12-707-cv(L)

12-791-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

v.

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, JAMES VOLZ, in his official capacity as a member of the Vermont Public Service Board, JOHN BURKE, in his official capacity as a member of the Vermont Public Service Board, DAVID COEN, in his official capacity as a member of the Vermont Public Service Board,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Vermont (Brattleboro)

BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

Marcus V. Brown
Wendy Hickok Robinson
ENTERGY SERVICES, INC.
639 Loyola Avenue, Suite 2600
New Orleans, Louisiana 70113
504-576-2765

Timothy A. Ngau
ENTERGY SERVICES, INC.
1340 Echelon Parkway
Jackson, Mississippi 39213
601-368-5680

Kathleen M. Sullivan
Faith E. Gay
Robert C. Juman
Sanford I. Weisburst
William B. Adams
Ellyde Roko
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
New York, New York 10010
212-849-7000

Attorneys for Plaintiffs-Appellees-Cross-Appellants

(Additional Counsel On the Reverse)

Robert B. Hemley
Matthew B. Byrne
GRAVEL AND SHEA PC
76 Saint Paul Street, 7th Floor
Burlington, Vermont 05401
802-658-0220
Attorneys for Plaintiffs-Appellees-Cross-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Plaintiff-Appellant Entergy Nuclear Vermont Yankee, LLC states that its sole member is Entergy Nuclear Vermont Investment Company, LLC, which in turn has a sole member named Entergy Nuclear Holding Company #3, LLC, which in turn has a sole member named Entergy Nuclear Holding Company. Entergy Nuclear Holding Company's parent company, and the owner of more than 10% of Entergy Nuclear Holding Company's stock, is Entergy Corporation, a publicly held company.

Plaintiff-Appellant Entergy Nuclear Operations, Inc. states that it has a parent company named Entergy Nuclear Holding Company #2. Entergy Nuclear Holding Company #2's parent company, and the owner of more than 10% of Entergy Nuclear Holding Company #2's stock, is Entergy Corporation, a publicly held company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, Bills, And Regulations

Other Authorities

GLOSSARY

Act 74	2005 Vt. Acts & Resolves No. 74
Act 160	2006 Vt. Acts & Resolves No. 160
Act 189	2008 Vt. Acts & Resolves No. 189
S.289	2010 bill to authorize post-March 2012 operation
AEA	Atomic Energy Act
Board	Vermont Public Service Board
CEDF	Clean Energy Development Fund
CPG	Certificate of Public Good
DPS	Vermont Department of Public Service
Entergy	Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	Independent System Operator
MOU	Memorandum of Understanding
MW	Megawatt
NRC	Nuclear Regulatory Commission
PPA	Power Purchase Agreement
PX[#]	Plaintiffs' Trial Exhibit not in Appeal appendix
SNF	Spent Nuclear Fuel
Vermont Yankee	Vermont Yankee Nuclear Power Station
VYNPC	Vermont Yankee Nuclear Power Corporation

INTRODUCTION

This case arises from the State of Vermont's attempts to thwart the federal statutory scheme that places the radiological safety of nuclear-power generation exclusively in the hands of the federal government. Concerned about the radiological safety of the Vermont Yankee nuclear power plant, the Vermont legislature targeted the plant with two statutes that purported to require it to shut down in March 2012 absent further legislative authorization. The district court correctly held those statutes preempted by the AEA, whose fundamental goal is "to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology," *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 194 (1983) ("*PG&E*")—a goal recently reaffirmed by President Obama.[1]

The AEA accomplishes this objective by granting the "federal government … complete control of the safety and 'nuclear' aspects of energy generation," *id.* at 212; *see also id.* at 207 (federal government has jurisdiction over both "safety" and "public health"), and preempting any state statute "grounded in safety concerns," *id.* at 213, or, equivalently, "written with safety purposes in mind," *id.* at 215. The district court correctly invalidated provisions of two Vermont statutes for this

[1] THE WHITE HOUSE, BLUEPRINT FOR A SECURE ENERGY FUTURE 3, 6-7, 17, 32, 34-36 (March 30, 2011), *available at* http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf (last visited Aug. 29, 2012).

reason, and this Court should affirm. The court's meticulous and detailed 101-page opinion, issued after a three-day bench trial, exhaustively canvasses the text and legislative history of Vermont's Act 160 and one provision in Vermont's Act 74, as well as the implausibility of their asserted purposes, and demonstrates beyond serious dispute that Vermont acted from preempted safety purposes.

Defendants' arguments for reversal are unpersuasive. *First*, Defendants propose that any AEA preemption inquiry is foreclosed if the state legislature merely expresses a purported non-safety purpose in the statute's *preamble*, no matter how much other evidence there is of a safety purpose or how implausible the purported non-safety purpose may be. This proposal must be rejected, for it would enable a state legislature bent on avoiding preemption to do so merely by including a non-safety purpose in the preamble. Recognizing as much, this Court, in an analogous preemption context, refused "blindly [to] accept the articulated purpose of an ordinance for preemption purposes." *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999) ("*Greater N.Y. Metro.*"), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39, 571 (2001).

Second, Defendants incorrectly criticize the district court's reliance on legislative history. As *PG&E* itself acknowledged, such review of legislative history is entirely proper in AEA preemption analysis. *See* 461 U.S. at 213

(examining legislative committee report to discern challenged statute's purpose). Nor did the district court "cherry-pick" such statements, as Defendants wrongly assert (Br. 47). To the contrary, Vermont legislators furnished the district court with a virtual cherry orchard of statements evincing that "safety is the prime concern," A1670; *see also* SPA74-75, 79-80 (collecting more than 30 examples). Even though coached by State lawyers to "find another word for safety" lest their preempted purpose be too obvious, the legislators repeatedly revealed their true safety purposes, without furnishing the State any legislative record of genuine and plausible non-safety purposes to present at trial. A1680. Nor did the district court rely solely on legislators' statements; the court emphasized textual references to "public health issues" in Act 160 and the use of an MOU to avoid including safety-focused SNF storage restrictions in Act 74.

Third, even were Defendants correct that *PG&E* precludes examination of non-preamble text or legislative history, they ignore that *PG&E* employed an independent method of evaluating the legislature's proffered purpose: asking whether that purpose is plausibly served by the challenged statute. In *PG&E*, California's statute passed that test; Vermont's statutes here do not. *PG&E* involved retail utilities selling power solely within California to captive California consumers; such utilities are traditionally regulated by the relevant state to prevent the unfair exercise of monopoly power and to protect the state's ratepayers,

specifically by limiting utilities' rates to their costs plus a defined return. *See* 461 U.S. at 205. Because the utilities' potentially high costs of disposing of SNF would be passed on to California consumers, California's non-safety economic purpose was plausibly advanced by the moratorium on nuclear plant construction pending development of a demonstrated SNF-disposal technology. *Id.* at 213-14.

Here, unlike the retail utilities in *PG&E*, Vermont Yankee is a *merchant generator* that does not have its rates set by a state regulator based on its costs, but rather sells to retail utilities (not consumers) on the interstate wholesale market at competitively determined market-based rates. Defendants ignore the district court's factual finding, SPA77, that the primary non-safety purposes asserted in Acts 74 and 160—"the state's need for power … and choice of power sources among various alternatives," Act 160, § 1(a); *see also* 10 V.S.A. § 6521 (similar for Act 74)—are *not* plausibly served by shutting down Vermont Yankee because, whether or not Vermont Yankee continues operating, Vermont's retail utilities are free to purchase power from sources other than Vermont Yankee, with Vermont Yankee selling its output to retail utilities in other states. As *PG&E* itself recognized, states' traditional authority over retail utilities concerning the "[n]eed for new power facilities, their economic feasibility, and rates and services," 461 U.S. at 205, is subject, in the case of wholesale generators like Vermont Yankee, to "the *exception* of the broad authority of … [FERC] over the need for and pricing of

electrical power transmitted in interstate commerce," *id.* at 205-06 (emphasis added).

Fourth, even if the legislative-approval requirements in Acts 74 and 160 could be facially sustained, they are preempted as applied, an issue the district court noted, SPA113, but did not reach given its facial-preemption ruling. Both Acts contemplate an ongoing legislative role in determining whether Vermont Yankee may operate past March 2012, and this role was applied in a safety-motivated way on two occasions.

In addition to its AEA preemption ruling, the district court enjoined Defendants from conditioning approval of continued operation on Entergy's commitment to sell power to Vermont utilities at below-market prices. That ruling too was correct; the condition violates the Dormant Commerce Clause because it is a naked discrimination against out-of-state purchasers in favor of Vermont purchasers. Defendants may not, consistent with the Dormant Commerce Clause, require Entergy to charge a higher price to out-of-state utilities than it would to Vermont utilities. Defendants' claim that the demand was not imposed with sufficient imminence to justify injunctive relief is waived and in any event belied by the record.

* * * * *

In short, the district court here catalogued the ample evidence that the challenged provisions served preempted safety purposes. The judgment should be affirmed so that Vermont's safety concerns do not interfere with the NRC's thoroughly considered determination, after five years of study, that Vermont Yankee should be re-licensed to operate through 2032. A1841. The district court is no outlier in its assessment of Vermont's purposes in seeking to regulate Vermont Yankee. The Federal Circuit recently concluded that a CEDF fee imposed on Entergy in connection with Act 74 was likely preempted as "a form of blackmail for the state approval of the construction [of an SNF storage facility]," *Vermont Yankee Nuclear Power Corp. v. United States*, 683 F.3d 1330, 1346 (Fed. Cir. 2012) ("*VYNPC*"), and a Vermont-required flood analysis was "directly motivated by safety concerns" and thus also "likely preempted under *PG&E*," *id.* at 1349.[2]

[2] The Federal Circuit addressed preemption in holding that Entergy may not recover, as damages for the U.S. Department of Energy's breach of its contract to remove SNF from the plant, Entergy's costs of complying with "likely preempted" Vermont requirements. *VYNPC*, 683 F.3d at 1349. One such requirement was that Entergy make payments into the CEDF, which was created by Act 74. Although Entergy abandoned its challenge to that Act 74 provision in this case, SPA2 n.3, the Federal Circuit's decision nonetheless suggests that the Act 74 provisions Entergy continues to challenge are preempted.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly ruled that one provision of Act 74 (10 V.S.A. § 6522(c)(4)) and the entirety of Act 160 are grounded in safety concerns and thus preempted by the AEA.

   a. Whether that ruling is supported by the court's review of statutory text and legislative-history documents, as well as legislators' statements disclosing a safety purpose.

   b. Whether, in any event, that ruling is supported by the court's finding that the non-safety purposes proffered in the statutes' preambles are not plausibly served by shutting down Vermont Yankee, a merchant generator.

   c. Whether another Act 74 provision (10 V.S.A. § 6522(c)(2)) is preempted for the same reasons § 6522(c)(4) is preempted.

2. Whether, even if the Act 74 provisions and Act 160 are not facially preempted, they are preempted as applied.

3. Whether the district court correctly ruled that the Dormant Commerce Clause precludes Defendants from conditioning the grant of a CPG for continued operation on Vermont Yankee's commitment to sell power to Vermont utilities at below-market prices.

4. Whether the district court erroneously rejected as premature Entergy's claim that the FPA preempts Defendants' imposition of that condition.

COUNTERSTATEMENT OF THE CASE

Defendants incorrectly assert that the district court, in holding the challenged statutes preempted, "relied not on the statutory text, but on parts of the legislative history." Def. Br. 3. In fact, the court began its analysis of Act 160 with the text, one provision of which requires that studies "identify, collect information on, and provide analysis of long-term environmental, economic, and *public health issues*, including issues relating to dry cask storage of nuclear waste and decommissioning options." 30 V.S.A. § 254(b)(2)(B) (emphasis added).

