

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 Attorney)
General of the State of Vermont; and MARY N.)
PETERSON, in her official capacity as the)
Commissioner of the Department of Taxes of the)
State of Vermont,)

Defendants.)

Case No. 5:12-cv-206

DEFENDANTS' REPLY MEMORANDUM IN
FURTHER SUPPORT OF ITS MOTION TO DISMISS

In their Motion to Dismiss, Defendants (collectively, the “State”) showed that Plaintiffs’ federal court challenge to Vermont’s Electrical Energy Generating Tax (“EET”) is barred by the “broad jurisdictional barrier” of the Tax Injunction Act. Challenges to state tax assessments belong in state forums, and Plaintiffs may pursue a “plain, speedy and efficient” remedy for their claims at the Vermont Department of Taxes and in the Vermont state courts. In response, Plaintiffs advance a cramped interpretation of the Tax Injunction Act and argue – contrary to the clear import of their own allegations – that the EET is not a “tax” after all. Plaintiffs further contend – contrary to the language of Vermont’s statutory tax appeal procedures and the explicit representations of the Vermont Department of Taxes – that Vermont’s remedy does not actually exist.

Plaintiffs are wrong. First, the EET bears all the hallmarks of a tax: It is and has always been located in the “taxation” title of the Vermont statutes; this year’s change in rate is found in

a tax bill promulgated by the state legislature; it is collected by the Department of Taxes; and it raises revenue for the general fund. Second, the State plainly provides an adequate forum for the complete resolution of Plaintiffs' claims – a forum that Plaintiffs' predecessors used to challenge the EET on many of the same grounds Plaintiffs advance here.

I. THE TAX INJUNCTION ACT IS A BROAD JURISDICTIONAL BARRIER TO FEDERAL COURT ADJUDICATION OF STATE TAX ISSUES.

The Tax Injunction Act, 28 U.S.C. § 1341, is a long-standing law embodying even longer-standing federalism and separation-of-powers principles. *See State Railroad Tax Cases*, 92 U.S. 575, 615 (1875) (“The levy of taxes is not a judicial function. Its exercise . . . is exclusively legislative.”); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) (“It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.”). Courts have therefore construed the Act broadly – as a “‘jurisdictional rule’ and a ‘broad jurisdictional barrier.’” *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825 (1997) (citation omitted). In particular, this Court has rejected approaches that “ignore[] the congressional purposes underlying the Act,” recognizing that the Act “states firm principles of federalism.” *Am. Trucking Ass’n, Inc. v. Conway*, 514 F. Supp. 1341, 1344 (D. Vt. 1981).

Courts apply these principles to both of the Act’s requirements – that the assessment be a “tax,” and that state remedies be “plain, speedy and efficient.” Regarding the first, “[c]ourts, including the Second Circuit, have broadly defined the word ‘tax’ under the Act to include *any state or local revenue collection device.*” *Cnty. Hous. Mgmt. Corp. v. City of New Rochelle, NY*, 381 F. Supp. 2d 313, 319 (S.D.N.Y. 2005) (emphasis added) (citing *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 549-50 (2d Cir. 1991)). Even the Fourth Circuit, on whose precedent

Plaintiffs place so much weight, has recognized that “the term ‘tax’ is subject to a ‘broader’ interpretation when reviewed under the aegis of the TIA.” *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (citation omitted). Put simply, the word “tax” is not meant to confine the Act but as an expression of the broad concerns that the Act embodies.

Regarding the second, courts “must construe narrowly the ‘plain, speedy and efficient’ exception to the Tax Injunction Act.” *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982). The Supreme Court has explained that a narrow construction is necessary to “be faithful to the congressional intent ‘to limit drastically’ federal-court interference with state tax systems.” *Id.* (quoting *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 522 (1981)). The state remedy need not be identical to a federal judicial remedy – the former suffices even if there is two-year delay, there is no interest on the eventual tax refund, or the initial state forum cannot address constitutional arguments. *Murray v. McDonald*, 988 F. Supp. 420, 423-24 (D. Vt. 1997) (discussing *Rosewell*), *aff’d*, 157 F.3d 147 (2d Cir. 1998). All that Congress intended to require was a full hearing, with appeal to the Supreme Court, and an appellate opportunity to raise constitutional objections. *See Gass v. County of Allegheny, PA*, 371 F.3d 134, 137 (3d Cir. 2004); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1255-57 (11th Cir. 2003).

These background principles may tip the balance in a hard case, and they weigh decidedly in favor of allowing state courts to decide controversies over state taxes. For the reasons that the State has explained in its Motion to Dismiss and reasserts more fully below, however, this is an easy case.

II. THE EET IS A “TAX” UNDER THE TAX INJUNCTION ACT.

In arguing that the EET is not a “tax” under the Tax Injunction Act, Plaintiffs ask the Court to ignore the Vermont statute that actually imposes the disputed assessment – which

clearly establishes a traditional revenue-raising tax – and rely instead on Plaintiffs’ own interpretation of what it believes the Vermont Assembly was really trying to accomplish. On closer inspection, however, it becomes clear both that the “evidence” on which Plaintiffs rely is spurious and that their position relies on a straitjacketed reading of the Tax Injunction Act that courts at every level have rejected.

