

UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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DISTRICT OF VERMONT

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ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY NUCLEAR)
OPERATIONS, INC.,)
Plaintiffs)

v.)

Docket No. 1:12-CV-206

PETER SHUMLIN, in his official capacity as)
GOVERNOR OF THE STATE OF)
VERMONT; WILLIAM SORRELL, in his)
official capacity as the ATTORNEY)
GENERAL OF THE STATE OF VERMONT;)
and MARY N. PETERSON, in her official)
capacity as the COMMISSIONER OF THE)
DEPARTMENT OF TAXES OF THE)
STATE OF VERMONT,)
Defendants)

HEARING REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Introduction

Plaintiffs Entergy Vermont Yankee, LLC (“ENVY”) and Entergy Nuclear Operations, Inc. (“ENOI”) (collectively “Plaintiffs” or “Entergy”), which own and operate, respectively, Vermont Yankee Nuclear Power Station (“Vermont Yankee Station”), respectfully submit this memorandum in support of their motion for a preliminary injunction against defendants Peter Shumlin, Governor of the State of Vermont (the “Governor”), William Sorrell, Attorney General of the State of Vermont (“Attorney General”), and Mary N. Peterson, Commissioner of the Department of Taxes of the State of Vermont (collectively, “Defendants”), prohibiting enforcement of recent Vermont legislation (the “Legislation”) that is expressly preempted by a federal statute and is unconstitutional under several provisions of the United States Constitution.

After this Court enjoined State officials from conditioning approval of a Certificate of Public Good on legislative approval or on Entergy providing below-market electricity rates, the Vermont General Assembly (“General Assembly”) passed its latest preempted and unconstitutional Legislation. The Legislation applies only to federally licensed Vermont Yankee Station. It imposes an illegal and burdensome new exaction (the “New Levy”) on this important provider of interstate electric power for the New England region in the wake of this Court’s injunction against efforts by the State to shut down the plant by officials of the State of Vermont (“State” or “Vermont”), including certain Defendants in this action, the Governor and the Attorney General. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin* (“*Entergy I*”), 838 F. Supp. 2d 183 (D. Vt. 2012) (“Merits Decision *Entergy I*”).¹

¹ The defendants in *Entergy I* appealed this Court’s order and Entergy filed a cross-appeal. Their appeals are currently pending before the Second Circuit Court of Appeals. *Entergy Nuclear Vermont Yankee, LLC, et al. v. Shumlin, et al.*, Dkt. Nos. 12-707-cv(L), 12-791-cv(XAP) (2d Cir.).

A preliminary injunction is necessary to preserve the status quo pending the conclusion of this litigation because the Legislation violates Entergy's constitutional rights and requires Entergy to make millions of dollars of additional new payments to the State beginning on or before October 25, 2012. Below, Entergy will show that it is likely to succeed on the merits, that the equities favor an injunction, and that Entergy has no adequate remedy at law. Indeed, there is no procedure under Vermont law by which Entergy can seek prospective review of the Legislation or obtain a refund once it has paid the amounts imposed by the Legislation.

Statement Of Facts

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

History of Vermont Yankee Station

Vermont Yankee Station, located in Vernon, Vermont, is one of New England's largest suppliers of electric energy. Declaration of Wanda C. Curry, dated September 7, 2012 ("Curry") at ¶ 5. Vermont Yankee Station employs over 600 people and has a capacity of over 600 megawatts of power, almost 12 times the capacity of the next largest generator in the State. Curry ¶¶ 5, 7; Declaration of Jeanne Cho, dated September 7, 2012 ("Cho") ¶ 3, Ex. 2 (2010 Summary Statistics, Table 2. Ten Largest Plants by Generating Capacity (U.S. Energy Information Administration 2010), Ex. 1 ("Report to the Vermont Department of Public Service on the Vermont Yankee License Renewal" (GDS Associates, Engineers and Consultants, Feb. 27, 2009) (the "GDS Study") at 12-12)); Declaration of Marc L. Potkin dated September 10, 2012 ("Potkin") ¶¶ 12, 16.

Vermont Yankee Station began operating in 1972 pursuant to a 40-year license issued by the Atomic Energy Commission, the predecessor of the United States Nuclear Regulatory Commission ("NRC"). Curry ¶¶ 6, 7. Vermont Yankee Station was originally owned by

Vermont Yankee Nuclear Power Corporation (“VYNPC”), a joint venture including Green Mountain Power Corporation (“Green Mountain”), Central Vermont Public Service Corporation (“Central Vermont”), and other Vermont retail utilities. Curry ¶ 5; Potkin ¶ 33.

In 2001, VYNPC invited bids for Vermont Yankee Station at auction. Curry ¶ 6. Entergy successfully bid to acquire the plant and participated in ten-month-long proceedings before the Vermont Public Service Board (“PSB”), requesting a Certificate of Public Good to own and operate the plant. *Id.*; Cho ¶ 17, Ex. 16 (Re Vt. Yankee Nuclear Power Corp., Dkt. 6545 (Vt. PSB, June 13, 2002) (“PSB Dkt. 6545”), available at <http://www.state.vt.us/psb/orders/2002/jun.htm>). On June 13, 2002, the PSB approved the sale of Vermont Yankee Station to Entergy. Cho ¶ 17, Ex. 16 (“PSB Dkt. 6545”).

Initial Power Purchase Agreement and Interstate Market

Starting when Entergy purchased Vermont Yankee Station in 2002, it sold power to VYNPC pursuant to a Power Purchase Agreement (“PPA”) that expired in March, 2012. Potkin ¶ 33; Cho ¶ 20, Ex. 19 (PPA between ENVY and VYNPC, dated Sept. 6, 2001). In its order approving the sale, the PSB found that, *inter alia*, the Vermont utilities had obtained a PPA through 2012, covering approximately 55 percent of Vermont Yankee Station’s output, under a formula that ensured Vermont ratepayers would be able to pay reduced rates. PSB Dkt. 6545 at 7, 8, 13.

Further, the Federal Energy Regulatory Commission (“FERC”) has authorized Vermont Yankee Station to sell power into the interstate market at market-based rates managed by ISO New England. Potkin ¶¶ 17-20. “ISO New England is a non-profit independent system operator, regulated by FERC, that administers New England’s wholesale electricity markets.” Merits Decision *Entergy I*, 838 F. Supp. 2d at 192; see also Potkin ¶ 7.

Request to Increase Output

On February 21, 2003, Entergy sought approval from the PSB to modify Vermont Yankee Station to increase its power output by up to 20 percent (“Uprate”). Curry ¶ 8; Cho ¶ 4, Ex. 3 (Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output, Order Dkt. No. 6812 (Vt. PSB, Mar. 15, 2004) (“PSB Dkt. 6812”). As part of its effort to obtain approval for the Uprate, Entergy entered into a Memorandum of Understanding with the Vermont Department of Public Service (“DPS”), “under which [DPS] agree[d] to support the power uprate and Entergy commit[ted] to pay approximately \$6 million of payments to the state of Vermont and establish some protection for ratepayers in the event that the uprate reduce[d] the reliability of Vermont Yankee” (the “2003 MOU”). Merits Decision *Entergy I*, 838 F. Supp. 2d at 193; Curry ¶ 9; Cho ¶ 4, Ex. 3 (PSB Dkt. 6812 at 3). On March 15, 2004, the PSB approved the Uprate. Cho ¶ 4, Ex. 3 (PSB Dkt. 6812 at 118). Entergy’s payments under the 2003 MOU have totaled over \$15 million. Curry ¶ 10, Curry Ex. 1.