Defendants also incompletely describe the events that led the district court, on March 19, 2012, to enjoin enforcement of 10 V.S.A. § 6522(c)(2) pending appeal. In its January 19, 2012 decision, the court observed that "the provision within section 6522(c)(4) requiring legislative approval appears to be the only provision in Chapter 157 which requires approval of any kind to store fuel beyond March 21, 2012." SPA79 n.27. Prior to the decision, Defendants had not invoked any other Act 74 provision as requiring legislative approval for storage of SNF derived from post-March 2012 operations. Several weeks later, however, the Board Defendants suggested that § 6522(c)(2) required such legislative approval. *See* ECF 195-1 at 1-2. Plaintiffs promptly moved to enjoin § 6522(c)(2)'s

enforcement pending appeal, explaining that, had § 6522(c)(2) been timely raised, the court would have held it preempted for the same reasons it held § 6522(c)(4) preempted. The court agreed. SPA109.

COUNTERSTATEMENT OF FACTS

A. Statutory And Regulatory Framework

1. Federal (NRC) Authority Over Nuclear Safety and Public Health

The AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *PG&E*, 461 U.S. at 207. "The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors under the strict supervision of the Atomic Energy Commission (AEC)," *English v. General Elec. Co.*, 496 U.S. 72, 81 (1990), whose role was later transferred to the NRC, *id*. The NRC "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states." *PG&E*, 461 U.S. at 207 (citations omitted); *see also Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004) (AEA "confers on the NRC authority to license and regulate the storage and disposal of [SNF]"). The NRC has adopted thousands of pages of regulations on these matters. *See, e.g.*, 10

C.F.R. ch. 1. Surveying this landscape, *PG&E* explained that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation." 461 U.S. at 212; *see also English*, 496 U.S. at 81-82 ("the NRC … is concerned primarily with public health and safety").

2. State Economic Authority Over Retail Utilities

A nuclear plant is only one of numerous means of generating electricity, and retail utilities had been engaged in the business of selling electrical power for years before the AEA. *See PG&E*, 461 U.S. at 205, 206 n.17. A retail utility sells directly to consumers in the geographic area where it is the state-franchised monopoly supplier. *See id.* at 205-06 (contrasting sales of power by retail utilities with wholesale sales of power in interstate commerce); *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 535 (2008) ("For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers."). Given such monopolies' potential to abuse their market power, states traditionally regulated their economic activities, including the rates they charged and the investments they were permitted to make (the costs of which would be passed along to consumers in those rates). *See PG&E*, 461 U.S. at 205 ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."); *Consol. Edison Co. of N.Y.*

v. Pataki, 292 F.3d 338, 343 (2d Cir. 2002) (explaining how a retail utility's costs are passed on to consumers); *Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC*, 471 F.3d 1053, 1058, 1062-64 (9th Cir. 2006) (similar) ("*PUD No. 1*"), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008).

3. Federal (FERC) Authority Over Merchant Generators Selling Power In Interstate Commerce

"Unlike a traditional regulated utility," a "merchant generator … is not required to supply the energy needs of any particular area." *Envt'l Law & Policy Ctr. v. NRC*, 470 F.3d 676, 679 (7th Cir. 2006). Instead, a merchant generator sells power on the interstate wholesale market to retail utilities, who in turn sell that power to consumers. *See PUD No. 1*, 471 F.3d at 1062. Just as a merchant generator need not sell to any particular in-state retail utility, an in-state retail utility is free to choose from which merchant generator(s) to purchase power. *See id.* at 1066 ("Local energy utilities[] could, rather than producing their own power to sell to the public, choose between various competing producers …."); A1662 (Vermont's retail utilities can "choose not to buy from [Vermont Yankee]").

Under the FPA, "the federal government regulates only interstate wholesale electric power sales and interstate electric power transmission, leaving to the states the regulation of rates charged to consumers." *PUD No. 1*, 471 F.3d at 1062 (citing 16 U.S.C. § 824(a), (b)(1)). Thus, *PG&E*, citing the FPA, excepted

interstate wholesale transactions from its description of states' traditional economic authority over retail utilities. *See* 461 U.S. at 205-06.

In the decades since *PG&E*, this federal/state regulatory division has remained intact, but "[t]echnological innovations now permit[] transmission of power over longer distances, allowing consumers to obtain power from beyond the geographic range of their local utility." *PUD No. 1*, 471 F.3d at 1064. "[T]hese advances in technology . . . have increased the number of electricity providers and have made it possible for a customer in Vermont to purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma." *New York v. FERC*, 535 U.S. 1, 8 (2002) (citation, brackets, and internal quotation marks omitted). These changes have also been accompanied by energy market reforms that have resulted in "a massive shift in regulatory jurisdiction from the states to the FERC." *PUD No. 1*, 471 F.3d at 1066 (citation and internal quotation marks omitted). Increased competition on the wholesale market has allowed FERC to switch its rate-setting approach from the cost-of-service method to a market-based system in which a willing seller and a willing buyer negotiate their own price at arm's length. *See id.* at 1064-66.

New England's wholesale electricity markets are operated by ISO-NE under FERC's regulation. *See, e.g.*, A466. ISO-NE coordinates its operation of the New England region with neighboring regions overseen by different operators. A468.

As of 2010, New England's power system served 14 million people and included 350+ generators, 8,000+ miles of high-voltage transmission lines, and 13 interconnections with systems in New York and Canada. A467.

4. NRC Statements Recognizing These Spheres Of Authority

In the United States, some nuclear plants are owned by merchant generators, and others by in-state retail utilities.[3] As noted above, while the NRC has exclusive authority over public health and safety regardless of the type of ownership, the type of ownership does determine whether the states or FERC have economic authority over the plant. As the NRC has summarized in the context of renewal of a plant's operating license:

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

61 Fed. Reg. 28467, 28473 (June 5, 1996) (emphasis added). Thus, for a retail utility, it is "State … decisionmakers" that have jurisdiction over economic and resource-adequacy issues; for a merchant generator, "Federal (non-NRC) decisionmakers" have such jurisdiction. *Id.*; *accord* A799.

---

[3] *See* Lucas W. Davis & Catherine Wolfram, *Deregulation, Consolidation, and Efficiency: Evidence from U.S. Nuclear Power* 1 (Energy Institute at Haas Working Paper No. 217, 2011), *available at* ei.haas.berkeley.edu/pdf/working_papers/WP217.pdf (last visited August 29, 2012).

B. Entergy's Purchase Of Vermont Yankee (2002)

Vermont Yankee, a nuclear plant located in Vernon, Vermont, commenced operation in 1972 under a 40-year license issued by the NRC's predecessor. PX378 at 5, 12-13. Vermont Yankee was originally owned by VYNPC, a joint venture of 8 retail utilities. *Id.* at 3 n.2, 12-13.

In 2001, Entergy successfully bid to purchase the plant. *Id.* at 14, 56. Entergy then sought the Board's[4] approval of the sale and issuance of a state license known as a CPG for Entergy's ownership and operation of the plant. During that process, Entergy, VYNPC, DPS,[5] and others entered into a MOU. A553. The MOU provided, *inter alia*, that the Board should limit the CPG's term to March 21, 2012, but contemplated that Entergy could, before that date, apply to the Board for authority to continue operating. A558.

On June 13, 2002, the Board approved the sale and issued the CPGs to Entergy. A574, A576. Also in 2002, Entergy obtained FERC's authorization to sell power on the interstate market at market-based rates. A616-18.

C. Act 74 (2005)

In 2004, Entergy obtained the Board's approval to expand Vermont Yankee's power output by 20%. PX362 at 34; A905. This would increase the rate

[4] Vermont law gives the Board supervisory authority over Vermont's public utilities and other generators located in Vermont. 30 V.S.A. §§ 3, 9, 203, 209.

[5] DPS represents the public interest in Board proceedings. 30 V.S.A. §§ 2(b), 209.

of SNF accumulation, and thus accelerate the time at which Vermont Yankee's wet-pool storage facility would be filled, necessitating construction of a dry-storage facility. PX362 at 32. The problem was exacerbated by the U.S. Department of Energy's breach of its contract with Entergy to remove SNF from the site. *See VYNPC*, 683 F.3d at 1336-38.

Entergy believed that, aside from technical approvals from the NRC (which had already pre-approved the dry-storage facility, a concrete pad on which concrete/steel-encased casks of SNF are placed), it needed approval only from the Board, not the Vermont legislature, to build the facility. A232. Specifically, although Vermont law prohibited the construction of an SNF facility absent legislative approval, 10 V.S.A. § 6501(c), an exemption applied to "any temporary storage [of SNF] by [VYNPC]," *id.* § 6505. Entergy viewed this exemption as site- rather than owner-specific, and thus was surprised when Vermont's Assistant Attorney General opined in April 2004 that the exemption no longer applied to Vermont Yankee. A373-76.

Rather than contest that opinion, Entergy sought legislative approval for the construction. Initially, Entergy proposed to change § 6505 by substituting "Vermont Yankee" for VYNPC. A234.[6] Subsequently, legislators (not Entergy)

[6] A subsequent Entergy proposal would have limited Entergy to 12 casks in the new facility, while authorizing the Board (as opposed to the legislature) to approve a higher number. *See* SPA13.

introduced the requirement of legislative approval for storage of SNF derived from post-March 2012 operation. *See* SPA16 (bill "provided that for continued operation, or expansion of the [SNF] storage facility 'beyond the capacity' authorized, Vermont Yankee 'must first obtain the approval of the general assembly,' and then a '[CPG] from the [Board]'"). This requirement remained in place through Act 74's enactment, *see* 10 V.S.A. § 6522(c)(4), and thus before and after the House's "strike-all" amendments (*see* Def. Br. 14). The legislative-approval requirement made shutdown of Vermont Yankee in March 2012 the default: unless the legislature affirmatively enacted a law authorizing the Board to approve continued operation, the plant would shut down.

During the drafting process, the legislature considered whether to include certain safety-related technical requirements regarding SNF storage that overlapped with NRC regulations and thus would likely be preempted. Seeking to avoid tainting Act 74 with such preempted matter, the legislature shunted it into a 2005 MOU, PX 465. *See, e.g.*, A1665 ("[I]n the [MOU] we have dealt with some health and safety issues, which we would be preempted from doing by legislation."); *id.* at 1664 (similar).

Beyond the 2005 MOU, the legislative history is replete with statements regarding radiological safety and public health. *See, e.g.*, A1667 ("I … trust the 180 people up here with their limited knowledge a lot more than I trust the NRC in

terms of their ability to act as an advocate for the population."); A1670 ("safety is the prime concern, safety is not for sale, no amount of money is worth it to increase any risk of danger to Vermonters"). To be sure, some legislators recognized that safety-based regulation is preempted, *see, e.g.*, A1269 (quoted at Def. Br. 16), but instead of identifying a genuinely held non-safety purpose, legislators sought to disguise their true safety purpose by using code words like "aesthetics." *See, e.g.,* A1653 (Representative: "[S]omeone might have a safety issue in mind, but—the[y] want to shield the … visible impact of these casks from the river or something?" DPS witness: "Certainly talking about aesthetics … would be totally acceptable."); A1652 (witness: "The problem that we're dealing with here is that a lot of the concerns that citizens have are concerns that you can't address directly the way they want them to be addressed."). References to "build[ing] our own set of diverse and sustainable power sources," A1205 (quoted at Def. Br. 15); *see also* A1224 (quoted at Def. Br. 17) (similar), pertained not to the legislative-approval requirement in 10 V.S.A. § 6522(c)(4), but to a different provision, *id.* § 6523, that created the CEDF. *See, e.g.*, Def. Br. 15 ("'the [CEDF] money would be used specifically to help bridge that gap for the time when Entergy will not be providing us with electricity. So it will be used to support in-state, mostly renewable energy projects ….'") (quoting A1276) (alterations in original).

