

**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 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.

Civil Action No. 11-cv-99

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR RELIEF FROM
JUDGMENT UNDER RULE 60(b), FOR INJUNCTION PENDING APPEAL, AND FOR
AN 'INDICATIVE RULING' ON THEIR RULE 60(b) MOTION**

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Plaintiffs filed motions to re-open the judgment and to obtain further injunctive relief based solely on a request for briefing from the Vermont Public Service Board. This point bears repeating: the Board has taken no action with respect to Vermont Yankee *other than requiring parties to its proceeding to submit briefs and to appear at a status conference*. And, given the Court's decision, neither the Attorney General nor the Department of Public Service has taken the position that Vermont Yankee must close after March 21, 2012, while Entergy's certificate of public good (CPG) petition is pending at the Board. The Court should reject this effort to delay and disrupt both the Board's proceeding and the State's appeal, and should deny both motions.

INTRODUCTION

In its January 20, 2012 ruling, this Court entered judgment in favor of Entergy and granted declaratory and injunctive relief addressed to two Vermont statutes. The Court invalidated Act 160 in its entirety and enjoined its enforcement. The Court invalidated part of Act 74, a provision codified as part of Vt. Stat. Ann. tit. 10, § 6522(c)(4). Neither party moved to amend the judgment under Federal Rule of Civil Procedure 59(e). Defendants timely appealed.

On January 31, 2012, Entergy filed a motion asking the Board to immediately grant Entergy's pending CPG petition to authorize Vermont Yankee to continue operating after March 21, 2012. *See Ex. 1*, at 1-3. Despite having told this Court that the Board's "current docket is tainted," Tr. 678:10 (ECF No. 170), Entergy argued to the Board that its record was "fully sufficient" and that the Board should issue a "prompt decision," *Ex. 1*, at 2-3. The Board sought briefing on that motion and set a status conference for March 9.

On February 22, 2012, the Board issued a memorandum setting forth questions for the parties to address. ECF No. 195-1. Among other things, the Board inquired whether, "[u]nder the language of Title 10, Chapter 157 (as modified by the District Court Order), . . . the Board ha[s] authority to grant Entergy VY's petition," and whether "3 V.S.A. § 814 stating that an existing

license does not expire while a timely and sufficient application for renewal is pending” applies to Entergy’s pending application. ECF No. 195-1, at 1-2. The Board did not give any indications about its tentative rulings on these questions, or any of the others it posed.

Entergy responded by immediately filing motions with this Court seeking additional relief, and with the Second Circuit seeking a limited remand so the Court can grant that relief.

Through both of its motions with the Court, Entergy seeks the same three categories of relief:

- 1) Declaring Vt. Stat. Ann. tit. 10, § 6522(c)(2) invalid, as preempted by the Atomic Energy Act, and enjoining defendants from enforcing it;
- 2) Declaring Vt. Stat. Ann. tit. 10, § 6522(c)(5) invalid, as preempted by the Atomic Energy Act, and enjoining defendants from enforcing it;
- 3) Enjoining defendants from taking “any action” that would require Vermont Yankee “to curtail operations” pending a decision by the Board on Entergy’s CPG petition “and any judicial review of that [Board] decision.”

ECF No. 193, at 1-2; *accord* ECF No. 190, at 1-2. Although Entergy now claims that the Court erred in crafting its declaratory and injunctive relief, Entergy does not explain its failure to file a timely motion to amend the judgment under Rule 59.

Entergy also asked the Board to defer briefing on the questions the Board posed and instead wait for this Court to rule on Entergy’s motions. On March 1, 2012, the Board denied Entergy’s request and required comments by March 7, 2012. ECF No. 197-1, at 4. The Board will hold a status conference on March 9 to consider both Entergy’s request that the Board decide Entergy’s CPG petition on the existing record and the questions set forth in the Board’s request for briefing. *See id.* at 2.

