No. 74.

34. Also on June 21, 2005, in order to obtain passage of Act 74 and, ultimately, to obtain approval to construct the dry fuel storage facility, Entergy entered into a Memorandum of Understanding with DPS ("2005 MOU"), which required Entergy to make quarterly payments to

---

[5] Mar. 15, 2004 PSB Order in Dkt. No. 6812 at 3, available at: http://www.state.vt.us/psb/orders/2004/files/6812fnl.pdf.

the CEDF for the period beginning on January 1, 2006 and "ending March 31, 2012," with a "total" amount of $15,625,000.

35. Act 74 also created the CEDF. Vt. Stat. Ann. tit. 30 § 8015 (formerly codified at Vt. Stat. Ann. tit. 10 § 6523). The purpose of the CEDF is "to promote the development and deployment of cost-effective and environmentally sustainable electric power and thermal energy or geothermal resources for the long-term benefit of Vermont consumers, primarily with respect to renewable energy resources, and the use of combined heat and power technologies." Vt. Stat. Ann. tit. 30 § 8015(c). Act 74 provided that the CEDF would receive payments made by Entergy pursuant to the 2003 MOU, relating to the Uprate, as well as the payments made by Entergy pursuant to the 2005 MOU, relating to the dry fuel storage facility (collectively, the "Contract Payments").

36. On April 26, 2006, the PSB approved the construction of the dry fuel storage facility.

37. Over the period 2003 through 2012, Entergy made Contract Payments in the total amount of over $30 million. Entergy has satisfied its current obligations under the 2003 and 2005 Memoranda of Understanding (together the "MOUs").

38. Because payments under the 2005 MOU were made to obtain approval from the State for the construction of a storage facility for spent nuclear fuel, which was necessary only because the federal government had breached its contract to remove spent nuclear fuel from Vermont Yankee Station, Entergy sought reimbursement for the 2005 MOU payments, among other damages incurred, in a lawsuit against the federal government.

39. The United States Court of Appeals for the Federal Circuit held that Entergy's payments to the State pursuant to the 2005 MOU were not reimbursable by the federal government, calling the 2005 MOU payments "a form of blackmail for the state approval of the

construction." *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1345. The Federal Circuit noted that the 2005 MOU payments bore "no relationship to any costs incurred by the state or its citizens as a result of the construction of the dry storage facility." *Id.*

The General Assembly's Prior Efforts To Shut Down Vermont Yankee Station

40. Beginning in 2006, the General Assembly took a series of steps to attempt to force Vermont Yankee Station to shut down in March 2012. On May 18, 2006, the governor signed into law Act 160, which required the General Assembly to approve the continued operation of any nuclear power plant before the PSB could issue a Certificate of Public Good for the continued operation. 2006 Vt. Acts & Resolves No. 160 ("Act 160"); Vt. Stat. Ann. tit. 30 § 248(e)(2). Accordingly, the General Assembly gave itself the authority to prevent Vermont Yankee Station from renewing the Station's Certificate of Public Good.

41. On February 19, 2010, the Vermont Senate Finance Committee introduced Senate Bill 289, which would have approved the continued operation of Vermont Yankee Station for an additional 20 years after March 21, 2012.

42. On February 24, 2010, the Vermont Senate voted against continued consideration of Bill 289. By voting against Bill 289, the Senate blocked approval for Vermont Yankee Station's Certificate of Public Good for the continued operation of Vermont Yankee Station.

43. Since February 2010, the General Assembly has not taken any further action to approve the continued operation of Vermont Yankee Station, and the PSB has not issued a renewed Certificate of Public Good to Vermont Yankee Station.

The January 19, 2012 Injunction

44. On March 21, 2011, the NRC issued a Renewed Facility Operating License for Vermont Yankee Station that will expire on March 21, 2032.

45. On April 18, 2011, Entergy filed suit in *Entergy I* to obtain, among other relief, an injunction enjoining the Vermont officials named as defendants in that action from undertaking any steps to enforce the requirements of Act 74 and Act 160 that Vermont Yankee Station obtain legislative approval in order to continue operating beyond March 21, 2012 pursuant to its NRC license, and enjoining the defendants from conditioning Vermont Yankee Station's continued operation after March 12, 2012 upon ENVY's agreement to provide below-market wholesale electricity rates to Vermont retail utilities.

