

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY NUCLEAR)
OPERATIONS, INC.,)
)
Plaintiffs,)
)
v.)
)
PETER SHUMLIN, Governor of the State of Vermont;)
WILLIAM SORRELL, Attorney General of the State of)
Vermont; and JAMES VOLZ, JOHN BURKE, and)
DAVID COEN, members of the Vermont Public Service)
Board,)
Defendants)
_____)

Docket No: 1:11-CV-99

**PRETRIAL MEMORANDUM OF LAW OF CONSERVATION LAW
FOUNDATION AND VERMONT PUBLIC INTEREST RESEARCH GROUP AS JOINT
AMICUS CURIAE SUPPORTING DEFENDANTS' OPPOSITION TO PLAINTIFFS'
REQUEST FOR RELIEF**

The Conservation Law Foundation and Vermont Public Interest Research Group, amicus curiae-applicants in the above-captioned proceeding, submit this memorandum of law in support of the Defendants' opposition to the Plaintiffs' request for relief. No person other than the amicus curiae applicants or their members contributed money that was intended to fund preparing or submitting this memorandum.

Amici expressly incorporate by reference their previous memorandum (Doc. 44) submitted to the Court on May 31, 2011.

I. LEGAL AND FACTUAL BACKGROUND

Plaintiffs seek to avoid any regulatory oversight by the State of Vermont. Years after Plaintiffs purchased the Vermont Yankee nuclear facility, promised to follow Vermont law, and relied on Vermont laws to gain regulatory approvals, Plaintiffs now seek to upend regulatory oversight by Vermont.

Rather than obey laws that Vermont passed, including a law that Plaintiffs—through its lobbyists—sought passage of, Plaintiffs ask this Court to declare them unconstitutional. Since Plaintiffs have not obtained the approvals needed under state law, they now argue that Vermont’s laws do not apply to them.

Vermont has carefully and legally managed power supply. The Vermont Legislature has considered laws affecting power supply and energy planning in every session over the past decade. The Legislature did its homework and obtained legal advice on the scope of its authority. It carefully crafted laws that would allow Vermont to meet its energy, economic and environmental goals.

The laws challenged in this proceeding fall clearly within the state’s traditional regulatory authority. The stated purpose of the laws demonstrates this as well as the matters considered by regulators and the Vermont Legislature. The actions of the state were based on traditional state concerns regarding power generation facilities – their economic and rate impacts, power supply, energy planning, trustworthiness of facility owners and environmental and land use impacts.

II. VERMONT’S ACTIONS ARE NOT PREEMPTED

Both Plaintiffs and Defendants acknowledge that in the realm of regulating nuclear power facilities, federal preemption is limited to matters of “radiological health and safety.” *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205, 212

(1983); 42 U.S.C. § 2018; Doc. 4 at 8 (Plaintiffs' Brief); Doc. 39 at 4 (Defendants' Brief). The actions taken by the State of Vermont and the context of those actions clearly reveal that Vermont carefully and intentionally avoided regulating radiological health and safety. Vermont's actions focused on power supply, economics, reliability and the trustworthiness of Vermont Yankee's owners, all matters within the purview of traditional state regulation. *Pacific Gas & Electric*, 461 U.S. at 205.

Plaintiffs replace any contextual analysis with a near constant repetition of the phrase "safety, safety, safety," (e.g. Tr. 6/23/11 at 27), offered as some incantation whose mere repetition will make it come to pass. The small handful of references to safety, many of which were taken out of context, fail to demonstrate that decisions were based on "radiological health and safety."

A. Untrustworthiness

The false testimony and other bad acts by Plaintiffs cited in Amici's initial memorandum (Doc. 44 at 11-14), demonstrate ample grounds within traditional state authority to deny a new certificate of public good for a nuclear facility based on the misrepresentations and untrustworthiness of the facility's owner and operator. These concerns are before the Public Service Board and were also on the minds of legislators. There is no question that Plaintiffs' officials provided false information to support the certificate of public good request. (Doc. 44-14 at 2). Plaintiffs were required to pay intervenors' attorneys' fees and costs as a result of providing false information. *Id.* at 10.