The legislature enacted Act 74, and Entergy signed the 2005 MOU, PX465, and obtained Board approval to construct the facility, PX362 at 89.

D. Act 160 (2006)

Around the same time in early 2006 that Entergy applied to the NRC for a renewal license to operate the plant through March 21, 2032, A1841, the Vermont legislature began deliberations on what would become Act 160. As enacted, Act 160's preamble, after describing Act 74's legislative-approval requirement, *see* Act 160, § 1(c)(1), stated that it should "be framed and addressed as a part of the larger societal discussion of broader economic and environmental issues relating to the operation of a nuclear facility in the state, including an assessment of the potential need for the operation of the facility and its economic benefits, risks, and costs; and in order to allow opportunity to assess alternatives that may be more cost-effective or that otherwise may better promote the general welfare," *id.* § 1(d). Accordingly, the legislative-approval requirement would now be explicitly tied to "operation of Vermont Yankee," *id.* § 1(f), and not simply to "storage of spent fuel derived from the operation of Vermont Yankee … after March 21, 2012," *id.* § 1(c)(1).[7]

Aside from this new gloss on the legislative-approval requirement, Act 160 provided for studies to assist the legislature in implementing its role, including one

[7] As with Act 74, Act 160 included a legislative-approval requirement from early drafts, *e.g.*, A1746, through the enacted statute, 30 V.S.A. § 248(e)(2) .

that "shall … identify, collect information on, and provide analysis of long-term environmental, economic, and public health issues, including issues relating to dry cask storage of nuclear waste and decommissioning options." 30 V.S.A. § 254(b)(2)(B).

Radiological safety issues pervade the legislative history. For example, an early bill emphasized "the extraordinary risks and dangers that result from hosting any nuclear facility within the borders of the state," PX429 at 2, before expressly linking this with the need for "the informed approval of the General Assembly," *id.* Numerous legislators similarly expressed their safety purpose. *See, e.g.*, A1683 ("[D]oes all our work get overturned … by the feds because it's based on safety? That's all it's going to be based on."); A1684 ("When something goes wrong with a nuclear power plant, the possible negative results are a lot worse than if a windmill breaks a blade or kills some birds or throws some ice."); SPA74-75 (collecting other examples).

At a Senate Finance Committee hearing on March 2, 2006, the Board's Chairman advised that the bill's express mention of "safety" was problematic because "technically the State is preempted from engaging in those [issues]." A1679;[8] *see also* A1682 (similar). Senator Cummings, Chairwoman of the

[8] Although the Board's Chairman made the same comment about "public health," A1680, those words made it into Act 160.

Committee, responded: "Okay, let's find another word for safety." A1680; *compare* A1307 (quoted at Def. Br. 15) (Senator Cummings' use of "economic impacts" a few days later).[9]

E. Act 189 (2008)

In 2008, a bill was introduced to help the legislature implement its Act 74/160 role. *See* SPA42 (quoting bill's purpose to "'enable the assessment … of the long-term economic and environmental benefits, risks, and costs related to the operation of a nuclear facility in the state'"). The 2008 bill was titled "An Act Relating to an Independent Safety Assessment of the Vermont Nuclear Facility," *id.*, and similarly referred in its preamble to the need for "an independent safety assessment" of Vermont Yankee, *id.* The bill's substantive provisions made more than 14 references to safety. A1752-58.

As with Act 160, the legislature was then coached not to use "safety," and instead to use "reliability"[10] as a substitute for safety concerns. *See, e.g.*, A1706 ("reliability is something to talk about where maybe safety is not"); A1708 ("I'm pretty good at tying almost everything to reliability"); A1716 (similar). "Safety"

---

[9] After the coaching, some legislators similarly took care to speak in non-safety terms. *See* Def. Br. 15 & n.4 (collecting examples). The district court found such instances not to outweigh the substantial number of legislator statements mentioning a safety purpose. SPA72, 74-75. The court in any event found non-safety purposes implausible as reasons to shut down Vermont Yankee. SPA77.

[10] Reliability is a plant's "capability of generating electricity at [the plant's] total capacity." A268; *accord* A1707.

was in turn scrubbed from the bill's title and body, replaced by "reliability." *Compare* A1751, *with* SPA146. Even after those changes, legislators referred to Act 189 as calling for a safety assessment, *see, e.g.*, PX302; PX417, and the enacted statute required investigation of safety systems, yet did not address the two non-safety plant components (turbine and generator) most important to reliability, A276-78; A280; A153-54; A789; SPA48.

F. S.289 (2010)

On January 7, 2010, Entergy confirmed that tritium was detected in a monitoring well at Vermont Yankee and immediately notified the NRC and several Vermont agencies. SPA49. Entergy promptly identified and stopped the leak and remediated the affected soil. A644. The NRC determined that "the public's health and safety and the off-site environment were not adversely affected." A647.

Just a few weeks after detection of the leak, on February 17, 2010, Vermont's legislative counsel presented S.289, which, if enacted, would have implemented the legislature's Act 74/160 role by authorizing Vermont Yankee (subject to the Board's further approval) to operate for an additional 20 years beyond March 21, 2012. SPA50-51. S.289 was rejected on February 24 when the Senate voted 26-4 against reading the bill for a third time. SPA51. During floor debate, a Senator described the bill as "a blatant political maneuver" where "politics came before a responsible process." A1741; *see also id.* ("The future of

600 jobs, affordable power, and the Vermont economy should not be decided in a rush to judgment."). Numerous Senators and witnesses revealed their safety motivation for voting against the bill. *See* A1734 (Senator: "[P]eople are not comfortable with the way that place is operating."); *id.* (DPS witness: "the question of … what sort of public health and safety issues do we need to address is sort of priority one"). The Senate's negative vote took place before the Senate received, *inter alia*, a supplemental reliability report (commissioned by an Act 189-created panel in the wake of the leak, A641), which found that the leak "did not affect the overall reliability of the plant," A645.

After the NRC granted a renewal license for operation through March 21, 2032, A1841, and after Entergy's negotiations with Vermont legislators and the Governor concerning state authorization of continued operation failed, A1931, Entergy filed this suit.[11]

---

[11] In June 2012, the D.C. Circuit vacated NRC rules concerning extended on-site SNF storage because the NRC had failed to make findings required by the National Environmental Policy Act ("NEPA"); the court remanded for the NRC to do so. *New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012). Subsequently, the NRC decided that it would stop issuing new licenses (including renewal licenses) pending the remand proceedings. *Calvert Cliffs Nuclear Project, LLC*, CLI-12-16 (N.R.C. Aug. 7, 2012), *available at* http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2012/2012-16cli.pdf (last visited Aug. 29, 2012). The NRC has made clear, however, that neither the D.C. Circuit's ruling nor the NRC's temporary moratorium affects already-issued licenses such as Vermont Yankee's. *See* Dave McIntyre, *Deciphering the Waste Confidence Order*, U.S. NRC BLOG (Aug. 28, 2012), http://public-blog.nrc-gateway.gov/2012/08/09/deciphering-the-waste-confidence-order/ (last visited

G. The Decision Below

After recounting the events discussed above, SPA5-55, the district court summarized *PG&E*, including its definition of the preempted field to include state statutes "'grounded in safety concerns,'" SPA62 (quoting *PG&E*, 461 U.S. at 213), and its recognition that state economic authority over in-state retail utilities is subject to an exception for "'electrical power transmitted in interstate commerce.'" SPA62 (quoting *PG&E*, 461 U.S. at 206). The district court observed that, to answer whether the challenged statute was "grounded in safety concerns," *PG&E* relied on a report "written by the state legislative committee that drafted and proposed the challenged statutes," SPA64, and concluded that the legislature's purpose was "'largely economic … [and] *not* safety-related.'" *Id.* (quoting *PG&*E, 461 U.S. at 213) (in turn quoting committee report)) (emphasis in report). The court then summarized several lower-court cases, both in AEA and other preemption contexts, that considered legislative history to discern the legislature's purpose. SPA64-69.[12]

Aug. 29, 2012). Moreover, Vermont, in its unsuccessful challenge to the NRC's renewal of Vermont Yankee's license, *Vt. Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 160 (D.C. Cir. 2012), failed to raise the issue of NEPA compliance. In any event, matters stemming from the D.C. Circuit's decision relate to safety-related environmental effects of SNF storage and thus are beyond Vermont's regulatory authority.

[12] As to an "effects" branch of AEA preemption, the court observed that "preempted 'effect' [can be] satisfied largely [based on] a preempted purpose." SPA69. Here, the effect of Acts 74 and 160 is to shut down Vermont Yankee in

Applying this framework, the district court turned first to Act 160, and more specifically, its provision requiring "that studies 'identify, collect information on, and provide analysis of long-term environmental, economic, and public health issues, including issues relating to dry cask storage of nuclear waste and decommissioning options.'" SPA72 (quoting 30 V.S.A. § 254(b)(2)(B)). The court found that this provision alone triggers AEA preemption:

> [T]he plain text of this provision calls for an analysis of public health issues that includes a subset of public health issues relating to storage of nuclear waste. Consideration of radiological public health in re-licensing decisions is the exclusive province of the NRC under the [AEA]. A state's consideration of it in determining whether to license a plant's continued operation is preempted.

SPA72-73.

Although Act 160's preamble mentions only non-preempted purposes, the court rejected Defendants' argument that the preamble alone controls, reasoning that "a court cannot 'blindly accept' a challenged statute's 'articulated purpose.'" SPA74 (quoting *Greater N.Y. Metro.*, 195 F.3d at 108). Thus, the district court, having already found a non-preamble textual provision of Act 160 to trigger preemption, SPA73, examined the legislative history and found "references, almost too numerous to count … reveal[ing] legislators' radiological safety motivations

---

March 2012 absent a further enactment authorizing operation beyond that date. As explained in Point I, *infra*, this effect, in conjunction with those Acts' radiological safety purpose, triggers preemption.

and reflect[ing] their wish to empower the legislature to address their constituents' fear of radiological risk, and beliefs that the plant was too unsafe to operate, in deciding a petition for continued operation." SPA74-75 (collecting examples).

Aside from this direct evidence of Act 160's safety purpose, the court found that the principal non-safety purposes—Vermont's "'need' for power" or "choice among power sources"—proffered by Act 160's preamble are not plausibly advanced by shutting down Vermont Yankee. SPA77. Specifically, the court found these purposes "invalid" as to a "merchant generator" from which Vermont is entirely free not to purchase power. *Id.*

The district court ruled that Act 74's legislative-approval requirement is likewise preempted. The court discussed documentary evidence, namely the 2005 MOU, demonstrating that the legislature had safety purposes in mind in enacting Act 74 but sought to shunt the more obviously safety-related provisions into a MOU to avoid tainting the statute. SPA22-23. The court found that legislators' statements during the drafting process similarly show that "the legislature's desire and intent to regulate the radiological safety of dry cask storage is crystal clear." SPA79-80 (collecting examples).

Turning to Entergy's non-AEA claims, the district court ruled that conditioning approval of continued operation of Vermont Yankee on its execution of a PPA with Vermont utilities at below-market prices violates the Dormant

Commerce Clause. SPA86-93. The court explained that *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), "makes clear that a state's requirement that a wholesale plant satisfy local demands and provide its residents an 'economic benefit' not available to customers in other states runs afoul of the Commerce Clause." SPA93. The court recited substantial "evidence of [Vermont's] intent to condition continued operation on the demonstration of some marked 'economic benefit,' or 'incremental value,' beyond that reflected in market rates for long-term contracts, in the form of below-wholesale-market long-term power purchase agreements for Vermont utilities." SPA88.

