UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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

Plaintiffs

v.

Docket No. 1:11-cv-99

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

PLAINTIFFS' SUPPLEMENT TO PROPOSED FINDINGS OF FACT

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Pursuant to this Court's Order dated June 27, 2011, Plaintiffs Entergy Nuclear Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENOI") respectfully supplement their Proposed Findings Of Fact (filed on June 16, 2011) ("PFF") based on the record created at the preliminary injunction hearing held June 23 and 24, 2011, and subsequent developments that could not have been raised at the hearing. Following each supplemental fact, Plaintiffs indicate the paragraph(s) of the original PFF to which the supplemental fact relates.

Reliability: Pretext And Public Harm

1. Reliability and similar economic issues are not within Vermont's authority to consider in the case of an interstate wholesale plant (as distinguished from a retail utility over which States have traditional power, *see Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983)). States' traditional authority over the retail electricity market reflects their role in protecting ratepayers who bear the costs of retail electricity rates. *See generally New York v. FERC*, 535 U.S. 1, 5 (2002) (noting that, traditionally, "the States possessed broad authority to regulate public utilities," which historically operated as "separate, local monopolies" that "bundled" their sales so that "consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery"). These ratepayers, however, have no relationship with or responsibility for wholesale plants, like the Vermont Yankee Station, and thus wholesale plants, which provide electricity in interstate commerce, fall outside of States' traditional authority. (PFF ¶ 8)

2. *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) ("*CDPUC*"), which Defendants cited for the first time in their sur-reply (at 2), is inapposite. There, the court *upheld* the federal authority of ISO-NE and FERC to regulate capacity "require[d] for reliability." *Id.* at 323. While the court suggested in *dicta* that States

retain the right to require retirement of existing generating facilities, *see id.* at 481, that *dicta* did not speak to the permissible bases on which a State could so require, and it is not clear what authority would allow a State permanently to shut down an interstate wholesale plant other than its eminent domain power. *See generally Citizens For An Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398 (1991) (discussing New York's agreement to acquire the Shoreham nuclear plant to shut it down). Nothing in *CDPUC* suggests any legitimate state authority to engage in *economic* regulation (*e.g.*, reliability, need, cost) of an interstate wholesale plant, and no such authority exists. *See, e.g.*, *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). (PFF ¶ 8)

3. Even if Vermont could consider the Vermont Yankee Station's reliability, the record reflects that it *is* reliable. On June 27, 2011, ISO-NE announced that "comprehensive studies sho[w] that the [Vermont Yankee] plant is needed to support the grid's ability to reliably meet demand in Vermont, southern New Hampshire, and portions of Massachusetts, as well as reliability for the entire region's power system." ISO-NE Press Release, *New England Procures the Power System Resources Needed for 2014-2015*, June 27, 2011, at 2, *available at* http://www.iso-ne.com/nwsiss/pr/2011/fca5_filing_release_06272011.pdf; *see also New England Needs Entergy Vermont Yankee Reactor – ISO*, REUTERS, June 27, 2011, *available at* http://www.reuters.com/article/2011/06/27/utilities-entergy-vermontyankee-idUSN1E75Q1O520110627. (PFF ¶¶ 43, 89)

4. Based on this finding, ISO-NE refused to allow the Vermont Yankee Station to withdraw from the Forward Capacity Market Auction for 2014-2015. ISO-NE Press Release at 2. ISO-NE had previously refused to allow the Vermont Yankee Station to withdraw from the

Forward Capacity Market Auction for 2013-2014. *Id.*; *see also* Decl. of Edward D. Kee filed Apr. 22, 2011, ¶ 73 & Exs. 25a, 25b. (PFF ¶¶ 43, 89)

5. The State's assertion that the Vermont Yankee Station is unreliable thus has no basis and its reliance on "reliability" as a rationale to shut down the Vermont Yankee Station must be considered a pretext for safety (*i.e.*, "another word for safety"). Evidence that Defendants' asserted non-safety rationales are implausible is relevant to determining whether Vermont had "safety purposes in mind," *PG&E*, 461 U.S. at 215, when it enacted Acts 74, 160, and 189, and when it implemented its ongoing CPG-veto role in S. 289. *Cf. McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (rejecting argument that "true 'purpose' is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent"; reiterating that "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act"); *id.* at 864-66 (concluding that asserted secular purpose of Ten Commandments display was implausible and hence pretextual) (internal quotation marks omitted); *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987) (stating that purpose enquiry looks to "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history … [and] the historical context of the statute, ... and the specific sequence of events leading to passage of the statute"); *id.* at 586-89 (finding implausible the asserted secular purpose of statute prohibiting the teaching of evolution in public schools unless accompanied by the teaching of creationism). (PFF ¶¶ 42-64)

