

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT)
 YANKEE, LLC and ENTERGY NUCLEAR)
 OPERATIONS, INC.,)
 Plaintiffs)
)
 v.)
)
 PETER SHUMLIN, in his official capacity as)
 GOVERNOR OF THE STATE OF)
 VERMONT; WILLIAM SORRELL, in his)
 official capacity as the ATTORNEY)
 GENERAL OF THE STATE OF VERMONT;)
 and JAMES VOLZ, JOHN BURKE, and)
 DAVID COEN, in their official capacities)
 as members of THE VERMONT PUBLIC)
 SERVICE BOARD,)
 Defendants.)

Docket No: 1:11-CV-99

**NEW ENGLAND COALITION, INC.’S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS’ EXPEDITED MOTION FOR AN INJUNCTION REQUIRING THE NEW
ENGLAND COALITION TO WITHDRAW ITS COMPLAINT SEEKING IMMEDIATE
SHUTDOWN OF THE VERMONT YANKEE NUCLEAR POWER STATION**

Brice Simon, Esq.
BRETON & SIMON, PLC
P.O. Box 240
344 Mountain Road
Stowe, VT 05672
Telephone: (802) 760-6773
Facsimile: (866) 653-0673

Jared M. Margolis, Esq.
243 Cilley Hill Rd.
Jericho, VT 05465
Telephone: (802) 310-4054

Counsel for New England Coalition, Inc.

New England Coalition, Inc. (hereinafter “NEC”), by and through counsel Brice Simon, Esq. and Jared Margolis, Esq., and, pursuant to Fed R. App. P. 7(b) and L.R.F.P. 7(a)(5), hereby files this Memorandum in Opposition to Plaintiffs’ Expedited Motion for an Injunction Requiring the New England Coalition to Withdraw its Complaint Seeking Immediate Shutdown of the Vermont Yankee Nuclear Power Station. NEC submits that this Court lacks personal and

subject matter jurisdiction over the NEC's Complaint before the Vermont Supreme Court, and Plaintiff is not entitled to the requested relief under any claim or theory relevant to, or pursued during, this litigation. A hearing on the Motion is requested, in the event NEC's ability to pursue its lawful Complaint before the Vermont Supreme Court is in jeopardy.

INTRODUCTION

NEC filed a Complaint with the Vermont Supreme Court (the NEC "Complaint") to enforce the Vermont Public Service Board's ("PSB") Order in Docket No. 6545, dated June 13, 2002 (the "Sale Order"). The Sale Order approved the sale of the Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC. At the time of the sale, the Vermont Yankee Station was owned and controlled by Vermont utilities, so the PSB had significant authority over its operation. The PSB sought to maintain control over whether the Vermont Yankee Station would continue operating after March 21, 2012, and inserted Condition 8 in the Sale Order to ensure operation would cease unless a new or renewed CPG had been issued. Plaintiffs concede they are continuing to operate the plant, despite Condition 8 of the Sale Order. The only question is whether NEC can be enjoined by the U.S. District Court from proceeding in the Vermont Supreme Court.

Plaintiffs seek an expedited injunction, pursuant to 28 U.S.C. §§ 1651 and 2283, and Federal Rule of Civil Procedure 65(d)(2)(C), requiring NEC to withdraw the Complaint. *See* Plaintiffs' Motion, *and* Exhibit D (NEC Complaint) filed therewith. Although Plaintiff seeks an injunction requiring NEC to withdraw its Complaint, the Motion attacks the Vermont Supreme Court's authority to enforce Condition 8 of the 2002 Sale Order pursuant to 30 V.S.A. § 15.

NEC's motion does not pertain to the Certificate of Public Good ("CPG") held by Entergy, dated June 13, 2002 (attached hereto and incorporated herein as Exhibit B). The CPG

was the subject of some discussion in the instant case before this Court. Rather, NEC seeks to have the Vermont Supreme Court enforce an independent provision of the 2002 Sale Order (Condition 8), which provides:

Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012.

See Sale Order at page 159, § XI, ¶ 8 (Excerpt containing Index and Section XI of Sale Order attached hereto and incorporated herein as Exhibit A). The Sale Order is a separate document, which the PSB has made clear pertains to the sale of the Vermont Yankee Station to Entergy, and not the continuing operation of the plant under authority of the CPG. *See* Docket No. 7440, Order of 3/19/12 at 16 (holding that this provision is a “condition, separate from the CPG, that expressly prohibits operation of Vermont Yankee after March 21, 2012,” and which pertained to “the Board’s Section 109 approval of the sale of Vermont Yankee... and not the approval of a continuing activity (which is, instead, addressed by the Docket 6545 CPG”).