The court denied relief on Entergy's separate claim that the FPA preempts that condition. SPA82-86. The court acknowledged that, "[u]nder the 'filed-rate doctrine,' state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the filed rate." SPA83. But the court rejected Entergy's claim as premature, reasoning that, if and when Entergy actually is coerced into a below-market PPA with Vermont utilities, Entergy "would have recourse to have the contract terms and conditions reviewed by FERC to determine if the agreement and the rates were just and reasonable and had an adverse effect on the public interest." SPA85.

SUMMARY OF ARGUMENT

I

The AEA preempts the legislative-approval requirement of Acts 74 and 160 because it was grounded in radiological safety/health concerns and in any event because the non-safety purposes proffered in those statutes' preambles are not plausibly advanced by shutting down a merchant generator.

A

The AEA preempts state statutes grounded in radiological safety/health concerns. Such a showing can be made by direct evidence in the text or legislative history of the challenged statute. Contrary to Defendants' principal argument on appeal, a court need not end its inquiry upon finding a non-safety purpose intoned in the challenged statute's preamble. *PG&E* itself relied on a committee report to determine a statute's purpose, and declined to consider other legislative history only because it pertained to a different enactment than the one at issue. After *PG&E*, this Court and other lower courts, in AEA and analogous preemption contexts, have readily consulted legislative history even in the face of a non-preempted purpose articulated in the statute's preamble.

Turning to the challenged statutes here, the district court correctly found that a safety/health purpose not only underlies them, but was the but-for cause of their enactment. As to Act 160, the court began not with legislative history, but with the

text of a provision in the body (as opposed to the preamble) of the statute, which states that the legislature's future decision whether to authorize Vermont Yankee's continued operation *must* take into account studies of the plant's effects on public health. The court went on to consider Act 160's legislative history, which contains documents and legislators' statements that overwhelmingly demonstrate that safety/health was the legislature's predominant purpose.

As to Act 74, the court similarly considered documents and statements from the legislative history. One document showed that the legislature had shunted the most obviously safety-related provisions into a side MOU to avoid tainting the statute with preempted matter. An avalanche of statements revealed that legislators' true purpose in imposing a legislative-approval requirement regarding post-March 2012 operation was their safety concerns, and that legislators were coached to use non-safety code words to disguise their true concerns.

B

Even if a statute's preamble could preclude inquiry into the statute's body or the legislative history, Defendants would still have to show that the preamble's proffered non-safety purposes are plausibly advanced by the challenged statute. The district court correctly found that they are not.

The primary non-safety purposes articulated by the preambles of Acts 74 and 160 are Vermont's interest in its need for power and choice of power sources.

Neither is advanced by shutting down a merchant generator such as Vermont Yankee. Vermont and its retail utilities are entirely free to satisfy their power needs or their desire for a particular mix of power sources by purchasing from sources other than Vermont Yankee—and indeed have recently done so from, *inter alia*, a nuclear plant in New Hampshire.

II

If this Court reverses the district court's ruling that the Act 74/160 legislative-approval requirement is facially preempted, this Court should proceed to consider and accept Entergy's as-applied challenge. *First*, in 2008, the legislature enacted Act 189, which elaborated, *inter alia*, on the studies and other processes that the legislature would follow in exercising its Act 74/160 role. In bill form, Act 189 was titled a "safety" assessment and included multiple other references to safety, before those were replaced by "reliability." The final enactment, for all its supposed attention to reliability, focused on safety systems and failed to include the two most important non-safety plant components (turbine and generator) bearing on reliability. *Second*, in S.289, the Vermont Senate rushed a vote against the bill in the wake of a tritium leak that was perceived by the Senate to pose a safety risk even though the NRC found none. The Senate voted before receiving, *inter alia*, a report that found the leak not to undermine the plant's reliability.

III

The district court also correctly ruled that the Dormant Commerce Clause precludes Vermont officials from conditioning state approval on post-March 2012 operation of Vermont Yankee on Entergy's commitment to sell power to Vermont utilities at prices lower than those it charges to out-of-state utilities. This requirement of preferential treatment violates the Dormant Commerce Clause. Defendants' argument that different PPAs cannot be meaningfully compared is belied by Vermont officials' own comparison of such PPAs in demanding that Vermont utilities get a better deal. Defendants' various procedural arguments, newly raised on appeal, are equally unpersuasive. For example, as to the ripeness of Entergy's claim, the trial evidence amply showed not just that Vermont's demand was imminent, but that it had been carried out when some legislators had voted against S.289 in part because of the lack of a below-market PPA.

IV

Vermont's insistence on a below-market PPA is also preempted by the FPA. Entergy has obtained FERC's approval of a market-based tariff for sales of Vermont Yankee's power on the interstate wholesale market. Such a tariff is approved based on FERC's determination that the market is competitive and therefore any specific contracts will be the product of a voluntary arm's-length negotiation between a willing buyer and a willing seller. Under the filed-rate

doctrine, the FPA's approval of the filed rate preempts a state from requiring any different rate.

The district court denied relief on this claim on the theory that Entergy must wait until it actually enters into a below-market PPA with a Vermont utility before seeking FPA relief. This reasoning misunderstands that FERC has already approved the market-based tariff, and thus has approved on a forward-looking basis any specific contracts reached under the assumptions of that tariff. Vermont's demand violates the assumption of an arm's-length transaction and therefore is preempted.

ARGUMENT

I. THE AEA PREEMPTS, ON THEIR FACE, ACT 160 AND THE PROVISIONS OF ACT 74 THAT REQUIRE SHUTDOWN OF VERMONT YANKEE ABSENT LEGISLATIVE APPROVAL

The touchstone of preemption under the AEA is whether the challenged statute was "grounded in safety concerns," *PG&E*, 461 U.S. at 213. *PG&E* determined that California's moratorium on nuclear plant construction to avoid a buildup of SNF was not so grounded. *PG&E* did so by consulting not only legislative text but also legislative history, specifically a committee report characterizing the SNF disposal problem addressed by the statute as "'largely economic or the result of poor planning, *not* safety related.'" *Id.* (quoting report; emphasis in report).

Here, the district court correctly found that all contemporaneous legislative materials pointed in the opposite direction, and that Act 160 and the two provisions of Act 74 that require that Vermont Yankee shut down on March 21, 2012, absent further legislative action, *were* "grounded in safety concerns," *id.*, and thus preempted because they invaded the exclusive realm of federal authority over nuclear safety. SPA71-82. The district court correctly relied upon direct evidence of a safety purpose in the texts of these statutes, direct evidence of a safety purpose permeating the legislative histories of these statutes, and circumstantial evidence of a safety purpose from the fact that shutting down Vermont Yankee could not possibly advance, in any objectively plausible way, any of the non-safety purposes (like energy diversity) that the State conjured in its effort to "find another word for safety." Each and every one of these categories of evidence was properly considered by the district court, contrary to Vermont's assertion that a statute's purpose is conclusively determined by a few words the legislature inserts in a statute's preamble.

A. Direct Evidence Demonstrates That Acts 160 And 74 Were Grounded In Safety Concerns

1. Safety Purposes In The Text Of Act 160 And A Document That Accompanied Act 74

Act 160. The district court correctly began with the text, and found that it alone was sufficient to trigger AEA preemption. Specifically, the court focused on

Act 160's requirement that studies "identify, collect information on, and provide analysis of long-term environmental, economic, and *public health issues*, including issues relating to dry cask storage of nuclear waste and decommissioning options." 30 V.S.A. § 254(b)(2)(B) (emphasis added).[13] The court found that "the plain text of this provision calls for an analysis of public health issues …. Consideration of radiological public health in re-licensing decisions is the exclusive province of the NRC under the [AEA]. A state's consideration of it in determining whether to license a plant's continued operation is preempted." SPA72-73. Other courts have similarly found the AEA to preempt statutes whose textual provisions mentioned public health or safety. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1246 (10th Cir. 2006) ("health and general welfare"); *Boeing Co. v. Robinson*, No. CV 10–4839, 2011 WL 1748312, at *9 (C.D. Cal. Apr. 26, 2011) ("public health and safety and the environment"); *Me. Yankee Atomic Power Co. v.*

[13] Act 160 directs that these studies be provided to the legislature for use in its future implementation of its role under Acts 74 and 160 in controlling the post-March 2012 operation of Vermont Yankee. *See* 30 V.S.A. § 254(a)(2)-(3). In this respect, Act 160's "public health" provision is distinct from the *PG&E* provision that mentioned "'public health and safety.'" 461 U.S. at 215 n.27. That provision concerned a "study of underground placement and berm containment of nuclear reactors," *id.*, and was not connected to the moratorium on new plant construction imposed by the challenged provision. Instead, the moratorium hinged only on a state agency's determination that the federal government had approved a demonstrated technology for SNF disposal. *Id.* at 198.

Me. Pub. Utils. Comm'n, 581 A.2d 799, 806 (Me. 1990) ("public health, safety, and the environment").

The Vermont Defendants argue that "public health" refers only to public-health issues concerning "*non-radioactive* contaminants at the facility" (Br. 36), and that "public health" cannot be equated with "public *safety*" (*id.*). These arguments fail. *PG&E* itself recognized the equivalence of "public health and safety" concerns. 461 U.S. at 207 (discussing NRC's role). And in the context of a statute that applies only to a "nuclear energy generating plant," Act 160, § 1(a), and not any other type of energy generator, the district court reasonably concluded that the "safety" at issue was radiological safety.

At best for Defendants, the term "public health" is ambiguous, requiring consideration of the legislative history.[14] And in that history, Vermont legislators participated in repeated colloquy using the term to mean *radiological* public health. *See, e.g.*, A1680 (Board's Chairman, after pointing out preemption problem with the bill's use of "safety," explained that "the same thin[g] happens at the bottom of the page where you reference public health"); A1682 (DPS witness: "I had similar issues on page three with the bill, … both the ones that Chairman Volz just pointed out. The safety in the first paragraph and in the bottom public

[14] Defendants' *amici* accept that legislative history may be consulted to clarify an ambiguous term. Nat'l Conf. of State Leg. Br. 7; New York Br. 23.

health issues."); A1684 ("[p]ublic health issues" and "safety issues" are "pretty close").

Act 74. The district court also correctly began with documentary evidence in finding Act 74's legislative-approval requirements preempted based upon the safety concerns. SPA79-82. The court considered, *inter alia*, the MOU that was signed the day Act 74 was enacted. To avoid tainting the statute with preempted safety concerns, the legislature shifted into the MOU various aspects of dry-cask SNF storage already regulated by the NRC, such as "line-of-sight barriers, pad siting, cask spacing, access road siting and construction, cask temperature monitoring and radiation surveillance." SPA22. *See, e.g.*, A1665 ("The benefit is that in the [MOU] we have dealt with some health and safety issues, which we would be preempted from doing by legislation."); A1664 (similar).

2. Safety Purposes In The Legislative Histories Of Acts 160 And 74

Act 160. As the district court correctly found, the legislative history corroborates the textual evidence of Act 160's radiological safety or health purpose. An early bill emphasized "the extraordinary risks and dangers that result from hosting any nuclear power facility within the borders of the state," PX429 at 2, before expressly linking this with the need for "the informed approval of the General Assembly," *id.* Another bill identified "safety" as an "objectiv[e] of the

public engagement process," A1746-47, and required that process to analyze, *inter alia*, "public health issues," A1747.