To distinguish regulatory fees from true taxes, “most courts agree that [a]ssessments which are imposed primarily for revenue-raising purposes are ‘taxes,’ while levies assessed for regulatory or punitive purposes, even though they may also raise revenues, are generally not ‘taxes.’” *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir. 1993) (internal quotation marks omitted), *rev’d on other grounds sub nom. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). Specifically, as Plaintiffs acknowledge, courts often rely on the analysis of *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1st Cir. 1992), to determine whether a state assessment is a “tax.” This analysis weighs three factors: (1) the nature of the entity that imposes the charge; (2) the population subject to the charge; and (3) whether the charge is expended for general public purposes, or used for the regulation or benefit of those upon whom the assessment is imposed. *IMS Heath Inc. v. Sorrell*, No. 1:07-cv-188, 2008 WL 2483299, at *3 (D. Vt. June 17, 2008). Chief among these factors – “the heart of the inquiry” – is the third factor, the ultimate use of the fee. *Cnty. Hous. Mgmt. Corp.*, 381 F. Supp. 2d at 321 (quoting *Collins Holding Corp. v. Jasper County, S.C.*, 123 F.3d 797, 800 (4th Cir. 1997)); *accord, e.g., Marcus v. Kan. Dept. of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999).

A fair reading of the EET and the allegations in Plaintiffs’ Complaint leads to the conclusion that the assessment is a “tax” for purposes of the Tax Injunction Act.

A. The EET Is Imposed By The Legislature And Collected By The Department Of Taxes.

The first *San Juan Cellular* factor unequivocally supports the conclusion that the EET is a tax. The Vermont state legislature, representing the general interests of the public, increased the rate of the tax alongside a variety of other state tax measures. *See* 2011 Vt. Acts & Resolves No. 143 (“Act 143”) (“An act relating to miscellaneous tax changes for 2012”). “The fact that the [EET] was imposed by the state legislature rather than by an administrative agency suggests that it is a tax rather than a fee.” *Cumberland Farms, Inc. v. Tax Assessor, State of Me.*, 116 F.3d 943, 946 (1st Cir. 1997). Moreover, the State’s Department of Taxes will continue to administer the EET as it has in the past. The EET thus is a far cry from the assessment in *San Juan Cellular* itself, which was administered by a regulatory agency. 967 F.2d at 686; *see also IMS Health*, 2008 WL 2483299, at *3 (charge administered by Office of Vermont Health Access). The EET is (and long has been) a legislative enactment for the common weal, not an exaction by a state agency for parochial ends.

Perhaps because they recognize that this factor decisively supports the characterization of the EET as a tax, Plaintiffs neglect it. Whether Plaintiffs believe that the Department of Public Service is the “real ‘agency-in-interest,’” Opp. at 18 – an arbitrary phrase not drawn from any case law – is beside the point. This first step in the inquiry focuses solely on the *actual* entities that impose and collect the charge. In any event, as explained below, Plaintiffs’ suggestion that some portion of the EET is tied to the Clean Energy Development Fund is simply wrong. *See* Section II.C, *infra*.

B. The Population Subject To The EET Is Wholly Consistent With The Goals Of Taxation.

The EET is a tax on large generators (nuclear or otherwise), not a tax on Vermont Yankee. By its terms, the EET applies to any “electric generating plant[] constructed in the state

subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more.” That Vermont Yankee – with a name plate capacity of over 600,000 kilowatts, Compl. ¶ 20, far over the threshold – currently is the only such plant is the product of many factors. Vermont is a small state, making it unlikely that other large plants will locate here, and technological development since the EET’s 1968 enactment has favored smaller-scale sources like wind and hydroelectric energy.

Taxes often fall on small populations – often comprising the largest entities – that are different in various ways from the public at large. That does not make them anything other than taxes, and courts routinely hold that they are “taxes” for purposes of the Tax Injunction Act. *See, e.g., Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (en banc) (statute requiring riverboat casinos to deposit 3 percent of revenues in special state fund); *Cumberland Farms*, 116 F.3d at 947 (surcharge applied only to limited class of milk producers); *Keleher*, 947 F.2d at 549 (Burlington, Vermont city ordinance imposing fee on “utility companies using and occupying City streets”); *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 372 (3d Cir. 1978) (fee directed solely at “private alarm signal system licensee[s]” for use of underground wires in Philadelphia); *Nat’l Right to Life Action Comm. v. Devine*, No. 96-359-P-H, 1997 WL 525139, at *2 (D. Me. Aug. 8, 1997) (registration fee imposed “upon only those who lobby – a very small minority of citizens”). Indeed, even an assessment directed specifically at *one* company has been held to be a “tax.” *See Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1391 (7th Cir. 1992) (City of Chicago “decided not to permit Western Union to activate the network unless [it] agreed to pay the city a franchise fee of 3 percent of the network’s revenues or so much per foot”); *Diginet, Inc. v. Western Union ATS, Inc.*, 845 F. Supp. 1237, 1240 (N.D. Ill. 1994) (holding that this fee was a “tax” for purposes of

the Act). The bulk of every tax code is its catalog of distinctions among differently situated taxpayers, and in a jurisdiction of Vermont's size, some groups will be very small.