The Department of Public Service, Entergy, and other parties filed comments with the Board on March 7, 2012. The Department advised the Board that “the permanent injunction issued by the federal district court does not . . . permit the State to prevent Entergy from operating for lack of a CPG for operation or spent nuclear fuel storage. Instead, Entergy could

continue to operate under its current CPG pursuant to 3 V.S.A. § 814(b) pending resolution of its CPG petition.” Ex. 2, at 4. The Attorney General agrees with the Department that, pending resolution of its CPG petition or reversal of this Court’s decision on appeal, Entergy may continue to operate under the terms of its current CPG pursuant to Vt. Stat. Ann. tit. 3, § 814(b). Entergy itself told the Board that it will keep operating and argued that “preclud[ing] VY’s operation” after March 21 would contravene this Court’s judgment. Ex. 3, at 9.

ARGUMENT

I. Entergy has not shown “extraordinary circumstances” that warrant granting relief under Rule 60(b) and is not entitled to further injunctive and declaratory relief.

Relief under Rule 60(b) “may be granted only in ‘extraordinary circumstances,’” *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994) (quoting *Ackermann v. United States*, 340 U.S. 193, 199-202 (1950)), and may not be used as a substitute for appeal, *United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009). Entergy points to the Board’s request for briefing as the reason for its motion, but the fact that the Board asked questions does not provide a basis for re-opening a final judgment and granting broad new injunctive relief. Entergy does not face an imminent threat that Vermont Yankee will be forced to close later this month. What Entergy calls an “unmistakable implication,” ECF No. 194, at 6, is in fact just a list of questions, and Entergy’s immediate return to this Court is premature and unnecessary.

The State has not taken the position that Vermont Yankee is required to close if the Board has not yet ruled on Entergy’s CPG petition by March 21, 2012. The Board asked for briefing on certain issues, nothing more. The Department of Public Service, in response to the Board’s queries, advised that, in light of this Court’s decision, Entergy may continue to operate Vermont Yankee under the terms of its current CPG until the Board rules on Entergy’s CPG petition. The Attorney General agrees with the Department’s position. There is no action for the Court to

enjoin and certainly no “exceptional circumstances” that warrant “extraordinary judicial relief” under Rule 60(b). *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986).

Entergy’s Rule 60(b) motion should accordingly be denied. To grant relief now would interfere in the Board’s proceeding and excuse Entergy’s unexplained failure to file a timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). And the Court cannot in any event grant the overbroad and improper injunctive relief that Entergy seeks.

A. The Court should not take on oversight of the Board’s ongoing process.

The Court’s intervention now would undermine the Board’s authority over the CPG proceeding. Again, the Board so far has done nothing but call for briefing and set a status conference. The Board, reasonably and not surprisingly, asked the parties to address the interpretation and effect of state laws, board orders, and agreements not held preempted, and offer their views on how the Board should structure its proceeding. Instead of engaging in the Board’s process, Entergy tried to stop that process and immediately came back to this Court to ask for an expanded injunction. If the Court grants Entergy relief now, it sets a precedent that any potentially adverse action by the Board – however innocuous – is a sufficient basis for Entergy to seek further federal court intervention.¹

In effect, Entergy is asking the Court to take on oversight of the Board’s ongoing proceedings. The Board, however, is an independent, quasi-judicial body, with the same obligations to interpret and apply the laws as a state court. Vt. Stat. Ann. tit. 30, § 9; *see also*,

¹ Entergy’s recent filing with the Board shows that this is a real concern. Entergy has made sweeping and unfounded assertions about the scope of the Court’s ruling, suggesting for example that the Board may not consider Entergy’s inaccurate testimony in past proceedings or Entergy’s trustworthiness. *See* Ex. 3, at 7 & n.15. Entergy also denies Board authority under Vt. Stat. Ann. tit. 30, § 248, *id.* at 2 n.6, – after telling this Court that it was not challenging the Board’s authority under § 248, *see* Tr. 674, 680 (ECF No. 170). Given the positions Entergy has taken, it could repeatedly return to this Court to contest aspects of the Board’s ongoing process.

