12-707-CV(L)

12-791-CV(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ENTERGY NUCLEAR VERMONT YANKEE, LLC
and ENTERGY NUCLEAR OPERATIONS, INC.,
Plaintiffs – Appellees – Cross-Appellants,

v.

PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD,
Defendants – Appellants – Cross-Appellees.

On Appeal from the United States District Court for the District of Vermont

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BRIEF OF CROSS-APPELLEES AND
REPLY BRIEF OF APPELLANTS

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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
AEA	Atomic Energy Act
BIECA	*Building Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184 (2d Cir. 2012)
Board or PSB	Vermont Public Service Board
CPG	Certificate of Public Good
D.E.	Docket Entry (from district court proceedings)
Doc.	Document filed in this proceeding
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
H.J.	Vermont House Journal (H.J.), *available at* http://www.leg.state.vt.us/ResearchMain.cfm (click on "Main Legislative Documents page")
NRC	Nuclear Regulatory Commission
NRC Letter	Letter from Nuclear Regulatory Commission Staff to Vermont Department of Public Service (Oct. 2, 2012), *available at* http://pbadupws.nrc.gov/docs/ML1225/ML122540962.pdf

PG&E	*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)
PPA	Power Purchase Agreement
PX	Plaintiffs' Exhibit (from district court proceedings)
RSA	Revenue Sharing Agreement
S.289	Vermont Senate Bill No. 289 (2010)
State's Ex.	State's Exhibit (from district court proceedings)
Vermont Yankee	Vermont Yankee Nuclear Power Plant

INTRODUCTION AND SUMMARY

Vermont enacted Act 160 so that the State Legislature — along with the Public Service Board ("PSB" or "Board") — could participate in the State's decision whether to relicense the Vermont Yankee nuclear plant. The State has long sought to encourage the development of in-state renewable energy and fuller civic participation in decisions about nuclear energy, a non-renewable resource. Nothing about that change to state process runs afoul of the Supremacy Clause. As the Supreme Court has made clear, a state can impose a moratorium on nuclear power "through a legislative judgment, applicable to all cases," *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 215 (1983) ("*PG&E*"); only a moratorium solely "grounded in safety concerns" is preempted, *id*. at 213. It is axiomatic, however, that a statute creating a process without any pre-ordained result about the relicensing of the Vermont Yankee plant is not preempted under the Atomic Energy Act ("AEA"). Indeed, the only textual argument that Entergy can muster is a provision in Act 160 that empowers the State to "study" "public health." SA133. But public health is not the same as radiological safety, and, more importantly, studying a problem is not the same as exerting regulatory power within the scope of the preemptive field. And even if a study provision somehow raises preemption concerns, *PG&E* itself confirms that a

state statute is not preempted merely because some safety concerns may be present along with the State's other, non-preempted purposes.

In attempting to defend the district court's erroneous analysis, Entergy appears to recognize the weak grounding of the court's holding. Entergy pays little attention to Act 160's text and instead relies almost exclusively on extraneous material like legislator statements in an attempt to mask the simple procedural change embodied in that statute. The Supreme Court, however, decisively rejected the very analytical approach advocated by Entergy and accepted by the district court. Courts do not rest preemption judgments on legislator statements precisely because of the inherent uncertainty in knowing under what standards to evaluate such statements. Those concerns are amplified in this case, where Entergy points to only five legislators (out of 156) who made statements about safety. And even those statements addressed bills that were long superseded in the legislative process by the bill ultimately enacted.

Entergy's defense of the district court's dormant Commerce Clause injunction is equally unavailing. The court lacked any evidence of an "ongoing" violation because there is none: once the court held Act 160 preempted, the Board began its work on the relicensing application, and it has not yet rendered a decision. The court's injunction also fails for lack of any factual findings of

favoritism to in-state business, any basis for enjoining the Governor and the Attorney General, or a ripe claim to evaluate.

Entergy's cross-appeal under the Federal Power Act ("FPA") has no merit. The district court correctly determined that there is no agreement involving the State or its officials to invalidate. Without any impermissible rates to review, the court properly denied Entergy's claim — a claim that, in any event, falls within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").

ARGUMENT

I. ACT 160 IS NOT PREEMPTED

A. Congress Preserved State Authority To Decide Whether Nuclear Plants, Including Merchant Generators, Will Operate Within State Borders

The AEA includes two savings clauses expressly preserving state authority, one of which authorizes states "to regulate activities [of nuclear power plants] for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k); *see id.* § 2018. As the Supreme Court has recognized, under the "dual regulation" of nuclear power that Congress devised, states are not required to authorize the construction or operation of nuclear plants, even if the plant has received a federal license. *PG&E*, 461 U.S. at 205-12; *see* State's Br. 4-5, 29-31.

The Nuclear Regulatory Commission ("NRC") has long held — and reaffirmed in its decision to renew the Vermont Yankee facility's federal license

— that it "does not have a role" in deciding "whether a particular nuclear power plant should continue to operate." JA802; *see also* JA795-96, 799 (similar). Instead, the *states*, not the NRC, "ultimately decide" whether a nuclear plant will continue to operate. JA801. Indeed, regarding the Vermont Yankee plant itself, the NRC recently reiterated that the State maintains "an important approval path *in addition to* the NRC's review of radiological safety, security and environmental effects, to ensure that the plant will continue to promote the general good of the state." Letter from NRC Staff to Vermont Department of Public Service ("DPS") (Oct. 2, 2012) ("NRC Letter") (emphasis added).[1] The NRC's interpretation of the AEA is entitled to *Chevron*[2] deference. *See, e.g.*, *Environmental Def. Fund v. NRC*, 902 F.2d 785, 788-89 (10th Cir. 1990) (citing cases).

Given that undisputed state role, Act 160 provides a process for the State Legislature to be involved in decisions concerning the renewal of the Vermont Yankee license. The express savings clauses in the AEA and the NRC's interpretation of those provisions preserve state authority to refuse to authorize the continued operation of nuclear plants generally and the Vermont Yankee plant in particular. Nothing in the AEA preempts a state from taking such a step by including the state legislature as part of that process, which is Act 160's function.

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[1] *Available at* http://pbadupws.nrc.gov/docs/ML1225/ML122540962.pdf.

[2] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In fact, the Supreme Court in *PG&E* expressly accepted that states can act "through a legislative judgment" in determining whether to have in-state nuclear power generation. 461 U.S. at 215. Those authorities provide a complete answer to the claims of Entergy and its *amici* that Vermont is powerless to refuse to relicense Vermont Yankee through a process that includes the State Legislature. Entergy Br. 51; Chamber of Commerce *Amicus* Br. 12. As the NRC explains, its decision to relicense a nuclear plant simply "provide[s] an *option* that allows for power generation." JA801 (emphasis added). Neither the AEA nor any NRC regulation speaks to or preempts a state judgment to involve its legislature in the renewal decision of any nuclear license.

The NRC's interpretation also answers Entergy's assertion that Vermont Yankee's status as a "merchant generator" — that is, an electricity wholesaler currently unaffiliated with any electricity retailer — changes Vermont's authority to deny Vermont Yankee the license it needs to continue to operate. Entergy Br. 4, 11-13, 54-57. In renewing Vermont Yankee's federal license, the NRC expressly recognized Vermont's continued authority to "ultimately decide" whether that facility will continue to operate, JA801, which is "an important approval path in addition" to NRC review, NRC Letter, *supra*.

Nor can Entergy rely on the existence of FERC to deny Vermont's long-standing authority over the licensing of electricity generating facilities within its

borders. The FPA gives FERC authority to regulate interstate *sales* of power, but not to regulate generating facilities. Indeed, the FPA expressly states that FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).[3] As the D.C. Circuit recently explained, states "retain the right to forbid new entrants from providing new capacity, *to require retirement of existing generators*, to limit new construction to more expensive, environmentally-friendly units, or to take any other action *in their role as regulators of generation facilities* without direct interference from" FERC. *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (emphases added); *see also, e.g.*, *Southern California Edison Co. & San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, at *62,080 (1995) (FERC recognizing that states may encourage renewables by "deny[ing] certification of other types of facilities if state law so permits").

Finally, Entergy's argument that states have no interest in electricity generating facilities except insofar as those facilities are owned by public utilities that sell power to the state's residents rests on a flawed premise. States regulate all sorts of entities that produce goods and services for the interstate market pursuant to their general police power. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 273 (1932) ("It must be conceded that all businesses are subject to some

[3] There are limited exceptions not relevant here, such as FERC's regulation of hydroelectric facilities. *See* 16 U.S.C. § 797.

measure of public regulation."); *Pullman Co. v. Kansas ex rel. Coleman*, 216 U.S. 56, 66 (1910) (White, J., concurring) ("Subject to constitutional limitations, the states have the power to regulate the doing of local business within their borders."). Traditional state police powers apply to in-state companies that make many different products (e.g., tanks, anti-aircraft missiles, aircraft carriers, and submarines) even though no consumer in the state purchases those items. Such companies are subject to state blue-sky, corporate governance, tax, environmental, employment, and public-safety laws, and, if their corporate conduct raises questions of integrity or exposes a state to additional economic burdens, the state can deny a license to operate. *See, e.g., United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) (per curiam) ("a State may provide that . . . [a business] must obtain state approval before entering into business"); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1983 (2011) (plurality) (recognizing principle of "[r]egulating in-state businesses through licensing laws"). Indeed, Entergy's argument on this point is inconsistent with its own recognition that it needs a certificate of public good ("CPG") from the Board to continue to operate within Vermont. *See* JA311; SA94; State's Br. 17, 23.