Plaintiffs post-trial injunction request confounds the authority to operate the plant after March 21, 2012 pursuant to the CPG, and operation of the plant in direct contravention and violation of the 2002 Sale Order, Condition 8. The PSB has determined that “3 V.S.A. § 814(b) does not serve to excuse compliance with that condition.” *Id.* at 18. The 3/19/12 Order was not appealed by Entergy. The Board’s analysis is sound, and this Court should give deference to its determination. *Gasoline Marketers of Vt., Inc. v. Agency of Natural Res.*, 169 Vt. 504, 508, 739 A.2d 1230, 1233 (1999) (“[A]bsent a clear and convincing showing to the contrary, decisions made within expertise of administrative agencies are presumed to be correct, valid, and reasonable.”).

In this proceeding, Plaintiffs have been awarded injunctive relief prohibiting Defendants

from taking action to compel Vermont Yankee to shut down after March 21, 2012: *1) because it failed to obtain legislative approval for a Certificate of Public Good for continued operation; or 2) because it failed to obtain legislative approval relating to storage of spent nuclear fuel requiring the approval of the general assembly.*¹ See *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 243 (D. Vt. 2012). Nothing in the pending Federal litigation purports to restrict the State of Vermont from enforcing PSB orders not related to Act 160, Act 74, or coerced power purchase agreements / wholesale pricing structures. *Entergy v. Shumlin* at 190 (stating the Court’s decision did not “purport to define or restrict the State’s ability to decline to renew a certificate of public good on any ground not preempted or not violative of federal law, to dictate how a state should choose to allocate its power among the branches of its government, or pass judgment on its choices. The Court has avoided addressing questions of state law and the scope of a state’s regulatory authority that are unnecessary to the resolution of the federal claims presented here.”) (Emphasis added.)

Based upon the scope of claims before this Court, and the Opinion issued in response, the Court should deny Plaintiff’s Expedited Motion for an Injunction, and allow the Vermont Supreme Court to exercise its original jurisdiction over NEC’s Complaint for enforcement of the Sale Order, pursuant to 3 V.S.A. §15 and V.R.A.P. 21. To do otherwise would impermissibly interfere with the State of Vermont’s authority to allocate to the Vermont Supreme Court the power to enforce PSB Orders, resulting in an unlawful evisceration of the State’s role in the regulation of the sale of Vermont utilities.

¹ The Court further enjoined the State of Vermont (on dormant Commerce Clause grounds) from conditioning the issuance of a Certificate of Public Good on a below-wholesale-market power purchase agreement benefitting Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states, but those issues are not relevant to Plaintiff’s claim against NEC.

ARGUMENTS

I. THE U.S. DISTRICT COURT LACKS JURISDICTION OVER NEC'S COMPLAINT TO THE VERMONT SUPREME COURT

Plaintiffs rely upon 28 U.S.C. §§1651 (“Writs Act”) and 2283 (“Anti-Injunction Act”) to support their request for an injunction to stop NEC from pursuing its 30 V.S.A. § 15 Complaint before the Vermont Supreme Court. Motion at 1.² The U.S. District Courts are empowered by 28 U.S.C. § 1651 to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law. *United States v. Table*, 166 F.3d 505, 506-07 (2d Cir. 1999). The Writs Act, however, does not confer independent jurisdiction, but relies upon jurisdiction being conferred by some other source. *See, e.g., United States v. New York Telephone Co.*, 434 U.S. 159, 172, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977) (approving discretionary jurisdiction under the Writs Act to compel a telephone company to install equipment needed by federal law enforcement agents to monitor telephone lines where there was probable cause to believe the lines were being used in the commission of a crime).