The discussion by Senate Finance Committee Chair Cummings at a key point in the drafting process on March 2, 2006, sheds especially significant light on the legislature's purpose. *See, e.g.*, *Skull Valley*, 376 F.3d at 1252 (relying on statement by bill's sponsor). At that meeting, the Board's Chairman warned that the bill's mention of "safety" and "public health" might trigger preemption. A1679-80.[15] Senator Cummings's telling response was: "Okay, let's find another word for safety." A1680. In describing the task as finding another *word* for "safety," Senator Cummings did not suggest that the legislature ought to find another, genuine non-preempted *purpose*.

The district court carefully reviewed the remainder of the statements in the legislative history and found "references, almost too numerous to count, … reveal[ing] legislators' radiological safety motivations and reflect[ing] their wish to empower the legislature to address their constituents' fear of radiological risk, and beliefs that the plant was too unsafe to operate, in deciding a petition for continued operation." SPA74-75 (collecting examples, including statements that "safety" is all that the Act is "going to be based on," A1683; "the closer you live to that

[15] The Board's Chairman was just one of several coaches who schooled the legislators to avoid overt reference to safety concerns. *See* A1678-79; A1682.

radioactivity, the more concerned you are"; "the possible negative results" "[w]hen something goes wrong with a nuclear power plant ... [create] enough potential that the Legislature felt that it was a public policy decision that they needed to make," A1684-85).

By contrast, non-safety purposes articulated in Act 160's preamble—such as "need for power" and "choice among power sources"—appear in the legislative history only after the legislators had been coached to avoid overt references to preempted safety concerns, and often were connected to a safety purpose in any event. SPA76-77. For example, numerous legislators wanted bargaining power to extract from Entergy a preferential PPA for Vermont utilities, *see* A1677, A1683, A1685, but that desire was in turn based on the notion that Vermont should receive "financial compensation for the perceived safety risk of having Vermont Yankee within the state," SPA77 (citing, *inter alia*, PX155 (audio recording) at Track 1 00:37:45); *see* PX155 at Track 1 00:37:52 - 00:38:04 ("[A]re those risks worth the benefit that we get?")). The absence of *genuine* discussion of non-safety purposes in the legislative history corroborated the surfeit of legislative history demonstrating that radiological safety was the overwhelming purpose. *See, e.g.*, *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 146 (2d Cir.

2006) (Sotomayor, J.) (county meeting minutes "contain no discussion whatsoever of [non-preempted] concerns").[16]

The district court correctly found that this legislative record furnished "overwhelming evidence" that radiological safety was "a primary motivation among others advanced for Act 160," sufficing to invalidate it under *PG&E*. SPA77-78 (citing, *inter alia*, *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88 (1992)); *see* SPA67-68 (discussing *Gade*'s teaching that a State may not avoid preemption by asserting dual purposes or effects); *Cnty. of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 59 (2d Cir. 1984) (State's complaint seeking to halt operations of nuclear plant preempted because it "appears, *at least in some respects*, to be motivated by safety concerns") (emphasis added); *United States v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001) (condition seeking "to protect human health *and the environment*" preempted) (emphasis added); *Me. Yankee Atomic Power Co.*, 581 A.2d at 806 (similar).[17] The district court alternatively found that

---

[16] Aside from their infrequency, the non-safety purposes (*see, e.g.*, Def. Br. 15 & n.4, 45) are either factually implausible as reasons to shut down Vermont Yankee, *see* Point I.B, *infra*, or independently precluded by the dormant Commerce Clause and/or the FPA, *see* Points III & IV, *infra*.

[17] In suggesting that preemption is not triggered where safety is one of several purposes, Defendants incorrectly quote *PG&E*'s statement that there are "'*both* safety and economic aspects to the nuclear waste issue.'" Br. 37 (quoting *PG&E*, 461 U.S. at 196) (emphasis Defendants'). The quote comes from *PG&E*'s factual background section, and bears at most on plausibility of the proffered non-safety purpose, not on the legislature's actual purpose. Regarding actual purpose, the

Act 160's radiological safety concerns invalidated that statute even under the "more lenient standard" that inquires whether such preempted purposes were the statute's but-for cause. SPA68, 78.[18]

Defendants accuse the district court of "cherry-picking … favorable snippets" (Br. 47) from a legislative record that is supposedly "incomplete" (*id.*) because "much of Act 160's legislative history went *unrecorded*" (*id.* at 45). But the district court did not cherry-pick: it heard a full bench trial, reviewed the entirety of the legislative history presented by both parties, and concluded that the "overwhelming" evidence demonstrated the predominance of the legislature's radiological safety/health purpose. SPA77. Defendants do not seriously contest that the snippets paying lip-service to non-safety purposes (*see* Br. 45) were far outweighed, and at crucial junctures, by the evidence that the statute was grounded in radiological safety/health concerns. Nor do Defendants cite any precedent for the notion that a court should infer that unrecorded legislative history contradicts

---

Court took care in the analysis section of its opinion to emphasize that safety was not even "a" purpose. *See* 461 U.S. at 213.

[18] Defendants' critique (Br. 41-42) of the but-for causation test for legislative purpose is unpersuasive; that test is routinely employed in analogous contexts where an impermissible purpose is one of several purposes. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977) (both discussed at SPA68). Because statutory purpose is the touchstone of AEA preemption under *PG&E*, analogies to constitutional inquiries into racial or ideological purpose are appropriate.

the clear weight of recorded legislative history. Such a rule would perversely induce a legislature to keep troubling legislative history unrecorded; the case law not surprisingly rejects it, placing the burden on *the State* to offer evidence of a *non*-safety purpose. *See Skull Valley*, 376 F.3d at 1246 ("unlike the state officials in [*PG&E*], the Utah officials here have failed to offer evidence that the provision … is supported by a non-safety rationale"); *Loyal Tire*, 445 F.3d at 148 ("*post-hoc*" rationales may not be considered).[19] Defendants failed to carry that burden.

Defendants also claim that the district court was improperly "troubled by the lack of reviewability of any legislative decision under Act 160 not to approve the continued operation of Vermont Yankee." Br. 43. That point is misdirected. To be sure, *PG&E* similarly involved (and sustained) a statute that reassigned authority from a state agency to the legislature. But the district court here did not fault Act 160 for that "process" (Def. Br. 28) aspect of Act 160; instead, the court held Act 160 preempted because of the "overwhelming evidence," SPA77, that it

[19] Defendants incorrectly suggest that the traditional "presumption against preemption" (Br. 43) supports an inference in their favor regarding the unrecorded legislative history. *PG&E* mentioned the presumption only because states have traditional authority over retail utilities, *see* 461 U.S. at 205-06; Vermont Yankee, however, is a merchant generator, and traditional state regulatory authority does not extend to the wholesale sale of electricity in interstate commerce. Even as to retail utilities, *PG&E* found the presumption categorically overcome as to any state law grounded in radiological safety. *Id.* at 212-13. After *PG&E*, it is for defendants, not plaintiffs, to show that a particular statute is outside the preempted field. *See Skull Valley*, 376 F.3d at 1246.

was grounded in safety concerns, SPA71-72 ("process" aspect is "a problem if, and only if, the legislature [acted] with a preempted purpose in mind"); *accord PG&E*, 461 U.S. at 213 (statute would have been preempted if "grounded in safety concerns").

Indeed, the legislative history specifically connected the "process" aspect of Act 160 with the safety purpose. One Senator explained that "[w]e want to give latitude to the General Assembly" to consider "safety questions." A1682. And Senator Cummings later elaborated, "[W]e can sit here and listen to three-headed turtles and sterile sheep and whatever we want to listen to and we can make our own decision. And we can have a much broader range of ability to hear and to, you know, than the Board does. … So this gives the folks that think perhaps they don't get heard at the board level, the ability to be heard by their elected representatives." A1683-84. The district court's concern about legislative process thus stemmed from its concern about the improper use of that process to mask preempted safety concerns.

Act 74. Turning to the statements from Act 74's legislative history, the district court accurately found that "the legislature's desire and intent to regulate the radiological safety of dry cask storage is crystal clear." SPA 79; *see also* SPA80 (collecting examples, including statements that the SNF might "burn and then the stuff would float around and come down," A1653, "this stuff … [is] high

risk," *id.*, "I … trust the 180 people up here with their limited knowledge a lot more than I trust the NRC in terms of their ability to act as an advocate for the population," A1667, and "safety is the prime concern," A1670); SPA14 ("in my mind it's a safety issue," A1649).

As with Act 160, the Act 74 process involved coaching of legislators to avoid the word "safety" and instead to mask their true safety purpose with words like "aesthetics." For example:

> REPRESENTATIVE 1: [S]omeone might have a safety issue in mind, but—the[y] want to shield the physical impact—the visible impact of these casks from the river or something?
>
> DPS WITNESS: Certainly talking about aesthetics in terms of berms would be … totally acceptable.
>
> * * * * *
>
> REPRESENTATIVE 2: I mean, berms are ugly. [Laughter]

A1653-54; *see also, e.g.*, A1660 (similar); *id.* (a "safety issue" can often be "tie[d] … back to something in th[e] economic/environmental" area).

Defendants' responses are unpersuasive. *First*, Defendants invoke Act 74's preamble, which they paraphrase as mentioning the non-safety purposes of "the State's energy policy and goal of transitioning to renewable energy sources." Br. 58-59 (citing 10 V.S.A. § 6521). But Defendants ignore the district court's correct finding, SPA81, that these textual purposes do not pertain to Act 74's provisions requiring legislative approval for storage of SNF derived from post-March 2012

operation, *see* 10 V.S.A. § 6522(c)(2), (4), but rather to Act 74's *separate* provision creating the CEDF, *see id.* § 6523.[20]

Second, Defendants argue that Act 74's legislative-approval requirement cannot have been grounded in nuclear safety concerns because "Entergy itself proposed and lobbied for the legislation that became Act 74—a law that allowed Entergy to obtain a CPG for dry-cask storage on-site." Br. 59. Defendants ignore that Entergy's initial proposal merely sought to clarify that the exemption in 10 V.S.A. § 6505 was site-specific rather than owner-specific. *See supra*, at 15 & n.6 (discussing this and a subsequent proposal). And far from being "voluntary," Entergy's lobbying was compelled by the adverse and unexpected Assistant Attorney General opinion that the existing § 6505 exemption was unavailable to Entergy, impeding Entergy's imminent need for more SNF storage capacity.[21] The dispositive fact for preemption purposes is that Act 74's requirement that Entergy obtain legislative approval to store SNF derived from post-March 2012 operation was grounded in safety concerns. SPA79.

---

[20] Even if these purposes were meant to pertain to the legislative-approval requirement, they are implausible because Vermont Yankee is a merchant generator. *See* Point I.B, *infra*.

[21] In any event, although Defendants argued below that Entergy's conduct leading to Act 74 supports equitable defenses to Entergy's claim that the AEA preempts Act 74, *see, e.g.*, ECF 143 at 19-20, the district court rejected those defenses, SPA93-99, and Defendants did not challenge that ruling in their opening brief on appeal.

Third, Defendants suggest (Br. 60) that, if the legislature had truly been motivated by safety concerns to shut the plant down, the legislature could simply have declined to enact Act 74, leaving Vermont Yankee to run out of SNF storage capacity and shut down *before* 2012 for that reason. But such inaction, together with the existing Vermont statute requiring legislative approval before construction of an SNF storage facility, would itself have been subject to attack on AEA preemption grounds as a regulation of plant operation. *See PG&E*, 461 U.S. at 212 (regulation of "operation of a nuclear powerplant …even if enacted out of non-safety concerns, would nevertheless conflict with the NRC's exclusive authority over plant … operation" and therefore be preempted); *VYNPC*, 683 F.3d at 1346-47 (Vermont's CEDF fee on Entergy in connection with Act 74 likely preempted as "a form of blackmail for the state approval of the construction [of an SNF storage facility]"). Entergy's attempt to work collaboratively with Vermont officials rather than rushing to court with a preemption suit in 2005 does not purge the safety purpose from Act 74's legislative-approval requirement.