e.g., *Barnet Hydro Co. v. Pub. Serv. Bd.*, 807 A.2d 347, 350 (Vt. 2002) (noting that the PSB has the “powers of a court of record” and affirming state trial court’s decision to “defer[] to the PSB” on matters of concurrent jurisdiction). Its decisions may be appealed to the Vermont Supreme Court. Vt. Stat. Ann. tit. 30, § 12. The Board has done nothing to suggest it will not adhere to this Court’s judgment. Principles of comity and federalism weigh strongly in favor of allowing the Board proceeding to go forward unhindered. *See, e.g.*, *Schwartz v. Dolan*, 86 F.3d 315, 319 (2d Cir. 1996) (“considerations of federalism” limit court’s discretion to frame equitable relief; court should respect “integrity and function of local government institution” and avoid remedies that intrude unnecessarily on state governance (quotations and citations omitted)). The Court should allow the Board to manage its own proceeding and not interfere with the Board’s responsible efforts to address the matters that are before it.

B. Entergy’s failure to file a Rule 59(e) motion undermines its present filings.

The Court should not excuse Entergy’s failure to seek timely relief under Rule 59(e). Entergy now asserts that the Court made a mistake when it invalidated only a single sentence of Act 74 and that the Court’s ruling supports invalidating other parts of the Act as well. ECF No. 194, at 7. But Entergy knew that the Court had not granted the expansive relief it sought, and that all of Act 74 was left in force except for one sentence. And Entergy knew that matters not addressed by the Court would be the province of the Public Service Board going forward. There are no surprises here.² Entergy made a strategic choice not to ask the Court to amend its judgment. While this Circuit allows a district court to entertain an untimely Rule 59(e) motion

² Entergy incorrectly claims that defendants “never invoked” Vt. Stat. Ann. tit. 10, § 6522(c)(2). ECF No. 194, at 3. In fact, defendants expressly identified that provision as relevant to Entergy’s post-March 21, 2012 operations. *See* ECF No. 39, at 14. In any event, Entergy bears the burden of identifying the relief it seeks – defendants have no obligation to help them in that effort.

under Rule 60(b) and to correct legal errors under Rule 60(b)(1),³ the Court must still find that “extraordinary circumstances” warrant the granting of such relief. *See, e.g., Nemaizer*, 793 F.2d at 61. Entergy’s failure to act in a timely manner – and its concomitant request to interrupt and delay the appellate process – weighs against a finding of extraordinary circumstances. *See, e.g., United Airlines*, 588 F.3d at 176 (“Rule 60 does not allow district courts to indulge a party’s discontent over the effects of its . . . strategic choice” (quotation omitted)).

C. Entergy seeks broad injunctive and declaratory relief that is neither proper nor consistent with the Court’s ruling.

Even if Entergy could show extraordinary circumstances – and it cannot – the relief Entergy seeks by way of its Rule 60(b) motion should not be granted. Entergy seeks a broad injunction that exceeds the Court’s authority to grant relief, and Entergy has not shown that its requested declaratory and injunctive relief is necessary to effectuate the Court’s ruling.

1. The broad injunctive relief sought by Entergy is improper and far exceeds the Court’s power to grant relief in any circumstance, much less under Rule 60(b).

The Court should not grant Entergy’s request to “enjoin[] Defendants from taking any action designed to, or having the effect of, forcing Vermont Yankee to curtail operations pending a decision by the PSB and any judicial review of that PSB decision.” ECF No. 193, at 2. Entergy’s request is fatally overbroad, disregards state sovereign immunity, and is otherwise impermissible.

a. The requested relief is overbroad, nonspecific, and would enjoin the Board’s CPG decision before that decision is made. An injunction must be specific and not overbroad. *See* Fed. R. Civ. P. 65(d)(1); *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 143 (2d Cir. 2011) (specificity is “no mere technical requirement[]”; “basic fairness requires that those

³ Contrary to Entergy’s assertion, the relief it seeks is not available under Rule 60(b)(6). A claim of legal error is not adequate to support relief under that provision. *See United Airlines*, 588 F.3d at 176.

enjoined receive explicit notice of precisely what conduct is outlawed” (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974))). Entergy’s request that the Court “enjoin[] Defendants from taking any action designed to, or having the effect of, forcing Vermont Yankee to curtail operations pending a decision by the PSB,” ECF No. 193, at 2, does not provide specific notice to defendants. Entergy does not identify what constitutes “any action” or provide the Court or defendants with any standards by which to determine whether such an action is “designed to” curtail operations. Its motion cannot be granted. *See, e.g., Schmidt*, 414 U.S. at 476 (striking down injunction in which “the defendants are simply told not to enforce ‘the present [state] scheme’ against” the plaintiffs).