Jurisdiction under the Writs Act is not available where, as here, the federal court does not have independent authority over the subject matter or the conduct of a non-party. Where federal law expressed a strong interest in establishing national wireless communications service, the Writs Act provided ancillary jurisdiction to require a School District to comply with the terms of a telecommunications lease requiring construction of a telecommunications tower. *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 414 (2d Cir. N.Y. 2002). When the Department of Veterans’ Affairs failed to take action on a death benefits claim for over ten (10) years, the Writs

² Plaintiffs assume, contrary to the general rule that an appeal suspends the power of the court below to proceed further in the cause (*see, e.g., Newton v. Consol. Gas Co. of New York*, 258 U.S. 165 (1922)), that the Court has authority to enjoin NEC to maintain the *status quo*. Plaintiffs fail to recognize, however, that the *status quo* is the continuing, unimpaired validity of the 2002 Sale Order, consistent with NEC’s Complaint.

Act supplied jurisdiction to review the Agency's inaction, as the federal courts were empowered to decide claims before the Department. *Erspamer v. Derwinski*, 1 Vet. App. 3, 7 (Vet. App. 1990). But, where a statute specifically addresses the particular issue at hand, "it is that authority, and not the All Writs Act, that is controlling." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (U.S. 2002) (quoting *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985)).

In this case, the District Court does not have jurisdiction over NEC's Complaint to the Vermont Supreme Court by any independent means. Moreover, ancillary jurisdiction does not attach to NEC or its Complaint before the Vermont Supreme Court. The Vermont Supreme Court Complaint simply seeks to enforce Condition 8 of the Sale Order. The issues raised by Entergy before this Court are neither applicable to, nor controlling over, NEC's claim that the Vermont Supreme Court should enforce Condition 8 of the Sale Order. There is no federal program or compelling reason for the Court to exercise jurisdiction over NEC's Complaint, there is no independent source of jurisdiction, and there is no basis for compelling NEC to act contrary to a valid state law excluded from the claims or decision in this case. The only purpose for exercising jurisdiction would be to frustrate Vermont's state-based procedure for enforcing lawful Public Service Board orders. Because the District Court has no personal or subject matter jurisdiction over NEC or its Complaint to the Vermont Supreme Court, Plaintiffs' Motion must fail.

Plaintiffs, not NEC, are making a procedural end-run around the law, by asking the U.S. District Court to effectively enjoin the Vermont Supreme Court - using NEC as a "straw man". Exceptions to the 28 U.S.C. § 2283 rule against injunctions by U.S. Courts against State Court actions are very limited. The recognized exceptions allow State Court action to be enjoined by a

U.S. District Court only, “where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.” The exercise of such jurisdiction is likewise limited to the issues being litigated in the present action, and does not include unrelated issues being litigated before a State Supreme Court.

The U.S. Supreme Court has held:

Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Public Service Com. v. Wycoff Co., 344 U.S. 237, 248 (U.S. 1952) (citing *Tennessee v. Union & Planters' Bank*, 152 U.S. 454; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22; and *Taylor v. Anderson*, 234 U.S. 74).

The issue being litigated before the Vermont Supreme Court (enforcement of the Sale Order - Condition 8) has the character of an action for extraordinary relief in State Court, and does not involve any federal question or assertion under federal law. It is well outside of this Court’s jurisdiction over Plaintiffs’ limited preemption claims to now entertain a defense to NEC’s cause of action before the Vermont Supreme Court. This Court’s Decision pertaining to Entergy’s rights under its CPG (*see Entergy v. Shumlin*, 838 F. Supp. 2d 183, and 10 C.F.R. §2.109(b))³ should therefore be recognized as having no nexus with NEC’s case before the

³ Plaintiffs claim (Motion at 5, fn. 1) that “while Entergy acknowledged to this Court that it would need to obtain a CPG from the PSB for post-March 21, 2012 operation, Entergy also argued that, given the delay caused by Act 160 to the PSB’s processing of Entergy’s petition, state law could not be invoked to shut down the VY Station during the

Vermont Supreme Court.

Because the PSB and the Vermont Supreme Court have jurisdiction over the issue upon which Plaintiff relies, and their orders may ultimately be appealed according to law, it is wholly inappropriate to ask this Court to act outside of the recognized procedure and take jurisdiction over Plaintiffs' defense to NEC's state law enforcement action. If Plaintiffs want to litigate the application of 3 V.S.A. § 814(b) to Condition 8 of the Sale Order, then they should proceed according to law before the PSB or the Vermont Supreme Court. Lacking jurisdiction over NEC or the subject matter of NEC's Complaint to the Vermont Supreme Court, this Court should deny Plaintiffs' Expedited Motion for an Injunction forthwith, or conduct a new trial on Plaintiff's apparent claim of unlimited preemption.