So-called "merchant generators" are no different, in this regard, from any other business that sells its goods or services in interstate markets but requires a state license to operate.

B. Act 160 Is a Permissible Exercise of the State's Retained Authority Over the Relicensing of Nuclear Plants

1. In Act 160, Vermont conformed its state procedures for relicensing existing nuclear plants to its long-standing procedures for licensing new plants. Since 1975, a company seeking to construct a new nuclear plant has needed authorization from the Legislature as well as the Board. *See* Vt. Stat. Ann. tit. 30, § 248(e)(1) (imposing legislative moratorium on construction of new nuclear plants). *PG&E* expressly accepted the notion that a state can "reach[ ] the same decision through a legislative judgment, applicable to all cases," and does not need to act solely through a public utilities commission. 461 U.S. at 215. Act 160 extended that same, two-step process to relicensing decisions.

Nothing about that alteration of the licensing *process* implicates the federal government's exclusive authority over the "safety of nuclear technology" or nuclear plants. *Id*. at 208. Rather, consistent with decades of Vermont statutes and energy plans, the stated "Legislative Policy and Purpose" of Act 160 is to ensure the "full, open, and informed public deliberation and discussion" of factors relevant to relicensing, including "the state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives." Act 160, § 1(a)-(b); *see, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936) ("[A] preamble may not be disregarded.").

2. Entergy can point to only one sliver of statutory text in Act 160 that, it claims, infringes on the sphere of federal authority. Section 4 of Act 160 calls for the *study* of "long-term environmental, economic, and public health issues, including issues relating to dry cask storage of nuclear waste and decommissioning options." SA133. Entergy fastens on the words "public health," but those words cannot bear the weight Entergy places on them. Section 4 simply calls for the *study* of "public health issues" but does not propose to base any *regulation* on the results of such a study.[4] And, given that the State is authorized and expected to play an active, informed role in proceedings before the NRC and in other interactions with the federal government regarding nuclear plants, such an ability to study nuclear issues is plainly permitted by federal law. *See*, *e.g.*, 42 U.S.C. § 2021(a), (g), (*l*); JA253.

Furthermore, Entergy disregards the State's broad and non-preempted authority to protect the public health. The NRC's predecessor long ago recognized that nuclear plants can present public health issues that are unrelated to the

[4] Section 4 thus differs markedly from the laws found to be preempted in the two AEA cases that Entergy cites. In *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1228-29 (10th Cir. 2004), "Utah's Radiation Control Act" directly regulated radiological safety by, among other things, requiring each plant to have a "security plan" and a "radiation safety program," and to "post a cash bond of at least two billion dollars" to cover an "accidental release" of radioactive materials. In *Long Island Lighting Co. v. County of Suffolk*, 628 F. Supp. 654, 659 (E.D.N.Y. 1986), a local law made it a crime to participate in an NRC-mandated radiological emergency response plan.

radiological hazards within the federal government's exclusive jurisdiction. *See In re Vermont Yankee Nuclear Power Corp.*, No. 50-271, 4 A.E.C. 75, 80, 1968 WL 7171, at *5 (Apr. 8, 1968) (explaining that federal "regulatory jurisdiction as respects public health and safety is limited to radiological hazards"). Indeed, a nuclear facility, as a large industrial complex, presents many "public health issues" unrelated to radiation safety from nuclear operations: stormwater runoff, thermal discharges to rivers, and potential releases of diesel fuel and other non-radiological pollutants. Certain matters related to nuclear generation also are not preempted. The federal Clean Air Act allows states to set a more stringent standard for air emissions of radionuclides. *See* 42 U.S.C. § 7412(d)(9). And the NRC and the Federal Emergency Management Agency welcome state involvement in public health issues like emergency preparedness. *See* 10 C.F.R. § 50.47(a)(2) (considering adequacy of "State and local emergency plans" as part of licensing review).[5] In any event, nothing in Act 160 "regulate[s]" the safety aspects involved in "the construction or operation of a nuclear powerplant." *PG&E*, 461 U.S. at 212.

[5] *See also* NRC, *The Fiscal Year 2012 Department of Energy and Nuclear Regulatory Commission Budget* 25 (Mar. 17, 2011) (unofficial transcript of testimony presented to the U.S. House Energy and Commerce Committee) (NRC Chair noting that the NRC "defer[s] to state and local governments" to establish radius in which potassium iodine tablets should be distributed if there is a contamination event), *available at* http://www.nrc.gov/about-nrc/organization/commission/comm-gregory-jaczko/0317nrc-transcript-jaczko.pdf.

3. Unable to find in the statutory text any support for its preemption claim, Entergy next asserts that the purposes articulated in Act 160 itself are "implausible" and should be disregarded. Entergy Br. 28-29, 37-38. Act 160, however, fits squarely within the State's long history of energy plans and legislation seeking to address issues of cost, reliability, energy efficiency, and promotion of a diverse group of renewable, sustainable, in-state energy sources. State's Br. 6-10. The purposes set forth in Act 160 plainly satisfy any test of plausibility. *See, e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (looking to whether a "plausible policy reason" exists for legislative action, whether the factual basis could rationally have been considered true, and whether the relationship to the legislative goal "is not so attenuated as to render the distinction arbitrary or irrational").

Entergy has no basis in the record for questioning that Vermont's energy policy favors renewable, sustainable energy sources and that Vermont has long evinced the intent to develop in-state renewable energy sources. Instead, Entergy contends (at 54-57) that Vermont could have achieved its goals while renewing Vermont Yankee's license. But, when a court reviews a legislature's actions in this context, the question is simply "whether there are 'plausible' reasons for [legislative] choices." *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997). The court does not have "license" to second-guess "the

wisdom, fairness, or logic of legislative choices" in light of the legislature's goals. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (quotations omitted).

Yet that is exactly what Entergy urges this Court to do by claiming that the statutory purposes must be implausible because Vermont has not prohibited in-state utilities from purchasing power generated by out-of-state nuclear plants. Entergy Br. 29, 56.[6] The question of plausibility concerns whether there is *a* fit between the statute and the legislature's goals, not whether the legislature has adopted the *best* fit. Moreover, "a statute is not invalid under the Constitution because it might have gone farther than it did," and states are free to pursue policy reforms "one step at a time." *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (per curiam) (quotations omitted). Because "a nonsafety rationale" supports the Legislature's decision to be part of the relicensing process, that is sufficient to sustain Act 160 under *PG&E*. 461 U.S. at 213; *see also, e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993) (accepting all "plausible rationales" and holding that the "assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review"); *Amatel v. Reno*, 156 F.3d 192, 202-03 (D.C. Cir. 1998) (question is not

[6] The contract to which Entergy refers between a Vermont utility and an out-of-state nuclear plant was signed in 2011 (five years after Act 160 was passed) and is for a small amount of power — approximately 5 percent of the State's portfolio.

whether legislative action "*will* advance" a legitimate goal, but whether legislature "could reasonably have believed that it would do so").

Nor is denying extension of a license to a large, in-state generator of non-renewable power an irrational or arbitrary way to promote energy conservation and renewable energy. Indeed, as the State's expert (and former state energy planner) explained at trial, the "sheer size" of the facility and the downward pressure that it exerts on prices "hamper" efforts at diversification and has "a dampening effect on the development of alternatives." JA194. Closing Vermont Yankee would "free up" space in the electrical generation market and "make it easier to promote diversity" and "sustainable resources." *Id.* It also incentivizes in-state consumers to obtain alternative sources of electricity and creates an environment for renewable electricity generators to locate in Vermont. *See* State's Br. 7 n.2 (listing numerous statutes addressing State's energy goals, including producing 25 percent of State's energy needs through in-state renewable energy). A reasonable, logical connection thus exists between Vermont's effort to promote diverse, sustainable, and renewable in-state generation and its decision not to relicense Vermont Yankee to allow it to operate beyond its originally scheduled retirement date. JA194; *see also, e.g.*, JA259-60 (expert trial testimony confirming that states have a "legitimate interest" in "energy planning" and promoting renewables and that "any sensible energy planner would be anticipating a time when Vermont would be

without Vermont Yankee"). That connection is more than ample to uphold Act 160.

The Vermont Legislature's decision to move toward renewable sources of in-state generation is further justified, as in *PG&E*, by the specter of "unpredictably high costs," 461 U.S. at 213-14, resulting from the "economic uncertainties engendered by the nuclear waste disposal problems," *id.* at 215. *See* Act 160, § 1(a) (noting need to evaluate "the economics and environmental impacts of long-term storage of nuclear waste"); State's Br. 34 & n.9. Indeed, the D.C. Circuit recently noted that the NRC "apparently has no long-term [storage] plan other than *hoping* for a geologic repository" and that, barring a drastic change, spent fuel "will seemingly be stored on site at nuclear plants on a permanent basis." *New York v. NRC*, 681 F.3d 471, 479 (D.C. Cir. 2012) (emphasis added); *see also id.* at 474 (noting that the "lack of progress on a permanent repository" creates "uncertainty" that calls into question "the reasonableness of continuing to license and relicense nuclear reactors"). The uncertain and possibly substantial economic burdens of long-term spent-fuel storage may well be borne by state taxpayers if companies like Entergy become insolvent or abandon their obligations. *PG&E* teaches that states may reasonably consider this economic uncertainty as a basis for refusing to license or relicense nuclear plants.