In short, abundant evidence from Act 74 shows that safety/health was not only a purpose of Act 74's legislative-approval requirement, but the primary or but-for purpose. SPA81. Accordingly, the district court properly found it preempted.

3. The District Court Correctly Relied On Legislative History

Defendants (Br. 31, 42-43 & n.14) and their *amici* (New York Br. 22-23; Nat'l Conf. of State Leg. Br. 8-11) err in their main critique of the district court's meticulous opinion, which is that the district court, in their view, should not have used legislative history to determine Act 160's and Act 74's preempted nuclear safety purpose. To begin with, Defendants are incorrect to suggest that *PG&E* foreclosed resort to legislative history. To the contrary, *PG&E* expressly relied on a legislative committee report to find that the challenged statute there "was aimed at economic problems, not radiation hazards." 461 U.S. at 213. And two lower-court decisions applying AEA field preemption under *PG&E*— cited by the district court, SPA64-65, but ignored by Defendants—similarly determined legislative purpose based on legislative history. In *Skull Valley*, 376 F.3d 1223, the Tenth Circuit found a preempted nuclear safety purpose based on statements by the "state legislator who sponsored [the challenged provisions]" and the Governor, who proclaimed that the provisions would "add substantially to our ability as a state to protect the health and safety of our citizens." *Id.* at 1252-53 (citation and internal quotation marks omitted). And in *Long Island Lighting Co. v. Cnty. of Suffolk*, 628 F.Supp. 654 (E.D.N.Y. 1986), the court did not end its inquiry with the challenged statute's proffered purpose (to prevent the county's police powers from being usurped by an NRC-approved test of the evacuation plan for the plant), *id.* at 665,

but considered the history behind that statute and the implausibility of the proffered purpose, *id.* at 665-66.

Contrary to Defendants' suggestions (Br. 37), it is of no moment that *PG&E* rejected the argument that *other* state laws that were "more clearly written with safety purposes in mind" could taint the challenged statute. *PG&E*, 461 U.S. at 215. The legislative histories surveyed by the district court exhaustively here are those underlying Acts 160 and 74 rather than some other statute "not before the Court," *id.* at 216.[22]

To be sure, *PG&E* observed that "inquiry into legislative *motive* is often an unsatisfactory venture." *Id.* at 216 (emphasis added) (citing *United States v.*

[22] Just as other statutes cannot be used to show that the challenged statute is preempted, they cannot be used to sustain the challenged statute. *Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("'the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute'") (citation omitted). Defendants' invocation (Br. 6-10, 12) of a panoply of Vermont statutes and other state materials besides those challenged here is therefore unavailing. Moreover, at least one of those statutes was predicated on preempted radiological safety concerns: 30 V.S.A. § 248(e)(1) (enacted by 1975 Vt. Acts & Resolves No. 23, not, as Defendants claim (Br. 12), by 1977 Vt. Acts & Resolves No. 11) grew out of a bill proclaiming that "[t]he general assembly recognizes that substantial questions have been raised concerning safety and the effect on public health of fission fueled electrical energy plants." H.127, An Act To Add 30 V.S.A. § 248(c) Relating To Issuance of Certificates of Public Good (1975). As to other statutes purportedly based on an energy-planning purpose, that purpose is inapposite to shutting down a merchant generator. *See* Point I.B, *infra*.

O'Brien, 391 U.S. 367, 383 (1968)).[23] But even if a single isolated legislator's subjective statement cannot be determinative, there can be no doubt that *PG&E* made objective legislative *purpose* the touchstone of AEA preemption. And while *PG&E* cautioned against relying on indicia of legislative history that are "subject to varying interpretation," 461 U.S. at 216, those indicia are in this case "overwhelming," SPA77, and "crystal clear," SPA79, in demonstrating that the challenged statutes were grounded in safety concerns. *See* Point I.A.2, *supra*; *cf. Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (applying *O'Brien*: "in the absence of a showing that a more significant segment of the Minnesota legislature shared Senator Marty's views, we are not inclined to conclude that his statements accurately reflect the legislative purpose"); *In re World Trade Ctr. Disaster Site Litig.*, 270 F.Supp.2d 357, 369-70 (S.D.N.Y. 2003) (similar).

Defendants are similarly wrong in arguing (Br. 39-40 & n.13) that courts may not look beyond the legislature's *proffered* purpose in ascertaining whether preempted purposes animated a statute. *PG&E*'s footnoted discussion, 461 U.S. at 216 n.28, of *Perez v. Campbell*, 402 U.S. 637 (1971), furnishes no such support. In *PG&E*, petitioners did not cite *Perez* to justify consulting legislative-history

[23] After citing *O'Brien*, *PG&E* offered a second "reaso[n] why we should not become embroiled in attempting to ascertain California's true motive." *Id.* at 216. That reason concerned the plausibility of the state's proffered non-safety rationale. *Id.* As explained in Point I.B, *infra*, however, the Vermont legislature's proffered non-safety purposes are inapposite to Vermont Yankee.

materials to discern the legislature's true purpose; indeed, that section of their brief did not refer to such materials. Rather, they cited *Perez* to argue that, "*whatever its asserted purpose*,"[24] the state moratorium on nuclear plant construction was preempted because it would "'frustrate' … [t]he major purpose of the initial passage in 1954 of the [AEA] … to encourage the private development of nuclear energy for peaceful purposes."[25] *PG&E* rejected petitioners' reliance on *Perez* only because a state moratorium based on economic concerns would come within states' traditional authority over retail utilities and hence would not conflict with Congress's goal to promote nuclear power. *PG&E*, 461 U.S. at 216 n.28. By contrast, "[a] state prohibition on nuclear construction *for safety reasons*" like the one here "would … be in the teeth of the [AEA]'s objective to insure that nuclear technology be safe enough for widespread development and use—and would be preempted for that reason." *Id.* at 213 (emphasis added).

In contexts other than the AEA, this Court has flatly rejected any effort like Defendants' here to treat the enacted statute's articulation of a non-preempted purpose as conclusive without inquiry into true purpose as revealed by legislative

---

[24] Petitioners' Br. 33, *PG&E*, 461 U.S. 190 (1982) (No. 81-1945), 1982 WL 957209 (emphasis added); *see also id.* at 48 (similar). *Amici* New York *et al.* (Br. 19) quote the latter page out of context, omitting the lead-in phrase: "Even if Section 25524.2 had not been enacted to regulate protection against radiation hazards, …."

[25] Petitioners' Br. 33, *PG&E* (quoting *Perez*, 402 U.S. at 651).

history. And with good reason, for Defendants' approach would enable States to avoid field preemption by the simple expedient of inserting language about non-preempted purposes into a statute otherwise redolent of purposes reserved to the federal government.[26]

In *Greater N.Y. Metro.* (relied upon by the district court at SPA66, 69, 74), for example, this Court considered whether a New York City ordinance concerning cigarette advertising was preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which preempts any "'requirement or prohibition *based on smoking and health* … with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.'" 195 F.3d at 105 (quoting 15 U.S.C. § 1334(b)) (emphasis added). The ordinance's "Declaration of legislative findings and intent" proffered a non-health purpose, namely "'to strengthen compliance with and enforcement of laws

[26] For similar reasons, the Supreme Court and this Court routinely look behind proffered legislative reasons to legislative history in other constitutional contexts where purpose is the touchstone. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (in Establishment Clause context, refusing to accept the "Act's stated purpose … to protect academic freedom" and instead consulting, *inter alia*, "legislative history that the purpose of the legislative sponsor" was to promote religion); *Consol. Edison Co.*, 292 F.3d at 344, 355 (in Bill of Attainder Clause context, refusing to accept the statute's "declaration of legislative findings" claiming a purpose "to protect the health, safety and economic interests of … customers," and instead consulting, *inter alia*, "the stated intent of at least some legislators—most notably one of the floor managers of the legislation—to punish Con Ed").

prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales.'" *Id.* at 108. This Court refused "blindly [to] accept th[is] articulated purpose," and instead "consider[ed] both the *purpose* of the ordinance as a whole, and the ordinance's actual *effect*, to determine whether it is 'based on smoking and health.'" *Id.* Regarding purpose, this Court consulted "the legislative history of the ordinance," which was "'replete' with references to the twin purposes of promoting 'health' and combating the dangers of smoking." *Id.*; *see also id.* at 108 n.1 (noting, *inter alia*, that "the primary sponsor of the law … [had] detailed the health risks of smoking" during a committee meeting); *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994) ("Reading the entire declaration of legislative findings and intent clarifies the secondary role of the City's economic motivations compared to its health concerns.").

Defendants seek (Br. 38-39 & n.12) to distinguish *Greater N.Y. Metro.* on the ground that FCLAA preemption requires a showing of both a purpose to regulate health *and* an effect on health. But *Greater N.Y. Metro.*'s purpose analysis applies, if anything, *a fortiori* to AEA preemption, which *PG&E* holds triggered by a showing of preempted safety purpose alone, *see PG&E*, 461 U.S. at 213 (state regulation "grounded in safety concerns falls squarely within the preempted field"); *see Skull Valley*, 376 F.3d at 1252 ("the Road Provisions were

enacted for reasons of radiological safety and are therefore preempted").[27] In any event, if both purpose and effect are required, the district court was correct in observing that "preempted 'effect' [can be] satisfied largely [based on] a preempted purpose," SPA69, and here, the effect of both Acts 74 and 160—to shut down Vermont Yankee in March 2012 absent a further legislative enactment authorizing operation beyond that date—could hardly have a more starkly preempted effect, for it would thwart altogether the federal government's decision to license the plant as fully safe.[28]

---

[27] This Court has likewise looked to legislative history in other contexts where preemption is triggered by statutory purpose. In *Loyal Tire*, this Court addressed a federal statute that "preempts state and local regulation 'related to a price, route, or service of any motor carrier … with respect to the transportation of property,'" 445 F.3d at 142 (quoting 49 U.S.C. § 14501(c)(1)), subject to an exception for regulations for which "'the purpose and intent of the body passing the law at issue, whether state or municipality, was truly safety,'" *id.* at 145 (quoting *Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir. 2005)). The municipality sought to defend its law by citing the law's "general, prefatory provision which states that the towing regulations as a whole are in the interest of public safety." 445 F.3d at 146. Looking beyond that preface to "the extant legislative history," the Court found that "the minutes from town meetings … contain no discussion whatsoever of safety concerns, but instead are replete with expressions of dissatisfaction with services provided by Loyal Tire and a desire to exclude Loyal Tire, as well as other out-of-town businesses, from the town's rotating tow list." *Id.*

[28] Defendants also argue (Br. 40 n.13) that *Greater N.Y. Metro.* is inapposite because it quoted *Gade*, 505 U.S. at 106, which in turn quoted *Perez*, 402 U.S. at 651-52, which *PG&E* deemed inapposite to the petitioners' argument, *see* 461 U.S. at 216 n.28. As explained *supra*, at 47-48 & nn.24-25, the *PG&E* petitioners, unlike Entergy, were not invoking this language to justify reaching legislative history of the challenged statute that contradicted the purpose articulated in the text.