Entergy’s requested injunction is also fatally overbroad. *See Mickalis*, 645 F.3d at 144 (“In addition to complying with Rule 65(d)’s specificity requirements, district courts must take care to ensure that injunctive relief is not overbroad.”). To begin with, by asking the Court to enjoin defendants from closing Vermont Yankee through “judicial review” of the Board’s CPG decision, Entergy is seeking to enjoin the Board’s CPG decision before the Board even makes it. The Court did not preempt the Board’s authority to grant or deny a CPG, *see* ECF No. 181, at 4, and the Court cannot hold *in advance* that a Board decision denying a CPG is preempted.

Moreover, by requesting an injunction that prevents defendants from taking “any action designed to . . . curtail operations,” Entergy seeks relief that goes beyond any issue litigated in this case. This Court may not grant relief that is “broader than necessary to cure the effects of the harm *caused by the violation.*” *Mickalis*, 645 F.3d at 144 (emphasis added) (quotation omitted). As the State noted in its post-trial brief, Entergy has “continuing obligations under the 2002 MOU, the 2005 MOU, and other agreements with the State and is subject to regulation by other state agencies, including the Department of Health and the Agency of Natural Resources,” ECF

No. 173, at 19 – all of which are unchallenged here. For instance, Entergy has a pending request at the Agency of Natural Resources for a new Clean Water Act permit for thermal discharges at Vermont Yankee. This Court cannot preemptively enjoin ANR’s permit process or other proceedings that have not been challenged in this lawsuit. *See, e.g., Mickalis*, 645 F.3d at 144.

b. The requested injunction would violate sovereign immunity. The requested relief far exceeds the Court’s authority to grant prospective injunctive relief against the State. Because Entergy has sued state officials in their official capacities – alter egos of the State itself – the Court may only grant prospective injunctive relief that requires state officials to conform their actions to *federal* law. *See, e.g., Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2010) (*Ex Parte Young* allows a federal court to “command[] a state official to do nothing more than refrain from violating federal law”); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (*Ex Parte Young* does not permit federal court to require state officials to comply with state law). Entergy has not shown, nor could it, that *any* state action “designed to . . . curtail [its] operations” would violate federal law. Entergy might fail to comply with its thermal discharge permit, fail to pay its taxes, or otherwise violate state laws never addressed in this case. The Court cannot grant injunctive relief that essentially gives Entergy immunity from all state regulation. And the Court cannot grant any injunctive relief against state officials absent finding a specific, ongoing violation of federal law.⁴

c. Entergy’s requested relief exceeds the relief available for a preemption claim

⁴ The cases Entergy cites for the proposition that courts have inherent powers to enforce their judgments do not involve sovereign immunity. *See* ECF Nos. 191, at 6; 194, at 12. Rather, the cited cases simply recognize the existence of ancillary jurisdiction for enforcing judgments, which the Second Circuit has held “has no impact whatsoever on the issue of sovereign immunity.” *Pres. Gardens Assocs. v. U.S. ex rel. Sec. of HUD*, 175 F.3d 132, 140 (2d Cir. 1999). Sovereign immunity imposes an independent jurisdictional barrier that “bars” courts from taking actions inconsistent with that immunity. *Id.*

brought under the Supremacy Clause and the Atomic Energy Act. The only relief that the Court can issue in an action brought under the Supremacy Clause is a declaration or injunction against state laws or regulations. *See, e.g., Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 730 (5th Cir. 2009); *McGRX, Inc. v. Vermont*, No. 5:10-cv-1, 2011 WL 31022, *12 (D. Vt. Jan. 5, 2011) (“As a predicate to pleading a Supremacy Clause claim, a plaintiff seeking declaratory or injunctive relief must at least identify the state law or regulation that interferes with or is contrary to an identified federal law.”), *aff’d*, ___ Fed. Appx. ___, 2012 WL 470301 (2d Cir. Feb 15, 2012). The Supremacy Clause does not allow freestanding claims to enjoin any *action* that allegedly violates federal law. *See, e.g., Equal Access for El Paso*, 562 F.3d at 730.