4. Entergy erroneously asserts (at 53-54) that the district court held that Act 160's statutory purposes are implausible. The court made no such finding. The pages of the opinion that Entergy cites contain that court's (improper) *subjective* analysis of the motivations of individual legislators. SA75-77. But in determining whether a legislature's actions are supported by non-preempted rationales, a court looks to *objective* reasonableness, not legislative motive. *See, e.g.*, *Heller*, 509 U.S. at 320 (legislature "need not actually articulate at any time the purpose or rationale" for its decision) (quotations omitted); *General Media*, 131 F.3d at 286 n.16 (it is "irrelevant whether the conceived reason . . . actually motivated the legislature") (quotations omitted).

Entergy also incorrectly suggests (at 40) that Vermont bears the burden of proving that its purpose in enacting Act 160 was not to regulate matters of radiological safety. Entergy, as the Plaintiff and proponent of preemption, bears the burden of proving that the AEA preempts Act 160. *See English v. General Elec. Co.*, 496 U.S. 72, 86 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *see also, e.g.*, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) ("considerable burden" in a preemption case); *Hattem v. Schwarzenegger*, 449 F.3d 423, 428 (2d Cir. 2006) ("heavy burden" in a preemption case). Indeed, in *PG&E*, the Supreme Court applied the presumption against preemption and refused to shift the burden to the State of California, even

in the face of legislative history showing considerable concern about radiological safety. *See* 461 U.S. at 215-16 & nn.27-28; *see also* New York et al. *Amicus* Br. 26-28 (explaining why burden-shifting is incompatible with preemption analysis).

Contrary to Entergy's claim (at 40), nothing in the Tenth Circuit's decision in *Skull Valley* holds otherwise. In *Skull Valley*, the court found that the statute at issue contained "provisions [that] address matters of radiological safety that are addressed by federal law and that are the exclusive province of the federal government." 376 F.3d at 1246. Only after reaching its conclusions about the "text of the [provisions]" in Utah's Radiation Control Act did the court point out that Utah had "failed to offer evidence" that its law "is supported by a non-safety rationale." *Id.* *Skull Valley* thus highlights the flaws in Entergy's arguments and the district court's ruling: unlike the Utah statute at issue there, Act 160's text does *not* address matters of radiological safety and Vermont has in the statutory text itself identified non-safety rationales for Act 160 that readily survive any review for plausibility.

C. The District Court's Reliance on Statements by Individual Legislators To Find Preemption Conflicts with Supreme Court Precedent and Misreads the Relevant Legislative History

1. PG&E Confirms the District Court's Error in Seeking To Divine the Legislature's "True Motive" from the Statements of Individual Legislators

a. The district court found Act 160 preempted based on its divination of the Legislature's "true motive" from the statements of a handful of individual legislators. State's Br. 44-47. The court's approach to preemption conflicts with *PG&E*, in which the Supreme Court refused to "become embroiled in attempting to ascertain California's true motive." 461 U.S. at 216. As the *PG&E* Court explained, "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.* Moreover, such a "true motive" inquiry would be "particularly pointless" in light of the states' "retain[ed] authority over the need for electrical generating facilities," which is more than "sufficient to permit a State so inclined" to enact a lawful, non-preempted statute that prevents the operation of a nuclear plant within its borders. *Id.* In these circumstances, it "should be up to Congress" — not the courts — "to determine whether a State has misused the authority left in its hands." *Id.*[7]

[7] The Supreme Court later expressed doubt whether any "legislative purpose" analysis is part of the preemption inquiry under the AEA. *See English*, 496 U.S. at 84 n.7 (declining to decide whether the "suggestion of the majority in *Pacific Gas* that legislative purpose is relevant to the definition of the pre-empted field is part of the holding of that case"). This Court need not reach that question,

The district court's approach is especially egregious given its reliance on only a handful of legislators' statements when the language of Act 160 itself is what they voted on. Nothing in the record shows that those statements — from only *five* named legislators of the 156 legislators to vote on Act 160, and from none of the bill's sponsors — reflect the considered intent of the whole legislative body. State's Br. 44; *see also PG&E*, 461 U.S. at 216. Indeed, most of the legislator safety statements cited by Entergy and the court were from Act 74, not Act 160. The Act 160 legislator safety statements on which the court relied are just a tiny fraction — less than 15 minutes in total — of the many hours (34 compact discs) of recorded debates on the bills that became Act 160.[8] For the court to rest a finding of purpose on the random statements of so few legislators, in the face of statutory text reflecting what all members agreed to enact, is an especially dubious way to assess legislative intent.

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because it is sufficient to hold that the district court engaged in the very mode of analysis that *PG&E* rejected.

[8] *See* JA1290-98 (listing 12 hearings and 34 CD recordings of Act 160); JA1675-84 (PX127A, 130A, 130B, 130D, 134A, 134B, 134D, 134E, 135A, 135B, 136A, totaling less than 10 minutes from 4 Senate committee hearings); JA1684-87 (PX140A, 140B, 144D, 146A, 146B, 149A, totaling less than 5 minutes from 8 House committee hearings). While Entergy and the court cited several other legislator statements, they did not involve safety.

Furthermore, most of the statements on which the district court relied are from two early hearings before the state Senate Finance Committee.[9] The House conducted 8 subsequent committee hearings on the bill, and a major "strike-all" amendment on April 27, 2006 on the House floor changed the bill substantially. State's Br. 46. Yet the House does not record floor debates, and legislative committee hearings are missing or incomplete. Additional debates on the bill on the House floor occurred on April 28 and May 3, with no recordings of those sessions either. *See* JA1289. Indeed, five additional drafts of the bill and the strike-all amendment on April 27, 2006 (State's Br. 14) all post-date the final legislator statement on which the court relied (SA75, citing PX149A from April 19, 2006).[10] The fact that the court's "evidence" of legislative motive comes from so early in the bill's history and principally from committee hearings attended by only a tiny subset of the entire legislative body fatally undermines the court's conclusion. And the absence of recorded legislative statements regarding later developments further rebuts the court's attempt to transform a handful of individual statements into the motivation of the entire legislative body.[11]

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[9] *See* SA75 (citing PX130A, 130B, 130D, 134A, 134E, 135A, 135B, all from 2/28/06 and 3/2/06 hearings).

[10] Draft bills that were saved in legislative bill files were part of the legislative history that Entergy lodged with the district court. *See* JA136, 181.

[11] Entergy inaccurately claims that, after the March 2, 2006 Senate Finance Committee hearing, the "district court carefully reviewed the remainder of the

b. Entergy, however, incorrectly contends that the district court's approach accords with *PG&E* because the Supreme Court there discussed an official legislative committee report. Entergy Br. 23, 27, 31, 45. In *PG&E*, the Supreme Court cited a published committee report from the California Legislature as consistent with the economic concerns identified by California as a non-preempted basis for its moratorium. The petitioners, however, argued that the "true motive" of California's legislature was not the one set forth in the committee report. 461 U.S. at 214, 216.

The Supreme Court squarely rejected the petitioners' argument that courts should look to evidence of "[w]hat motivate[d] [individual] legislator[s] to vote for a statute." *Id.* at 216. The district court did exactly what the Supreme Court rejected by seeking to divine a "legislative motive" from the statements of a handful of individual legislators, ignoring *PG&E*'s admonition that "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.*

Moreover, Entergy ignores the well-recognized differences between a printed formal committee report and statements of individual legislators.

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statements in the legislative history and found [safety] 'references, almost too numerous to count.'" Entergy Br. 36 (quoting SA74-75). The court cited five legislator references to "safety" after March 2, 2006 (out of a total of only six that exist, *see* JA1684-87), the last of which was on April 19, 2006, before the April 27 strike-all.

Committee reports reflect — or, at least, are presumed to reflect — the collective understanding of legislators involved in the drafting of a bill. *See, e.g.*, *Zuber v. Allen*, 396 U.S. 168, 186 (1969). In contrast, courts strongly disfavor relying on statements of individual legislators as a means of divining the intent of the legislative body as a whole. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (rejecting inquiry into individual motivations), *cited with approval in PG&E*, 461 U.S. at 216; *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (refusing to "undertake a search for motive in testing constitutionality"; "a judiciary must judge by results, not by the varied factors which may have determined legislators' votes"); *General Media*, 131 F.3d at 283 n.13 ("[T]he motivations of individual legislators, to the extent we may be able to discern them, are not dispositive.").

Finally, to the extent *PG&E* sanctions any inquiry into legislative motive at all, the Court plainly concluded that a permissible non-safety motive overrides an impermissible safety motive where evidence of both exists. *See* 461 U.S. at 213 (concluding that "it is necessary to determine whether there is *a* nonsafety rationale" for the state law) (emphasis added); *id.* at 196-97 (noting that the "California laws at issue here" were "responses to . . . concerns" that included "*both safety and economic aspects* to the nuclear waste issue") (emphasis added). The *PG&E* Court noted that the very next section of the California law it was

upholding required "a study of underground placement and berm containment of nuclear reactors, to determine whether such construction techniques are necessary for enhancing the public health and safety." *Id.* at 215 n.27 (quotations omitted). And the very committee report that Entergy cites (at 23, 27, 31, 45) is replete with suggestions that safety animated California's decision, just as economic concerns did. *See* California State Assembly Committee on Resources, Land Use & Energy, *Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and Its Alternatives* (1976).[12] Yet the Court's validation of California's economic motives confirms that some evidence of safety motivation is insufficient to warrant a finding of preemption. *See PG&E*, 461 U.S. at 216 (explicitly refusing to search for the legislature's "true motive" and instead accepting the state's "avowed" purpose); *see also id.* at 213 (holding that "the test of pre-emption" looks at " 'the matter on which the State *asserts* the right to act' ") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)) (emphasis added).