Nuclear Fuel Removal

To dispose of Vermont Yankee Station’s spent nuclear fuel, in 1983 VYNPC entered into a Standard Contract pursuant to 42 U.S.C. § 10222, whereby the United States Department of Energy (“DOE”) agreed to dispose of the spent fuel. When Entergy acquired Vermont Yankee Station from VYNPC in 2002, VYNPC assigned certain rights and duties to Entergy pursuant to Article XIV of the Standard Contract. This assignment of rights included the obligation of the DOE to dispose of spent fuel. The DOE breached the Standard Contract and failed to dispose of the spent fuel. As a result, Entergy was forced to make alternate arrangements to store the spent

nuclear fuel on-site until the DOE removes it in accordance with the Standard Contract. *Vt. Yankee Nuclear Power Corp. v. United States*, 583 F.3d 1330, 1337 (Fed. Cir. 2012) (the “Federal Damages Action”). To that end, on March 10, 2005, Entergy proposed legislation to the General Assembly to permit Vermont Yankee Station to seek approval from the PSB to construct a dry fuel storage facility for spent nuclear fuel at Vermont Yankee Station. Potkin ¶ 23.

On June 21, 2005, the governor signed into law Act 74, which added sections 6521, 6522, and 6523 to title 10 of the Vermont Statutes. 2005 Vt. Acts & Resolves No. 74 (“Act 74”). Section 6522 of Act 74 authorized Vermont Yankee Station to seek approval from the PSB to construct a dry fuel storage facility. In order to obtain passage of that portion of Act 74 and, ultimately, to obtain approval to construct the dry fuel storage facility, on June 21, 2005, Entergy entered into a new Memorandum of Understanding with DPS (“2005 MOU”), which required Entergy to make quarterly payments to the Clean Energy Development Fund (“CEDF”) for periods through March 31, 2012, in the total amount of \$15,625,000. Curry ¶ 12; Cho ¶ 6, Ex. 5 (2005 MOU); Merits Decision *Entergy I*, 838 F. Supp. 2d at 199. On April 26, 2006, the PSB approved the construction of the dry fuel storage facility. Potkin ¶ 25.

Act 74 also created the CEDF. Vt. Stat. Ann. tit. 30 § 8015 (formerly codified at Vt. Stat. Ann. tit. 10 § 6523). The purpose of the CEDF is “to promote the development and deployment of cost-effective and environmentally sustainable electric power and thermal energy or geothermal resources for the long-term benefit of Vermont consumers, primarily with respect to renewable energy resources, and the use of combined heat and power technologies.” Vt. Stat. Ann. tit. 30 § 8015(c). The CEDF was established by the General Assembly to receive and dispense funds from Entergy for the development and deployment of renewable energy and

alternatives to nuclear energy. Cho ¶ 19, Ex. 18 (*Clean Energy Development Fund, Annual Report Fiscal Year 2011* (Submitted to the General Assembly and the Governor, Jan. 2012)); 2005 Vt. Acts & Resolves No. 74.

Act 74 provided that the CEDF would receive payments from Entergy under the 2003 MOU and any MOUs entered into before July 1, 2005, thereby including payments under the 2005 MOU, which was entered into as of June 21, 2005 (collectively, the “Contract Payments” or the “MOUs”). Curry ¶¶ 12, 14; Merits Decision *Entergy I*, 838 F. Supp. 2d at 199.

Request to Extend the PPA

During negotiations to extend the PPA, the utilities informed Entergy that, absent a below-market PPA, they would not expect the General Assembly or the PSB to approve the continued operation of Vermont Yankee Station. Potkin ¶ 35. The PPA was not extended. Entergy does not currently have a PPA with any of Vermont’s utilities, and Entergy has not sold power to the Vermont utilities since March 2012. Potkin ¶ 37.

Taxes, Fees and Contract Payments Made By ENVY

In recent years ENVY has paid Vermont taxes and fees of over \$6.7 million per year. Curry ¶ 5; Cho ¶ 18, Ex. 17 (*Issue Paper, Vermont Yankee Nuclear Power Facility: Taxation and Other Fees and Payments to the State* (Vermont Legislative Joint Fiscal Office, Feb. 2011) (“JFO Issue Paper”) at 4 of 4)). These taxes and fees included significant amounts imposed under two tax provisions, both of which were applicable only to Entergy: the Electrical Energy

Tax (“EET”) and the Electric Generating Plant Education Property Tax (“EGPEPT”)² (together the “Prior Levy”).³)

In addition to these taxes and fees, Entergy has also paid made Contract Payments totaling over \$30 million during the period 2003 through 2012. Curry ¶ 14; Cho ¶ 18, Ex. 17 (JFO Issue Paper at 4 of 4). Entergy paid over half of that amount to the CEDF. Curry ¶¶ 12, 14; Cho ¶ 18, Ex. 17, JFO Issue Paper at 4 of 4. Entergy has fully satisfied its current financial obligations under the MOUs. Curry ¶ 13.

Federal Spent Fuel Litigation

As noted above, the DOE breached its contractual obligations and failed to accept spent nuclear fuel from Vermont Yankee Station. *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1336. Because payments under the 2005 MOU were made to obtain approval from the State for the construction of a storage facility for the spent nuclear fuel that the federal government had failed to remove, Entergy sought reimbursement for the 2005 MOU payments, among other damages incurred as a result of the breach, in a lawsuit against the federal government. Potkin ¶ 26; *Vt. Yankee Nuclear Power Corp.*, 683 F.3d 1330.

In the Federal Damages Action, the United States Court of Appeals for the Federal Circuit recognized the federal government’s breach of contract, which had not been disputed on appeal, but held that Entergy’s payments to the State pursuant to the 2005 MOU were not

² The EGPEPT was limited in its application to “any operating electric generating plant subject to tax under chapter 213” of Title 32. As the EET was imposed under chapter 213 of Title 32, only entities subject to the EET (*i.e.*, ENVY) were subject to the EGPEPT.

³ The two charges constituting the Prior Levy were imposed by Vt. Stat. Ann. tit. 32 § 8661 (the EET) and 5402a (the EGPEPT). Both charges were formulated in basically the same manner and were based upon the electrical energy output of Vermont Yankee Station. Sections 57 and 58 of 2011 Vt. Laws 143 (“Act 143”) repealed the EGPEPT in its entirety and modified Vt. Stat. Ann. tit. 32 § 8661 so as to greatly increase the amount of EET due. The New Levy thus consists solely of the greatly increased EET.

reimbursable by the federal government. *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1346.⁴ The Federal Circuit called the 2005 MOU payments “a form of blackmail for the state approval of the construction” and noted that the 2005 MOU payments bore “no relationship to any costs incurred by the state or its citizens as a result of the construction of the dry storage facility.” *Id.*

B. The General Assembly’s Prior Efforts To Shut Down Vermont Yankee Station And This Court’s January 19, 2012 Injunction.

Beginning in 2006, the General Assembly began taking steps to attempt to shut down Vermont Yankee Station or to require it to enter into below-market sales contracts with Vermont utilities. Potkin ¶ 27.