Defendants' intimations that the "true purpose" of Acts 160 and 74 is unknowable, and that the district court thus misstepped in its careful examination of legislative history, are misplaced. In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 861 (2005), the Court rejected the government's similar suggestions in the context of a successful Establishment Clause challenge to the repeated posting of the Ten Commandments in public spaces, explaining:

> Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country …. The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, *legislative history*, and implementation of the statute, or comparable official act.…The cases with findings of a predominantly religious purpose point to the straightforward nature of the test.… [I]n *Edwards* [*v. Aguillard*, 482 U.S. 578, 586-88 (1987)], we relied on a statute's text and the *detailed public comments of its sponsor*, when we sought the purpose of a state law requiring creationism to be taught alongside evolution.

Id. at 861-62 (citations and internal quotation marks omitted; emphases added).[29]

Building Industry Electrical Contractors Association v. City of New York, 678 F.3d 184 (2d Cir. 2012) ("*BIECA*") (cited at Def. Br. 40, 42-43), is inapposite.

---

[29] In quoting *McCreary*'s disclaimer of "'any judicial psychoanalysis of a drafter's heart of hearts'" (Def. Br. 43 n.14 (quoting *McCreary*, 545 U.S. at 862)), Defendants omit *McCreary*'s express approval of consulting "legislative history," 545 U.S. at 862 (internal quotation marks and citations omitted), and recognition that *Edwards* did exactly that, *see McCreary*, 545 U.S. at 862 (citing *Edwards*, 482 U.S. at 586-88). Defendants offer no support for their assertion that *McCreary*'s "civil rights framework" "differs markedly from" "[p]reemption analysis." Br. 42. To the contrary, in both frameworks, the constitutional constraint on state legislation turns on the state legislature's purpose.

BIECA involved the unique context of National Labor Relations Act preemption as applied to project labor agreements ("PLAs") entered into by cities; such PLAs are not preempted if the city is acting as a market participant rather than a regulator. *See id.* at 188. In that context, the city's purpose is irrelevant to whether the city is acting as a market participant. *See id.* at 192 ("It is hard to see why, *even if political favoritism was a motivating factor* in the City's decision to contract with particular contractors or unions, the PLAs would thereby be transformed into *regulations*.") (first emphasis added); *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (similar). *BIECA*'s Establishment Clause example, 678 F.3d at 191 (citing *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)), pre-dates *Edwards* and *McCreary*, which make clear that courts should scrutinize a legislature's proffered purpose by examining legislative history. *See supra*, at 52 & n.29.[30]

B. The Non-Safety Purposes Conjured By The Vermont Legislature Are Not Plausibly Advanced By A Shutdown Of Vermont Yankee

The district court's analysis did not stop with direct evidence of Vermont's legislative purpose from Act 160's and Act 74's text and history, but rather

[30] Even under *Mueller*, the proffered purpose must be plausible. *See Mueller*, 463 U.S. at 394-95 (describing "reluctance to attribute unconstitutional motives to the states, particularly when a *plausible* secular purpose for the state's program may be discerned from the face of the statute") (emphasis added). As explained in Point I.B, *infra*, the proffered purposes in the preambles to Acts 74 and 160 are not plausibly served by shutting down Vermont Yankee.

properly continued to considering whether Vermont's proffered non-safety purposes (such as energy diversity and need for power) were possible plausible reasons for the statute. As the district court correctly found, the non-safety purposes proffered for Act 74 and 160 fail that test, and thus provide further, circumstantial evidence of the statutes' preempted safety purposes. SPA75-77, SPA81.[31]

The key to understanding this conclusion by the district court is the fact that Vermont Yankee is a merchant plant generating electricity in interstate commerce, and not a retail utility regulated by the State. *PG&E* involved in-California retail utilities, *see* Petitioners' Br. ii, *PG&E*, 1982 WL 957209, whose costs of service were generally passed on to consumers, *see, e.g.*, *PUD No. 1*, 471 F.3d at 1063; *Consol. Edison*, 292 F.3d at 343. The Supreme Court found that California's "economic" interest in keeping those costs in check was a plausible non-safety reason for the challenged statute, which imposed a moratorium on new construction of nuclear plants until the federal government had approved a demonstrated method of SNF disposal, absent which plant operation could be

[31] *See also Auto. Club of N.Y., Inc. v. Dykstra*, 520 F.3d 210, 215 (2d Cir. 2008) ("First, a court 'must consider any specific expressions of legislative intent in the statute itself as well as the legislative history.' Then, it must assess those 'purported [non-preempted] justifications … in light of the existing record evidence.'") (quoting *Loyal Tire*, 445 F.3d at 145) (citation omitted; alteration in original); *Loyal Tire*, 445 F.3d at 146 (challenged statute must be "genuinely responsive" to proffered non-preempted purpose).

extremely costly, with costs in turn passed on to California ratepayers. *See PG&E*, 461 U.S. at 213-14 ("Without a permanent means of disposal, the nuclear waste problem could become critical, leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors."); SPA68 (district court's recognition that "the economic purpose professed in the legislative history [of the *PG&E* statute] was plausibly served by the moratorium at issue").

But Vermont Yankee is not a retail utility. It is a merchant generator that sells at market-based rates on the interstate wholesale market to retail utilities (not directly to consumers), has no monopoly power, and does *not* have its rates set by a regulator on the basis of its costs. *See Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004); *PG&E*, 461 U.S. at 205-06 (states' traditional authority over retail utilities is subject to "the exception of the broad authority of [FERC] over the need for and pricing of electrical power transmitted in interstate commerce").[32] More to the point regarding the primary non-safety purposes proffered by Acts 74 and 160 (namely, "the state's need for power … choice of power sources among various alternatives," Act 160, § 1(a);

[32] *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009), is not to the contrary. There, the court upheld *the federal authority of ISO-NE and FERC* to regulate capacity "require[d] for reliability." *Id.* at 480. While the court suggested in *dicta* that States retain the right to require retirement of existing generating facilities, *id.* at 481, that *dicta* did not address the permissible bases on which a State could so require.

see also 10 V.S.A. § 6521 (similar for Act 74)), Vermont is free to pursue its proffered non-safety purposes by declining to purchase any power from Vermont Yankee, and instead purchasing (or directing its utilities to purchase)[33] from whichever "diverse group of renewable, sustainable" (Def. Br. 33) sources it prefers. *See PUD No. 1*, 471 F.3d at 1066 ("Local energy utilities, could, rather than producing their own power to sell to the public, choose between various competing producers…."); A1662 (similar). (Vermont's professed interest is belied by the Board's recent approvals of Vermont retail utilities' contracts to purchase power from a nuclear plant in New Hampshire. *See, e.g.*, *Green Mountain Power Corp.*, Docket No. 7742, 2011 WL 5507224, at *1 (Vt. Pub. Serv. Bd. Nov. 4, 2011); *see also* A551-52.)

Because Vermont Yankee is a merchant plant rather than a retail utility, the district court correctly found that the Vermont legislature's supposed interests in "the 'need' for power or … a viable choice among power sources" are "invalid" as applied to Vermont Yankee. SPA77.[34] Vermont can readily serve its interests in

---

[33] California has done so. *See Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, 2010 WL 2794334, at *19 (July 15, 2010).

[34] One of Defendants' witnesses speculated that shutting down Vermont Yankee could further the legislature's purported interest in energy diversity because Vermont Yankee's presence could lower power prices, "acting as a dampening effect on the development of alternatives." A194. But there is no evidence that this rationale was in the mind of any legislator when Acts 74 or 160 were passed, and it is contradicted by evidence that the legislature wanted a below-market PPA

assuring its desired power supply by contracting with its desired power sources, not by shutting down a merchant plant from which utilities in New Hampshire, Maine, or Connecticut might like to buy their power.

The Vermont legislature's additional proffered non-safety purpose—to address the "environmental impacts of long-term storage of nuclear waste," Act 160, § 1(a)—is equally unavailing because Defendants' opening brief identifies nothing in the legislative record describing any environmental impact of concern, *see Loyal Tire*, 445 F.3d at 146. In any event, this purported concern is preempted, regardless of its non-safety nature, as a regulation of SNF storage. *See Me. Yankee Atomic Power Co. v. Bonsey*, 107 F.Supp.2d 47, 54-55 (D. Me. 2000).

In short, even aside from the direct evidence of a safety purpose in the text and legislative history of the challenged statutes, the shutdown brought about by the legislative-approval requirement in Acts 74 and 160 is not "genuinely responsive," *Loyal Tire*, 445 F.3d at 146, to the non-safety purposes proffered in those Acts' preambles, furnishing an additional and independent ground for affirming the district court's finding that those provisions are AEA-preempted.

---

from Vermont Yankee, *e.g.*, A1677, and that diverse power sources have developed notwithstanding the existence of a nuclear plant in the grid, A251.

C. For The Same Reasons Act 74's § 6522(c)(4) Is Preempted, Its § 6522(c)(2) Is Preempted

As explained in Points I.A & B, *supra*, the district court correctly held that the legislative-approval requirement of Act 74's § 6522(c)(4) is preempted. The court would have invalidated § 6522(c)(2) for the same reasons had Defendants timely raised it before judgment as a free-standing legislative-approval requirement. SPA107. Entergy respectfully requests that relief from this Court.

II. THE AEA PREEMPTS THE LEGISLATIVE-APPROVAL REQUIREMENT OF ACTS 160 AND 74 AS APPLIED IN ACT 189 AND S.289

If this Court rejects the district court's facial preemption ruling, this Court should reach and accept Entergy's as-applied challenge. *See, e.g.*, *Pharma. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 78 (1st Cir. 2001) (rejection of facial challenge was "without prejudice to [challenger's] right to renew its preemption challenge after implementation of the Act, … 'as applied'"). Two applications of Act 74/160's legislative-approval requirement were clearly grounded in safety concerns.

Act 189. In 2008, the Vermont legislature enacted Act 189, which implemented Act 160's provisions commissioning studies that must be considered by the legislature in making the future decision whether to authorize post-March 2012 operation of Vermont Yankee. *See* SPA82. Abundant evidence shows Act 189's safety purpose. The bill was titled "An Act Relating to an Independent

Safety Assessment of the Vermont Nuclear Facility," SPA42 (emphasis added), and made more than 14 other references to "safety," *see* A1752-58. In what was now a familiar refrain, after legislators were coached to avoid that word, *see, e.g.*, A1706; A1708; A1716, "safety" was promptly replaced by "reliability." *Compare* A1751, *with* Act 189, as enacted (SPA146). Even after those changes, legislators continued to describe Act 189 as calling for a safety assessment, *see, e.g.*, PX 302; PX 417; indeed, the Act called for extensive review of Vermont Yankee's safety systems, while omitting to address the two non-safety plant components (turbine and generator) most important to reliability, A276-78; A280; A153-54; A789; SPA48.[35]

S.289. In 2010, soon after a tritium leak (found by the NRC not to have adversely affected public health or safety, A647), Vermont Senators sought to seize upon Vermont Yankee's bad press and curry favor with anti-nuclear constituents by voting against this straw-man bill that would have authorized post-March 2012 operation. SPA50-51. This "blatant political maneuver," A1741, not surprisingly led to a vote against the bill, a vote held before the receipt of materials that a non-safety-focused legislature would have at least considered before voting. Most notably, although an Act 189-created panel had commissioned an updated

[35] Moreover, because Vermont is free not to purchase power from Vermont Yankee if it considers the plant unreliable, *see* Point I.B, *supra*, any reliability concern is not plausibly advanced by shutting down Vermont Yankee.

assessment of the plant's "reliability" in the wake of the leak, A641, the Senate voted on February 24, 2010, before receiving the report. (The report was issued on April 30, 2010, and found that the leak "did not affect the overall reliability of the plant." A645.) This "sequence of events," *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977), powerfully demonstrates that the rejection of S.289 was grounded in safety concerns.