[12] *Available at* http://archive.org/details/reassessmentofnu19761cali. The California Report notes that the legislative committee had "been observing and debating nuclear safety issues since 1971," *id.* at 1, and contains lengthy discussions of core safety concerns such as reactor meltdowns, earthquake risks, and nuclear terrorism, *id.* at 34-78. The Report also addresses safety issues related to the transporting, disposing, and storing of nuclear waste. *Id.* at 12, 65-67 (risks from spent-fuel-transportation accidents), 13 (identifying "[r]adiologic safety" as first problem of nuclear power), 20, 25, 33, 117-18 (concerns and uncertainty regarding toxic spent fuel), 67-71 (evaluating hazards, leaks, and other safety concerns for permanent waste disposal).

c. The Supreme Court's refusal in *PG&E* to undertake a search for the legislature's "true motive" — and its reliance on the "avowed . . . purpose as the rationale for enacting" the statute — is also consistent with the Court's normal approach to preemption. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (beginning preemption analysis by discussing the "stated purpose" and "official state policy" as reflected in the text of challenged state laws); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 518 (1989) (evaluating state's "avowed purpose" in statutory text).

This Court has done the same, most recently in *Building Industry Electrical Contractors Association v. City of New York*, 678 F.3d 184 (2d Cir. 2012) ("*BIECA*"). In *BIECA*, this Court explained that the proper "means for determining governmental purpose" for purposes of preemption is to focus on the statutory text. *Id.* at 191; *see also, e.g.*, *Kuhne v. Cohen & Slamowitz, LLP*, 579 F.3d 189, 193 (2d Cir. 2009) ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.") (quotations omitted).

Entergy suggests (at 52-53) that *BIECA* is limited to the specific federal statute at issue. But this Court explained at length that its decision to focus on statutory text, rather than "search[ing] for an impermissible motive," applies to preemption cases generally — which concern "what legislation *does*, not why

legislators voted for it" — as well as "across many fields of substantive law." 678 F.3d at 191 (quotations omitted). As *BIECA* holds, courts look to the "objective purpose clear on the face of the enactment, not to allegations about individual officials' motivations in adopting the policy." *Id*. *BIECA* thus mirrors *PG&E*'s direction to accept the avowed purpose of a state statute and not engage in a "pointless" search for "true motive." 461 U.S. at 216.

Furthermore, *BIECA* recognized the serious "separation of powers concerns" raised by any search to discern an impermissible legislative motive in the statements of individual legislators. 678 F.3d at 191. As this Court explained, such inquiries "represent a substantial intrusion into the workings of other branches of government," and "[p]lacing a decisionmaker on the stand is therefore usually to be avoided." *Id.* (quotations omitted); *see also* Nat'l Conf. of State Legislatures *Amicus* Br. 1-18 (critiquing district court's preemption analysis and describing the profound difficulties it would create for state legislatures and the judicial system). In this way, *BIECA* echoes the *PG&E* Court's observation that, "[i]n these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands." 461 U.S. at 216. Those concerns are especially apt in this context, where the state statute merely creates a *process* for legislative involvement in a relicensing decision but does not mandate any particular outcome.

Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 1999), and *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), on which the district court relied and which Entergy claims are controlling, are consistent with *PG&E* and *BIECA*. Those cases stand for the uncontroversial proposition that, whatever the purpose of a statute, if the state's actions intrude into the protected federal field, the statute will be preempted. State's Br. 37-39. Those cases, however, do not direct courts to divine the "true motive" of a legislature from the statements of individual legislators as part of the preemption analysis.[13]

Entergy also incorrectly contends that courts "routinely look behind proffered legislative reasons to legislative history in other constitutional contexts." Entergy Br. 49 n.26; *see also id.* at 52 & n.29 (citing Establishment Clause cases). To the contrary, while courts may search for "racially invidious intent" or religious discrimination, "the Supreme Court has noted that inquiries into legislative

[13] Equally inapposite is *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006). In that case, this Court found that there was direct Supreme Court precedent for how courts were to apply preemption for the particular statutory provision in the Interstate Commerce Act at issue and cited the proposition that "the Supreme Court tells us that our focus *in a preemption case like this one* is whether the purpose and intent of the body passing the law at issue . . . was [legitimate]." *Id.* at 145 (quotations omitted; emphasis added). Similar to *Loyal Tire*, the Supreme Court's on-point precedent in *PG&E* governing how courts are to apply the preemption analysis for the AEA rejects the method applied by the district court. *See also* New York et al. *Amicus* Br. 24 n.4 (distinction between ordinances and state statutes). And, even if *Loyal Tire*'s analysis somehow applied, Act 160 would not be preempted. *See* Act 160, § 1(a); State's Br. 15 & n.4.

purpose are otherwise disfavored." *HMK Corp. v. Walsey*, 828 F.2d 1071, 1076 (4th Cir. 1987) (rejecting "attempt to divine [a legislative body's] 'actual' purpose") (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)); *see also, e.g.*, *Dukes*, 427 U.S. at 303 ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines").

d. Entergy and its *amici* erroneously assert that accepting a state's avowed purpose would allow it to intrude on the federal government's exclusive authority over radiological safety by "including a non-safety purpose" in the statute. Entergy Br. 2; NEI *Amicus* Br. 15. The Supreme Court, however, addressed this very concern in *PG&E*. As the Court explained, the area that Congress preserved for the states includes "authority over the need for electrical generating facilities" that is "easily sufficient to permit a State" to prevent a facility from continuing to operate within its borders. 461 U.S. at 216. "In these circumstances, it should be up to Congress" — not the courts — "to determine whether a State has misused the authority left in its hands." *Id.*

PG&E also addressed that issue when it rejected the petitioners' reliance on *Perez v. Campbell*, 402 U.S. 637 (1971). As the Court explained, in *Perez*, there was an "actual conflict" between federal and state law, and "state law may not

frustrate the operation of federal law simply because the state legislature in passing its law had some purpose in mind other than one of frustration." *PG&E*, 461 U.S. at 216 n.28. But *Perez* was inapplicable in *PG&E* — and is inapplicable here — because there is no "actual conflict between [state law] and the [AEA]," in light of the states' retained authority over electrical generating facilities, including nuclear plants. *Id.* at 216 & n.28. The lack of an actual conflict belies any argument (*see* NEI *Amicus* Br. 10 n.4) that court intervention is needed here to avoid conflicting or inconsistent standards.

The Supreme Court's holding on this point controls, regardless of whether, as Entergy contends, the petitioners in *PG&E* "did not cite *Perez* to justify consulting legislative-history materials to discern the legislature's true purpose." Entergy Br. 47-48; *accord id.* at 51 n.28. And, in fact, that is exactly how the petitioners and their *amici* in *PG&E* used *Perez*.[14]

[14] *See* Petitioners' Br. 49, No. 81-1945 (U.S. filed Sept. 4, 1982), 1982 WL 957209 ("The effect of the Court of Appeals' erroneous analysis was to lead the Court to permit California to ban the development of nuclear energy by a strategy disapproved by this Court in *Perez v. Campbell*, 402 U.S. at 652, *i.e.*, simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective.") (quotations omitted); Pac. Legal Found. *Amicus* Br. 10-11, No. 81-1945 (U.S. filed Sept. 3, 1982), 1982 WL 954400 (citing *Perez* and accusing California of dressing its moratorium in "Emperor's New Clothes"); *see also* Legal Found. of Am. *Amicus* Br. 8-9, No. 81-1945 (U.S. filed Sept. 10, 1982), 1982 WL 957210 (claiming that "legislators masked their motivations by pretexts" and citing *Perez*).

2. The District Court Drew Improper Conclusions from the Limited Recorded Legislative History

The district court also erred by resting its conclusion that radiological safety was the "primary motivation" of the Legislature as a whole on bits and pieces of Act 160's legislative history. SA74, 77; *see* New York et al. *Amicus* Br. 27-28 and citations therein (citing Supreme Court's rejection of searching for the "primary" purpose of a statute). The court gave excessive weight to a small sliver of statements in the legislative history, failing to recognize their place in the larger context of recorded and unrecorded legislative history. *See supra* pp. 17-19. The district court's flawed analysis is not surprising given the misguided task it sought to undertake. "Inquiry into the hidden motives" of a legislative body "is beyond the competency of courts." *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937).

Entergy misses the point when it suggests (at 39) that the State is arguing that the unrecorded legislative history must be presumed to contain non-safety justifications for Act 160. The problem with the district court's approach is that the incompleteness of the legislative record underscores the hazards of imputing "legislative" motive from the statements of individual legislators that happened to be recorded. *See*, *e.g.*, *United States v. Johnson*, 14 F.3d 766, 771 (2d Cir. 1994) ("We do not consider this problematic legislative history sufficient to overcome [statutory presumptions]."); *Linquist v. Bowen*, 813 F.2d 884, 889-90 (8th Cir.