Plaintiffs suggest what amounts to a *per se* rule to the contrary – *i.e.*, that a levy imposed on a single taxpayer cannot be a tax – but that makes no sense. First, small – perhaps single-taxpayer – populations necessarily are set apart when large entities dominate a tax base. This is a simple consequence of progressive taxation. May not Georgetown, Kentucky (population 29,098) have a “tax” bracket that includes only its mammoth Toyota plant (employing 6,229)? Did U.S. taxes on large commercial aircraft not continue to be “taxes” when Boeing merged with McDonnell-Douglas? Yes and yes – being the only game in town is not a get-out-of-“tax”-free card. Second, a tax base carved up into small segments is still a tax base. This is a case in point. In addition to the EET on large generators, Vermont imposes various taxes on the different types of small generators. *See* 32 V.S.A. § 5402c (wind); *id.* § 5404b (hydroelectric); *id.* § 8701(b) (solar). To declare that each is not a “tax” because each reaches only a small number of generators would mean that, despite this plethora of taxes, Vermont does not “tax” its generators at all. That would be absurd. Even worse, it would invite *all* of them into federal court – undermining the “congressional concern to confine federal court intervention in state government” behind the Tax Injunction Act. *Farm Credit Servs.*, 520 U.S. at 826-27.

Against this background, Plaintiffs' narrow reading of *GenOn Mid-Atlantic LLC v. Montgomery County, Maryland*, 650 F.3d 1021 (4th Cir. 2011), is misplaced. *GenOn* does not – as Plaintiffs indicate – hold that a “single-payor feature” of a statute ends the inquiry “[b]y itself.” *Opp.* at 19. For starters, such a rule would have no supporting authority. To the contrary, it would fly in the face of numerous cases holding that a levy on a small population is a “tax” – including *Dignet*, where the City of Chicago singled out one company. Given that

courts regularly find assessments imposed on limited classes to be “taxes,” it is not surprising that Plaintiffs cite only one decision in support of their position. Even more obviously, Plaintiffs’ rigid rule would eviscerate the three-factor *San Juan Cellular* framework. The “population subject to the charge” factor is not determinative. Rather, it exists to help courts weed out fees on discrete groups that use discrete state services, are subject to discrete state regulation, or both. *See San Juan Cellular*, 967 F.2d at 685. The EET is not such a fee.

C. EET Revenue Is Used For The Benefit Of The General Public.

The bellwether factor in this analysis is “the revenue’s ultimate use” – that is, whether the revenue “provides a general benefit to the public,” as a tax does, or “provides more narrow benefits to regulated companies or defrays the agency’s costs of regulation.” *Travelers Ins. Co.*, 14 F.3d at 713 (quoting *San Juan Cellular*, 967 F.2d at 685). The EET rests at the “tax” end of the spectrum. Unlike levies earmarked for special funds, *e.g.*, 32 V.S.A. § 9610, the EET does not designate a use for its revenue, *see* Act 143 § 58. The revenue generated goes into the State’s general fund, like most of the other taxes in Vermont’s tax code. *See* 32 V.S.A. § 435(b)(3).

Plaintiffs would have this Court believe that the EET is linked to the Clean Energy Development Fund (“CEDF”). That claim is meritless for three reasons. First, the \$3 million appropriated to the CEDF in 2013, *see* 2011 Vt. Acts & Resolves No. 162 (“Act 162”) § D.108(a)(2), is *not* an “amount of the New Levy,” *Opp.* at 20. The CEDF line-item comes out of the State’s general fund. Thus, the EET no more funds the CEDF than it funds the roughly \$3 million appropriated to tourism and marketing from the general fund, Act 162 § B.805, or a similar amount appropriated to forestry, *id.* § B.704. All of these items come out of the general fund. That the EET goes into the general fund does not mean that it pays for a particular item

funded by the general fund.

Second, the EET is proportional to a generator's output. *See* Act 143 § 58. By contrast, any amount that the legislature allocates to the CEDF in a particular year is fixed. So if Vermont Yankee has a very low output in 2013, its EET payments may add up to less than the \$3 million allocated to the CEDF. Conversely, the higher Vermont Yankee's output in 2013, the smaller the share of its EET that possibly could go to the CEDF. This disconnect between the EET revenue and the CEDF is yet another degree of separation from *GenOn*, in which the assessment's revenue and the amount directed to the greenhouse gas fund moved in lock step. *See* 650 F.3d at 1022.

Third, the \$3 million appropriated to the CEDF from the general fund is transferred only if it "do[es] not create a projected negative balance in the general fund and reduce the reserve position anticipated for the close of fiscal year 2013." Act 162 § D.108(a). As noted above, even if generation at Vermont Yankee falls to zero, the CEDF could still be funded. Conversely, because of the provision in section D.108(a), even if generation – and, therefore, tax revenues – were unexpectedly high, the \$3 million dollars may not be appropriated if doing so would "create a projected negative balance in the general fund and reduce the reserve position anticipated for the close of fiscal year 2013." The EET, by contrast, will be collected regardless of what the State's overall revenues are.