2. The Court should deny Entergy’s belated request to invalidate and enjoin additional provisions of Act 74 to limit the authority of the Public Service Board.

The Court’s holding that part of Act 74 is preempted has been appealed by both parties to the Second Circuit. All questions relating to the validity of Act 74 are questions of law that will be considered de novo by that court. That includes preemption, statutory interpretation, and severability. *See, e.g., Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 209 n.3 (2d Cir. 2011); *Sprint PCS L.P. v. Conn. Siting Council*, 222 F.3d 113, 115 (2d Cir. 2000). For this reason, Entergy cannot show any “exceptional circumstance” that warrants re-opening this Court’s judgment instead of allowing the appeal to proceed expeditiously. Granting the requested relief will neither eliminate the appeal nor substantially simplify it. For that reason alone, the Court should deny relief under Rule 60(b).⁵

⁵ Defendants do not concede that the Court’s holding was correct; indeed, defendants respectfully disagree with the Court’s interpretation of Act 74, its holding that the statute was preempted, and the specifics of the declaratory and injunctive relief entered by the Court.

In any event, Entergy's claim that the Court's judgment supports invalidating further provisions of Act 74 is mistaken. The Court did what it said it intended to do. It invalidated the provision of Act 74 that mandated legislative approval for storage of spent fuel generated from operations after March 21, 2012. ECF No. 181, at 81-82, 99-101. The Court did not preempt the Board's authority over the CPG process as it relates to storage of spent fuel at Vermont Yankee.

Entergy now asks the Court to enjoin Vt. Stat. Ann. tit. 10, § 6522(c)(5), but that provision requires Entergy to obtain a CPG from the Board, not legislative approval. Again, the Court did not hold the CPG process preempted. *See* ECF No. 181, at 4. Enjoining § 6522(c)(5) is not consistent with – but rather would expand – the Court's holding.

The same is true of Entergy's request that the Court enjoin Vt. Stat. Ann. tit. 10, § 6522(c)(2). As the Department of Public Service has explained, given the Court's injunction directed at the last sentence of § 6522(c)(4), § 6522(c)(2) does not restrict the Board's authority to consider Entergy's petition for a renewed CPG for storage of spent fuel at Vermont Yankee. Ex. 2, at 3. Rather, § 6522(c)(2) put an end date on Entergy's CPG for establishment of its spent fuel facility (the same date as the CPG for facility operations), and is one of the provisions that requires Entergy to seek a renewed CPG from the PSB for storage of fuel derived from operations after March 21, 2012. Ex. 2, at 3. The Attorney General agrees with this interpretation.

Entergy's position is less clear. While Entergy told this Court on February 27, 2012 that it seeks a CPG from the Board for both continued operations *and* "storage of spent nuclear fuel . . . derived from such operations" ECF No. 194, at 1, Entergy took a different position in its Board filing yesterday. There, Entergy argued that the Board has no authority under § 6522 or any other statute to regulate storage of spent nuclear fuel. *See* Ex. 3, at 4. Entergy also told the

Board that it expects that “the District Court . . . will clarify that the court adopts the narrow interpretation of Section 6522(c)(2) set forth” by Entergy or hold § 6522(c)(2) preempted. *Id.* at 4 n.9. Entergy has not, however, asked this Court to restrict the Board’s authority under § 6522. *See* ECF No. 194, at 7; ECF No. 191, at 5-6 (asking for relief directed at legislative restriction on storage of spent nuclear fuel).