Relevance Of The 2002 MOU

6. Defendants concede that the 2002 MOU and other documents and/or testimony in which Plaintiffs supposedly waived their ability to assert federal preemption do not allow Vermont to regulate the Vermont Yankee Station based upon radiological safety concerns. Transcript of June 23, 2011 Hearing ("Tr.") 71:8-12 (THE COURT: "[I]s it the state's position that it can regulate radiation safety? ATTORNEY ASAY: No[,] the state the state [sic] has not regulated radiological [safety] at the plant and it's not the state's position that it can do so …."). (PFF ¶ 15)

Irreparable Harm

7. Absent a preliminary injunction, Plaintiffs will suffer irreparable harm from an adverse impact on their credit, attrition of key employees at the Vermont Yankee Station, and any of the three choices available to them: (a) changing the outage date and incurring the associated safety risk; (b) making a blind expenditure of more than $65 million that is unrecoverable from the State; or (c) shutting down the Vermont Yankee Station. (PFF ¶¶ 65-87)

Irreparable Harm: Downgrade Of Entergy Corp.'s Credit Outlook From "Stable" To "Negative"

8. On June 28, 2011, leading credit ratings agency Standard & Poor's revised Entergy Corp.'s credit outlook from "stable" to "negative," a change that will likely increase the cost to raise capital for Entergy Corp. and those subsidiaries like ENVY that depend upon it for financing. The downgrade occurred because of the current uncertainty over the Vermont Yankee Station's future, as well as uncertainty for Entergy's relicensing efforts at other plants, including Indian Point Units 2 and 3 in New York. Standard & Poor's, *Outlook On Entergy Corp. Is Revised To Negative Amid Reliscensing [sic] Uncertainties; Ratings Are Affirmed*, June 28, 2011 ("S&P Report"), attached hereto as Exhibit A; *see also* Terri Hallenbeck, *Vermont Yankee*

owner's credit rating downgraded, BURLINGTON FREE PRESS, June 28, 2011, *available at http://blogs.burlingtonfreepress.com/politics/2011/06/28/vermont-yankee-owners-credit-rating-downgraded/*. According to the Standard & Poor's report, "[e]ven though New York State has no formal authority over the license extension of Indian Point Units 2 and 3, as Vermont has over Vermont Yankee, a successful shutdown of Vermont Yankee could provide further momentum to opponents of the New York plants." S&P Report at 3. The report concludes that "the uncertainty regarding the relicensing effort, in addition to potentially disrupting Entergy's hedging program and introducing cash flow volatility, also increases Entergy's business risk." *Id.* at 4. (PFF ¶¶ 78-81)

9. A downgrade of a company's credit constitutes irreparable harm. *See, e.g.*, *Painewebber Inc. v. Nwogugu*, 1998 WL 545327, *2 (S.D.N.Y. Aug. 26, 1998) (damages due to "harm ... [to] credit rating" and reduced "confidence of present and future customers and creditors … are incalculable"); *Hybred Int'l v. Thorne Legal, Inc.*, 2008 WL 5068896, *5 (E.D.N.Y. Nov. 24, 2008) ("While the value of the stock itself can be compensated, the decreased credit rating and inability to raise capital cannot."); *Countrywide Home Loans, Inc. v. Arbitration Alliance Int'l, LLC*, 2004 WL 987131, *8 (D. Utah Apr. 14, 2004) ("potential damage to [plaintiffs'] credit ratings" constituted irreparable harm that warranted preliminary injunction); *cf. Register.Com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) ("the district court did not abuse its discretion in finding that, unless specific relief were granted, Verio's actions would cause Register irreparable harm through loss of reputation, good will, and business opportunities"). (PFF ¶¶ 78-81)

Irreparable Harm: Attrition

10. John T. Herron, the CEO and Chief Nuclear Officer for Plaintiff ENOI, is "concerned" with current attrition of key employees at the Vermont Yankee Station, and the likelihood of future attrition. Tr. 149:9. Mr. Herron's concern is based not only on exit interviews of departing employees, but "on a lot of different inputs," Tr. 150:16, including ENOI's "H R organization," Tr. 150:17; "all hands meetings [at] which people are asking me questions with respect to the future of this facility," Tr. 150:22-23; and "personal conversations with people," Tr. 151:10. (PFF ¶¶ 65-70)

11. Given his concerns, Mr. Herron took the "unusual" step (Tr. 153:8) of writing a "personal letter to every employee at Vermont [Yankee]," Tr. 152:12-13, which was sent "to their home[s]," Tr. 153:8, expressing Plaintiffs' commitment to do everything possible to help the employees find work elsewhere if the plant is shut down, Tr. 153:11-12; *see also* Reply Declaration of John T. Herron, filed May 31, 2011, Ex. 11. Even this letter is unlikely to stem attrition because many Vermont Yankee Station employees may prefer to work at nuclear plants owned by other companies rather than work at other plants that Plaintiff ENOI manages, such as the one in Port Gibson, Mississippi. Tr. 155:2-8. (PFF ¶¶ 65-70)