For all of these reasons, any purported connection between the EET and the CEDF appropriation is baseless. On top of that, the "expressly stated purpose" of the EET is to raise revenue, not to replace contracts. *Contra* Opp. at 21. The legislature could have tried to force the MOUs' terms on Vermont Yankee, but it did not. When state tax legislation raises general revenue, federal courts do not speculate as to what the complaining party asserts to be its "real"

purpose. Maine, for example, had enacted a plainly unconstitutional surcharge on milk, which a court struck down. *Cumberland Farms*, 116 F.3d at 944. Afterward, the state enacted a “nearly identical” surcharge, with one key difference – it “direct[ed] that the revenues generated [we]re to be deposited into Maine’s general fund.” *Id.* at 945. Under the old surcharge, Maine dairy farmers received a subsidy directly from the surcharge; under the new, they received the same amount from the general fund. Because of that key difference, the First Circuit held that the Tax Injunction Act barred consideration of the new surcharge in federal court. The court explained: “[T]here is neither any precedent nor any plausible jurisprudential basis for analyzing separate tax and subsidy statutes as an integrated unit under the Tax Injunction Act.” *Id.* at 947. Hence, even if the CEDF were tied to the EET, which the State has here shown to be mathematically impossible, the Tax Injunction Act would apply.

“[T]he predominant factor is the revenue’s ultimate use.” *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000). The ultimate use of the EET is just like that of any other tax – it goes into the general fund. It is thus squarely within the ambit of the Tax Injunction Act.

D. Response To “Summary And Additional Considerations”.

The State respectfully submits that the Court need not resort to “additional considerations” where the “primary factors” so starkly paint the EET as a “tax.” *See Hexom v. Oregon Dept. of Transp.*, 177 F.3d 1134, 1137 (9th Cir. 1999) (noting that factors beyond *San Juan Cellular* may matter in “the more elusive cases”). And if it does, the two that Plaintiffs suggest are off base.

First, it is worth emphasizing that a tax is not a contract, and the EET is not the MOUs. The EET existed for years *alongside* the MOUs – indeed, the Plaintiffs concede that the prior EET was valid. Pl’s. Mot. for Prelim. Inj. (Doc. 3) at 9 n.12. The current EET has everything to

do with raising revenue and nothing to do with Vermont Yankee's "uprate" or storage of spent fuel. The State's responses to those events, like Vermont Yankee's leaks of radioactive water, simply are not before this Court. At any rate, Plaintiffs' dogged effort to "eliminate any distinction between properly substantiated findings of fact . . . and gratuitous dicta" by a divided Federal Circuit should avail them nothing. *See O'Guinn v. Dutton*, 88 F.3d 1409, 1450 n.18 (6th Cir. 1996) (Batchelder, J., dissenting).

Second, Plaintiffs' invocation of federalism would turn the sound policies underlying the Tax Injunction Act on their head. The fact that Plaintiffs are alleging a Commerce Clause violation is no reason to give the Act a narrower berth. *See Cumberland Farms*, 116 F.3d at 947. Indeed, the Supreme Court first applied the current Act to allegations of a state's interference with "the general maritime law in its interstate and *international* aspects" – a matter far more "federal" than the provision of electricity to a few states. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 295 (1943) (emphasis added). State courts routinely handle such questions, and the Act erects a barrier against "assaults in the federal courts" on "state internal economy and administration." *Id.* at 298. Congress enacted the Act to "free[], from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid." *Id.* at 301. As set forth in Part I, that broad principle remains valid today and compels this Court to dismiss this case for want of jurisdiction.

Finally, Plaintiffs' afterthought that 15 U.S.C. § 391 is at odds with the Tax Injunction Act is both wrong and ironic. Wrong, because the sole court to have confronted the question held in no uncertain terms that Section 391 is not an exception to the Tax Injunction Act. *City of Burbank v. State of Nevada*, 658 F.2d 708, 709 (9th Cir. 1981) ("In enacting [Section] 391, Congress did not intend to affect [Section] 1341's jurisdictional limitation. . . . State courts

provide an adequate forum for implementation of [Section] 391.”). And ironic, because Section 391 on its face applies only to *taxes*. By alleging that the EET violates Section 391, Plaintiffs have no choice but to recognize that it is a “tax.” *Cf. Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir. 2004) (“[J]udicial estoppel prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that it successfully advanced in another proceeding.”).

III. VERMONT LAW PROVIDES PLAINTIFFS WITH A PLAIN, SPEEDY, AND EFFICIENT FORUM FOR ANY CHALLENGE TO THE EET.

In the Motion to Dismiss, the State showed that Plaintiffs have at least two options for raising their federal challenges to the EET in a state forum: Plaintiffs could either refuse to pay the EET and appeal the resulting notice of deficiency through the Department of Taxes and the state courts, or they could pay the tax and then seek a refund – which also is appealable through the Department and the courts. Both the Second Circuit and this Court have held these procedures sufficient for purposes of the Tax Injunction Act’s “plain, speedy and efficient remedy” requirement.