46. Between September 12, 2011 and September 14, 2011, this Court held a three-day bench trial on the merits of Entergy's complaint.

47. On January 19, 2012, this Court issued its decision, ordering an injunction permanently enjoining the defendants "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," and "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." Merits Decision *Entergy I*, 838 F. Supp. 2d at 243.[6]

---

[6] On February 18, 2012, the defendants in *Entergy I* filed a Notice of Appeal, appealing "each and every part of the Decision and Order on the Merits of Plaintiffs' Complaint entered in this action on January 19, 2012." Notice of Appeal, *Entergy I* (February 18, 2012) ECF No. 187.

The Legislation Directed At Vermont Yankee Station

48. On March 22, 2012, the Vermont House Committee on Ways and Means introduced Bill 782, titled "An Act Relating to Miscellaneous Tax Changes for 2012," which included a proposed amendment to the Prior Levy, and applied only to Vermont Yankee Station.

49. On May 15, 2012, the Governor signed Bill 782, which is codified at 2011 Vt. Acts & Resolves No. 143 ("Act 143").

50. The New Levy is imposed on "electric generating plants . . . having a name plate generating capacity of 200,000 kilowatts, or more, . . . at the rate of $0.0025 per kWh of electrical energy produced." Vt. Stat. Ann. tit. 32 § 8661 (a); Act 143, § 58.

51. Vermont Yankee Station is the only electric generating plant in Vermont, built subsequent to July 1, 1965, with a name plate generating capacity of 200,000 kilowatts or more and thus is the only plant subject to the New Levy.

52. At the time it passed Act 143, the General Assembly knew that the New Levy would be applicable only to Vermont Yankee Station. The General Assembly estimated Entergy's liability under the New Levy to be $12.8 million annually, which is approximately two and one-half times greater than the Prior Levy.

53. The stated purpose of the New Levy is to replace the Contract Payments by generating total payments from Entergy equivalent to the amounts paid by Entergy under the Prior Levy plus the amount of the Contract Payments.

54. During the General Assembly's consideration of the imposition of the New Levy on ENVY, the General Assembly was advised that the New Levy could be subject to challenge.

55. By calling the New Levy a "tax" and imposing it only on electricity generated by Vermont Yankee Station, Defendants seek to forcibly extend the payment obligations under the

expired MOUs and extract payments comparable to the Contract Payments, but without providing any consideration to Entergy in return. Indeed, the General Assembly expressly contemplated that the New Levy would require Entergy to continue to make payments equivalent to the Contract Payments, in spite of the fact that the MOUs have expired.

56. The New Levy constitutes a legislative exaction imposed solely and entirely on ENVY, as the owner of Vermont Yankee Station.

57. The New Levy took effect July 1, 2012. Act 143, § 63(1), 2011 Vt. Laws 143.

58. The first payment of the New Levy is due on October 25, 2012, for the quarter ending September 30, 2012. Act 143, § 58(a).

59. The Legislation provides that if the New Levy is not paid, it may be assessed against the electric generating plant, along with interest and penalties. Vt. Stat. Ann. tit. 32 § 8661(b).

60. Vermont Law does not provide any procedure by which Entergy can seek review of the claims asserted herein or challenge an assessment of the New Levy (including any interest or penalties assessed thereunder) on the grounds asserted herein.

61. Vermont Law does not provide any procedure whereby Entergy can seek a refund of the New Levy (including any interest or penalties assessed thereunder) once it is paid.

62. Thus, if it pays the New Levy, Entergy has no way to seek a refund, and if it does not pay the New Levy, Entergy may be subject to penalties.

COUNT I
Supremacy Clause/Federal Preemption (Declaratory and Injunctive Relief)

63. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 62 as if fully set forth herein.

64. Article VI, Clause 2 of the United States Constitution, which is known as the Supremacy Clause, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

65. A federal statute, 15 U.S.C. § 391, provides that "[n]o state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity."

66. The federal statute further provides that "[f]or the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391.

67. The New Levy is discriminatory, within the meaning of 15 U.S.C. § 391, because it applies to a single electricity generator, Vermont Yankee Station, which sells power exclusively to purchasers outside of Vermont, and does not apply to any electric generating plants that sell power to purchasers within Vermont.