In support of that effort, Vermont has taken the position that Vermont Yankee Station is required to have a State-issued license, known as a “Certificate of Public Good,” to continue operating in the State. Potkin ¶ 31. Accordingly, the General Assembly passed legislation (2006 Vt. Acts & Resolves No. 160 (“Act 160”)) to directly intercede in that process by requiring General Assembly approval before the PSB could issue a Certificate of Public Good for continued operation of the Station. On May 18, 2006, the governor signed into law Act 160. Merits Decision *Entergy I*, 838 F. Supp. 2d at 208; Vt. Stat. Ann. tit. 30 § 248(e)(2).

On February 24, 2010, the Vermont Senate voted against consideration of Senate Bill 289, which would have approved the continued operation of Vermont Yankee Station for an additional 20 years after March 21, 2012. Potkin ¶ 28; Merits Decision *Entergy I*, 838 F. Supp. 2d at 215-16. By voting against consideration of Senate Bill 289, the Senate blocked approval for Vermont Yankee Station’s Certificate of Public Good for the continued operation of Vermont Yankee Station.

⁴ On August 29, 2012, Entergy filed a petition requesting a rehearing and an *en banc* rehearing.

Since February 2010, the General Assembly has taken no further action to approve the continued operation of Vermont Yankee Station, and the PSB has not issued a renewed Certificate of Public Good to Vermont Yankee Station. Potkin ¶ 29.

In contrast, on March 21, 2011, the NRC issued a Renewed Facility Operating License for Vermont Yankee Station, which will expire on March 21, 2032. Potkin ¶ 30; Cho ¶ 8, Ex. 7 (NRC’s Renewed Facility Operating License No. DPR-28, Mar. 21, 2011).

Faced with this impasse, on April 18, 2011, Entergy filed suit to obtain, among other relief, an injunction “enjoining Defendants from undertaking any steps, based upon Vermont’s or its officials’ denial of a [Certificate of Public Good], to shut down or make preparations to shut down the operation of Vermont Yankee Station as of March 21, 2012” and “enjoining Defendants from conditioning Vermont Yankee Station’s continued operation after March 12, 2012 upon ENVY’s agreement to provide below-market wholesale electricity rates to Vermont retail utilities.” Complaint, *Entergy I*, Dkt. No. 1:11-CU-99 (Apr. 18, 2011); Merits Decision *Entergy I*, 838 F. Supp. 2d at 233.

After a three-day bench trial on the merits of Entergy’s Complaint, this Court issued an order on January 19, 2012, that permanently enjoined the defendants in that case “from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee [Station] to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation,” and “from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee [Station] to sell power to Vermont utilities at rates below those available to wholesale customers in other states.” Merits Decision *Entergy I*,

838 F. Supp. 2d at 243. As a result, Vermont Yankee Station continues to operate. *Id.*⁵ However, Vermont is continuing its efforts to shutter the facility. Potkin ¶¶ 31, 32.⁶

C. The Challenged Legislation Directed at Vermont Yankee Station.

On March 22, 2012, following the issuance of this Court’s injunction and the expiration of the prior Certificate of Public Good, House Bill 782 was introduced to impose a significant new financial burden on ENVY based on the generation of electricity by Vermont Yankee Station.

In various public statements, the General Assembly expressly asserted that House Bill 782 was designed to replace the expired Contract Payments. Those payments, of course, were made in return for favorable action by the State on the Uprate and dry fuel storage petitions. For example, during a Conference Committee Hearing held on March 16, 2012, legislators made the following statements regarding the intended purpose of the New Levy:

UNIDENTIFIED MALE SPEAKER:⁷ They’re no longer paying into the Clean Energy Development Plan ... so this would pick up for that lost revenue. But rather than ... trying to recreate the clean energy development structure, we’re just using the existing tax structure.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 80:8-9, 11-15).

REPRESENTATIVE MASLAND: ... it replaces the MOUs that we won’t have.

⁵ Pursuant to Act 160, “when a nuclear plant petitions for continued operation, if the Vermont legislature declines to act, or is unable to pass, for any reason, affirmative legislation approving a certificate of public good (CPG) for continued operation, the plant’s petition will remain pending and its current certificate will expire.” Merits Decision *Entergy I*, 838 F. Supp. 2d at 189 (citing Act 160).

⁶ On February 18, 2012, the defendants in *Entergy I* filed a Notice of Appeal, appealing “each and every part of the Decision and Order on the Merits of Plaintiffs’ Complaint entered in this action on January 19, 2012.” Notice of Appeal, *Entergy I*, Dkt. 187 (Feb. 18, 2012). *Entergy I* is currently on appeal before the Second Circuit Court of Appeals.

⁷ Upon information and belief, the speaker was Representative Oliver K. Olsen.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 84:17-18).

Similarly, Molly Bachman, of the Vermont Department of Taxes, testified as follows before the Senate Finance Committee on April 18, 2012:

MS. MOLLY BACHMAN: ... you know, with the MOUs there leaves a huge hole in the budget and this is to – an attempt to have the plant shoulder the same burden, the same portion of the budget as it does now.

Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118) at 14:6-9).

MS. MOLLY BACHMAN: The tax burden is more but the total burden for support of government services is the same because I think, as I understand it, the MOUs did – they paid about 6 million, 7 million under the MOUs, so that’s what I mean by burden.

Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118) at 15:5-9).

One legislator was apparently concerned about imposing a “tax” to replace the Contract Payments, expressly recognizing that the Contract Payments had been in exchange for favorable State regulatory action:

UNIDENTIFIED MALE SPEAKER:⁸ I mean, the MOUs that were reached before were under pretty specific, you know, conditions where it was sort of a quid pro quo for, you know, we want to do this and, well, you know, we’ll agree to let you pay that and I’m not sure that’s going to happen.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 85:15-20).

The Vermont legislators were also well aware that they would be taking a calculated risk by enacting House Bill 782, in light of the State’s prior illegal efforts to shut down Vermont Yankee Station and this Court’s injunction in *Entergy I*. For example, Scot Kline, of the Environmental Protection Division at the Attorney General’s Office, testified as follows:

⁸ Upon information and belief, the speaker was Representative Oliver K. Olsen.

I do want to say that even with this version, given the current circumstances which include the pending federal court litigation, the decision from the district court which is now on appeal and the ongoing proceedings at the Public Service Board, there is a risk associated within [sic] increasing a bill that would increase the generating tax at this time.

Cho ¶ 11, Ex. 10 (Tr. of Apr. 18, 2012 Hearing (CD 12-118) at 24:5-11).

On May 15, 2012, the Governor approved and signed Act 143 (2011 Vt. Acts & Resolves No. 143 (“Act 143”). The New Levy imposes a State tax at the rate of \$0.0025 per kWh of electrical energy produced, but only on electric generating plants constructed in the State subsequent to July 1, 1965, and only on those having a name plate generating capacity of 200,000 kilowatts, or more. Vt. Stat. Ann. tit. 32 § 8661(a) (2012). Since Vermont Yankee Station is the sole electric generating plant built after July 1, 1965 and having the specified name plate capacity, by its carefully crafted terms the New Levy is applicable only to ENVY, as the owner of Vermont Yankee Station, and not to any other generator of electricity. Potkin ¶ 13; Curry ¶ 8. The New Levy results in a levy that is two and one-half times that paid under the Prior Levy (which included the EET and the EGPEPT, which Act 143 repealed) and four and one-half times that paid by ENVY under the EET by itself.⁹ Cho ¶ 18, Ex. 17 (JFO Issue Paper at 4 of 4); H.782 Conference Committee Fiscal Summary (estimating revenue from the New Levy in the amount of \$12.8 million for the year 2014)). Further, while the Prior Levy had been designed to serve as a proxy for the statewide property tax, the New Levy imposes a burden vastly exceeding any burden borne by any other entity.