Plaintiffs also provided false information in advertising campaigns. In prominent advertisements, Plaintiffs falsely claimed that nuclear power is "zero emissions." Following a complaint to Vermont's Attorney General regarding Entergy advertisements from amicus Vermont Public Interest Research Group, Plaintiffs acknowledged the factual inaccuracy of this

claim, and stopped using it. Cusimano Ex. 14 (AG letter re Entergy Advertisement). When combined with concerns regarding economics, including the inadequacy of the decommissioning fund and economic repercussions from creating a proposed spin-off company, legislators could rightly conclude that Plaintiffs were not sufficiently trustworthy to operate a business in Vermont and lacked the ability to meet their legal obligations.

B. Economics

Vermont regulators and legislators have considered the poor economics of various Vermont Yankee proposals in recent years. In the context of decommissioning, both the Public Service Board and the Vermont Legislature were presented with analysis that the money available is not sufficient to clean up the site once the facility closes. The Vermont Public Service Board record in the certificate of public good proceeding (Docket 7440) examined the adequacy of funds for decommissioning and the effect of having insufficient funds. Cusimano Ex. 15A, 15B, 15C (excerpts from PSB record on decommissioning docket 7440). Based on economic concerns, the Department of Public Service recommended ~~annual~~ contributions to the decommissioning fund beginning in March 2012 to insure the full funding of all decommissioning, spent fuel management and state-required site restoration costs....” (Cusimano Ex. 15B at 25-26 (Lamont testimony). Based on economics, the Windham Regional Commission recommended additional decommissioning cost analysis and a remediation plan to address land use impacts (Cusimano Ex. 15C at 4 (WRC testimony) and based on economics, the New England Coalition notes that the decommissioning ~~fund~~ falls short and that ENVY has contributed nothing to the fund.” Cusimano Ex. 15A at 4-5 (Shadis testimony). Amici specifically highlighted to the Board that the funds available for decommissioning are not adequate. (Doc. 44-2 at 6-21). The same analysis was presented in 2009 to the Vermont Legislature as well. Cusimano Ex. 16 (CLF Testimony 2-18-09). The lack of adequate

decommissioning funds justifies a legislative and/or Board determination that Plaintiffs will leave the state of Vermont ~~—burdened~~ with costs,” and bearing ~~—the~~ nuclear equivalent of a junk car in its back yard.” (Doc. 44-2 at 6).

Legislators also expressed grave concerns about the economics of the proposed spin-off company and the lack of adequate resources for decommissioning and cleaning up the site so it would be suitable for other uses. These concerns are well reflected in opinion pieces by prominent Vermont Senators, one who has since become the Secretary of State, one who serves in Senate leadership, and the third a prominent Senate Committee Chair. Cusimano Ex. 17 (Sens. J. Condos and B. Carris, *Rutland Herald*, 4/9/08); Cusimano Ex. 18 (Sens. J. Condos and B. Carris, *Rutland Herald*, 5/4/08); Cusimano Ex. 19 (Sen. Vice Illuzzi, *Times Argus*, 1/28/10). In the pieces by Senators Condos and Carris, both Senators stated that they ~~—~~support the use of nuclear power as part of any energy mix for the state of Vermont.” Cusimano Ex. 18. Both Senators expressed concerns about the economics of Entergy’s then-planned ~~—~~complex restructuring that will allow it to duck promised obligations to Vermonters, by spinning off its merchant nuclear plants to a weaker, highly leveraged (\$7 billion debt) entity that will likely be in poor position to pay the bills for the inevitable decommissioning of the plant.” Cusimano Ex. 17. Both Senators also clearly noted their concern about economics and ~~—~~who will pay the \$800 million bill to clean up the site when the power plant shuts down” stating ~~—it~~ would be unconscionable to support the continued operation of Vermont Yankee without the [sic] ensuring that taxpayers are protected.” Cusimano Ex. 18. These same concerns are expressed by Senator Illuzzi who expresses concerns about rising decommissioning costs, ~~—~~whether a shell corporation can guarantee Vermonters won’t be left holding the bag,” and the advisability of ~~—~~transferring an aging Vermont nuclear plant to a company with “junk bond” credit rating that seeks a 20-year “license extension”” Cusimano Ex. 19.

