

# 12-707-CV(L)

12-791-CV(XAP)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

v.

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

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

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**BRIEF OF AMICUS CURIAE  
AND  
IN SUPPORT OF AFFIRMANCE**

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September 7, 2012

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## GLOSSARY

AB	Appellant's Brief
Act 74	2005 Vt. Acts & Resolves No. 74
Act 160	2006 Vt. Acts & Resolves No. 160
AEA	Atomic Energy Act
D.E.	Docket Entry (from district court proceedings)
ECF No.	Docket Entry (from United States Court of Appeals for Second Circuit)
Entergy	Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.
IBEW	International Brotherhood of Electrical Workers, Local Union 300
NRC	Nuclear Regulatory Commission
PSB	Public Service Board
PX	Plaintiff's Exhibit
PSDAR	Post-Shutdown Decommissioning Report
SA	Special Appendix
Vermont Yankee	Vermont Yankee Nuclear Power Plant

## STATEMENT OF IDENTITY AND INTEREST

The International Brotherhood of Electrical Workers, Local Union 300 (“IBEW”) provides exclusive representation to over 1,100 Vermonters in a variety of trades, including utilities, telecommunications, construction, municipal, professional and manufacturing.<sup>1</sup> As of May 2011, 174 IBEW members were permanently employed at the Vermont Yankee power plant (“Vermont Yankee”).<sup>2</sup> The IBEW submits this *amicus curiae* brief on behalf of these workers and their families whose personal and financial well-being depends upon the continued operation of Vermont Yankee.



IBEW Member Michelle Joy – Vermont Yankee Reactor Operator  
IBEW Member Trevor Morrison – Vermont Yankee Auxiliary Operator  
(These and other employee stories can be found at  
<http://www.iamvy.com/stories.php>)

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<sup>1</sup> Counsel for *amicus curiae* was the sole author of this brief, and no person other than *amicus curiae* contributed money that was intended to fund preparing or submitting this brief. F.R.A.P. 29(c)(5), Local Rule 29.1(b).

<sup>2</sup> Docket Entry (“D.E.”) 54 (Amicus Curiae Brief filed on behalf of IBEW below), Att. 1 (Declaration of Jeffrey Wimette), ¶ 3.

By 03/12/12 letter to the Clerk of Court, the parties have consented to the filing of *amicus curiae* briefs without the need for individualized petition. Docket Entry – United States Court of Appeals for the Second Circuit (“ECF No.”) 53.

### **SUMMARY OF ARGUMENT**

The closing of Vermont Yankee would deliver a crushing economic blow to the plant’s employees, their families, and the Vermont community. In submissions below, the IBEW concisely summarized Vermont Yankee’s importance to the prosperity of its workers and the State. D.E. 54. Through expert Richard Heaps, the IBEW provided a thoughtful economic analysis of the financial benefits linked to the plant’s operations. D.E. 54, Att. 2; Plaintiff’s Exhibit (“PX”) #326 (Heaps Report admitted below without challenge). IBEW renews those submissions here and asks the Court to consider the unique perspective of the worker in this matter.

While the parties are well equipped to argue the statutory and constitutional nuances at issue, any consideration on the merits must also recognize the impact of this appeal on plant employees. The Court’s decision will effectively determine whether the plant stays open until 2032 or is forced to shut its doors prematurely. For Vermont Yankee employees, this appeal will determine if they can continue to pursue a good livelihood with a great employer. The IBEW therefore supports Entergy’s efforts to seek affirmance of the decision below.

Anyone who has weathered the risk of job loss will understand that the threat of plant closure is imminent enough to warrant injunctive relief. For this reason, the Court should also uphold the injunction below and grant Vermont Yankee workers a measure of stability while the legal battle ensues.

## ARGUMENT

### **I. VERMONT YANKEE CONTRIBUTES IMMEASURABLY TO THE ECONOMIC WELL-BEING OF ITS WORKERS, THEIR FAMILIES, AND THE VERMONT COMMUNITY.**

It is uncontested that Vermont Yankee, ranked consistently as a top employer,<sup>3</sup> contributes immeasurably to the economic stability and well-being of the State of Vermont.<sup>4</sup> This impact can be seen on both the individual level (the wages and job stability enjoyed by employees) and the state-wide level (Vermont Yankee's fiscal contributions to the public coffers).