Entergy’s Board filing confirms that the relief it seeks is not consistent with or intended to effectuate the Court’s judgment. The Court should not grant additional relief that expands its judgment to limit the Board’s authority under § 6522 or other provisions of state law.

Entergy also suggests that the Court should enjoin § 6522(c)(2) and (c)(5) of Act 74 because they might be construed to override Vt. Stat. Ann. tit. 3, § 814(b). *See* ECF No. 194, at 10-11. Section 814(b) provides that, where an applicant makes a timely and sufficient application to renew a license or other permit, the existing license does not expire until the application is “finally determined by the agency.” The Department of Public Service and the Attorney General both take the position that, given the Court’s decision, § 814(b) applies and Entergy may continue to operate under the terms of its current CPGs while its CPG petition remains pending at the Board. The Court has no need to re-open the judgment to address this issue.

In any event, Entergy’s request for injunctive relief that enforces § 814(b) is an improper request for the Court to enforce state law. *See* ECF No. 194, at 10 (arguing that Entergy is entitled to the benefit of Vt. Stat. Ann. tit. 3, § 814(b) “under Vermont law”). As explained above, the Court cannot issue an injunction to construe or enforce *state* law, only to prevent a continuing violation of *federal* law. *See supra* 8. Entergy did not seek – and the Court has no basis to grant – an injunction requiring the Board to apply Vt. Stat. Ann. tit. 3, § 814(b) to Entergy’s pending CPG petition.

Indeed, Entergy's flawed effort to draw this Court into matters of state law is underscored by the express terms of Vt. Stat. Ann. tit. 3, § 814(b). First, § 814(b) does not say that an applicant for a renewed license is "permitted to operate" while the application is pending. *See* ECF No. 194, at 3, 9. It states that the applicant's current license "does not expire until the application has been finally determined by the agency." Vt. Stat. Ann. tit. 3, § 814(b). Entergy's continued operations under § 814(b) thus depends on its compliance with the conditions of its existing CPGs. Yet the injunction Entergy seeks would effectively relieve it of the obligation to comply with its current CPGs. Second, § 814(b) does not apply through the end of "judicial review" of any agency decision. *See* ECF No. 194, at 13. It applies only "until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court." Vt. Stat. Ann. tit. 3, § 814(b). Entergy is not only asking this Court to enforce state law (something it cannot do), but to provide relief that in fact *exceeds* what is available under state law.

II. The Board's request for briefing does not support issuing an injunction pending appeal.

Entergy's request for an injunction pending appeal is similarly flawed and should be denied for all of the reasons noted above. Its motion rests solely on speculation and inference about the Board's request for briefing. Entergy has not identified any concrete, imminent harm that warrants an injunction, and the injunction it seeks is improper.

A. A request for additional briefing is not sufficient to warrant the extraordinary remedy of an injunction.

A party seeking an injunction at any time must demonstrate an imminent risk of irreparable harm. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010) (showing of irreparable harm required for permanent injunction); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (irreparable harm is "single most important prerequisite" for preliminary injunction (quotation omitted)); *Dexter 345 Inc. v. Cuomo*, No. 11

Civ. 1319, 2011 WL 1795824, at *3 (S.D.N.Y. May 3, 2011) (injunction pending appeal denied based in part on failure to show irreparable harm). An injunction is an “extraordinary” remedy, *e.g.*, *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 84 (2d Cir. 2004), and may not be granted to allay a moving party’s unease or to address potential harm that is speculative and uncertain rather than real and concrete. *See, e.g.*, *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 22 (2008) (party seeking preliminary injunction must show likelihood of irreparable harm, not possibility); *Faiveley Trans. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (parties seeking preliminary injunction must show they “will suffer an injury that is neither remote nor speculative, but actual and imminent” (quotation omitted)); *Latino Officers Ass’n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999) (rejecting “conjectural chill” on free speech rights as insufficient “to establish real and imminent irreparable harm”).