Notwithstanding the State’s express, on-the-record representations that Plaintiffs are entitled to challenge the EET in a state forum, however, Plaintiffs now contend that adequate state-forum review is not available. Plaintiffs’ argument is simply not credible, particularly given that Plaintiffs’ predecessors used the very same review procedures to raise substantially identical challenges to a previous version of the EET. In any event, Plaintiffs have cited no authority to show that state-forum review would be unavailable. Indeed, Plaintiffs’ reading of the EET and the tax appeal statutes incorporated therein runs contrary to statutory language and the Commissioner’s longstanding, reasonable construction of that language (which is entitled to substantial deference under Vermont law). Moreover, Plaintiffs’ suggestion that Vermont’s

review procedures are inadequate plainly conflicts with multiple decisions of the Vermont Supreme Court, the Second Circuit and this Court – all of which hold that the State’s procedures afford litigants a “plain, speedy and efficient” forum for raising their federal claims.

A. Vermont Law Provides Plaintiffs With A State Forum To Challenge The EET.

Under the Tax Injunction Act, Plaintiffs bear the burden of showing the absence of an adequate state law remedy. *E.g.*, *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 340 (1990); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1256 (11th Cir. 2003); *Chase Manhattan Bank v. City & County of San Francisco*, 121 F.3d 557, 560 (9th Cir. 1997). In light of the important concerns of federalism and comity underlying the Tax Injunction Act, Plaintiffs’ burden on this front is significant. *See Grace Brethren Church*, 457 U.S. at 413 (“In order to accommodate these concerns and be faithful to the congressional intent ‘to limit drastically’ federal-court interference with state tax systems, we must construe narrowly the ‘plain, speedy and efficient’ exception to the Tax Injunction Act.”). “Mere speculation” about the insufficiency of state review will not suffice. *Franchise Tax Bd.*, 493 U.S. at 341.

As the State has explained in detail, Vermont’s statutory appeal scheme provides Plaintiffs with a clear state procedure for advancing a federal challenge to the EET. *See* Motion to Dismiss at 2-3. The EET expressly incorporates 32 V.S.A. § 3203, which provides for notifications of deficiency or denials of refund requests, and this statute is, in turn, expressly incorporated into 32 V.S.A. § 5883, which provides for a full hearing and Commissioner review of notifications of deficiency and denials of refunds. The Commissioner’s decision under 32 V.S.A. § 5883 is expressly made reviewable in the Vermont Superior Court by 32 V.S.A. §

5885(b).¹

Thus, the State is not simply “suggesting that [the appeal procedures in sections 5883 and 5885] have general applicability to other taxes,” as Plaintiffs contend. Opp. at 26. To the contrary, these provisions are *expressly* made applicable to the EET by virtue of the EET’s reference to section 3203. Plaintiffs’ efforts to pick apart this statutory appeal scheme are unfounded and offend well-established principles of statutory construction in Vermont, not to mention the Department’s actual administrative practice. Cf. *Holmberg v. Brent*, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993) (“[L]aws related to a particular subject should be construed together and in harmony if possible.” (quotation omitted)); *Lincoln St., Inc. v. Town of Springfield*, 159 Vt. 181, 184-85, 615 A.2d 1028, 1030 (1992) (“[W]e must read the separate clauses of this [tax] statute together, as parts of a unified statutory system.”); *Langrock v. Dep’t of Taxes*, 139 Vt. 108, 110, 423 A.2d 838, 839 (1980) (“The [legislative] intent should be gathered from a consideration of the whole and every part of the statute, the subject matter, the effects and consequences, and the reason and spirit of the law.” (quotation omitted)).

Moreover, nothing in sections 5883 or 5885 limits application of the appeal procedures in these statutes solely to refund claims and deficiency challenges related to income taxes. Plaintiffs’ attempt to artificially limit them in such a manner, *see* Opp. at 26-27, directly contradicts the Vermont Supreme Court’s edict that tax “appeal rights are to be liberally construed in favor of persons exercising those rights.” *Casella Const. Inc. v. Dep’t of Taxes*, 2005 VT 18, 178 Vt. 61, 63, 869 A.2d 157, 159 (2005) (quoting *In re Hignite*, 2003 VT 11, ¶ 9, 176 Vt. 562, 844 A.2d 735 (2003) (mem.)); *see also* *Langrock*, 139 Vt. at 110, 423 Vt. at 839

¹ More generally, the Commissioner is also provided with the authority to “[h]old hearings, administer oaths and examine under oath any person relating to his or her business or relating to any matter within the commissioner’s jurisdiction,” 32 V.S.A. § 3201(a)(3), and to “[a]ssess, determine, revise and readjust the taxes imposed in this title.” 32 V.S.A. § 3201(a)(4).

(“It is . . . a well stated rule of law that in construing an ambiguous statutes doubts are to be resolved against the taxing power and in favor of the taxpayer.”). Read as a whole and in accordance with that well-established rule of construction, there can be little doubt the EET and the tax appeal statutes provide Plaintiffs with an avenue to seek relief – either a refund or challenge to a notice of deficiency – before the Department and in the Vermont courts. *See, e.g., Hedgepeth v. Tennessee*, 215 F.3d 608, 616 (6th Cir. 2000) (construing state tax review statute “liberally” in favor of review in light of “general purpose” of the legislation and state law direction to construe broadly).