**II. THE VERMONT SUPREME COURT HAS INDEPENDENT STATE
JURISDICTION TO CONSIDER NEC'S 30 V.S.A. § 15 COMPLAINT.**

Title 30, Vermont Statutes Annotated, Section 15 provides for enforcement of decrees of the PSB:

A party to an order or decree of the public service board or the board itself, or both, may complain to the supreme court for relief against any disobedience of or noncompliance with such order or decree. In such proceedings and upon such notice thereof to the parties as it shall direct, the supreme court shall hear and consider such petition and make such order and decree in the premises by way of writ of mandamus, writ of prohibition, injunction, or otherwise, concerning the enforcement of such order and decree of the public service board as to law and equity shall appertain.

Section 15 vests original jurisdiction over enforcement of PSB orders in the Vermont Supreme Court. Plaintiffs do not claim that 30 V.S.A. § 15 is unconstitutional, or that the

Interim Period. Undersigned counsel was not present during the exchange; however, it seems incredible that Entergy would claim an absolute right to operate past March 21, 2012, when the only issues before the Court were narrow preemption claims. Regardless, the discussions referenced by counsel do not constitute evidence in this proceeding and should not be relied upon by the Court.

Vermont Supreme Court does not have authority to hear enforcement actions pursuant thereto. Instead, Plaintiffs contend that because this Court has issued injunctions relative to certain other preempted claims, all actions intended to bring Vermont Yankee into compliance with the Sale Order must cease pending Plaintiffs' application for a new or amended CPG. No authority has been cited for this sweeping proposition, other than a statutory provision relating to CPG's – not the Sale Order or any law applicable thereto.

According to Plaintiffs' reasoning, orders of the PSB unrelated to preempted concerns, and separate from a CPG, cannot be enforced if such enforcement coincides with an attempt to obtain an extended or renewed CPG. Absent from Plaintiffs' analysis is any consideration of the fact that Plaintiffs never objected to the Sale Order's prohibition against operating the plant after March 21, 2012, or NEC's right to enforce same, until after the condition was violated. Now, Entergy asks this Court to override the 2002 Sale Order Condition 8, merely because the Court found limited provisions of unrelated laws are preempted by federal law. As noted by the PSB, Plaintiffs actively sought the March 21, 2012 deadline in the 2002 Sale Order, and repeatedly submitted to the PSB's authority over the sale of Vermont Yankee. Plaintiffs cannot now claim prejudice or call foul when they are expected to abide by the condition containing the deadline they sought, and for which they accepted unconditional responsibility. PSB Order re: Motion to Amend, dated November 29, 2012, pages 12 - 20 (Plaintiff's Motion, Exhibit C).

Nowhere in the pleadings, record or Opinion in this case can Plaintiffs find any prohibition against enforcement of PSB orders before the Vermont Supreme Court. Instead, Plaintiffs rely upon purported representations and statements of counsel and the Court to support the proposition that no action may be taken against continued operation of Vermont Yankee in any forum by any party without offending the Court's Order granting Plaintiffs partial, limited

injunctive relief. Motion at 1 and 5. The statements relied upon, moreover, pertained to the parties' belief that the CPG issued to Entergy continued after March 21, 2012 – a claim that NEC does not dispute. Motion at 3 (stating the Attorney General agreed the CPG remained in effect). This does not, however, provide any basis for Entergy to now use this Court to avoid complying with Condition 8 of the Sale Order, which is separate and distinct from the CPG. The PSB has ruled that Condition 8 is not a license subject to 3 V.S.A. § 814(b), and “that not only did Entergy VY understand that Condition 8 was a sale condition, but that Entergy VY actively agreed to the provision as a condition of the sale.” Docket Nos. 6545, 7082, 7440 Order Re Motion to Amend of 11/29/12 at 18-19.

Plaintiffs' attempt to deprive the Vermont Supreme Court of its original, statutory jurisdiction to enforce Condition 8 of the Sale Order should be rejected. By seeking to deprive the Vermont Supreme Court of its original jurisdiction to enforce orders of the PSB, Plaintiffs are attempting to gain more from the Court's 2012 Opinion than was given. Without recourse to the Vermont Supreme Court for enforcement of PSB orders, parties would be left with no means by which to ensure compliance with such orders, and the PSB process would become a sham.