68. Accordingly, the New Levy is in conflict with 15 U.S.C. § 391 and void pursuant to the Supremacy Clause.

69. An actual controversy exists between Plaintiffs and Defendants because Defendants have imposed the New Levy on ENVY, as the owner of Vermont Yankee Station, and Plaintiffs contend that the New Levy is preempted by federal law.

70. Plaintiffs seek a declaration that the New Levy is preempted by federal law.

71. Plaintiffs also seek to enjoin any action by Defendants to impose, assess, or collect from ENVY and/or ENOI the additional amounts (including any interest or penalties thereon) imposed by the New Levy.

COUNT II
Violation of the Commerce Clause of the
United States Constitution (Declaratory and Injunctive Relief)

72. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 71 as if fully set forth herein.

73. Article I, Section 8, Clause 3 of the United States Constitution, which is known as the Commerce Clause, provides that Congress shall have the power to regulate commerce among the several states. The United States Supreme Court has held that the Commerce Clause prohibits states from imposing any levy on interstate commerce that does not satisfy a four-pronged test requiring: (1) substantial nexus with the taxing state; (2) fair apportionment; (3) no discrimination against interstate commerce; and (4) a "fair[] relat[ion] to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

74. The New Levy is designed to be borne solely by the owner of Vermont Yankee Station, which, because of State action, sold power exclusively to purchasers outside of Vermont. The New Levy does not apply to electric generating plants that sell power to purchasers within Vermont. The New Levy, therefore, discriminates against interstate commerce in favor of intrastate commerce.

75. In addition, the New Levy is not fairly related to the services provided by the State. It is intended to replace, in part, 2005 MOU payments that the Federal Circuit held bore "no relationship to any costs incurred by the state or its citizens as a result of the construction of the dry storage facility." *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1346 (emphasis added).

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

76. Accordingly, the New Levy operates to impose an unconstitutional burden on interstate commerce and violates the Commerce Clause.

77. An actual controversy exists between Plaintiffs and Defendants because Defendants have imposed the New Levy on ENVY and Plaintiffs contend that the imposition of the New Levy violates the Commerce Clause.

78. Plaintiffs seek a declaration that Defendants' imposition of the New Levy on electrical energy produced by Vermont Yankee Station violates the Commerce Clause.

79. Plaintiffs also seek to enjoin any action by Defendants to impose, assess, or collect from ENVY and/or ENOI the additional amounts (including any interest or penalties) imposed by the unconstitutional New Levy.

COUNT III
Violation of the Equal Protection Clause of the
United States Constitution (Declaratory and Injunctive Relief)

80. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 79 as if fully set forth herein.

81. Section 1 of the Fourteenth Amendment of the United States Constitution, which is known as the Equal Protection Clause, provides: "[N]or shall any State . . . deny any person within its jurisdiction equal protection of the law." This Amendment prohibits states from making unreasonable classifications.

82. The New Levy creates an unreasonable classification by creating a "class of one," that is, by singling out one entity from a class of similarly situated power producers for imposition of the New Levy in violation of the Equal Protection Clause.

83. The New Levy violates the Equal Protection Clause because it was enacted without a legitimate governmental purpose. Instead, the New Levy was enacted either (1) to

extract from Entergy "blackmail" payments previously made to the State pursuant to contracts that have either expired or been abrogated by the State; or (2) as part of Defendants' continuing efforts to force the closure of Vermont Yankee Station; or (3) for both of these purposes.

84. The New Levy violates the Equal Protection Clause because it was not reasonable for the General Assembly to believe that targeting Entergy as the sole subject of the New Levy would serve a legitimate purpose.

85. Thus, an actual controversy exists between Plaintiffs and Defendants because Defendants have imposed the New Levy on ENVY, as the owner of Vermont Yankee Station, and Plaintiffs contend that the imposition of the New Levy on violates Plaintiffs' rights under the Equal Protection Clause.

86. Plaintiffs seek a declaration that Defendants' imposition of the New Levy on electrical energy produced by Vermont Yankee Station violates Plaintiffs' rights under the Equal Protection Clause.