⁹ As previously noted, the Prior Levy, constituted by the EET and the EGPEPT, was applicable only to ENVY. However, because the Prior Levy served as a proxy for the Statewide property tax Entergy did not and does not object to the Prior Levy, which Entergy is prepared to continue to pay. Entergy objects only to the New Levy, which imposes a dramatically higher burden that is not equivalent to what other similarly situated generators of electricity in Vermont are subject.

The New Levy took effect July 1, 2012. Act 143, § 63(1). The first payment of the New Levy is due on October 25, 2012, for the quarter ending September 30, 2012. Act 143, § 58(a). If the New Levy is not paid, it may be assessed against the electric generating plant, along with interest and penalties. Vt. Stat. Ann. tit. 32 § 8661(b).

By calling the New Levy a “tax” and imposing it only on ENVY, Defendants are attempting to forcibly extend the payment obligations under the expired MOUs and extract payments comparable to the Contract Payments, this time without providing any consideration or commitments to Entergy in return. Indeed, the General Assembly expressly contemplated that the New Levy would require Entergy to continue to make payments equivalent to the Contract Payments, despite its knowledge that the MOUs have expired.

In sum, Defendants now seek to require Entergy to continue to pay amounts that it had previously paid pursuant to contracts by simply relabeling those contractual payments as “taxes” applicable only to ENVY. The State offers no commitments in return.

Argument

To obtain a preliminary injunction, the moving party must demonstrate (1) irreparable harm absent injunctive relief; (2) either (a) a likelihood of success on the merits, or (b) a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction. *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011); *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir.2010), *cert. denied*. 131 S. Ct. 1569 (2011). Where the preliminary injunction will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, a district court should not apply

the less rigorous serious questions standard; the moving party must establish likelihood of success on the merits. *Red Earth*, 657 F.3d at 143, *Metro Taxicab*, 615 F.3d at 156.

As explained below, Entergy meets the requirements for a preliminary injunction because it is likely to succeed on the merits on multiple legal grounds, it faces irreparable harm absent a preliminary injunction, and the public interest favors granting a preliminary injunction. Moreover, to the extent that the balance of equities is also considered,¹⁰ Entergy will endure substantially more hardship if a preliminary injunction is not granted than Defendants will endure if a preliminary injunction is granted.

I. ENTERGY IS LIKELY TO SUCCEED ON THE MERITS.

The New Levy suffers from multiple problems, any one of which would require a federal court to invalidate it. It is expressly preempted by a federal statute (15 U.S.C. § 391) and violates several provisions of the United States Constitution (the Supremacy Clause, the Commerce Clause, the Equal Protection Clause, and the Contract Clause). If Plaintiffs are able to show a likelihood of success on the merits on *any* of these grounds, they satisfy this

¹⁰ Other formulations of the preliminary injunction standard add the additional requirement that the balance of equities must tip in favor of the movant (apparently, regardless of whether the movant establishes likelihood of success or merely shows serious questions going to the merits). In *Entergy I*, this Court articulated a four part standard based on *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”) See *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, Memo. and Order on Pls.’ Mot. For Prelim. Inj., Docket No. 1:11-cv-99-jgm (D. Vt. July 18, 2011). In *Citigroup Global Markets, Inc. v. VCG Special Opp. Master Fund Ltd.*, 598 F.3d 30, 35-37 (2d Cir. 2010), the Second Circuit undertook a review of its preliminary injunction jurisprudence in light of *Winter* and other decisions articulating the requirements using different language, and reiterated the applicability of the standard used by the Second Circuit for over five decades—a standard that requires balancing of equities only where the movant relies on the lower “serious questions” standard. See also *Nordic Windpower USA v. Jacksonville Energy Park*, 2012 U.S. Dist. LEXIS 55552 (D. Vt. Apr. 18, 2012) (explaining that the balance of hardships analysis applies when the movant is relying on the lower “serious questions” standard).

requirement for the issuance of a preliminary injunction. As explained below, Plaintiffs are likely to succeed on each of their legal challenges to the New Levy.

A. Entergy Is Likely To Succeed On Its Claim That The New Levy Is Preempted by 15 U.S.C. § 391.

The Supremacy Clause dictates that “the Laws of the United States which shall be made in Pursuance [of the United States Constitution] . . . shall be the supreme Law of the Land” U.S. Const., art. VI, cl. 2. Once Congress has spoken, the Supremacy Clause requires that any state law in conflict with federal law be “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Congress, pursuant to its plenary power over commerce, has expressly singled out the generation and transmission of energy for protection against discriminatory tax impositions by enacting 15 U.S.C. § 391, which provides:

No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The New Levy, effective July 1, 2012, is in conflict with this federal statute – and, therefore, is preempted – because it imposes what Vermont describes as a “tax” with respect to the generation or transmission of electricity and discriminates against electricity that, because of actions taken by the State, is transmitted in interstate commerce to out-of-state purchasers.

The New Levy applies only to ENVY because Vermont Yankee Station is the only electric generating plant “constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more.” Vt. Stat. Ann. tit. 32 § 8661. All of

Vermont Yankee Station’s electricity is subject to the New Levy. And, because all of Vermont Yankee Station’s electricity is sold to out-of-state purchasers, the electricity generated by Vermont Yankee Station, which is transmitted in interstate commerce, bears a greater tax burden than electricity generated and sold in Vermont. Potkin ¶¶ 37, 38.

In *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 149 (1979), the Supreme Court invalidated a New Mexico statute that imposed an electrical energy tax of 2% on all electricity generated in New Mexico, regardless of whether the electricity was sold to in-state or out-of-state purchasers, and provided a credit/reimbursement mechanism that was available to generators when the electricity they produced was ultimately consumed in New Mexico. Wholesalers selling electricity for local consumption would receive a 2% credit against the New Mexico Gross Receipts Tax that would then be reimbursed to the generators, thereby allowing the generators to eliminate their electrical energy tax burden. However, wholesalers selling the electricity for consumption outside of New Mexico did not receive a credit because the Gross Receipts Tax did not apply to such sales. The Supreme Court rejected New Mexico’s argument that the electrical energy tax was “an evenhanded tax on the generation of electricity,” focusing on the fact that the “tax itself indirectly but necessarily discriminates against electricity sold outside New Mexico.” *Id.* at 150.

Here, the New Levy was designed to apply only to ENVY, which sells all of the electricity it generates for consumption outside Vermont. The New Levy does not apply to other in-State generators of electricity. The discrimination prohibited by 15 U.S.C. § 391 is plain.¹¹

¹¹ Weighing in as *amici* against New Mexico in *Snead*, five states (New York, New Jersey, Maryland, Ohio and Virginia) warned of the “proliferation of state taxes on exported power as distinct from power locally consumed” and “subtly contrived” impositions on exported power that might appear at first blush to be evenhanded. *Snead*, Brief of Amici Curiae, 1978 WL 207190 at 6 (filed Nov. 22, 1978). Here, one need not look deeply to conclude that the New Levy is discriminatory by contriving to impose the New Levy *just* on ENVY, the company (Footnote continues on next page.)

This Court need not look beyond the discriminatory effect of the New Levy to determine whether the New Levy is preempted. In *Snead*, the Supreme Court rejected New Mexico’s argument that the electrical energy tax needed to be examined within the context of New Mexico’s total tax structure, which New Mexico contended would show that the tax did not discriminate against electricity sent out of the state. “To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it.” 441 U.S. at 149-50. Accordingly, the Supreme Court held that “[b]ecause the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.” *Id.* at 150.