Rather than ignore the statutory provision vesting the Vermont Supreme Court with original jurisdiction to enforce PSB orders, this Court should permit the NEC's Vermont Supreme Court Complaint to go forward, and only consider further action in the event a violation of this Court's 2012 Opinion or federal law occurs. *See, also*, 42 USCS § 2021(k) (recognizing the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards). This Court should appropriately respect the PSB process, and the authority of the PSB to issue enforceable orders, and undertake no action to interfere with the Vermont Supreme Court's exercise of its original, statutory jurisdiction.

III. PLAINTIFF IS BARRED BY THE DOCTRINE OF *RES JUDICATA* FROM RAISING NEW CLAIMS POST-TRIAL

In their pleadings and through trial, Plaintiffs had the option of asserting that no party, before this Court or the PSB, could seek enforcement of the conditions of the Sale Order.⁴ Plaintiffs chose not to bring any such challenge, and instead made discrete preemption claims against particular statutes. Plaintiffs chose not to litigate in this action whether a party to the PSB Order permitting the sale of Vermont Yankee could seek enforcement of the Sale Order pursuant to 30 V.S.A. § 15, although it could have joined parties before the PSB – such as NEC – in this action to do so. Because Plaintiffs could have litigated their present claim at trial, by seeking to enjoin any action, by any person or entity, to enforce any PSB order prohibiting the illicit operation of Vermont Yankee pending a decision on the CPG petition, and failed to do so, they are now barred from raising their new preemption claim. *See, e.g., Lamb v. Geovjian*, 165 Vt. 375, 380 (Vt. 1996) (the doctrine of *res judicata* bars parties from litigating claims or causes of action that were or should have been raised in previous litigation) (internal citations and quotation omitted).

IV. PLAINTIFFS HAVE NOT CHALLENGED THE EFFICACY OF THE SALE ORDER, THEREFORE PLAINTIFFS CANNOT OBJECT TO NEC'S COMPLAINT SEEKING ENFORCEMENT OF THAT ORDER

Plaintiffs' Emergency Motion is devoid of any attack on the validity or enforceability of the Sale Order. Motion at 1–7. Plaintiff seems to take the position that NEC's timing is

⁴ The PSB's November 29, 2012 Order verifies that Entergy knew or should have known of these matters when the Sale Order was issued in 2002. *See* Docket Nos. 6545, 7082, 7440 Order Re Motion to Amend of 11/29/12 at 19-20 (stating that it is "difficult to understand how Entergy VY could reach any conclusion but that Condition 8 was a condition of the sale of Vermont Yankee, which was a discrete transaction (unlike the continuing activity to which Section 814(b) applies)").

impermissibly bad, but Plaintiffs do not deny NEC's general ability to pursue enforcement of PSB orders regarding Vermont Yankee in accordance with 30 V.S.A. § 15. Plaintiffs provide no rational, however, for why it is permissible for NEC to seek enforcement of PSB orders at some times, but not others. Plaintiffs seem to be in denial that the Sale Order contains a Condition 8 - prohibiting the operation of Vermont Yankee after March 21, 2012, and that the Sale Order was neither stayed nor extended by this Court's Opinion.

Plaintiffs' attempt to impair the enforceability of the Sale Order, based upon the purported delay from preempted actions by the State of Vermont, does not constitute a valid objection to NEC's Complaint before the Vermont Supreme Court, or the enforceability of the Sale Order pursuant to 30 V.S.A. § 15. As the PSB has found, Plaintiffs' inability to comply with Condition 8 of the Sale Order is the result of choices and strategies that Entergy itself has employed, and upon representations made by Entergy to the Board,⁵ which were relied upon in issuing the Sale Order and Condition 8 therein. PSB Order, dated November 29, 2012 at 7. The PSB further declined to adopt Plaintiffs' theory that the delays resulting in Plaintiffs' non-compliance with the Sale Order "stemmed from Vermont statutes that have now been found (by the District Court) to be preempted by federal law or enjoined." The Board instead found that, "Entergy VY had available other strategic choices that would have resulted in federal rulings far enough in advance that no delay would have occurred. And as we stated in the previous paragraph, between the time that Entergy VY revealed that it had not been fully accurate in