Plaintiffs’ position here is particularly incredible in light of the fact that the Commissioner effectively adopted the State’s construction of the EET and the tax appeal scheme in the 1997 Vermont Yankee Nuclear Power Corporation Determination (the “VYNPC Determination”) and allowed Plaintiffs’ predecessor to bring a refund claim under substantially identical review provisions found in the prior version of the EET. *See* Motion to Dismiss, Exh. B. Significantly, the Commissioner’s interpretation of these provisions is entitled to substantial deference under Vermont law.² *See In re Williston Inn Group*, 2008 VT 47, ¶ 12, 183 Vt. 621, 624, 949 A.2d 1073, 1077 (2008) (“We have long extended th[e] principle of deference to agency interpretations of statutes which the Legislature has entrusted to their administration. . . . [A]bsent compelling indication of error, we uphold the Commissioner’s interpretation of tax statutes.” (citations omitted)). Plaintiffs’ position directly contradicts the Commissioner’s reasonable interpretation allowing review and thus would not withstand scrutiny under Vermont

² While the Commissioner did not explicitly cite the statutory provisions authorizing the administrative appeal in the VYNPC Determination, *see* Opp. at 32, this fact suggests only that neither the Commissioner nor the parties to that case had any reason to doubt that such appeal was available under Vermont law. Moreover, Plaintiffs’ suggestion that the VYNPC Determination is “inconsistent with Vermont law” because it addressed the facial constitutionality of a statute, Opp. at 32-33, is blatantly inaccurate. *See* VYNPC Determination at 14 (deciding only the as-applied challenge).

law.

Not surprisingly, then, Plaintiffs have failed to identify any Vermont authority (1) contradicting the conclusion that Vermont law provides Plaintiffs with a forum to challenge the EET, or (2) declining on any basis to allow review of claims such as theirs.³ And this omission is significant, as it is Plaintiffs' burden to show that Vermont law does not provide them a remedy. *See Franchise Tax Bd.*, 493 U.S. at 340 (finding state remedy sufficiently certain, noting that plaintiff had not cited any "case in which the [state] courts refused to hear a claim similar to the claims [advanced by the challengers of the tax].").

In light of the plain language of the relevant statutes, the Commissioner's reasonable interpretation of those statutes, the principles of comity and federalism underlying the Tax Injunction Act, and the fact that Plaintiffs have not provided any state authority suggesting that a state remedy is unavailable, Plaintiffs have failed to provide any convincing reason why the availability of state review is so speculative in this case as to warrant federal court review of their claims. Plaintiffs are clearly entitled to raise their federal challenges to the EET in a state forum.⁴

³ Plaintiffs cite a number of examples of Vermont taxes that do not explicitly contain refund provisions or appeal procedures, Opp. at 27, but do not cite any authority showing that either the Department or state courts have denied refund or appeal claims under these provisions. Notably, only one Vermont tax statute explicitly disallows refund claims, *see* 32 V.S.A. § 6072, reflecting a fairly liberal policy with regard to the availability of tax refunds.

⁴ Plaintiffs spend approximately two pages of their Opposition discussing the Eastern District of California's 1999 decision in *United States Satellite Broadcasting Co. v. Lynch*, 41 F. Supp. 2d 1113 (E.D. Cal. 1999). According to Plaintiffs, this decision "warrants special consideration," because that court rejected a Tax Injunction Act claim where the law in question "contain[ed] no express scheme for the refunding or challenging of an illegal or erroneous tax." Opp. at 33-34 (quoting *United States Satellite*, 41 F. Supp. 2d at 1118). Of course, as explained above, the law at issue in this case *does* expressly incorporate refund and review procedures and is thus easily distinguishable from *United States Satellite* on that basis, but even if the Vermont review procedures were not so explicit, the *United States Satellite* still would be plainly distinguishable on the ground that the court in that case relied heavily on a state statute explicitly limiting the relief available to taxpayers challenging the validity of state taxes. *Id.* at 1118 ("In light of [the limiting statute], the court cannot find a 'plain' cause of action or procedure [for challenging the tax]."). Therefore, *United States Satellite* is not useful in analyzing the present case.

B. Vermont's Review Process Provides Plaintiffs With An Adequate Opportunity To Raise Their Federal Claims.

As this Court has observed, “[t]he Supreme Court has determined that the procedures required by the Tax Injunction Act are ‘minimal.’ . . . [T]he state remedy must include a full hearing and judicial determination, with an opportunity to raise constitutional objections to the tax.” *Boivin v. Town of Addison*, No. 2:08-CV-66, 2008 WL 27872345, at *4 (D. Vt. July 15, 2008), *aff'd*, 366 Fed. Appx. 201 (2d Cir. 2010); *see also Folio v. City of Clarksburg*, 134 F.3d 1211, 1214-15 (4th Cir. 1998) (“Stated differently, the taxpayer [must be] entitled to a meaningful opportunity to assert federal constitutional challenges to the tax in state court.” (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990))).