1987) (ascertaining "[legislative] intent from vague or missing legislative history would be hazardous at best").

Although Entergy seeks to evade this problem by asserting (at 39) that legislators discussed radiological safety concerns "at crucial junctures," that claim is false. The most critical juncture was when the Legislature voted to adopt Act 160. *See United States v. Locke*, 471 U.S. 84, 95 (1985) (courts should presume legislators "vote on the language of a bill" as that bill was enacted).[15] Yet every single legislator statement cited by the district court and Entergy stems from committee discussions relating to *superseded* draft bills.[16] When the Senate voted

[15] *See also, e.g., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 n.72 (2011) ("[T]he only authoritative source of statutory meaning is the text that has passed through the Article I process."); *Exxon Mobil Corp. & Affiliated Cos. v. Commissioner*, 689 F.3d 191, 201 (2d Cir. 2012) (discussing a document in legislative history that "is not a committee report" and "is not available to members of Congress at the time they vote on [a] bill") (quotations omitted; alteration in original); *United States v. Gowing*, 683 F.3d 406, 409 (2d Cir. 2012) (per curiam) (legislative history "could not trump the plain meaning of the text"). Even "[f]loor debates reflect at best the understanding of individual Congressmen." *Zuber*, 396 U.S. at 186.

[16] *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("mere statement[s]" from committee members "as to what the Committee believes an earlier statute meant" are entitled to little weight). The district court cited only one draft bill (from February 26, 2006) as containing a reference to "safety" in a provision that called for a public-engagement process for studies to be developed by the Board and provided to the Legislature. SA27-28. Entergy cites the same February 26 draft and an even earlier January 30, 2006 draft. Entergy Br. 35 (quotations omitted). However, *PG&E* rejected looking at past versions of a bill to show that California's law was "taint[ed]" by safety concerns. 461 U.S. at 215-16. Further, "attempting to divine legislative intent on the basis of unexplained

on the bill on March 14, 2006, the bill sponsor explained to the entire chamber that "this bill is not about safety." JA1300; *see also, e.g.*, JA1300-01, 1305 (discussing "energy policy," Vermont's "energy future," and "renewables").[17] And, when the House voted and enacted a strike-all of the bill on April 27, 2006, it added (without recorded discussion) the following legitimate areas of state authority to be considered in the Act's "Legislative Policy and Purpose": "the state's need for power, the economics and environmental impacts of long term storage of nuclear waste, and choice of power sources among various alternatives." H.J. 1378-84 (Apr. 27, 2006), *available at* http://www.leg.state.vt.us/docs/2006/journal/HJ060427.htm; *see* Act 160, § 1(a) (incorporating those legislative purposes).

Further, even the statements on which the district court and Entergy rely show only a part-time, citizen legislature attempting to educate itself about the boundaries of its authority. The full legislative record shows legislators learning, not being coached, about the limits of their authority in dealing with a nuclear power facility. The committees brought in expert witnesses to help educate them

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modification of language in earlier drafts of legislation can be problematic." *First Merchants Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 401 (3d Cir. 1999) (quotations omitted); *see John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) (courts are guided by statute's "words, and not by the discarded draft[s]").

[17] *See NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (quotations omitted); *In re Spong*, 661 F.2d 6, 10 (2d Cir. 1981) (giving greater weight to remarks of principal sponsors).

about areas reserved to federal authorities.[18] There is nothing suspect about legislators seeking such input and using that advice to craft a bill that respects those limits.

Finally, the legislative history also contains numerous statements — largely ignored by the district court — of legislators discussing the need for energy planning and diversity and the desire to foster renewable sources of energy. State's Br. 15 & n.4. Again, *PG&E* holds that individual legislative statements are not a proper focus of inquiry, 461 U.S. at 215-16, and indeed the "absence of legislative facts has no bearing on whether a statute's purpose is legitimate," *Waterman v. Farmer*, 183 F.3d 208, 214 (3d Cir. 1999) (citing *Nordlinger*, 505 U.S. at 15); *see also, e.g.*, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require

[18] *See* JA1352-66 (2/28/06 Senate hearing); JA1372 (4/4/06 House hearing). For example, Entergy relies heavily on one legislator's statement of "let's find another word for safety." Entergy Br. 3, 20, 32, 36 (citing 3/2/06 Senate hearing). However, the full context of that hearing simply confirms this learning process. *See* JA1679-81 (expert witness explaining the bounds of preemption, including that the proposed study provision should not include radiological safety, that "public health" could be included without encompassing radiological safety aspects, and that the Board would "keep it all straight"); JA1681 (senator's statement that he expected the bill to be revised to reflect those non-preempted areas within state authority); PX134 at Track 1, 42:01 (senator responding that striking "references to safety" makes clear only studying areas within state authority); *supra* note 9 (2/28/06 and 3/2/06 draft bills, showing these revisions). Entergy also wrongly describes (at 19, 36) another senator (from the same hearing) as stating that Act 160 is "based on safety," but the full quotation shows the senator merely asking a hypothetical question about constituent concerns. *See* JA1683.

Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute."). But, if a court is going to delve into such statements, the district court's failure here to give weight to the statements put forward by the State is yet another error that undermines its preemption holding.[19]

D. Entergy's "As-Applied" Challenge Fails

Entergy briefly raises (at 58-60) an "as-applied" challenge to Act 160, as an alternative to its claim that the statute is preempted on its face. That claim also fails.

First, Entergy points to Act 189, enacted in 2008, which called for a study of whether the plant would provide power reliably if relicensed. But that study has already occurred, and the district court correctly found that, because Act 189 "is no longer in effect," Entergy's "challenge to Act 189 is moot." SA82; *see Burke v. Barnes*, 479 U.S. 361, 363-65 (1987) (when a bill has expired and does not have a "present effect," any challenge to it is moot). Entergy has no response to the district court's mootness finding. Therefore, its as-applied challenge based on Act

[19] The district court erred for the additional reason that the legislative history put forward by the State is "*in accord with*" the statutory language and thus provides a more reasonable interpretation than reliance on statements that are "*at odds with* the plain meaning of the statutory language." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1306 (2d Cir. 1990); *see* Entergy Br. 24, 37 (recognizing "non-preempted purposes" put forward in Act 160).

189 fails, regardless of whether that law had a "safety purpose," as Entergy now contends (at 58).[20]

Second, Entergy points to S.289, a proposed bill that sought to authorize the Board to move forward with Entergy's relicensing application. *See* State's Br. 17-19 (discussing S.289). But the Senate's rejection of that bill says nothing about whether the process the Legislature enacted in Act 160 is preempted. Indeed, if S.289 had become law, Entergy would not have a preemption claim with respect to Act 160 at all.[21] More generally, as Entergy concedes, "other statutes cannot be used to show that the challenged statute is preempted." Entergy Br. 46 n.22; *see also Bruesewitz*, 131 S. Ct. at 1082 ("Permitting the legislative history of subsequent . . . legislation to alter the meaning of a statute would set a dangerous precedent."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is . . . a particularly dangerous ground on which

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[20] Entergy previously took precisely the opposite position. *See* PX417 (Entergy lobbyist: "Fact: The 2008 Comprehensive Vertical Audit and Reliability Assessment Act (CVA) [Act 189] involving Vermont Yankee did not call for, *nor did the legislature intend it to call for*, an Independent Safety Assessment . . . . The legislation *and legislative intent* of the CVA Bill was all about reliability of the plant, *not safety*.") (emphases added).

[21] While Entergy now claims (at 29) that the Senate "rushed a vote" on S.289, Entergy had been asking for such a vote for years before S.289 was defeated. *See* State's Ex. 1208 (2009 Entergy letter: "it is our intention to push legislative leadership for an affirmative vote on continued operation this year"); JA950-51 (2008 Entergy letter discussing legislative decision "to allow for the continued operation of Vermont Yankee"); JA1113-14 (Entergy hired a lobbyist in 2009 to lobby for state approval of continued operations).

to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.") (quotations omitted).

II. THE DISTRICT COURT ERRED IN ISSUING AN INJUNCTION UNDER THE DORMANT COMMERCE CLAUSE

A. The District Court Applied the Wrong Legal Standard and Lacked Any Basis To Enjoin State Officials' Uncertain Future Actions

1. Federal law requires, and Entergy does not dispute, that a federal court can impose the drastic remedy of permanently enjoining state officials only to prevent an "*ongoing* violation of federal law," *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007), or an "'actual and imminent' threat" of such a violation, *Brooks v. Giuliani*, 84 F.3d 1454, 1468 (2d Cir. 1996). Entergy makes no real effort to defend the district court's failure to adhere to that standard. No state law, rule, or Board order requires "below-wholesale-market" contracts or any other sort of preferential treatment for Vermont utilities. Rather, absent further legislative action, Act 160 requires that Vermont Yankee retire as scheduled in 2012.[22]

The interplay between the two parts of the district court's judgment is crucial to understanding why that court lacked any basis to enter an injunction

[22] Entergy does not dispute that, if Act 160 is upheld, the dormant Commerce Clause injunction should be vacated as moot, because the Vermont Yankee plant will be retired and no Defendant will be able to impose any conditions on continued operations. State's Br. 49 n.17.

under the dormant Commerce Clause, and why Entergy's efforts to defend that injunction fall short. By invalidating Acts 160 and 74 and enjoining their enforcement, the court recognized (*see* SA4) that it was opening the door for Entergy to seek a renewed state license in an administrative proceeding before the Board. That part of the ruling thus worked a substantial change in state law: it functionally ended the legislative role in deciding the plant's future and put the decision in the Board's hands, pursuant to the Board's authority under the law as it existed before Acts 160 and 74. The Board recognized that change and promptly opened a new proceeding to consider Entergy's petition for a renewed CPG. State's Br. 24 & n.7. Because the Board has not issued a decision, however, and no decision is expected until late 2013, *id.*, there was no "ongoing" or "imminent" violation of law to enjoin. Nor are there any contractual terms — below-wholesale-market or otherwise — to enjoin.