⁵ For example, the Board noted that "[t]his view was augmented by Entergy VY's brief, which stated: 'In its prefiled testimony and in the MOU, ENVY and ENO have committed that they *will not attempt to operate the VY Station beyond its current term without obtaining an extension or renewal of its CPG* from the Board.'" November 29 Order at 18 (emphasis in original). Entergy's Proposed Findings in Docket 6545 similarly stated that "ENVY agrees to a condition in an order issued by the Board approving this sale to the effect that the Certificate of Public Good (CPG) issued by the Board will be limited to a term of years ending with the VY Station's current license termination date (March 2012) and that operation of the VY Station beyond its license termination date will be allowed only if the CPG has been renewed by the Board." *Id.*

describing underground piping systems and January 2012, Entergy VY made no request for the Board to proceed.” *Id.*

Accordingly, Plaintiffs acknowledge the continuing validity of the Sale Order, which is enforceable as any order of a Court according its plain meaning. Plaintiffs’ non-compliance with the Sale Order is the result of Plaintiffs’ own strategic choices and their failure to request any Board action after disclosing it misrepresented the underground piping system at the facility in January, 2012.⁶ The unambiguous language of the Sale Order prohibits Plaintiffs from operating Vermont Yankee after March 21, 2012, and NEC should be allowed to pursue enforcement thereof before the Vermont Supreme Court. If Plaintiffs wish to raise objections to the enforceability of the Sale Order, the proper forum for such defenses is before the Vermont Supreme Court in response to NEC’s Complaint.

**V. STATE’S RIGHTS DICTATE THE VERMONT SUPREME COURT
MUST BE PERMITTED TO HEAR NEC’S 30 V.S.A § 15 COMPLAINT**

Plaintiffs do not claim the Vermont Supreme Court is barred on federal preemption grounds from considering NEC’s Complaint. Instead, Plaintiffs claim that this Court’s recognition that Vermont Yankee could operate under Section 814(b) without violating its CPG should be bootstrapped into a finding that Vermont Yankee can continue to operate in violation of the Sale Order. Motion at 3. While Entergy may very well have sought an additional injunction barring any shutdown during the Interim Period for any reason (Motion at 3, ¶ 3), there was indeed “no action to enjoin” because none of the parties were in a position to act contrary to Plaintiffs’ position in this litigation. Since Plaintiffs’ position in this litigation was

⁶ Plaintiff’s Exhibit A is a partial transcript from PSB Docket 7600, concerning the release of radioactive material, in which the PSB Chair indicated it would be inappropriate to discuss the CPG docket, because the parties to that docket had not been notified and were not all present. Entergy had ample opportunity at that time to seek formal resolution of whether the CPG docket should be concluded despite the contemporaneous legislative action. Failure to do so was a strategic choice, not the result of preempted conduct by the State of Vermont.

always limited, however, to matters other than the validity and enforceability of the Sale Order, this Court never reached the question (nor should it) of whether federal preemption bars enforcement of the Sale Order pursuant to 30 V.S.A. § 15.

Considering the context of Plaintiffs' Motion within the pending litigation, the substance of Plaintiff's injunction request is inconsistent with the sovereignty of the State of Vermont, and the enforceability of PSB orders in state court. Again, NEC does not contend that Plaintiffs are prohibited from operating Vermont Yankee regardless of whether a new CPG is granted, nor does NEC dispute the validity of Section 814(b) to allow continued operation under the old CPG while an application for a new CPG is pending. Instead, NEC's Complaint is limited to the sole issue of whether Plaintiffs are allowed to operate the Vermont Yankee facility in clear and direct violation of Condition 8 of the Sale Order with impunity, or if the Vermont Supreme Court has some enforcement authority over the undisputed conduct.

As there exists no authority upon which Plaintiffs could rely to continue their illegal operation of the plant in violation of the Sale Order, the State of Vermont has authority to enforce the Sale Order, to enjoin Plaintiffs from operating the plant in violation of state law, or take such other action the Vermont Supreme Court deems appropriate. Plaintiffs' apparent contention that they should be allowed to act contrary to the PSB Sale Order indefinitely without consequence, despite having made no claim the Sale Order is preempted or was issued without authority, is wholly inconsistent with the most basic recognition of State sovereignty and the validity / enforceability of PSB orders.

Title 30, Vermont Statutes Annotated constitutes a permissible exercise of State authority to regulate utilities in the State of Vermont. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (U.S. 1983) (*citing Vermont Yankee Nuclear*

Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550 (1978)). To the extent Plaintiffs claim NEC is prohibited from seeking 30 V.S.A. § 15 relief from the Vermont Supreme Court to enforce the Sale Order, in reliance upon prior interpretations of Section 814(b), the Public Service Board has held such reliance is inapposite to the Sale Order and this Court is not being asked to otherwise find.