12. Attrition will likely escalate if Plaintiffs do not place the fuel fabrication order on July 22-23, 2011, because "every person at Vermont [Yankee] right now is waiting for [Mr. Herron] to give the [g]reen light to go and fabricate that fuel." Tr. 166:20-23. (PFF ¶¶ 65-70)

Irreparable Harm: Safety Implications Of Changing Outage Date

13. Delaying the fuel fabrication order would require delaying the refueling outage, Tr. 159:17-160:10, a highly unusual step in the nuclear industry, which relies on "consistency and structure," Tr. 161:6. In the case of the Vermont Yankee Station, the October 8, 2011

refueling outage was scheduled at least 28 months ago. Tr. 160:19. According to Mr. Herron, delaying the outage date "put[s] a safety risk at play here." Tr. 161:16. (PFF ¶¶ 71-77)

Irreparable Harm: Unrecoverable Cost Of Refueling

14. The State erroneously implied that Plaintiffs could recoup the more than $65 million cost of re-fueling through its post-outage operations under its existing certificate of public good (which expires in March 2012). Tr. 115:25-117:17. The Vermont Yankee Station generates approximately $20 million in *revenue*—not profit—each month, Tr. 117:17, 157:14-22, and its profit, if any, is "not even close" to that amount, Tr. 157:24; *see also* Kee Decl. Ex. 2 (Entergy CEO stating that the Vermont Yankee Station is "simply not covering its cost of capital"). Thus, there is no evidence that Plaintiffs could re-coup their substantial re-fueling costs in the approximately four to five months of post-outage operations. (PFF ¶¶ 71-77)

Irreparable Harm: Shutdown Of Vermont Yankee Station

15. Mr. Herron stated that, if this Court denies a preliminary injunction, it is "highly likely" that Plaintiffs would decide to shut down the Vermont Yankee Station because of their understandable concern about "fiscal responsibility" regarding "i[n]vest[ing] [that] kind of money," *i.e.* more than $65 million, in a refueling investment that might be unrecoverable—although such a decision would have to be discussed among senior management. Tr. 172:5-12. (PFF ¶¶ 71-77)

16. A temporary shutdown of the Vermont Yankee Station is not practicable given, among other things, the substantial costs that Plaintiffs would incur during a shutdown. Kee Decl. ¶¶ 26-29. The nuclear power plants that have shut down temporarily were either owned by regulated utilities and thus could seek recovery of their costs from ratepayers (Brunswick 1 & 2 and Davis Besse) or were owned by a federal government agency (Browns Ferry). Tr. 165:22-

166:12; *see also* Herron Reply Decl. ¶ 13. As Mr. Herron explained, since the Vermont Yankee Station is a merchant plant, it "has to sur[vive] on its own" based on the market. Tr. 166:8; *see also* S&P Report at 4 ("[U]nlike nuclear power plants operating under rate regulation, Entergy's merchant nuclear plants need to rely on market prices to recover costs relating any incremental NRC-imposed regulations …."). (PFF ¶ 85)

Balance of Hardships

17. Defendants have not offered any evidence of material harm that Vermont would suffer if a preliminary injunction is granted. (PFF ¶¶ 148-51)

NRC's Position

18. On June 15, 2011, the NRC voted to ask the U.S. Department of Justice ("DOJ") to appear in this case in support of Plaintiffs. Simon Lomax, *NRC Sides With Entergy in Vermont Plant Debate, Sanders Says*, BLOOMBERG, June 16, 2011, *available at* http://www.bloomberg.com/news/2011-06-16/nrc-sides-with-entergy-in-vermont-plant-debate-sanders-says-1-.html. While Senator Bernie Sanders has suggested that the DOJ has decided not to intervene in this case (*see* Susan Smallheer, *Sanders: NRC won't intervene in suit*, RUTLAND HERALD, July 1, 2011, *available at* http://www.rutlandherald.com/article/20110701/NEWS02/707019920), a DOJ spokesperson announced on June 30, 2011, that "[t]he department has not decided whether to intervene in this case" and that "it will continue to monitor the situation." *Justice Department Unsure on Vermont Yankee Stance*, BURLINGTON FREE PRESS, July 1, 2011, *available at* http://www.burlingtonfreepress.com/article/20110701/NEWS02/107010306/Justice-Department-unsure-Vermont-Yankee-stance?odyssey=tab|topnews|text|FRONTPAGE. (PFF ¶ 12)

Dated: July 1, 2011

Respectfully submitted,

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel:

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