These economic concerns are identical to the concerns that led to the California statute that the Supreme Court upheld in *Pacific Gas & Electric*. There, based on economic grounds, the California Legislature would not permit construction of a nuclear facility until a solution for the disposal of the waste is provided. *Id.* at 198, 216. Here, the Vermont Legislature has expressed and acted on concerns about the economic consequences of Plaintiffs' proposals. This demonstrates clear factual support for concerns about economics and belies Plaintiffs' claims that economic concerns were a pretext.

C. Reliability

The reliability of Vermont Yankee as a viable and economic source of power for Vermont has been an ongoing concern of Vermont regulators and legislators. As with economics and power supply, the Vermont Public Service Board received significant information regarding reliability. This information was also available to Vermont Legislators. Amici specifically provided testimony stating:

Based on recent experiences, there is a non-trivial risk that Vermont Yankee would need to close abruptly during the life-extension period. For example, in early January 2009, Vermont Yankee experienced two leaks of radioactive water within two days. Vermont Yankee's overall performance compared to the industry moved from between the top and median quartile through 2006 to the bottom quartile for 2008.¹

(Doc. 44-2 at 6). The State's reliability assessment showed that the plant's overall performance had declined relative to the industry as a whole. *Id.* This demonstrates clear factual support for concerns about reliability and belies Plaintiffs' claims that reliability concerns were a pretext.

D. Context of safety references

Plaintiffs' claims regarding references to safety fail to show the Vermont Legislature's actions are preempted. Many of the statements Plaintiffs rely on are presented out of context and in fact show that the legislators were well informed about the scope of preemption. The paucity

¹ *Vermont Yankee Benchmark Report*, Appendix B at B-3 of the DPS Act 189 reliability assessment (12/22/08).

of references to safety that Plaintiffs rely on from a vast legislative record demonstrates that legislators were not motivated by safety.

Of the many statements Plaintiffs rely on to argue that the Legislature was motivated by safety, many are not even statements by legislators. For example, Plaintiffs rely on testimony from Sarah Hofmann, a witness before the House Natural Resources Committee, Tim Nulty, James Volz, and statements made by Governor Shumlin. *See* Ngau Reply Ex. 34A, Ngau Reply Ex. 53A, Ngau Reply Ex. 60A, Ngau Reply Ex. 36A, Ngau Reply Ex. 41A, Ngau Reply Ex. 45A, Ngau Ex. 1, Ngau Ex. 7, Ngau Ex. 14. Plaintiffs cannot argue Vermont legislators were safety motivated when the majority of the statements Plaintiffs cite come from non-legislators.

Furthermore, Plaintiffs rely on statements taken out of context. For example, Plaintiffs cite to testimony by both Sarah Hofmann and Michael Dworkin to support their proposition that the Legislature was covering up safety related motivations. Ngau Reply Ex. 53A, Entergy Nuclear/Vermont Yankee Leg. Briefing, http://www.leg.state.vt.us/JFO/vt_yankee_video.aspx (Part 2 Video 1:04:20 (Nov. 19, 2008)). However, Hofmann's statement was part of a presentation she gave on preemption and Professor Dworkin's statement was given in response to a question about preemption. *Id.* A statement made by Peter Shumlin about radioactive leaks was provided during the gubernatorial campaign. Ngau Ex. 14. Vermont's governor directs Vermont's participation in Nuclear Regulatory Commission proceedings. 30 V.S.A. § 1 (commissioner appointed by and serves at the pleasure of the governor); 30 V.S.A. § 20 (b)(11)(personnel for participation in NRC proceedings). Candidate Shumlin's statement in the context of a campaign has no bearing on the motive of the Legislature. A later statement by Peter Shumlin that —safety is our top concern” was provided in the context of a Department of Health proposed rulemaking, and did not address any specific legislative action. Ngau Ex. 13.