III. THE DORMANT COMMERCE CLAUSE PROHIBITS DEFENDANTS FROM CONDITIONING VERMONT YANKEE'S CONTINUED OPERATION ON PREFERENTIAL POWER PURCHASE AGREEMENTS FOR VERMONT UTILITIES

The district court correctly determined that Vermont's scheme to extract a below-market PPA from Entergy as a condition of approval of post-March 2012 operation violated the Dormant Commerce Clause. SPA86-93. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978) (similar). State regulation impermissibly discriminates against interstate commerce where it accords "differential treatment [to] in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Here, as the district court found, Vermont applied the Act 74/160 legislative-approval requirement to discriminate against interstate commerce by demanding that Entergy provide more favorable rates to in-state than out-of-state retail utilities (at least in part to compensate Vermont for the safety risk perceived by legislators). SPA96. Such a requirement violates the dormant Commerce Clause. *See, e.g.*, *New England Power*, 455 U.S. at 336, 339 (statute requiring a hydroelectric generating company to sell its power in-state "at special rates adjusted to reflect the entire savings" attributable to its low costs violated the Commerce Clause because it was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states"); *Brown-Forman*, 476 U.S. at 580 (Impermissible "[e]conomic protectionism … may include attempts to give local consumers an advantage over consumers in other States.").

Defendants argue (Br. 47-48) that the district court applied the wrong legal standard in granting injunctive relief by focusing on Vermont's "intent" to condition the continued operation of Vermont Yankee on agreement to a below-market PPA. But the district court found more than an "intent" to discriminate; it determined that both DPS and legislative leaders told Entergy that a favorable PPA was required for continued operation. SPA89-92. In light of the substantial

evidence in the record supporting this finding, A174-75, A240-42, A573-75, A754, A759, A762-63, A787, Defendants do not argue that it was clearly erroneous.[36]

Defendants also contend (Br. 54) that the district court "misunderstood" interstate power markets. But Defendants never argued below that Entergy's claim failed because it is impermissible to "revie[w] rates in isolation" (Br. 55); this argument is therefore waived. *See, e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008). In any event, the evidence at trial showed that Vermont officials could—and did—compare the value of energy contracts in pushing for a below-market PPA from Entergy. *See, e.g.*, A166.

Defendants' contention (Br. 56) that it was legitimate for state officials "to push for a good deal" for Vermonters likewise fails as a matter of law. While a State, as a *market participant*, "may pick and choose its business partners, its terms of doing business, and its business goals—just as if it were a private party," *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995), a State, as *regulator*, may not demand that an interstate wholesale generator provide preferential treatment to in-state utilities over out-of-state utilities, *see, e.g.*, *New England*

[36] *Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (cited at Def. Br. 47), is inapposite. *Gold* held that, *on its facts*, there was insufficient evidence of intent to violate law, not that such intent can never support injunctive relief. *Alleyne v. New York State Education Department*, 516 F.3d 96, 101 (2d Cir. 2008) (cited at Def. Br. 49), is inapposite because the district court there, unlike the court here, had failed to comply with FRCP 52(a)(2) and 65(d)(A).

Power, 455 U.S. at 338-39; *Brown-Forman*, 476 U.S. at 580. As explained, the district court found that Vermont officials used regulatory leverage to attempt to extract "rates that would not otherwise be available to the utilities *if they were negotiating on the same footing as customers in other states*."[37] SPA93 (emphasis added).

Defendants' procedural arguments—new on appeal—are equally unavailing. *First*, Defendants contend that Defendants Peter Shumlin (the Governor) and William Sorrell (Attorney General) should not have been enjoined because they "lac[k] authority under state law to commit the violations in question." Br. 48. But neither Defendant raised this argument below, and it is therefore waived. *Nortel Networks,* 539 F.3d at 132.[38] In any event, under *Ex parte Young*, 209 U.S. 123 (1908), the official against whom suit is brought need only have *some* connection with the action sought to be enjoined. *See, e.g.*, *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372-73 (2d Cir. 2005). Here, Defendant Shumlin appointed and may remove the DPS Commissioner, 30 V.S.A. § 1(b), and

---

[37] Defendants' intimation (Br. 56) that DPS simply sought for Entergy to provide favorable terms *in comparison to other means of power generation* is belied by DPS's statement that the Board should reject any argument that Entergy "cannot provide a price below long-term market expectations" and should "require that a favorably-priced PPA be made available to Vermont utilities before it makes an affirmative finding" of general good. A787.

[38] Defendants' failure to raise this argument below is especially prejudicial because it prevented Entergy from amending its complaint to name other State officials.

Defendant Shumlin has the constitutional duty to execute Vermont law, VT. CONST. §§ 3, 20. And Defendant Sorrell is charged with advising state officials on the law and enforcing a shutdown of Vermont Yankee if the legislature or the Board declines to grant a new CPG based on the lack of a below-market PPA. 3 V.S.A. § 159.

Second, Defendants unpersuasively contend that the injunction inappropriately "restrains a quasi-judicial state agency rather than a private actor." Br. 52. The Board Defendants are Vermont officials who have been sued in their official capacities for prospective injunctive relief. This is precisely the procedure of *Ex Parte Young*, and it has been applied to suits against public service commissioners. *See, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 639 (2002).[39]

Third, Defendants' ripeness argument (Br. 51-52) likewise fails. Ripeness has both constitutional and prudential components. *See, e.g.*, *Ehrenfeld v. Mahfoud*, 489 F.3d 542, 545-46 (2d Cir. 2007). Entergy's claim is constitutionally ripe because substantial evidence showed that Vermont was already acting (not merely threatening to act) upon its demand that Entergy provide a below-market PPA. Specifically, the legislature declined to exercise its Act 74/160 role to

[39] *Dean v. Coughlin*, 804 F.2d 207 (2d Cir. 1986) (cited at Def. Br. 53), unlike this case, involved ongoing federal court *administration* of state facilities.

authorize the Board to proceed in part because Entergy had not committed to a below-market PPA. *See* A174-75, A240-42, A573-75, A754; *Middle S. Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 410-11 (8th Cir. 1985) ("It can hardly be doubted that a controversy sufficiently concrete for judicial review exists when the proceeding sought to be enjoined is already in progress."). And there was substantial additional evidence that, if the Board were authorized to proceed, it would impose the same condition. SPA89-91.

Defendants did not raise prudential ripeness below, and thus have waived it. *See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1767 n.2 (2010). In any event, the argument fails because Defendants offer no legitimate reason to postpone review of the claim until after the conclusion of proceedings before the Board. Even aside from the facts just discussed that satisfy constitutional ripeness, the claim here presents a purely legal issue. *See, e.g.*, *PG&E*, 461 U.S. at 201 (AEA preemption issue ripe because, *inter alia*, it was "predominantly legal").[40]

[40] Defendants' authorities (Br. 51 & n.20) are inapposite. For example, in *Connecticut v. Duncan*, 612 F.3d 107, 114 (2d Cir. 2010), the district court had determined that "it would benefit from a more developed administrative record." In *Middle S. Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 491 (5th Cir. 1986), the dispute involved *potential* regulatory action, whereas here the legislature has already acted upon the impermissible condition.

The judgment on the Dormant Commerce Clause claim should therefore be affirmed. In the event that this Court concludes that the district court erred in granting *injunctive* relief, this Court should grant *declaratory* relief, which Entergy requested, A1838-39; SPA3, but the district court did not address.

IV. THE FPA PREEMPTS ANY VERMONT REQUIREMENT REGARDING RATES CHARGED FOR VERMONT YANKEE'S POWER

Entergy demonstrated that the below-market PPA condition is also preempted by the FPA because it effectively sets rates that are different from those approved by FERC. *E.g.*, A838-40, A1650, A1661-62, A1689. The district court did not reject the theory of Entergy's FPA claim, but deemed the claim premature because Entergy has not yet entered into a below-market PPA with a Vermont retail utility; according to the court, Entergy could obtain relief from FERC upon doing so by asking for a ruling that the below-market PPA is not a just or reasonable rate. SPA85.

The court erred. FERC has already approved a market-based tariff for Entergy's sales of Vermont Yankee power on the interstate wholesale market. Such a tariff is a forward-looking authorization of contracts and sales between a willing buyer and seller negotiating at arm's length. Under the species of FPA preemption known as the filed-rate doctrine, Vermont's condition is preempted

because it interferes with FERC's assumption even before it culminates in a below-market PPA.

The FPA requires that all wholesale electricity rates be "just and reasonable," 16 U.S.C. § 824d(a), and grants FERC "*exclusive authority* to regulate the transmission and sale at wholesale of electric energy in interstate commerce," *New England Power*, 455 U.S. at 340 (emphasis added); *see also* 16 U.S.C. § 824(b)(1). A State "must … give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

Under the "filed rate doctrine," States are preempted from requiring the payment of rates other than the filed rate. *See, e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003). Over the past two decades, FERC has permitted sellers of wholesale electricity to file "market-based" tariffs that, "instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into *freely negotiated* contracts with purchasers." *Morgan Stanley*, 554 U.S. at 537 (emphasis added); *see also id.* at 562 n.2 ("The regulatory system created by the [FPA] is premised on contractual agreements *voluntarily* devised by the regulated companies ….") (emphasis added). Every circuit to have addressed the issue has held that a market-based tariff, like other tariffs filed with FERC, is

subject to the filed-rate doctrine. *See, e.g., Tex. Comm. Energy v. TXU Energy, Inc.*, 413 F.3d 503, 509-10 (5th Cir. 2005).[41]

It is the market-based tariff filed with and authorized by FERC—not, as the district court erroneously concluded, SPA85-86, the rate in a particular contract negotiated under the umbrella of the market-based tariff—that precludes States from requiring payment of rates other than the filed market-based rate. *See, e.g., Entergy La.*, 539 U.S. at 47; *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988). Here, FERC authorized Entergy to sell Vermont Yankee's power at market-based rates on the assumption that such rates would be negotiated at arm's length, but Vermont interfered with that assumption. A843, A608-17. The FPA preempts such state action.

CONCLUSION

The judgment should be affirmed insofar as it ruled that Act 160 and 10 V.S.A. § 6522(c)(4) are preempted by the AEA, and that Defendants are enjoined, as barred by the Dormant Commerce Clause, from conditioning approval of Vermont Yankee's continued operation on Entergy's commitment to sell Vermont Yankee's power to Vermont utilities at below-market prices. This Court should modify the judgment by ruling that 10 V.S.A. § 6522(c)(2) is also preempted by

[41] The issue is raised in *Simon v. KeySpan Corp.*, No. 11-2265-cv (2d Cir.) (pending).

the AEA, and that the condition barred by the Dormant Commerce Clause is also preempted by the FPA.

Dated: August 31, 2012

Respectfully submitted,

/s/ Kathleen M. Sullivan

Kathleen M. Sullivan
Faith E. Gay
Robert C. Juman
Sanford I. Weisburst
William B. Adams
Ellyde Roko
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100

Marcus V. Brown
Wendy Hickok Robinson
ENTERGY SERVICES, INC.
639 Loyola Avenue, Suite 2600
New Orleans, LA 70113
Telephone: (504) 576-2765

Timothy A. Ngau
ENTERGY SERVICES, INC.
1340 Echelon Parkway
Jackson, MS 39213
Telephone: (601) 368-5680

Robert B. Hemley
Matthew B. Byrne
GRAVEL & SHEA PC
76 St. Paul Street, 7th Floor
Burlington, VT 05402-0369
Telephone: (802) 658-0220

Attorneys for Plaintiffs-Appellees-Cross-Appellants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in FRAP 28.1(e)(2)(B), because it contains 16,451 words, excluding the parts of the brief exempted by the rule.

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because it has been prepared in proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan
Attorney for Plaintiffs-Appellees-Cross-Appellants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.