Because the court enjoined the Defendant Board members with respect to a decision they have not yet made in a pending proceeding, the injunction cannot stand.

2. The district court also misunderstood interstate power markets in imposing its injunction. State's Br. 54-57. In response to the State's point that the injunction erroneously viewed the rates of a long-term power purchase agreement ("PPA") in isolation, Entergy claims that "Vermont officials could — and did —

compare the value of energy contracts in pushing for a below-market PPA from Entergy." Entergy Br. 62 (citing JA166). The evidence does not support Entergy's broad-based assertion[23] or alter the unworkability of the district court's focus on price alone.

For instance, the district court ignored the effect on rate negotiations of a Revenue Sharing Agreement ("RSA") entered into between Entergy and Vermont utilities when those utilities sold the Vermont Yankee plant to Entergy in 2002. It is undisputed that Entergy wanted the utilities to "exchange" their majority portion of the RSA "for a 20-year power purchase contract." JA166. The court noted that the RSA was estimated to be worth "$587.8 million." SA6 n.8. If Vermont utilities were giving up hundreds of millions of dollars in "exchange" for a power deal, JA166, then of course they would expect a better rate than utilities that were not giving up anything of value. *See* JA172. The injunction disregards the RSA and wrongly assumes that Vermont utilities are similarly situated to out-of-state utilities in their negotiations with Entergy. In fact, the RSA and other factors that might be addressed in a power contract — such as the length of the contract, the amount of power sold, and any number of contingencies — could easily result in a

[23] Entergy cites testimony (at JA166) from its negotiator, who described negotiations between Entergy and Vermont utilities. He described speculation by utility agents about what the Board would consider. The witness did not, of course, provide any direct evidence about the Board's deliberations. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) (it "is just not possible" to prove in advance that a judicial proceeding will lead to "any particular result").

lower *price* for Vermont utilities than for other purchasers. The RSA is just one example of why there is no ascertainable "market price" for a long-term power deal and no way to measure whether a given price is "below-market."[24]

B. The District Court's Injunction Against the Board Is Erroneous

There is no evidence (or finding) that the Board has issued or contemplated issuing any order or ruling requiring Entergy to provide "below-wholesale-market" contracts as a condition of relicensing. Absent such evidence, the district court had no authority to issue an injunction. *See, e.g.*, *Leonhard v. United States*, 633 F.2d 599, 621 (2d Cir. 1980) (refusing to enjoin state officials when plaintiffs failed to show "that any of the[ ] defendants participated in" the alleged wrongful conduct).

The district court's injunction rested on supposed "evidence of *intent* to condition continued operation on . . . below-wholesale-market long-term [PPAs] for Vermont utilities." SA88 (emphasis added). The record, however, contains *no* evidence that any Defendant evinced such "intent." State's Br. 49-50. Nor would any such evidence provide a basis for an injunction. *Id.* at 47-48, 51-54. Perhaps

[24] Entergy erroneously asserts (at 62) waiver. Defendants preserved this argument by specifically informing the district court that rates cannot be viewed in isolation when dealing with power contracts that involve many other factors. *See* D.E. 39, at 27 (describing power markets); D.E. 63, ¶ 12 (similar); D.E. 173, at 13-14 (explaining how FERC sets rates and states can negotiate but there is no set market rate); D.E. 173, at 15 (summarizing trial testimony and arguing that prices are subject to free-market influences); JA162 (explaining uncertainty about future power prices). Testimony at trial also explained the connection between the RSA that Vermont utilities had with Entergy and the effect on negotiations between Entergy and the utilities for a new PPA. *See* JA162, 172, 175.

recognizing that the district court's proffered basis is indefensible, Entergy shifts ground to claim (at 61) that the "court found more than an 'intent' to discriminate." But Entergy's suggested "evidence" derives *not* from the Defendants who were enjoined, but from "*DPS and legislative leaders* [who] told Entergy that a favorable PPA was required for continued operation." *Id.* (emphasis added).

Evidence of past statements by DPS or legislative leaders to Entergy[25] cannot support a prospective injunction against the Board. Legislative leaders have no say in Board decisions, and DPS is a party to the Board's proceeding. *See, e.g.*, SA3 n.5. Neither has any authority to direct the Board's actions or to place conditions on Entergy's continued operations.[26]

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[25] Entergy's lead contract negotiator in fact testified that no legislator dictated the terms of a PPA. *See* JA171 ("Q: And no one in the legislature told you what needed to be in the PPA with CVPS and GMP [the in-state utilities], correct? A: Nobody told me that, that's correct.").

[26] The district court's injunction misapprehended the position of DPS in the now-closed docket before the Board. State's Br. 55-56. DPS is a litigant before the Board in a CPG proceeding, not, as Entergy suggests (at 62), a "regulator." DPS's statements in a brief cannot provide the basis for a claim under the dormant Commerce Clause. Entergy has not met its burden of producing "substantial evidence of an actual discriminatory effect" on interstate commerce. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007). Entergy admitted at trial that it was entirely free to contract with out-of-state purchasers in transactions "subject solely to free market influences." JA175; *see SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (no dormant Commerce Clause claim where law "does not, by its terms or its effects, directly regulate sales . . . in other states" or increase costs of compliance that necessarily affect interstate commerce); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004) (no violation where state law does not "regulate prices or otherwise . . . control the

The only state officials with present, prospective authority to place conditions on or deny a CPG are the Board members — a quasi-judicial, deliberative body that has not yet taken action on Entergy's petition for a CPG. The court below cited no evidentiary basis and made no findings that the *Board* placed an impermissible condition on a new CPG or threatened to do so. Entergy glosses over that glaring problem by repeatedly referring (at 60, 61, 62, 63, 64) to actions taken by "Vermont" or by unspecified "Vermont officials." Entergy needs those nonspecific labels because it is not referring to the Board or any other Defendant.[27] Nor is there any evidence that bears on the outcome of the Board's proceeding. Although the Board has issued a schedule for its proceeding that calls for concluding the hearings and briefing by August 2013, it has not acted. There is no basis for enjoining Board members with respect to a decision they have not made.

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terms of out-of-state transactions"); *see also National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (alleged "scheme" does not violate the dormant Commerce Clause because it is "indifferent" to out-of-state transactions and "makes no mention of other states for any purpose").

[27] Entergy also resorts (at 60) to challenging "Vermont's scheme" and claims (at 63) that unspecified "Vermont officials used regulatory leverage to attempt to extract" good rates for Vermont utilities. *See also* WLF *Amicus* Br. 5-8, 13, 14 (unspecified "scheme"). Federal courts enjoin "specific legal violations" by the named state officials. *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (quotations omitted). The Eleventh Amendment bars federal courts from issuing injunctions against undefined state actions by unnamed state actors, such as "Vermont officials." *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 & n.11 (1984).

A recent Entergy filing with this Court confirms that the district court entered a hypothetical and erroneous injunction. In that filing, Entergy states that the dormant Commerce Clause injunction "merely requires the Board to stay within the constitutionally permissible scope of its authority." Doc. 171, at 7. Entergy thus concedes that the injunction serves only as an admonition that the Board should comply with federal law. But any such injunction *in advance of the Board's decision* cannot be squared with the presumption that state courts and officials will follow federal law. *See, e.g.*, *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Such an injunction also violates the Eleventh Amendment. State's Br. 52-53; *see also*, *e.g.*, *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[D]eterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.").

Rather than meaningfully address those concerns, Entergy responds (at 64) with the conclusory and irrelevant assertion that Board members may be sued under *Ex Parte Young*, 209 U.S. 123 (1908), citing *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). In *Verizon*, the plaintiff sought prospective injunctive relief from an order *already issued* by Maryland's public service commission. 535 U.S. at 645. Here, by contrast, the Board has not issued an order or given any indication that an unconstitutional order might ever be issued. In these circumstances, concerns of comity, federalism, and

the limitations on *Ex Parte Young* actions require that the district court's injunction be vacated.

In light of the real harms caused by the district court's erroneous and premature injunction, this Court cannot seriously credit Entergy's claim (at 65) that the State has failed to offer a "legitimate reason to postpone review." The State has identified multiple harms — not the least of which is a direct violation of state officials' Eleventh Amendment immunity — resulting from enjoining Board actions that have not been taken or even contemplated.