As explained in the Motion to Dismiss, both the Second Circuit and this Court have repeatedly held that Vermont's tax appeal procedures provide a “plain, speedy and efficient” remedy for federal challenges to the State's tax laws. *See* Motion to Dismiss at 7 (citing *Murray v. McDonald*, 157 F.3d 147, 148 (2d Cir. 1998); *Boivin v. Town of Addison*, 366 Fed. Appx. 201, 202 (2010); *Hoffer v. Ancel*, No. 1:01-CV-93, slip op. at 4 (D. Vt. June 27, 2001) (copy attached as Exh. C to the Motion to Dismiss)). Thus, it is surprising that Plaintiffs' position on the adequacy of Vermont's state remedies relies almost entirely on an argument substantially identical to the argument rejected in the decisions cited in the Motion to Dismiss.

Specifically, Plaintiffs suggest that even if they are allowed appeal an EET assessment to the Commissioner and, ultimately, to the Superior Court, such review is not adequate because the Commissioner may not pass on the facial constitutionality of the EET. According to Plaintiffs, that precludes the courts from considering such claims. *See* Opp. at 28 (citing 32 V.S.A. § 5883; 32 V.S.A. § 5885(b)). Plaintiffs astutely observe that these concerns led to the Second Circuit's

decision in *Barringer v. Griffes*, 964 F.2d 1278 (1992), in which the court held that Vermont law did not provide an adequate remedy because it was not clear at that time that constitutional review would be available in the courts.

As the more recent cases cited above recognize, however, the Second Circuit has since effectively overruled this portion of the *Barringer* case, reasoning that, since *Barringer* was decided, it has become clear that the Vermont courts are authorized to consider facial constitutional challenges, even when reviewing decisions from state agencies not authorized to pass on the constitutionality of state statutes. *Murray v. McDonald*, 157 F.3d 147, 148 (2d Cir. 1998) (“We are now satisfied that the courts of Vermont are empowered to decide constitutional questions, even when reviewing determinations made by administrative agencies that lack such power.”).

Notwithstanding Plaintiffs’ creative efforts to cast doubt on the *Murray* court’s reasoning, *see* Opp. at 29 n.17 (questioning the court’s “assumption” that Vermont courts will consider constitutional challenges), it is well-established that Vermont courts considering appeals from administrative agencies are authorized to decide constitutional issues that the agencies themselves are not empowered to decide. *See Hoffer v. Dep’t of Taxes*, 2004 VT 86, 177 Vt. 537, 861 A.2d 1085 (2004) (deciding, on appeal from Commissioner’s decision, constitutional challenge to state tax law); *In re Williams*, 166 Vt. 21 (1996) (same (cited in *Murray*, 157 F.3d at 148)).

As the *Murray* decision implicitly recognizes, these decisions and the Vermont Supreme Court’s post-*Barringer* holding in *Stone v. Errecart*, 165 Vt. 1, 5, 675 A.2d 1322, 1325-26 (1996) (administrative agencies are entitled to take evidence on constitutional issues and decide as-applied constitutional challenges), have converted *Barringer*’s reasoning – and Plaintiffs’

present argument – into a syllogistic fallacy. Now, it is simply not true that “[i]f the jurisdiction of the Superior Court is premised entirely upon the ‘determination’ made by the Commissioner, and the Commissioner cannot determine the constitutionality of the [EET], then the Vermont Superior Court lacks jurisdiction to hear these Constitutional claims.” Opp. at 30. Vermont courts may plainly consider facial constitutional claims on review from agency decisions, and there is nothing remarkable or inadequate about this process. *See, e.g., Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126, 2137 n.8, 2138 (2012) (noting that “it is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide” and that agency review processes provide sufficient means for litigants to establish facts related to constitutional challenges).

Therefore, Plaintiffs’ argument that Vermont courts will not or cannot pass on the constitutionality of a state statute because the “Commissioner is not empowered to make determinations of the constitutionality of statutes,” Opp. at 29, is simply wrong, and has found no support in the law since the Second Circuit rejected the same argument in 1998 in *Murray v. McDonald*. For at least the last 14 years, it has been clear that Vermont law provides Plaintiffs an opportunity for a “full hearing and judicial determination at which [Plaintiffs] may raise any and all constitutional objections to the” EET. *Boivin*, 2005 WL 3334708, at *4 (quoting *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431 (2d Cir. 1989)). This is all the Tax Injunction Act requires. Therefore, Plaintiffs’ claims should be dismissed.

C. If A Vermont Court Held That The Administrative Review Process Was Not Available, Plaintiffs Would Be Entitled To Direct State Court Review Of Their Claims.

As explained in detail above, Vermont law plainly provides Plaintiffs with an opportunity

to have their federal challenges to the EET heard through the administrative review process at the Department of Taxes and upon review in the Superior Court. *See* Part III.A, *supra*. Even if Plaintiffs were somehow correct, however, that the EET and related administrative review statutes discussed above did not permit such a challenge, Plaintiffs still would have a plain, speedy and efficient state remedy for purposes of the Tax Injunction Act because their challenge to the tax could be brought directly in the Superior Court under the Vermont Declaratory Judgments Act (“DJA”). 12 V.S.A. § 4711. Notably, the Vermont Supreme Court has held that the DJA may be used to lodge a facial challenge to the constitutionality of a statute. *Travelers Indemnity Co. v. Wallis*, 2003 VT 103, ¶ 18, 176 Vt. 167, 175, 845 A.2d 316, 323 (2003).