#### **A. Vermont Yankee is one of Vermont's premier employers.**

Vermont Yankee provides good jobs to the people of Vermont. Salaries are generous.<sup>5</sup> Health and dental insurance benefits extend to employees and their

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<sup>3</sup> 2012 rankings available at <http://www.vermontbiz.com/news/april/best-places-work-vermont-rankings-revealed>. (Entergy ranked as #3 in list of best large employers in State of Vermont).

<sup>4</sup> Richard Heaps's Report, *The Economic Impact of the VY Station*, was admitted without objection at trial below. PX #326.

<sup>5</sup> In 2009, Vermont Yankee workers had an average annual wage of \$104,000. PX #326, p. 3. Controlling for inflation and using the same methodology as that incorporated in the Heaps report, the average annual wage of those same workers

dependents.<sup>6</sup> Employment is stable, even exhibiting slight growth over the past few years.<sup>7</sup> And the plant has not gone through the downsizing seen recently in other industries. PX #326, pp. 7-8. While the State's economy is only just now beginning to edge out of recession, Vermont Yankee continues to serve as a mainstay in the Vermont job market, by virtue of its high wages, good benefits, and prominence as a large employer within the state.<sup>8</sup>

**B. Vermont Yankee contributes to regional and state prosperity.**

Vermont Yankee also serves as a stabilizing force for Windham County's employment levels. In both 2010 and 2011, Windham County's unemployment rate stayed comparable to statewide levels, while fully half of the other counties

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is estimated to be \$107,460 in 2011. The average annual wage for Vermonters in 2011 was \$40,289. (Data available at <http://www.vtlni.info/indareanaics.cfm?areatype=01>). Even if Vermont Yankee salaries had remained frozen for the past two years (which they have not, *see* D.E. 54, Att. 1, ¶ 8), the average Vermont Yankee employee earned about 61% more than the average Vermont worker in 2011.

<sup>6</sup> D.E. 54, Att. 1, ¶¶ 9-10.

<sup>7</sup> Vermont Yankee currently employs 650 individuals. *See* <http://www.safecleanreliable.com/about-us/this-is-vermont-yankee/>. This represents an increase of 8 employees (or 1%) over the 2009 figure cited in the Heaps report. D.E. 54, Att. 2, p. 3. (This figure does not include contractors working on site.) Vermont Yankee has avoided downsizing and even made small gains in its full time work force during the recent recession.

<sup>8</sup>The United States Department of Labor CareerOneStop currently ranks Vermont Yankee as #37 among large employers in the State of Vermont. *See* <http://www.acinet.org/oview6.asp?soccode=&stfips=50&from=State&id=&nodeid=12>

saw unemployment surge ahead (often significantly) of the statewide average.<sup>9</sup>

This trend of consistency and stability has continued in 2012.<sup>10</sup>

The prosperity and stability of Vermont Yankee's employees flows over into the community and statewide coffers. The Heaps Report detailed the 2009 fiscal contributions of Vermont Yankee and its employees through personal income taxes (\$3M), General Fund taxes (\$1.87M), and a special Electrical Energy Tax (\$2.8 M). D.E. 54, Att. 2, p. 16; PX #326. The 2009 Vermont Education Fund also benefited from Vermont Yankee's direct contributions (\$2M) and indirect contributions through the economic activity of its employees (\$.78M). *Id.* at 17. As Vermont Yankee's payroll has expanded, it stands to reason that these

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<sup>9</sup>Vermont Department of Labor records show a 2010 average annual unemployment in Windham County at 6.4%, which was also the statewide average. In 2011, statewide unemployment was at 5.6% with Windham County showing an average unemployment rate of 5.7 %.