C. There Is No Basis To Enjoin the Governor or the Attorney General

The only basis Entergy asserts (at 64-65) for enjoining the Governor and the Attorney General is their possible future role in enforcing the Board's as-yet-unknown future ruling. That asserted enforcement authority, in this context, is entirely hypothetical, and the record shows no ongoing or imminent threat of a violation of federal law by those Defendants required for issuance of the injunction. *See Rowland*, 494 F.3d at 96; *see also, e.g.*, *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) ("General authority to enforce the laws of the state is not sufficient to make government officials the

proper parties to litigation challenging the law.") (quotations omitted).[28] In short, Entergy proffers no evidence that either the Governor or the Attorney General in their current official capacities has required, will require, or even *could* require "below-wholesale-market" power deals for in-state utilities.

Entergy's contention (at 63) that Defendants somehow waived this argument has no merit. Defendants have Eleventh Amendment immunity from all claims other than prospective injunctive relief against an "*ongoing* violation of federal law." *Rowland*, 494 F.3d at 96. That immunity creates a jurisdictional bar to any other type of relief and "need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Moreover, the constraints of the Eleventh Amendment and *Ex Parte Young* warrant this Court using its "broad discretion" to address legal issues even if waived. *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103 (2d Cir. 2004).[29]

In any event, Defendants vigorously contested both the relevancy and the appropriateness of the injunction as it applied to them. *See* D.E. 39, at 25-26; D.E. 173, at 19-20; D.E. 78, ¶ 29. Defendants adequately preserved the argument

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[28] The Governor's power over DPS (Entergy Br. 63-64) and the Attorney General's advice-giving function (*id*. at 64) are plainly irrelevant in the context of *Board* actions.

[29] This Court also must address these same issues in analyzing Entergy's cross-appeal on the FPA, where the State is the cross-appellee and thus free to raise all arguments why Entergy should not receive the same erroneous injunctive relief that the district court ordered under the dormant Commerce Clause.

that they cannot be enjoined because there was no requirement that Entergy sell power to Vermont utilities. *See, e.g.*, D.E. 63, ¶ 11 ("Vermont has not imposed any requirement that ENVY sell power to Vermont utilities, or do so at below-market rates."); D.E. 173, at 14 ("[N]o one from the State ever told ENVY what it *had* to charge purchasers."); JA171-73 (same); D.E. 78, ¶ 29; D.E. 143, at 17-18; D.E. 173, at 15 (arguing that nothing in the record supports finding a violation of the dormant Commerce Clause). Finally, a party cannot waive arguments that arise after the court issues its decision, such as the district court's failure to make any findings that would support the issuance of an injunction.

D. Entergy's Dormant Commerce Clause Claim Is Unripe

Entergy cannot prevail on a dormant Commerce Clause claim that depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted).[30] In denying relief under the FPA, the district court itself acknowledged that there was no "agreement" or "demanded" rate for a power contract between

[30] *See also, e.g.*, *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (rejecting as unripe a challenge "directed at possibilities and proposals only, not at a concrete plan which has been formally promulgated and brought into operation"); *Virginia v. Browner*, 80 F.3d 869, 881 n.6 (4th Cir. 1996) (claim unripe where agency "has expressed no intention" of what it will do); *Gates v. Deukmejian*, 987 F.2d 1392, 1409 (9th Cir. 1992) (claim unripe where defendant "has not even threatened" to take challenged action).

Entergy and Vermont utilities. SA85-86. Given the lack of any state action, much less a state-law requirement, the injunction is unripe. State's Br. 51-52.

In response, Entergy does not address the *Texas* case or even attempt to explain why the Court should not vacate the injunction when the Board has not issued a ruling. Instead, Entergy asserts (at 64-65) that a prospective injunction is warranted because "the legislature declined to exercise its Act 74/160 role to authorize the Board to proceed in part because Entergy had not committed to a below-market PPA." Entergy's argument on this point is factually and legally flawed.[31] Past actions of "the legislature" with respect to Acts 74 and 160 have no bearing, and no probative value, on the Board's prospective role, unrelated to those Acts, in reviewing Entergy's CPG petition. Entergy also insists (at 65) that "there was substantial additional evidence that, if the Board were authorized to proceed, it would impose the same condition." In fact, Entergy proffered *no* evidence at all that the Board would impose a condition requiring below-market power rates. The district court's injunction must be vacated because any claim directed at Board action is unripe.

[31] The 26-4 Senate vote against Entergy in 2010 primarily reflected Vermont's efforts to move toward renewable sources of in-state electric generation, as well as the economics of Entergy's then-pending Enexus spin-off proposal, and distrust of Entergy, which had been less than transparent in its dealings with Vermont. State's Br. 17-19.

Entergy again offers a cursory "waiver" argument that misses the mark. Entergy itself dropped its dormant Commerce Clause claim during the preliminary injunction phase of the proceeding. *See* D.E. 143, at 18 n.9 (State noting that Entergy "did not address this claim at the [preliminary injunction] hearing or in its proposed conclusions of law, so the State is presently unable to address it in depth"). And its pretrial brief argued only that "the *General Assembly* has applied its statutory scheme to discriminate against interstate commerce," D.E. 144, at 25 (emphasis added); Entergy's dormant Commerce Clause argument in that brief says *nothing* about actions taken — or that might be taken — by the Board, Defendant Shumlin, or Defendant Sorrell. *See also* JA354 (Entergy expressly linking claim of coercion under the dormant Commerce Clause with legislative action); JA355 (court asking Entergy at end of trial for clarification on the "exact relief" it was seeking). Moreover, at trial, Entergy's counsel disavowed a challenge to the Board's authority and asked only that the court advise the Board to stay away from safety. JA311-12. Given that Entergy repeatedly linked its dormant Commerce Clause claim to legislative action and Acts 160 and 74, it was unclear that Entergy was seeking, or that the court would grant, an injunction directed at the Board in a proceeding unrelated to those statutes.

Entergy's waiver claim on prudential ripeness also lacks merit. The State's argument is that Entergy's dormant Commerce Clause claim is not only

prudentially unripe, but also constitutionally unripe because Entergy's alleged harm is a future one that is hypothetical and speculative, and may never occur. *See, e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 324-25 (1936) ("Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention."). Further, even the prudential aspects of ripeness can be raised at any time. *See National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003); *see also*, *e.g.*, *Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir. 1998) (noting that ripeness includes constitutional and prudential elements that concern justiciability, and it is "of no moment that the defendants . . . have failed to argue the issue"). This Court has directed that, if a case would be "*better* decided later," it is unripe. *Connecticut v. Duncan*, 612 F.3d 107, 113-14 (2d Cir. 2010) (quotations omitted), *cert. denied*, 131 S. Ct. 1471 (2011). The Court also has recognized that ripeness principles have "heightened importance" when "the potentially unripe question presented for review is a constitutional question." *Id.* at 113 n.3 (quotations omitted). Courts should not decide constitutional questions unless it is "unavoidable." *Id.* (quotations omitted).

At any rate, the State preserved all ripeness claims and in fact specifically argued below that consideration of hypothetical conditions that might be placed on a PPA is "not even ripe" because Entergy could not point to anything imposing an

actual obligation on the company. JA334.[32] Further, some aspects of Defendants' ripeness argument could not have been raised earlier: whatever weight DPS's filings might have had at the district court, they are entirely irrelevant now that, after the court's ruling, the Board closed its previous docket and opened a new docket on Entergy's CPG application. *See* State's Br. 52 (citing *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 140 (1974), for proposition that ripeness depends on current factual situation, not the situation before the district court).

E. Declaratory Relief Is Not Available

In one sentence near the end of its brief, Entergy notes that, if the Court denies injunctive relief, it nevertheless "should grant *declaratory* relief, which Entergy requested, but the district court did not address." Entergy Br. 66 (citations omitted). Entergy's request contains no legal argument and thus inadequately raises this issue on appeal. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). Nor is Entergy entitled to declaratory relief. *See supra* pp. 34-47; *see, e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) ("there is little practical difference between injunctive and declaratory relief"). The Eleventh

[32] *See also, e.g.*, D.E. 39, at 25-27 ("The Court should not adjudicate the constitutionality of something the State has not done. . . . The bare possibility that Vermont might seek to impose such a condition does not suffice to make out an actual controversy."); D.E. 173, at 19-20 (arguing that "the PSB should not be enjoined in any way" and that "the Court should presume that the PSB will base its decision on non-preempted grounds").

Amendment and the limitations on *Ex Parte Young* actions apply to requests for declaratory relief and preclude this Court from granting such relief absent an ongoing or imminent violation of federal law. *See, e.g.*, *Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000).

III. ACT 74 NEED NOT BE ADDRESSED AND AT ANY RATE IS NOT PREEMPTED

If Act 160 is upheld, then any challenge to Act 74 is moot and nonjusticiable, and the injunction against Act 74 should be vacated. State's Br. 57-58. Entergy does not dispute that argument.

If the Court does address Act 74, the Court should uphold it. The law is grounded in non-preempted purposes and does not address radiological safety in any way. State's Br. 58-60. Accordingly, as with Act 160, the district court erred when it disregarded the statutory text and searched for impermissible motive in the legislative history.[33] Further, the statutory text, the Memorandum of

[33] Entergy asks (at 42-43) this Court to ignore the express statutory purposes, *see* Vt. Stat. Ann. tit. 10, § 6521, based on the district court's supposed "finding" that these purposes apply only to the clean energy development fund, *see id.* § 6523, not the provisions added at Entergy's urging, *see id.* § 6522. The district court's holding on this point — which is a legal conclusion, not a factual finding — is mistaken. The legislative purposes address the State's intent to "transition" *from* the nuclear power that § 6522 allows to continue for a limited period *to* the renewable, sustainable, in-state generation described in § 6523. That was the purpose of Act 74 as a whole, and nothing in federal law prevents the State from making that choice.