87. Plaintiffs also seek to enjoin any action by Defendants to impose, assess, or collect from ENVY and/or ENOI the additional amounts (including any interest and penalties) imposed by the unconstitutional New Levy.

COUNT IV
Violation of the Contract Clause of the
United States Constitution (Declaratory and Injunctive Relief)

88. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above in paragraphs 1 through 87 as if fully set forth herein.

89. Article I, section 10, clause 1 of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. Const. art I, § 10, cl. 1 (the "Contract Clause").

90. State statutes that impair the right to terminate a contract or otherwise extend or modify a private contract or a contract with the state violate the Contract Clause.

91. The General Assembly has stated that the purpose of the New Levy is to obtain the same payments previously made by Entergy in the form of Contract Payments under the MOUs, which have now expired. Thus, the State seeks to unilaterally revive and extend the MOUs – this time without providing any contractual consideration in exchange for the payments of the New Levy now demanded of Entergy.

92. The New Levy thus seeks to extend and materially modify the former MOUs in the guise of a "tax" in violation of the Contract Clause.

93. An actual controversy exists between Plaintiffs and Defendants because Defendants have imposed the New Levy on ENVY, as the owner of Vermont Yankee Station, and Plaintiffs contend that the imposition of the New Levy violates the Contract Clause.

94. Plaintiffs seek a declaration that Defendants' imposition of the New Levy on electrical energy produced by Vermont Yankee Station violates Plaintiffs' rights under art I, § 10, cl. 1 of the United States Constitution.

95. Plaintiffs also seek to enjoin any action by Defendants to impose, assess, or collect from Entergy the additional amounts imposed (including any interest or penalties) by the unconstitutional New Levy.

Prayer for Relief

In light of the foregoing, ENVY and ENOI respectfully pray that this Court:

A. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Rule 57 of the Federal Rules of Civil Procedure, that:

i. federal law, 15 U.S.C. § 391, preempts sections 57 and 58 of Act 143 and prevents Defendants from requiring ENVY and/or ENOI to pay the New Levy (including any interest or penalties thereon), the first installment of which would be due on October 25, 2012;

ii. the Commerce Clause prohibits Defendants from enforcing sections 57 and 58 of Act 143 and requiring ENVY and/or ENOI to pay the New Levy (including any interest or penalties thereon), the first installment of which would be due on October 25, 2012;

iii. the Equal Protection Clause prohibits Defendants from enforcing sections 57 and 58 of Act 143 and requiring ENVY and/or ENOI to pay the New Levy (including any interest or penalties thereon), the first installment of which would be due on October 25, 2012; and

iv. the Contract Clause prohibits Defendants from enforcing sections 57 and 58 of Act 143 and requiring ENVY and/or ENOI to pay the New Levy, the first installment of which would be due on October 25, 2012.

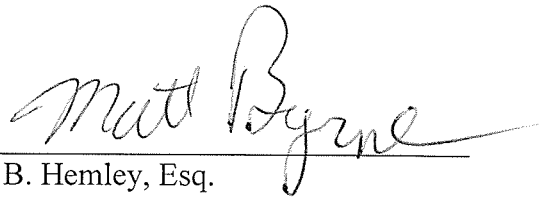
B. Issue a preliminary and permanent injunction, pursuant to 28 U.S.C. § 1651(a), 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure, enjoining Defendants from enforcing Vermont statutes, regulations, or other laws (including without limitation Act 143) purporting to impose or enforce the New Levy (including any interest or penalties thereon) or taking any other action that would prejudice Plaintiffs, including but not limited to the denial of a Certificate of Public Good.

C. Award reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

gravel & shea | ATTORNEYS AT LAW
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369
A PROFESSIONAL CORPORATION

D. Award such other relief available under the law that may be considered appropriate under the circumstances, including other fees and costs of this action to the extent allowed by the law.

Dated: Burlington, Vermont
September 11, 2012



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

Of Counsel:

Hollis L. Hyans
Thomas H. Steele
Robert A. Salerno
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0500
(212) 468-8000

Alan C. Gutierrez
Steven E. Goerner
Entergy Services, Inc.
2001 Timberloch Place, Suite 2N
The Woodlands, TX 77380