<http://www.vtlmi.info/Labforce.cfm?qperiodyear=2010&qareatype=04&qadjusted=N> (2010 annual unemployment statistics for State and Windham County)

<http://www.vtlmi.info/Labforce.cfm?qyearqperiod=201100&qareatype=04&qadjusted=N> (2011 annual unemployment statistics for State and Windham County).

<sup>10</sup>For the first seven months of 2012, the average unemployment rates in Windham County and statewide have been comparable, at roughly 5.2%. *See* <http://www.vtlmi.info/Labforce.cfm?qyearqperiod=201207&qareatype=04&qadjusted=N> (January through July 2012 statewide and county unemployment statistics).

impressive fiscal contributions have only increased over the past three years. *See infra* at 3.<sup>11</sup>

Vermont's economic recovery from the recent recession has been incremental. Throughout this period, Vermont Yankee has provided stable employment and fiscal support to individuals and the community alike. The budgetary fall-out from the plant's closing would undermine Vermont's tentative economic recovery.

## **II. THE PROCESS OF DECOMMISSIONING VERMONT YANKEE IS UNLIKELY TO MITIGATE THE ECONOMIC IMPACTS OF CLOSING THE PLANT.**

Decommissioning a nuclear power plant is a complex endeavor. It requires planning and skill. But most of all it requires time.<sup>12</sup> Under any likely scenario for decommissioning Vermont Yankee, plant operations would cease, necessitating the dismissal of hundreds of employees. A skeleton staff would then remain for a period of years to ensure the continued integrity of the plant site. Former employees would be left to seek more modest employment within the State of Vermont or leave the state altogether to seek better jobs elsewhere. With only

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<sup>11</sup> As previously noted, *infra* at 2, the IBEW's Amicus Curiae submitted below, as well as the attached Heaps Report, offer detailed and compelling analyses of the many contributions made to the state and its residents as a result of Vermont Yankee's operations in Vernon.

<sup>12</sup> The Nuclear Regulatory Commission offers a compact summary of the basic decommissioning process at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html>. All facts cited in this portion of the brief derive from that summary, unless otherwise noted.

modest staffing requirements, any jobs created through the decommissioning process will not mitigate the extensive economic repercussions of the plant closing.

**A. The options for decommissioning Vermont Yankee.**

Decommissioning is the process by which a nuclear plant licensee dismantles and decontaminates a plant, culminating in the termination of its facility license and release of the former nuclear site for other use. According to the Nuclear Regulatory Commission (“NRC”), there are three options for decommissioning a plant, only two of which have been utilized by licensees. The two options are:

- DECON (immediate dismantlement), which entails removal or decontamination of equipment, structure and portions of the facility shortly after a nuclear facility closes;
- SAFSTOR (often considered “delayed DECON”), under which the facility is maintained and monitored until radioactivity decays, after which time it is then dismantled and decontaminated.

A licensee may also choose to combine elements from the two options, by dismantling some parts of the plant immediately and others after a period of SAFSTOR.

A licensee must decommission a facility within 60 years of closing its doors. Decommissioning involves a three step process. First, within thirty days of closing, a licensee must submit a written certification of permanent cessation of operations to the NRC. Within two years of providing the certification of permanent cessation, a licensee must submit a post-shutdown decommissioning

report (“PSDAR”) detailing the plan and cost for decommissioning the plant (consistent with the 60 year time limit).

In the next phase, which begins 90 days after submission of the PSDAR, the licensee may undertake decommissioning activities, including plant disassembly and decontamination. In the final phase, the licensee must submit a License Termination Plan (“LTP”) within two years of the expected license termination. The NRC evaluates the plan and signs off on final license termination if the dismantlement and decontamination has successfully complied with all NRC regulations and standards.

Of the twenty-three nuclear power plants that have been, or are currently being, decommissioned, only three have successfully met the stringent requirements for license termination.<sup>13</sup> Within this group of three, only one plant (Saxton, in Saxton, PA) was a long term functioning nuclear power plant.<sup>14</sup>

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<sup>13</sup> The twenty-three power plants are listed at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html>.