B. Energy Is Likely To Succeed On Its Claim That The New Levy Discriminates Against Interstate Commerce In Violation Of The Commerce Clause Of The United States Constitution.

The New Levy violates the Commerce Clause of the United States Constitution. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court articulated a four-prong test to determine whether the imposition of a state levy¹² is permissible under the Commerce Clause. Under this test, the levy will be sustained only if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the service provided by the

(Footnote continued from previous page.)

owning the *only* power plant in the State subject to the New Levy and selling *all* of the electricity it generates to out-of-state purchasers.

¹² The State has cast the New Levy as a “tax” and, accordingly, the Commerce Clause analysis is made on that basis. However, the Court of Appeals for the Federal Circuit found the 2005 MOU payments, which the New Levy was designed to replace, to be “blackmail.” *Vt. Yankee Nuclear Power Corp. v. United States*, 683 F.3d 1330, 1346 (Fed. Cir. 2012). There is no reason why “blackmail” should be viewed more charitably than a suspect tax for Commerce Clause purposes.

state. *Complete Auto Transit*, 430 U.S. at 279. Failing *any* of the four prongs dooms the levy under the Commerce Clause. Entergy’s challenge to the New Levy is based on the third and fourth prongs of the *Complete Auto Transit* test, and it is likely to succeed on the merits on both bases.

With respect to the third prong, the Supreme Court instructed that “[a] tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.” *Complete Auto Transit*, 430 U.S. at 288-89, n.15. The New Levy must be subjected to such careful scrutiny because it is clearly tailored to single out one business that sells its product solely in interstate commerce. The New Levy cannot survive the required level of scrutiny.

As discussed above in connection with the preemption analysis, the New Levy was targeted to apply to just one generator – ENVY – whose sales are made entirely in interstate commerce though the wholesale market administered by ISO New England. Until recently required to do so by the Merits Decision in *Entergy I*, Vermont has refused to consider Entergy’s application for a renewal of its Certificate of Public Good. ENVY was unable to secure PPAs with Vermont utilities. In this regard, the State’s actions limiting ENVY’s energy sales to out-of-state purchasers, when combined with a tax that applies only to ENVY, results in a discriminatory tax on out-of-state purchasers just as surely as would statutory language limiting the tax to out-of-state purchasers.

For these reasons, the New Levy is distinguishable from the severance tax that was upheld in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981), because the Montana severance tax was generally applicable and “the tax burden was borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state

consumers.” In contrast, the New Levy is designed to burden a single business that State action has restricted to making sales to out-of-state purchasers, thereby violating the third prong of *Complete Auto Transit*.

The New Levy also violates *Complete Auto Transit*’s fourth prong because it bears no relationship to any services provided by the State. As held by the Court of Appeals for the Federal Circuit in the Federal Damages Action, the 2005 MOU payments, which funded the CEDF, bore “no relationship to any costs incurred by the state or its citizens as a result of the construction of the dry storage facility.” *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1346 (emphasis added). Indeed, the Federal Circuit characterized those payments as “a form of blackmail” for the State’s granting regulatory approval for the storage facility. *Id.* Thus, the situation here is unlike that presented in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981), where the Court rejected taxpayers’ challenge to *Complete Auto Transit*’s fourth prong because it would require “federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation.” No such analysis is required here because the New Levy is a replacement for the blackmail payments that have already been held to have “no relationship to any costs incurred by the state or its citizens” (*Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1346) and, thus, cannot be “fairly related” to any services provided by Vermont. *See also American River Transp. Co. v. Bower*, 813 N.E.2d 1090, 1093 (Ill. App. Ct.), *appeal denied*, 824 N.E.2d 282 (Ill. 2004) (fourth prong of *Complete Auto Transit* proved fatal to an assertion of Illinois use tax for fuel and supplies purchased by an out-of-state tugboat operator, even though its boats spent 50% of their time pushing barges in Illinois waters, because the tax “has no relation to any services provided by this state”).

Accordingly, Plaintiffs have demonstrated likelihood of success on the merits of their Commerce Clause challenge because the New Levy does not pass muster under prongs three and four of the *Complete Auto Transit* test.

C. Entergy is Likely To Succeed On Its Claim That The New Levy Violates Entergy's Right To Equal Protection Under the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.¹³

For purposes of evaluating whether a statute violates the Equal Protection Clause, statutes that do not implicate a fundamental right or a suspect class are subject to rational basis review, under which a court must determine whether the statute is “rationally related to legitimate government interests.” *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Armour v. City of Indianapolis*, ___ U.S. ___, 132 S. Ct. 2073 (2012).

The United States Supreme Court has characterized the rational basis test as entailing a two-part analysis. Under the rational basis test, the court must inquire: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981). Challenged legislation can run afoul of the Equal Protection Clause by failing either part of the two-part analysis. In the instant

¹³ Corporations, such as ENOI, are deemed to be “persons” entitled to the protection of the Equal Protection Clause. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Likewise, a limited liability company, such as ENVY, is protected by the Equal Protection Clause. *Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 476 n. 34 (D. Md. 2007), *aff'd*, 305 F. App'x 90, 2008 (4th Cir. 2008).

situation, the New Levy fails both.

1. The New Levy Does Not Have A Legitimate Purpose.

The General Assembly has expressed that the purpose of the New Levy is to replace the Contract Payments that ended in March of 2012. Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 80:8-15; 84:17-18; 85:8-13. Whether one takes the General Assembly at its word that it is simply after a replacement for the expired Contract Payments, or whether one views the New Levy in a broader context of State efforts to force the closure of Vermont Yankee Station, the New Levy has no legitimate purpose.

As noted, Entergy was contractually obligated to make payments under the MOUs through March of 2012. That obligation having ended, Defendants now seek to impose unilaterally the same obligation on Entergy under the simple guise that the State's budget has a "hole" to fill. *See, e.g.*, Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118)) at 15:5-11. There can be no legitimate government purpose for unilaterally transforming Contract Payments having "no relationship to any costs incurred by the state or its citizens" (*Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1346), which Entergy agreed to make only through March of 2012 into mandatory impositions that Entergy must pay indefinitely into the future. Assuming that it is not an attempt to circumvent this Court's injunction through the imposition of a financial burden that makes it uneconomical for Vermont Yankee Station to continue operating, the only conceivable purpose of the New Levy is to single out Entergy, as distinct from all other generators of electricity in the State. That is not a legitimate government purpose. Thus, the New Levy lacks a legitimate purpose and violates the Equal Protection Clause.

While transcripts of the General Assembly's discussions relating to the passage of the New Levy indicate that the General Assembly sought to replace the Contract Payments, that expressed purpose is inconsistent with the State's continuing efforts to shut the plant down. The

legislative history must also be viewed in light of the litigation history and the lesson that the General Assembly learned from the Merits Decision in *Entergy I*. According to the United States Supreme Court, contemporaneous declarations of the purpose of the statute need not be accepted at face value if “an examination of the circumstances forces [the Court] to conclude that [the declared objective] ‘could not have been a goal of the legislation.’” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)).

An examination of the instant circumstances begins with this Court’s findings in the Merits Decision in *Entergy I* that Vermont enacted legislation with a preempted purpose in mind (safety). Based upon a review of the legislative history, this Court concluded that references to “safety” by legislators and witnesses were “too numerous to recount.” Merits Decision *Entergy I*, 838 F. Supp. 2d at 195. *See also id.* at 229, 231-32.