Plaintiffs’ reliance on *Town of Bridgewater v. Dep’t of Taxes*, 173 Vt. 509, 787 A.2d 1234 (2001), *see* Opp. at 31, is directly at odds with their own assertion that they lack an administrative remedy for their claims. Of course, the State agrees the DJA cannot be used to “skirt the requirement to exhaust administrative remedies,” Opp. at 31, but if a Vermont court were to somehow agree with Plaintiffs that they lack a remedy at the Department of Taxes, the exhaustion requirement would not be an impediment to seeking relief under the DJA. *Town of Bridgewater* suggests that the only bar to immediate state court review of a tax challenge is the presence of an administrative remedy that must first be exhausted. *Id.* If, as Plaintiffs contend, an administrative remedy is not available, *Bridgewater* suggests that immediate state court review would be available. Moreover, such review of tax claims in the absence of administrative remedies is contemplated by 12 V.S.A. § 517, which provides a limitations period for “[a]n action to recover money paid under protest for taxes.”

In addition, the Vermont DJA is indistinguishable in all material respects from the New York DJA held to represent an adequate state remedy in the *Tully* case cited by Plaintiffs. Opp.

at 30; *see Tully v. Griffin, Inc.*, 429 U.S. 68, 76 (1976) (New York DJA suit is a “plain, speedy and efficient remedy” for purposes of the Tax Injunction Act). Therefore, even if Plaintiffs were correct that Vermont law does not provide a sufficiently certain administrative remedy for their claims, this federal suit still would be barred by the Tax Injunction Act because the DJA provide Plaintiffs with a plain, speedy and efficient state law remedy.

IV. PRINCIPLES OF COMITY BAR PLAINTIFFS’ CLAIMS.

In the Motion to Dismiss the State pointed out that even if Plaintiffs’ claims were not plainly barred by the Tax Injunction Act, the principles of federal-state comity underlying the Tax Injunction Act still would bar Plaintiffs’ challenge to the EET, which is a state tax on a clearly commercial activity. *See* Motion to Dismiss at 8-9 (citing *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010)). Plaintiffs’ response to the State’s comity defense revolves largely around its arguments that the EET is not a “tax” and that Vermont does not provide Plaintiffs with an adequate state forum to raise their claims – both arguments that, as explained in detail above, lack any legal or factual support. However, Plaintiffs raise two other arguments in support of their comity argument that warrant a brief response.

First, Plaintiffs’ argument that this Court should exercise jurisdiction because “the challenge to the exaction in this case arises in an area of heightened federal interests” as expressed in 15 U.S.C. § 391, *Opp.* at 36, is belied by the legislative history of that statute. As one federal court of appeals has noted, section 391 does not affect the balance between federal and state courts on matters of tax issues. *See City of Burbank v. State of Nevada*, 658 F.2d 708, 709 (9th Cir. 1981) (“In enacting s[ection] 391, Congress did not intend to affect [the Tax Injunction Act’s] jurisdictional limitation. . . . State courts provide an adequate forum for implementation of s[ection] 391.” (citing S. Rep. No. 94-938, at 437-38 (1976), reprinted in 1976

U.S.C.C.A.N. 2897, 3439, 3865-66)).

Second, Plaintiffs claim that because the EET presently applies only to one taxpayer, federal review would not “cause potential for disruption with the operations of the state by impeding the administration of state taxation.” Opp. at 37. This argument misses the point. Of course, notwithstanding the limited class of taxpayer to which the EET applies, the amount of revenue generated by the tax is significant (particularly for a small state such as Vermont), and federal interference would therefore have a substantial effect on the state’s revenue. In any event, however, the underlying concern for disruption of state tax administration is not dependent on the number of taxpayer claims at issue, but rather the fear that excessive federal interference would allow any taxpayer to “escape the ordinary procedural requirements imposed by state law.” *Rosewell*, 450 U.S. at 527; *see Empress Casino Joliet Corp.*, 651 F.3d at 722 (stressing the importance of comity and cautioning against a “general lowering of standards” guarding against federal court interference).

Allowing Plaintiffs’ federal suit to move forward would offend the traditional “strong background presumption against interference with state taxation” existing before and underlying the Tax Injunction Act. *Nat’l Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 590 (1995). Therefore, even if this suit were not explicitly barred by the Act, dismissal still would be appropriate in light of the principles of federal-state comity underlying the Act.

CONCLUSION

Challenges to state tax assessments belong in state forums. The EET is a “tax” for purposes of the Tax Injunction Act, and Plaintiffs have plain, speedy and efficient remedy for challenging this state tax in a state forum. Thus, the Tax Injunction Act divests this Court of subject matter to adjudicate Plaintiffs’ claims, and Plaintiffs’ Complaint therefore should be dismissed.

DATED at Montpelier, Vermont this 16th day of October 2012.

STATE OF VERMONT

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2012, I electronically filed Defendants' Reply Memorandum in Further Support of Their Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: Matthew B. Byrne, Robert B. Hemley, and Robert A. Salerno.

STATE OF VERMONT

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