<sup>14</sup> The three plants are: Pathfinder in Sioux Falls, SD, which ceased operations in 1967; Saxton in Saxton, PA, which ceased operations in 1972, and Shoreham in Suffolk Co, NY, which ceased operations in 1989. Those plants received license terminations from the NRC in 1972, 2005 and 1995 respectively. The Pathfinder plant operated for only one year (August 1966 - September 1967). See <http://www.nrc.gov/info-finder/decommissioning/complex/pathfinder.html> The Shoreham plant operated for just two years (1985-1987). See <http://pbadupws.nrc.gov/docs/ML0037/ML003704087.pdf>.

NRC records indicate that the Saxton plant took 32 years to achieve license termination. After ceasing operations in 1972, the Saxton plant was monitored for fifteen years (SAFSTOR), with minimal decommissioning activity.

The vast majority of licensees opt for SAFSTOR, under which a facility is maintained and monitored for extended periods of time until radioactivity decays. As the Saxton plant timeframe shows, this decommissioning process happens over the course of decades, not years. According to a current list of NRC nuclear power reactors in the decommissioning phase, the vast majority (seven out of thirteen) are in SAFSTOR. Of the four sites that are in active DECON, the NRC predicts that it will terminate these licenses anywhere from 22 to 60 years after plant closing. As these timeframes demonstrate, the overwhelming majority of plants embark on the more labor intensive process of decontamination and dismantling only many years after a plant closes.<sup>15</sup>

#### **B. The impact of closure on Vermont Yankee employees.**

The decommissioning process will not mitigate the loss of over six hundred jobs if Vermont Yankee is closed. As NRC records reflect, in most instances when a plant is shut down, it is maintained and monitored for decades before any

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<sup>15</sup> The first ceased operations in 1972 (Fermi 1: estimated date of closure 2032); another in 1983 (Humboldt Bay: estimated date of closure 2015), and the last two in 1998 (Zion 1 & 2: estimated date of closure 2020). For a current list of NRC nuclear power reactors in the decommissioning phase (as of 08/29/12), *see* <http://www.nrc.gov/info-finder/decommissioning/power-reactor/>.

meaningful efforts are made to engage in the more labor intensive process of decontamination or dismantling of the structures and equipment. Current Vermont Yankee employees are likely to have relocated by the time any dismantling begins, even should they have suitable experience and skills to assist in the decommissioning process.

If Vermont Yankee is forced to close its doors, the job outlook for former employees will be bleak. Given the unique skills involved in nuclear power plant employment, these employees are unlikely to find jobs of a similar nature and pay scale in Vermont. *See* D.E. 54, Att. 1, ¶ 15. They will face the unsavory choice of seeking lower paid jobs within a recession weary state, or relocation outside the state in search of jobs with comparable compensation. Under either scenario, the employees and their families lose. And the State suffers a decrease in the economic contributions derived from this employer and its workforce. The decommissioning of the plant will not generate sufficient re-employment opportunities to reduce this impact or spread these losses in any manageable way.

**III. IN LIGHT OF THE IMMEDIATE AND SIGNIFICANT HARM THAT WILL COME FROM VERMONT YANKEE'S CLOSING, INJUNCTIVE RELIEF IS RIPE AND NECESSARY TO PREVENT IMMINENT HARM.**

This Court is being asked to decide whether Vermont Yankee will continue to operate or be forced to shut down. In 2005-2006, the Vermont Legislature enacted Acts 160 and 74, which required that Vermont Yankee's parent company

seek legislative approval in order to continue its operations beyond March 21, 2012. Appellant's Brief ("AB") 1-2. The Legislature did not approve the plant's continued operations. AB 2. Entergy challenged these Acts on preemption and other grounds. The District Court found that the Atomic Energy Act ("AEA") preempted the statutes. Special Appendix ("SA") 78; SA-82. It entered a permanent injunction barring Defendants from enforcing the laws. SA-100; SA-101.