The PSB found that Entergy VY could have avoided any hardship occasioned by expected compliance with the Sale Order, by complying with the Board's Order; could have sought reconsideration (rather than waiting several months before filing a motion to amend that was ultimately denied by the Board); or could have sought immediate, interlocutory review of the Board's decision and a stay from the Board pending such review. Entergy VY chose none of these options. Instead, "it voluntarily elected to continue operating Vermont Yankee even after the Board affirmatively stated that Condition 8 of the Sale Order and the applicable conditions in the DFS Order and CPG were not extended by 3 V.S.A. § 814(b)." PSB November 29, 2012 Order (emphasis added).

Considering Plaintiffs' own actions resulted in their present non-compliance with the Sale Order, and further recognizing that the State of Vermont had undisputed authority to issue the Sale Order and is the sole jurisdiction in which enforcement of the Sale Order may occur, Plaintiffs' request that this Court usurp such authority of the State of Vermont should be denied.

VI. THE UNITED STATES AND VERMONT CONSTITUTIONS REQUIRE THE VERMONT SUPREME COURT BE PERMITTED TO HEAR NEC'S COMPLAINT

The First Amendment to the U.S. Constitution states, "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.” The Right to petition for redress of grievances is among the most precious of liberties safeguarded by Bill of Rights, and is intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press. *United Mine Workers v Illinois State Bar Ass'n.*, 389 US 217 (1967). By restricting NEC’s ability to petition the Vermont Supreme Court for redress relative to Entergy’s violation of the PSB’s 2002 Sale Order, this Court would be impermissibly invading NEC’s First Amendment interest in recourse to legal process.

The Tenth Amendment to the U.S. Constitution reserves vast powers to the states: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As discussed, *supra*, Plaintiffs do not dispute the validity of the Public Service Board’s general authority to regulate Vermont Yankee. Nor do Plaintiffs contend the Sale Order, including Condition 8, was issued without authority. Plaintiffs have not attacked the validity of 30 V.S.A. § 15, but have instead claimed that §15 should not be utilized to enforce Condition 8 of the Sale Order because it was assumed Section 814(b) would allow continued operation of Vermont Yankee during the Interim Period without resulting in a violation of Section 248 (prohibiting operation without a CPG). *See, also*, Motion at 2 (acknowledging that “[t]his Court’s ruling did not disturb the Vermont *administrative* process under which Entergy is required to obtain a CPG from the PSB for post-March 21, 2012 operations), *and* ECF No. 181 at 4. This assumption was incomplete, as it was premised on the erroneous supposition that the CPG was the only requirement for continued operation, and that Condition 8 of the Sale Order was subject to 3 V.S.A. § 814(b). The Board has ruled otherwise, and whereas the State of Vermont has sole jurisdiction over the issue, there is no basis for this Court enjoin NEC.

The Vermont Constitution secures the right of every person within this state to have recourse to the laws, for all injuries or wrongs which one may receive in person, property or character, and provides that, “every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws. Vt. Const. Ch. I, Art. 4 (2012). The Article protects recourse to judicial process. *Levinsky v. Diamond*, 151 Vt. 178, 559 A.2d 1073 (1989) (overruled on other grounds) and *Muzzy v. State*, 155 Vt. 279, 583 A.2d 82 (1990). Barring NEC’s action before the Vermont Supreme Court would offend the Vermont Constitution’s guarantee of judicial process “conformably to the laws” of the State of Vermont. Accordingly, upon independent State Constitutional grounds, Plaintiffs’ Motion should be denied.

VII. NEC’S ACTION BEFORE THE VERMONT SUPREME COURT TO ENFORCE THE 2002 SALE ORDER IS NOT PROHIBITED BY THIS COURT’S PRIOR JUDGMENT

Absent from this case is a principal allowing Vermont Yankee to continue operating indefinitely, regardless of whether it is violating a valid order issued pursuant to state law. Plaintiffs brought their Complaint for Declaratory and Injunctive relief seeking limited relief, against the named parties, significantly on preemption grounds.⁷ Plaintiffs cannot ask this Court to excuse them from the 2002 Sale Order, because they have not raised a preemption (or any other) claim against NEC’s ability to enforce the Sale Order or Condition 8 thereof. The relief sought by Plaintiffs’ Motion - enjoining NEC from exercising its right, as a party, to seek enforcement of a PSB Order – is simply unavailable considering Plaintiffs’ causes of action.