Entergy’s request fails this basic requirement. According to Entergy, the Board “has questioned” whether its CPG expires later this month, and Entergy worries that the Board “*may* argue” that Vermont Yankee should close. ECF No. 191, at 8-9 (emphasis added). Because the Board has “raised these questions,” Entergy contends, it is possible that defendants “*may* seek to answer [them] at any time adversely to” Entergy. ECF No. 191, at 1 (emphasis added). This kind of speculative concern about future events does not come close to meeting the requirement that Entergy show an imminent risk of concrete harm absent an injunction. This is particularly true given the position of the Department and the Attorney General that, in light of this Court’s decision, Entergy may continue to operate under the terms of its current CPGs while its petition remains pending at the Board.

Accordingly, the Court should deny Entergy’s request for an injunction based on the Board’s request for briefing on issues relevant to its proceeding. Entergy’s attempt to

immediately return to this Court, before the Board took any action other than asking for legal memoranda, was premature and unnecessary. In the absence of any imminent threat of irreparable harm to Entergy, the Court should stay its hand and allow the Board's proceeding to continue unhindered.

B. The Court does not have jurisdiction to enjoin enforcement of other provisions of Act 74 or otherwise expand the Court's judgment absent a remand from the Second Circuit.

Entergy's assertion that this Court has jurisdiction over its motion for injunction pending appeal, ECF No. 191, at 2 n.2, is only partially correct. The Court's power to grant further injunctive relief at this time is limited because jurisdiction over the case has been transferred to the Court of Appeals. *See generally Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962). The Second Circuit, like most circuits, "narrowly interprets" Rule 62 to allow district courts "to grant only such relief as may be necessary to preserve the status quo pending an appeal where the consent of the court of appeals has not been obtained." *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2d Cir. 1988).⁶ Absent a remand, the Court may modify the injunction to preserve the status quo, but may not "materially alter the status of the case on appeal" or "adjudicate anew the merits of the case." *Natural Res. Defense Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (quotations omitted).

Entergy does not cite this standard or explain how its requests for injunctive relief meet it. Regardless, Entergy's request that the Court now enjoin provisions of Act 74 that the Court

⁶ The exception to this rule applies only where the district court is "satisfied that [its] order was erroneous" based on evidence that was before the court when the order was issued. *See N.Y. v. NRC*, 550 F.2d 745, 759 n.7 (2d Cir. 1977), *superseded on other grounds as noted in Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 170 (2d Cir. 2001). Entergy's request to substantially expand the injunctive relief granted by the Court, based on a request for briefing that the Public Service Board issued after the Court's judgment entered, does not fit within this exception.

did not hold preempted is impermissible under Rule 62. Striking additional provisions of a statute cannot be deemed relief that preserves the status quo. To the contrary, it would materially alter the issues raised by the parties' appeals and thus encroach on the jurisdiction of the Court of Appeals.

Likewise, Entergy's broad request for injunctive relief to prohibit any action "designed to, or having the effect of, forcing Vermont Yankee to curtail operations" is an impermissible effort to relitigate the merits. As Entergy acknowledges, it requested this relief earlier and the Court did not grant it. ECF No. 191, at 6. Entergy may not use a motion for injunction pending appeal as a vehicle for obtaining relief that the Court declined to grant on the merits.

C. Entergy has not demonstrated a need for relief to preserve the status quo, and the relief it seeks is barred on other grounds.

The Court should not grant any injunctive relief pending appeal. Just as Entergy has failed to show irreparable harm – which is a bedrock requirement for injunctive relief – it has failed to demonstrate a need for the Court to act to preserve the status quo. No defendant has taken the position that Entergy's current CPGs expire and Vermont Yankee must close after March 21, 2012 while its petition for a new or renewed CPG remains pending at the Public Service Board. And as set forth above, Entergy's broad, nonspecific request for injunctive relief violates Rule 65 and is otherwise beyond the Court's power to grant. *See supra* 3-12.

CONCLUSION

For these reasons, the Court should deny (1) Entergy's motion for relief from judgment under Rule 60(b), (2) Entergy's motion for an injunction pending appeal, and (3) Entergy's request for an 'indicative ruling' on its Rule 60(b) motion.

Dated March 8, 2012, at Montpelier, Vermont.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the above 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 (NEF) to the following NEF parties:

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