On the heels of the issuance of the Merits Decision in *Entergy I*, the General Assembly proposed the Legislation to require Entergy to pay 2.5 times the amount it paid under the Prior Levy. That the transcripts of the hearing do not overtly reference any ill will on the part of the General Assembly should come as no surprise because after the issuance of the decision in the Merits Decision in *Entergy I*, the members of the General Assembly were no doubt mindful that what they said on the record might be used against them in the continuing litigation with Entergy.

In meetings conducted on April 18, 2012 to discuss the proposed New Levy, when Representative Olsen directed questions to Ms. Bachman relating to whether the Legislation was “defensible,” before Ms. Bachman could answer the question, Madam Chair (Senator Ann Cummings) interjected “I know these are touchy issues, so if you feel we’re wandering into

places where we could get ourselves in trouble - -.” Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118) at 35:18-24. This warning statement from Senator Cummings is a clear indicator that the General Assembly did not want Ms. Bachman to put statements on the record that would get the General Assembly “in trouble” should Entergy challenge the New Levy. A thorough review of the April 18, 2012 transcript leaves the reader with the uncomfortable feeling that at least some of the participants in the discussions were speaking in a prearranged code, particularly with respect to the often referenced “risk” associated with the proposed Legislation.

In point of fact, over twenty references to such “risk” during the April 18, 2012 meeting confirms that at the time the General Assembly was creating the legislative history for the New Levy they knew they should not evidence any ill will toward Entergy that would taint the legislative history in the same way that repeated references to “safety” pervaded the legislative record in the Merits Decision in *Entergy I*.

With statements such as the following comment from Scot Kline of the Environmental Protection Division at the Attorney General’s Office, there can be no doubt that the General Assembly was well aware that the New Levy would be considered in the context of the litigation that is the subject of the Merits Decision in *Entergy I*:

However, I do want to say that even with this version, given the current circumstances which include the pending federal court litigation, the decision from the district court which is now on appeal and the ongoing proceedings at the Public Service Board, there is a risk associated within [sic] increasing a bill that would increase the generating tax at this time. (Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118)) at 24:5-11.)

Given the General Assembly’s hypersensitivity to the fact that the legislative history for the New Levy would be considered in the context of the pending federal court litigation, serious

doubt is cast on whether replacing the Contract Payments was the only purpose behind the enactment of the New Levy.

Although questioning the express legislative history is not something that happens in every case, this Court in the Merits Decision in *Entergy I* acknowledged that “[w]hile this Court is aware that ‘a legislature’s stated reasons will generally get deference,’ a Court cannot be ‘so naive’ in its purpose inquiry to accept ‘any transparent claim.’” Merits Decision *Entergy I*, 838 F. Supp. 2d at 228 (citation omitted). Likewise, given the contentious litigation history between Entergy and Defendants, the legislative history surrounding the New Levy cannot be considered in a vacuum. When viewed in the appropriate and unavoidable context, the New Levy is another chapter in Vermont’s continuing effort to destroy Vermont Yankee Station, if not by forcing it to shut down prematurely, then by punishing it financially.

Vermont has previously sought to exact monetary tribute from Vermont Yankee Station at the same time that it was attempting to shut it down. The General Assembly was also extremely concerned that Entergy be required to provide electricity to Vermont utilities at below-market rates. In the Merits Decision in *Entergy I*, this Court held that Vermont was permanently enjoined, as prohibited by the dormant Commerce Clause, from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market PPA between Entergy and Vermont utilities, or requiring Entergy to sell power to Vermont utilities at rates below those available to wholesale customers in other states. Merits Decision *Entergy I*, 838 F. Supp. 2d at 243.

While the twin goals of forcing Entergy to shut down Vermont Yankee Station and forcing Entergy to enter into PPAs at below-market rates may seem irreconcilable, in the Merits Decision in *Entergy I*, this Court explained how these two impermissible purposes were tied

together, stating “[t]he legislative history makes clear that the demand for a favorable power purchase agreement was itself rooted in safety concerns, because the General Assembly wanted financial compensation for the perceived safety risk of having Vermont Yankee within the state.” Merits Decision *Entergy I*, 838 F. Supp. 2d at 230. Thus, the members of the General Assembly walked a treacherous line between trying to close Vermont Yankee Station and also trying to obtain favorable rates for the electricity produced by Vermont Yankee Station as compensation for the perceived safety risk to the State.

Since the General Assembly lacked a legitimate purpose in singling out Entergy, the New Levy is unconstitutional. Such “clear and hostile discrimination” against particular persons and classes is “obnoxious” to the Equal Protection Clause. *Bell’s Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

For instance, in *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901), the United States Supreme Court struck down a Kansas law that limited the price that only one stock yard company could charge for its services. In doing so, the Court characterized the law as “direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do.” *Id.* at 112. The Court also refused to shut its eyes to the fact that the law benefited those who had control of the legislature at the expense of a single business that was viewed as being too profitable. *Id.* at 105.

Similarly, Defendants are seeking to benefit Vermont and its citizens at the expense of Entergy by imposing the New Levy. ENVY, like the stock yard that was subject to the law in *Cotting*, is the sole entity subject to the New Levy and, as the owner of an unpopular nuclear power plant, has been targeted to suffer financial burdens by the General Assembly. As the Supreme Court has explained, “if the constitutional conception of ‘equal protection of the laws’

means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.” *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (italics in original).

In a similar context in New York, a district court concluded that Consolidated Edison Company of New York, Inc., “a powerful utility, although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular. This is particularly so when it is accused of exposing the public to the risk of nuclear leaks” *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 117 F. Supp. 2d 257, 268 (N.D.N.Y. 2000), *aff’d & remanded*, 292 F.3d 338 (2d Cir. 2002), *cert. denied*, 357 U.S. 1045 (2002). For that reason the court concluded that Consolidated Edison “fits nicely into the class of persons traditionally protected from bills of attainder” where that constitutional provision’s “historical scope properly includes actions against any person or persons who are so unpopular politically that the legislature may take unilateral action against them without fear of political retribution.” *Id.* See also *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (holding that plaintiffs sufficiently stated a claim for relief under the Equal Protection Clause that survived a motion for Rule 12(b)(6) dismissal where plaintiffs asserted that the Village’s 33-foot easement demand (18-feet in excess of the demands made of other property owners) was “irrational and wholly arbitrary” and was motivated by the Village’s ill will resulting from the plaintiffs’ previous filing of an unrelated successful lawsuit against the Village.)

State courts have also struck down legislation founded on ill will toward a singled-out class. In *Palmer Park Theatre Co. v. City of Highland Park*, 106 N.W.2d 845 (1961), a City ordinance imposed a fee of “\$20 per ton on any water-cooled unit or combination of units exceeding 5 tons capacity for all systems . . . not meeting certain water conservation

requirements.” *Id.* at 847. Units of less than 5 tons capacity were exempt. *Id.* Evidence showed that the City hoped “that by saddling non-conserving air conditioning with a heavy charge, the owners would be encouraged either to convert to conserving-type equipment or to discontinue use altogether.” *Id.* at 849. The charge imposed by the ordinance was “purposely designed to be a large and burdensome one to owners.” *Id.* Furthermore, the city did not pass the ordinance in order to raise revenue but was seeking a cessation in the use of the targeted equipment. *Id.*

The Supreme Court of Michigan held that “[t]he attempt to regulate a portion of the class under the ordinance . . . constituted an arbitrary and discriminatory classification and denied the equal protection of the laws.” *Id.* at 856. The New Levy is on all fours with the facts of *Palmer Park Theatre Co.*, except that the New Levy is even more egregious because the class subject to the New Levy consists of one generator of electricity.