⁷ Plaintiffs’ prayer for relief sought injunctions on the grounds that federal law preempted the named defendants from: 1) requiring Plaintiffs to receive legislative approval for a CPG to operate after March 21, 2012; 2) regulating radiological safety; 3) or shutting down Vermont Yankee based upon a denial of a CPG. None of those claims encompasses NEC’s state law Complaint to the Vermont Supreme Court alleging ENVY is operating the Vermont Yankee Plant in violation of the 2002 Sale Order.

Having made no claim against NEC relative to the 2002 Sale Order, or which conceivably provides Plaintiffs relief from Condition 8 of the Sale Order, it is improper for Plaintiffs to ask this U.S. District Court to interfere with NEC's attempt to seek enforcement of the PSB Sale Order, pursuant to state statute, by recourse to the Vermont Supreme Court.⁸

The Court should follow the great weight of authority recognizing a federal injunction against state proceedings is inappropriate if the claim or issue in question has not actually been litigated and decided by the judgment of a federal court. *See, e.g. Texas Commerce Bank National Ass'n v. State of Florida*, 138 F.3d 179, 182 (5th Cir. 1998) (quoting Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d β 4226, at 300 (2d ed. 1988 & Supp. 1998)); *Nationwide Mutual Ins. Co. v. Burke*, 897 F.2d 734, 737 (4th Cir. 1990) (limiting preclusive effect of federal judgment for purposes of an injunction to claims or issues which were actually decided by the federal court); *American Town Center v. Hall 83 Associates*, 912 F.2d 104, 112 n.2 (6th Cir. 1990) (noting that additional claims in the state court proceedings limited the federal court's authority to enjoin).

Contrary to Plaintiffs' argument, it is of no moment that when Plaintiffs filed the pending Motion, no further action had been taken in the Vermont Supreme Court. Regardless, since that time the Vermont Public Service Department ("PSD") has filed an opposition to NEC's Complaint (Exhibit C). NEC has filed a response to the PSD's opposition. (Exhibit D). The Vermont Supreme Court has assigned docket number 2012-448 to the case, and has indicated the action is being considered a complaint of extraordinary relief.⁹ The State Court enforcement

⁸ Plaintiffs make much of the effervescent "expectation" that as a result of this case, Vermont Yankee would be permitted to operate under its existing CPG pursuant to 3 V.S.A. § 814(b); however, any such expectation is necessarily limited to the issues before this Court in this action. No discernable issue in this case includes, or could reasonably be construed to include, the sole issue NEC has raised before the Vermont Supreme Court - enforcement of the 2002 Sale Order.

⁹ V.R.C.P. 21 provides, in part: "An original action for extraordinary relief in the Supreme Court shall be governed by the Rules of Civil Procedure as modified by this rule."

action should be allowed to proceed, and any action by the Vermont Supreme Court in response to NEC's Complaint can be challenged by Plaintiffs by appropriate action.

CONCLUSION

The pleadings in this case, the record, and the Court's Judgment are barren of any claim against NEC seeking to prohibit it from enforcing Condition 8 of the 2002 Sale Order. The mechanism of enforcement is a Complaint to the Vermont Supreme Court pursuant to 30 V.S.A. § 15, which NEC has brought and the Vermont Supreme Court is treating as an original action for extraordinary relief pursuant to V.R.C.P. 21. It would be improper for the District Court to interfere with such a State Court action at this stage of Vermont Supreme Court proceeding. Instead, the District Court should allow NEC's state action to continue, mindful that Plaintiffs may retain legitimate procedural means by which they could attempt to challenge any decision of the Vermont Supreme Court.

WHEREFORE, NEC respectfully requests the Honorable Court to DENY the Plaintiffs' Expedited Motion for an injunction requiring NEC to withdraw its enforcement Complaint, which is being appropriately litigated before the Vermont Supreme Court.

DATED at Stowe, Vermont this 14th day of December, 2012.

NEW ENGLAND COALITION, INC.:

By: /s/ Brice Simon /s/ Jared Margolis

Brice Simon, Esq. and Jared Margolis

Breton & Simon, LLC

PO Box 240

344 Mountain Road

Stowe, VT 05672

802.760.6773

brice.simon@stoweattorneys.com