Understanding cited by Entergy, and the legislative process provide no reason for holding Act 74 preempted.

By its plain terms, Act 74 nowhere discusses safety, much less radiological safety. Indeed, Act 74 explicitly and appropriately leaves all radiological safety matters to the NRC by calling for compliance with "any order or requirement" of the NRC. Vt. Stat. Ann. tit. 10, § 6522(c)(2).

What Entergy calls a "textual argument" is based not on the statute, but on the provisions of a 2005 contract between Entergy and DPS (known as the 2005 Memorandum of Understanding, or "MOU"). Entergy claims (at 35) that the Legislature "shifted" preempted concerns into the MOU. The MOU was an agency contract, not legislation, and its terms cannot be attributed to 180 state legislators, none of whom signed it. Indeed, Entergy identifies only two statements about the MOU from a five-legislator committee hearing. There is no basis for attributing the MOU to the Legislature as a whole. Nor is there any legal basis for arguing that a state statute may be invalidated based on the terms of a separate contract.

Not only is the MOU irrelevant, but Entergy agreed in the MOU that its provisions were *not* preempted and promised not to challenge it as preempted in the future. PX465, ¶ 12 ("The Company agrees that it will not . . . rely on the doctrine of federal preemption to prevent enforcement of its express obligations

under this MOU."). Entergy also neglects to mention that the MOU, like Act 74, required compliance with any order or requirement of the NRC. *Id.* ¶ 13 ("Nothing in this MOU, including specifically Paragraph 12 [preemption waiver], shall be interpreted as prohibiting or restricting the Company from complying with any requirements or order of . . . the NRC.").[34]

Finally, any consideration of the legislative record defeats Entergy's claim that legislators acted out of safety concerns. Entergy itself proposed, lobbied for, and praised Act 74, which allowed it to build storage units that it needed *to continue operating* under its then-existing license. State's Br. 10-11, 59. In response to the inconvenient fact that Entergy is challenging a law that it asked for and supported, Entergy erroneously claims (at 15-16) that the Legislature drastically altered Entergy's proposal by inserting a requirement that Entergy come back for legislative approval to operate beyond 2012. As Entergy recognizes, its own proposal "limited Entergy to 12 casks in the new facility." Entergy Br. 15 n.6. Entergy wrongly claims, however, that its proposal also "authoriz[ed] the Board (as opposed to the Legislature) to approve a higher number" that presumably would allow operations beyond 2012 without further legislative approval. *Id.* In fact, Entergy's proposal limited the facility to 12 casks unless the Board found that

[34] While Entergy references (at 6, 15, 44) the Federal Circuit's split decision in *Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330 (Fed. Cir. 2012), which questioned payments required by the MOU, that court did not hold Act 74 preempted, and it said *nothing* about Act 160.

additional casks were needed for operations through the plant's "existing license" and to offload the fuel core for decommissioning. SA13. Entergy's proposal thus would have granted legislative approval only through the end of the license period, March 21, 2012.[35]

Thus, far from changing Entergy's proposal to insert radiological safety concerns, the Legislature simply made explicit what was already indisputably a part of Entergy's own proposal. Properly viewed, Entergy's argument is that the Legislature must have been motivated by radiological safety because it *failed to remove* the limitations on dry-cask approval that Entergy itself proposed. That cannot be the test for preemption.

IV. THE COURT SHOULD REJECT ENTERGY'S CROSS-APPEAL

If the Court upholds Act 160, then it need not address any of the issues raised by Entergy's cross-appeal because they are moot. State's Br. 49 n.17, 57-58.

A. The District Court Correctly Rejected Entergy's Federal Power Act Claim

Entergy's cursory briefing of its cross-appeal falls far short of justifying its request for injunctive relief under the FPA. Any claim under that Act fails

[35] Entergy's witness agreed at trial that its legislative proposal for 12 dry casks allowed for "adequate storage to get the plant to March of 2012" and that the result of Entergy's own proposal was that it "would have to come back for approval" from the Legislature to operate beyond 2012. JA224. And Entergy's lobbyist told legislators in 2005 that the "current issue does not go beyond 2012. We're simply looking for what we need to be able to operate the plant through 2012." JA1215.

because, as the district court correctly found, "there is no agreement" or "agreed-upon or demanded rate over which FERC has jurisdiction under the FPA." SA85-86. What Entergy refers to (at 66) as "the below-market PPA condition" does not exist. Indeed, it is undisputed that private utilities, not state officials, negotiated the PPAs; that no one from the State told Entergy what it had to charge purchasers; and that the PPA negotiations fell apart for reasons other than price. *See* JA171-73 (testimony of Entergy's lead witness). As explained above, this evidence, and the district court's finding that there was no "agreed-upon or demanded rate," should have led the court to deny Entergy's claim under the dormant Commerce Clause as well.

In any event, Entergy's cross-appeal should be denied for the same reasons that support vacating the district court's injunction under the dormant Commerce Clause: the claim is not ripe, an injunction would violate the Eleventh Amendment, and there is otherwise no factual or legal basis for enjoining any of the Defendants with respect to a supposed "condition" that does not exist. *See supra* pp. 36, 38, 43-47. Moreover, the absence of any provision of state law that mandates or sets power rates provides an additional basis for rejecting a claim that is grounded in preemption. To have a "viable claim under the Supremacy Clause," Entergy must identify some "state law or regulation" that conflicts with, and thus is

preempted by, federal law. *Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 730 (5th Cir. 2009). Its inability to do so defeats any claim of preemption.

Entergy contends (at 66-67) that "Vermont's condition is preempted because it interferes with FERC's assumption" of "a willing buyer and seller negotiating at arm's length" before that condition "culminates in a below-market PPA." Again, there is no such "condition" — but putting that aside, Entergy's suggestion that its market-based tariff is intended to protect Entergy in its negotiations with potential buyers has it backwards. FERC's decision to approve a market-based tariff is based on the seller's demonstration to FERC that the *seller* lacks market power and cannot raise rates "without losing substantial business to rival sellers." *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993); *see also*, *e.g.*, 18 C.F.R. § 35.37 (requiring market-power analysis of seller). In fact, the D.C. Circuit initially remanded FERC's approval of market-based tariffs for Entergy because of FERC's failure fully to account for the ways in which "*Entergy* might retain significant market power." *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (per curiam) (emphasis added). The notion that the bargaining power of Vermont utilities as potential buyers from Entergy could interfere with the "assumption" of FERC's market-based tariff is unsupported and inconsistent with the federal regulatory program.

Regardless, even if the supposed condition existed, and even if Entergy's tariff-interference theory were cognizable, this Court has no jurisdiction to grant the relief that Entergy seeks. The filed-rate doctrine that Entergy cites (at 66-67) gives FERC exclusive jurisdiction to enforce its approved tariffs, including market-based tariffs such as Entergy's. *See, e.g., Public Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760-62 (9th Cir. 2004) (electricity purchaser's claims of anticompetitive conduct encroached on area "reserved exclusively to FERC, both to enforce and to seek remedy") (quotations omitted); *see also, e.g., Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 547, 554 (2008) (confirming FERC's authority to set aside contracts based on fraud or duress, or where a party engaged in "unlawful market manipulation" that "alter[ed] the playing field for contract negotiations"). As this Court recently observed, when the filed-rate doctrine applies, "it bars both state and federal claims." *Simon v. KeySpan Corp.*, — F.3d —, No. 11-2265-cv, 2012 WL 4125845, at *7 (2d Cir. Sept. 20, 2012); *see also California Pub. Utils. Comm'n*, Nos. EL10-64-000 & EL10-66-000, 132 FERC ¶ 61,047 (2010), *clarified on reh'g*, 133 FERC ¶ 61,059 (2010). If Entergy has a claim — and it does not — the claim must be adjudicated by FERC.

Entergy has, in short, failed to meet the "heavy burden" of showing that a state law is preempted, *Hattem*, 449 F.3d at 428, and has likewise failed to show

that the district court had jurisdiction over its FPA claim. Its cross-appeal should be denied.

B. Section 6522(c)(2) Is Valid for the Same Reasons As Section 6522(c)(4)

Entergy raises only one other issue in its cross-appeal. It claims that, if this Court affirms the district court's ruling that one provision of Act 74 (§ 6522(c)(4)) is preempted, another section of that same Act (§ 6522(c)(2)) should be preempted as well. The State recognizes that, if this Court both reaches the district court's ruling as to Act 74 and affirms the court's decision to enjoin the operation of § 6522(c)(4), then § 6522(c)(2) should be treated the same way. However, as shown above, the Court need not reach Act 74 at all,[36] and, if it does, it should reverse the district court's decision that § 6522(c)(4) is preempted. Therefore, Entergy's challenge to § 6522(c)(2) would fail as well.

CONCLUSION

The district court's judgment should be reversed, the permanent injunction vacated, the cross-appeal rejected, and the injunction pending appeal dissolved.

[36] The validity of Act 160 moots all other issues in this appeal and requires that all of the district court's injunctive relief be vacated. State's Br. 49, 57-58.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,996 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

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