Whether the enactment of the New Levy was motivated by an intent to replace the Contract Payment, by ill will toward Vermont Yankee Station, or both, the Equal Protection Clause is offended because the General Assembly lacked a legitimate purpose for the enactment of the New Levy. In the absence of a legitimate purpose for the enactment, the New Levy fails the first prong of the Equal Protection analysis required under *Western & Southern* and therefore is unconstitutional.

2. It Was Not Reasonable For The General Assembly To Believe That Targeting Entergy Would Promote A Legitimate Purpose.

The second part of the rational basis test requires that it must have been reasonable for the lawmakers to *believe* that use of the challenged classification would promote a legitimate purpose. *Western & Southern Life Ins. Co.*, 451 U.S. at 668. The challenged classification in this case is “electric generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more.” Vt. Stat. Ann. tit.

32 § 8661. The legislative history indicates that the General Assembly gave careful consideration to making sure that ENVY would be the only electricity generator subject to the New Levy.

For example, at one point in the legislative hearings in which the New Levy was discussed a dialog took place among Peter Griffin (a legislative lawyer), Representative Sharpe, and others, in which Representative Sharpe expressed a concern that a dam in Essex not be subject to the New Levy. Cho ¶ 10, Ex. 9 (Tr. Mar. 20, 2012 Hearing (CD 12-170)) at 43:20–45:7. An unidentified speaker (who appears to be Representative Sharpe) states “I realize the intention is to cover one person. I just question whether the language, in fact, does that.” Cho ¶ 10, Ex. 9 (Tr. Mar. 20, 2012 Hearing (CD 12-170)) at 43:20-22. Later Representative Sharpe states, “I just want to make sure that the language does what we intend it to do. That’s all.” Cho ¶ 10, Ex. 9 (Tr. Mar. 30, 2012 Hearing (CD 12-170)) at 45:5-7. An unidentified female speaker responds, “I agree. I think we need to make sure.” Cho ¶ 10, Ex. 9 (Tr. Mar. 20, 2012 Hearing (CD 12-170)) at 45:8-10. In other words, the General Assembly was concerned not only that ENVY be subject to the New Levy, but also that no other generators of electricity might accidentally slip into the class subject to the New Levy.

If the General Assembly truly had revenue raising goals in mind when it passed the New Levy then it simply was not reasonable for the General Assembly to believe that those goals would be achieved by limiting the class subject to the New Levy to ENVY. The class subject to the New Levy is under-inclusive and, therefore, raises less revenue than it would if Vermont had included ENVY’s competitors within the subject class. Additionally, since ENVY was selected as the sole business subject to the New Levy while the State’s efforts to close Vermont Yankee Station continue, it is not reasonable to impute to the General Assembly a revenue raising

motive. Revenue raising goals cannot be ascribed to the New Levy in the face of the State's goal to force the closure of the one generator subject to the New Levy.

In this regard the New Levy is similar to a discriminatory classification that was struck down by New Hampshire's Supreme Court in *Verizon New England v. City of Rochester*, 940 A.2d 237 (N.H. 2007), *reh'g denied*, 2008 N.H. LEXIS 13 (Feb. 12, 2008). In that case, the court considered Verizon's challenge to a real estate tax on Verizon's use of public ways where other private utilities similarly used and occupied real estate on public ways but were not subject to the same tax. The court found the relevant inquiry to be "whether the city, without a rational basis, is singling out Verizon by not imposing this tax upon the other utilities." *Id.* at 244. The court concluded that it could "conceive of no rational reason for selectively imposing the tax upon Verizon, and not upon other utilities that use[d] and occup[ied] the public property in the same manner as Verizon." *Id.*

Likewise, there is no rational basis for the General Assembly to single out Entergy as the sole subject of the New Levy if the goal was to raise revenue. The New Levy operates arbitrarily and unreasonably to treat similarly situated businesses differently in violation of the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, (1985) (stating that the "Equal Protection Clause of the Fourteenth Amendment ... is essentially a direction that all persons similarly situated should be treated alike"); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class); and *Oxx v. Vermont Dep't of Taxes*, 159 Vt. 371, 376 (1992) (holding that a Vermont income tax statute violated the Equal Protection Clause because "[a] statute is unconstitutional, as applied, if it treats similarly situated persons

differently and the different treatment does not rest upon some reasonable consideration of legislative policy”).

As it was not reasonable for the General Assembly to believe that targeting Entergy would promote a legitimate purpose, the New Levy fails the second prong of the Equal Protection analysis required under *Western & Southern* and is unconstitutional.

D. Entergy Is Likely To Succeed On Its Claim That The New Levy Violates The Contract Clause Of The United States Constitution.

Article I, section 10, clause 1 of the United States Constitution, known as the Contract Clause, states, “No State shall . . . pass any . . . Law impairing the Obligations of Contracts.” U.S. Const. art. I, § 10, cl. 1. The Contract Clause applies to both public and private contracts and the United States Supreme Court has noted that “[i]t long has been established that the Contract Clause limits the power of the State to modify their own contracts as well as to regulate those between private parties.” *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977). Further, the Court has “indicated that impairments of a State’s own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.” *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978) (citing *United States Trust Co.*, 431 U.S. at 22-23); *see also Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (noting that “stricter judicial scrutiny may be in order where public contracts, hence state self-interest, are involved”).

Generally, courts have applied a three-part test to determine whether a state law that impacts the contractual obligations of a public entity violates the Contract Clause. Courts examine: (1) whether there is a contractual obligation; (2) whether the state law at issue substantially impaired the contractual obligations, and (3) whether that impairment is reasonable and necessary to serve an important public purpose. *State of Nevada’s Employee’s Ass’n v.*

Keating, 903 F.2d 1223, 1226 (9th Cir. 1990); *Maryland State Teacher's Ass'n v. Hughes*, 594 F. Supp. 1353, 1359-61 (D. Md. 1984).

In determining whether a contractual obligation has been impaired, the United States Supreme Court has held that “[t]he narrow view that the [Contract] Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them . . . [has] been expressly repudiated,” *Allied Structural Steel Co.*, 438 U.S. at 245 (internal citations omitted). In *Allied Structural Steel*, the Court held that a Minnesota law, which assessed a pension funding charge against the employer because it closed one of its offices and several of the discharged employees did not have vested pension rights under the employer's pension plan had “an extremely narrow focus” in that it applied “only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established private pension plans,” and “only when such an employer closes his Minnesota office or terminates his pension plan.” *Id.* at 248. The Court held that the law violated the Contract Clause and explained that the law did not possess the attributes of state laws that had been upheld in the past because:

The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships – irrevocably and retroactively.

Allied Structural Steel Co., 438 U.S. at 250 (internal citations omitted).

Moreover, courts have held that statutes impairing the right to terminate a contract violate the Contract Clause. *See, e.g., Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (finding an act unconstitutional under the Contract Clause because it conferred a private cause of

action against Hanover for exercising its contractual right to unilaterally terminate its agency agreement with Garris); *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19 (Del. 1971) (holding that the statute violated the Contract Clause by imposing on Four Roses the obligation to deal with Globe indefinitely).