The court also found that placing a condition precedent on the issuance of Vermont Yankee's Certificate of Public Good would be a violation of the Dormant Commerce Clause. It issued a permanent injunction barring the imposition of this below-market power purchase agreement condition upon Vermont Yankee. SA-101. Defendants argue that this injunction should be lifted because the matter is not ripe in the absence of a Public Service Board ("PSB") order actually imposing such a condition upon Vermont Yankee, and because injunctive relief against the individual Board members is improper. AB 51-53. Because the injunction addresses an immediate and concrete threat to Vermont Yankee's continued operation, and guards against immeasurable and imminent economic damages to its employees and the Vermont community, it should be upheld.

**A. This matter is ripe for injunctive relief.**

The absence of a PSB order imposing the objectionable condition precedent upon Vermont Yankee does not render this matter unripe for injunctive relief. The “ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 545-46 (2d Cir. 2007) (citing *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (internal quotation marks omitted)). Article III ripeness limits a court’s ability to render decisions in the absence of a concrete dispute. Where a proceeding sought to be enjoined is already underway, however, “it can hardly be doubted that a controversy sufficiently concrete for judicial review exists.” *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 411-12 (8th Cir. 1985). In light of the pending PSB proceeding involving the relicensing of Vermont Yankee, Article III ripeness is satisfied. Only prudential ripeness remains for the Court’s review.

In determining ripeness on prudential grounds, “a court examines ‘both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*, No. 2:05-CV-302, 2:05-CV-304, 2006 WL 3469622, \*4 (D. Vt. Nov. 30, 2006) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136,149 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). At the heart

of this inquiry is whether the matter is “better decided later.” *Ehrenfeld*, 489 F.3d at 546 (internal quotes omitted).

Given the specter of job loss and the uncertainties that this litigation imposes upon Vermont Yankee’s employees,<sup>16</sup> it is both reasonable and necessary to find that injunctive relief is appropriate *before* the PSB acts. In a similar ripeness challenge before the Eight Circuit Court of Appeals, defendants argued that an injunction imposed upon the Arkansas Public Service Commission was not ripe for review because the Commission had not yet invalidated the disputed power contracts. *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985). The Court found that the challenge ignored “the true nature of the relief sought,” where plaintiff did not challenge the ultimate substantive decision but rather the authority to even conduct the contemplated proceeding.” *Id.* at 410.

Similarly, here the District Court afforded injunctive relief because the contemplated condition precedent would violate the Commerce Clause. SA-101. To require Entergy and its employees to wait for the PSB to violate the Commerce Clause when the validity of such a condition can be easily determined on the facts before the Court, is inefficient at best.

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<sup>16</sup> See D.E. 54, Att. 1, ¶ 17 (noting that uncertainty at Vermont Yankee has significantly impacted employee morale).

It also ignores the very real economic damages that will flow from the imposition of a condition precedent upon Vermont Yankee's Certificate of Public Good which, as all parties now know, cannot possibly be met. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*, No. 2:05-CV-302, 2:05-CV-304, 2006 WL 3469622 (D. Vt. Nov. 30, 2006)(injunctive relief against State available where "early review may be appropriate when the legal question is fit for resolution and delay means hardship," (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (citing *Abbott Labs.*, 387 U.S. at 148-49) (internal quotes omitted)).

**B. Injunctive relief is appropriate against Defendants Volz, Burke and Coen in their official capacities.**

Finally, injunctive relief can be afforded with respect to PSB members Volz, Burke and Coen in their official capacities. Under the doctrine of *Ex Parte Young*, the appropriate inquiry is whether "the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997). That inquiry is satisfied in this instance. An injunction will ensure that the PSB does not impose an unconstitutional condition precedent upon Vermont Yankee in any future orders related to the company's Certificate of Public Good proceedings. There is certainly nothing extraordinary about this remedy. Injunctions against state

regulators have been approved in similar contexts. *See Verizon Maryland, Inc. v. Public Serv. Comm. of Maryland*, 535 U.S. 635, 645 (2002) and cases cited.

### CONCLUSION

The IBEW supports affirmance of the District Court's decision below.

Respectfully submitted,

/s/ Caroline S. Earle, Esq.

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September 7, 2012

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 3,216 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ Caroline S. Earle  
Caroline S. Earle

September 7, 2012