The Legislative record shows that legislators were well informed about preemption, not

that they were somehow treading on federal authority or covering up actions that would be preempted. In discussions regarding Act 160, the Public Service Board Chairman James Volz advised the Legislature to —~~make~~ a distinction between the safety issues that we are preempted from and the other topics that we are allowed to talk about.” Ngau Reply Ex. 45A. In response, the Chair of the Senate Finance Committee inquired about what areas of safety would not be preempted, for example, she inquired about a safety issue relating to evacuation. *Id.* She then acknowledged that the bill language should be clearer to ensure it clearly falls within state authority. *Id.* It is in this context that she said to —~~find~~ another word for safety.” *Id.* This shows a clear effort to act within state authority. In 2008, the Department of Public Service’s attorney Sarah Hofmann gave a presentation to the House Natural Resources Committee on how to avoid a preemption problem. Ngau Reply Ex. 53A. Similarly, Professor Michael Dworkin, a Vermont Law School professor and former Vermont Public Service Board Chair also advised the Legislative Joint Fiscal Committee to base its decisions on grounds aside from radiological safety. Entergy Nuclear/Vermont Yankee Leg. Briefing, http://www.leg.state.vt.us/JFO/vt_yankee_video.aspx (Part 2 Video 1:04:20 (Nov. 19, 2008)). The testimony of these two scholars shows that the Legislature was being well informed about the scope of preemption and fails to demonstrate any radiological safety motivation on the part of legislators.

The occasional statement where legislators discuss safety refutes Plaintiffs’ claim. —~~A~~ [A judiciary] cannot undertake a search for motive in testing constitutionality.” *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949). The legislative history includes over 2,500 pages and over 200 CDs of recorded hearings. Kolber Ex. 32. The very few statements Plaintiffs rely on actually show that the issue of safety was rarely discussed and —~~w~~]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it.”

Pacific Gas and Elec., 461 U.S. at 216. Plaintiffs' reliance on a few statements that use the word "safety" is not sufficient to transform the Legislature's actions into matters preempted by federal law. The limited references instead demonstrate a well informed Legislature that acted carefully in accordance with the stated purposes of its laws.

E. "Not Safety"

By Plaintiffs' own admission the dramatic collapse of a portion of Vermont Yankee's cooling towers in 2007 was not a safety related failure. Cusimano Ex. 20 (Associated Press report 10/1/07); Cusimano Ex. 21 at 6 (Entergy letter to NRC 9/27/2007) ("Failure of cooling tower...has not impact on safety...."). The collapse of the cooling tower has been the poster child for problems at the Vermont Yankee facility. The image of the collapse is ubiquitous and has appeared in numerous press reports and at Congressional hearings. Cusimano Ex. 22, 23, 24. Plaintiffs claimed the cooling tower problems should not be part of the Nuclear Regulatory Commission's license review for Vermont Yankee because the cooling towers are "not strictly considered safety equipment and so are outside the scope of federal review." Cusimano Ex. 20. By Plaintiffs claims, the cooling towers are not equipment or operations that affect radiological health and safety. Consideration of the cooling tower collapse which was clearly on the mind of the public and legislators and its import with regards to plant operations thus cannot be preempted by federal law. Plaintiffs cannot make broad claims of preemption here when they have previously sought to restrict federal review over the same matters. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel bars taking contrary positions).

F. Power Supply

In recent years, Vermont has been considering its power supply and how Vermont Yankee may fit into that mix. A report by the Vermont Public Interest Research and Education Fund in the summer of 2009 was given to every legislator. It sets forth explicitly how Vermont

can repower ~~with~~ local renewable energy resources” instead of committing ~~to~~ an additional 20 years of Vermont Yankee.” (Doc. 44-11 at 4). The report highlights the economic benefits of replacing Vermont Yankee with local renewable power. *Id.* at 15-16. The report provides the analysis of the tax benefits of replacing Vermont Yankee showing that ~~in~~ moderate growth in the local renewable energy sector would contribute 1.5 times as much in property taxes as Vermont Yankee, \$75 million vs. \$50 million from VY (2012 dollars).” *Id.* at 16. The publication and dissemination of this report counter Plaintiffs’ myopic claims about Vermont Yankee and show that the economics of future power supply in Vermont favored examining alternatives to Vermont Yankee. This study is but one example of how Vermont has considered and been motivated by the non-preempted area of power supply for the region, and not radiological health and safety.

III. CONCLUSION

For the foregoing reasons, the Court should deny the relief requested by Plaintiffs and confirm that Vermont’s laws and actions regarding the Vermont Yankee nuclear power facility are constitutional and not preempted by federal law.

Respectfully submitted,

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