Vermont entered into two Memoranda of Understanding with Entergy: (a) the 2003 MOU, as part of Entergy's effort to obtain approval for the Uprate "under which [DPS] agree[d] to support the power uprate and Entergy commit[ted] to pay approximately \$6 million of payments to the state of Vermont and establish some protection for ratepayers in the event that the uprate reduce[d] the reliability of Vermont Yankee"; and (b) the 2005 MOU, in order to obtain passage of Act 74 and, ultimately, to obtain approval to construct the dry fuel storage facility. PSB Dkt. 6812 at 3. Although the MOUs did not require payments for periods after March 2012, the General Assembly effectively extended the term of the agreements by requiring ENVY to continue making payments for subsequent periods by enacting the New Levy. Impairing contracts through the "guise" of taxation has long been held to be impermissible. *See, e.g., Murray v. Charleston*, 96 U.S. 432 (1878) (imposition of an *ad valorem* tax, which had the effect of reducing the interest rates on government-issued bonds violated the Contract Clause). As such, the New Levy results in a substantial impairment of Entergy's rights requiring a finding that Vermont violated the Contract Clause.

Accordingly, Entergy has demonstrated likelihood of success on the merits of its Contract Clause challenge to the New Levy, as the New Levy does not purport to deal with a broad, generalized economic or social problem, was intended to replicate the Contract Payments, and effectively prevents the termination of the MOUs by extending indefinitely the payments that Entergy agreed to make thereunder.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

“When an alleged deprivation of a constitutional right is involved, most courts find that no further showing is necessary” to demonstrate that irreparable harm will be suffered absent a preliminary injunction. *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (citing 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2948 (1973)). *See also Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (because appellants alleged violation of their First Amendment rights, “[b]y the very nature of their allegations, then, appellants have met the first prong of the [preliminary injunction] test.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (“it is the alleged violation of a constitutional right that triggers a finding of irreparable harm”); *Nolen v. City of Barre*, 2011 U.S. Dist. LEXIS 20238 (D. Vt. Mar. 1, 2011) (“Turning first to the question of irreparable harm, such harm is often presumed where a constitutional injury is at stake.”).

This principle applies fully in commercial cases. In *Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010), *aff’d*, 657 F.3d 138 (2d Cir. 2011), the court enjoined the United States from enforcing a federal law requiring tobacco retailers who sold their products in interstate commerce to comply with all state and local excise taxes in the place of delivery. Plaintiffs challenged the federal law on Commerce Clause, Equal Protection, Due Process and Tenth Amendment grounds. The court found that “since plaintiffs allege deprivation of their constitutional rights, the Court is satisfied that they have demonstrated a threat of irreparable injury absent injunctive relief.” *Id.* at 244.

In *Wal-Mart Stores v. Rodriguez*, 238 F. Supp. 2d 395 (D.P.R. 2002), vacated pursuant to settlement, 322 F.3d 747 (1st Cir. 2003), parties to a proposed corporate merger sought an injunction against Puerto Rico’s Secretary of Justice, who demanded certain levels of local

purchases in order to approve the transaction. Wal-Mart alleged that the Secretary's demands violated the Commerce Clause and Equal Protection Clause. Relying on Second Circuit precedent, the court granted the motion for a preliminary injunction, finding that "the deprivation of Wal-Mart constitutional rights ... is the utmost irreparable harm in this case. A presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights." *Id.* at 421 (citing *Mitchell* and *Jolly*).

Moreover, Entergy faces actual and imminent financial harm if the status quo is altered by the New Levy because the New Levy provides no mechanism for Entergy to obtain a refund of any amounts paid thereunder and subjects Entergy to assessments, fines, and penalties for failure to pay amounts due thereunder. *See United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (*per curiam*) (finding that, where the Eleventh Amendment bars recovery of monetary damages from a state entity, remedies at law may be inadequate).

The New Levy, Vt. Stat. Ann. tit. 32 § 8661 (effective July 1, 2012), provides:

(a) There is hereby assessed upon electric generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more, a state tax at the rate of \$0.0025 per kWh of electrical energy produced. The tax imposed by this section shall be paid to the commissioner on the electrical energy generated in the prior quarter on or before the 25th day of the calendar month succeeding the quarter ending on the last day of March, June, September, and December by the person or corporation then owning or operating such electric generating plant.

(b) A person or corporation failing to make returns or pay the tax imposed by this section within the time required shall be subject to and governed by the provisions of sections 3202 and 3203 of this title.

Section 3202 authorizes the imposition of interest and penalties if returns are not filed or not timely filed and if the tax due is not paid or is not paid timely. Section 3202 does not provide for review of any penalty or interest imposed or for review of the underlying tax liability.

Section 3203 provides for the issuance of deficiency notices or refund denial notices: “If the commissioner finds that any taxpayer has failed to discharge in full the amount of any tax liability incurred under this title or has claimed a refund in error or that a penalty or interest should be assessed under this title, the commissioner shall notify the taxpayer of the deficiency or denial of refund or assess the penalty or interest. . . .”). While section 3203 addresses the duties that the commissioner must perform with respect to notices of deficiency and claims for refund, section 3203 is not an affirmative grant of a right to file a refund claim. No such grant for recovery of the New Levy exists in any Vermont statute.

Accordingly, because Entergy has asserted violations of constitutional rights on which it is likely to succeed on the merits, and because Entergy faces financial deprivations that cannot be adequately remedied through an action against the state for money damages, Entergy meets the irreparable harm requirement for a preliminary injunction.

III. CONSIDERATION OF THE PUBLIC INTEREST WEIGHS IN FAVOR OF A PRELIMINARY INJUNCTION.

It is in the public interest to protect and preserve the constitutional rights of all entities. “[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law,” and it is clearly in the public interest that defendants avoid unconstitutional actions. *ACLU v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) (citation omitted). Enforcement of the New Levy would be contrary to this public interest in avoiding unconstitutional action by the Defendants to enforce the New Levy.

Additionally, by enacting the New Levy, Defendants have shown that they are willing to impose laws singling out Entergy, not for general revenue raising purposes, but to replace terminated contractual obligations. Absent a preliminary injunction, other entities will lack confidence that they can operate in the State without similar interference from Defendants and,

therefore, failure to grant a preliminary injunction goes against the public's interest for this reason as well.

Furthermore, the public has an interest in being assured that contracts with the State will be upheld. As discussed above, Defendants have attempted to unilaterally force the continuation of the MOUs by enacting the New Levy, while simultaneously continuing their efforts to shut down Vermont Yankee Station. There can be no legitimate public interest in such conduct. Thus, an injunction is necessary to reassure the people that contractual arrangements with the State will be respected and cannot be continued indefinitely at the whim of the State.

Finally, the public has an interest in seeing that a state is not permitted to single out a politically unpopular business for a levy that does not apply to other similar businesses.

The appropriateness of issuing a preliminary injunction in this case is further supported by consideration of the balance of the hardships. Entergy will suffer violations of its constitutional rights and be forced to pay an illegal levy with no right to refund. In contrast, the state would be unable to collect an illegal levy that, in effect, perpetuates contract payments to which it is no longer entitled. Moreover, paying the New Levy until this matter is resolved on the merits would impose a significant burden on Entergy, while deferring payment until this matter is resolved will have little impact on the state's coffers. Accordingly, the equities also favor a preliminary injunction.

Hearing Requested

Plaintiffs respectfully request a hearing on this motion.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction.

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