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12-791-cv(XAP)

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellees-Cross-Appellants,
v.

PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT;
WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF
VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities
as members of the VERMONT PUBLIC SERVICE BOARD,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Vermont

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES, URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Washington Legal Foundation states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code; it has no parent corporation, and no publicly held company has a 10% or greater ownership interest.

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INTERESTS OF *AMICUS CURIAE*¹

The Washington Legal Foundation (WLF) is a public interest, law and policy center with supporters in all 50 states, including Vermont. WLF devotes a substantial portion of its resources to defending and promoting economic liberty, free enterprise, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving preemption issues, to point out the economic harms that result when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In addition, WLF has appeared as an *amicus* in numerous other cases raising similar concerns under the dormant Commerce Clause. *See, e.g., Am. Beverage Ass'n v. Snyder*, No. 11-2097 (6th Cir., dec. pending); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

WLF is particularly concerned that economic liberties and the American

¹ Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

economy suffer when state law imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of specific federal regulatory regimes, such as (in this case) the Atomic Energy Act (“AEA”) and the Federal Energy Regulatory Commission (“FERC”). WLF agrees with Plaintiffs-Appellees and the U.S. District Court for the District of Vermont that the AEA preempts the state laws successfully challenged below. WLF writes separately to emphasize that the Federal Power Act also preempts Vermont’s interference with FERC’s exclusive regulation of electricity rates in the wholesale power market. Likewise, the Commerce Clause of the U.S. Constitution bars Vermont from the discriminatory regulation of private markets that favors in-state over out-of-state residents.

STATEMENT OF THE CASE

Plaintiffs-Appellees—Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively “Entergy”)—own and operate the Vermont Yankee Nuclear Power Station (“Vermont Yankee”), which sells electrical power wholesale on the interstate market. J.A. 1811 ¶ 13. Vermont Yankee began operating in 1972 under a 40-year license issued by the Atomic Energy Commission, the predecessor to the Nuclear Regulatory Commission (NRC). Set to expire on March 21, 2012, Vermont Yankee’s license was renewed by the NRC in March 2011 for another 20 years—through March 21,

2032.

Although Congress has granted the NRC exclusive authority over the safety, licensing, and operation of nuclear power plants, Vermont politicians and regulators devised a plan to effectively shutter Vermont Yankee's operations upon the expiration of its initial operating license. In 2005, the Vermont General Assembly first passed Act 74, which requires affirmative approval by the General Assembly for the storage of all spent nuclear fuel generated after March 21, 2012. *See* 10 V.S.A. § 6522 (June 21, 2005) ("Act 74"); S.A. 136-145. In 2006, the General Assembly passed Act 160, which divests Vermont's Public Service Board of the authority to issue a new "certificate of public good" ("CPG") for any "nuclear energy generating plant" without the express approval of the General Assembly. *See* 30 V.S.A. § 248(e)(2) ("Act 160"); S.A. 128-135.

Because Vermont Yankee is the only nuclear facility within Vermont, Act 74 combines with Act 160 to effectively place Vermont Yankee's continued existence beyond March 21, 2012 at the sole discretion of the General Assembly. In February 2010, the Vermont Senate considered several proposals that would have allowed Vermont Yankee to continue operating beyond March 21, 2012, but each of these measures was defeated. S.A. 52. Vermont officials emphasized that any future decision by the General Assembly

to authorize the Public Service Board's issuance of a new CPG must be conditioned on Vermont Yankee's agreement to sell power to Vermont utilities at rates below those authorized by FERC for the interstate wholesale market.

In April 2011, Entergy filed suit in federal district court seeking a permanent injunction and declaration that Acts 74 and 160 are preempted by the AEA. J.A. 1807, 1832-1835. Entergy also sought a permanent injunction and declaration that Vermont may not condition Vermont Yankee's continued operation on the existence of below-market power purchase agreement with Vermont utilities without running afoul of the Federal Power Act and without imposing an improper burden on interstate commerce in violation of the dormant Commerce Clause. *Id.*

Following a full bench trial, the district court specifically found that Vermont officials had conditioned Vermont Yankee's continued operation on "rates that would not otherwise be available to the utilities if they were negotiating on the same foot as customers in other states." S.A. 93. Finding that Vermont had acted out of concerns over radiological safety, an area exclusively the focus of the AEA, the district court issued an order (1) declaring that Act 160 and a portion of Act 74 are preempted by the AEA and (2) permanently enjoining Defendants-Appellants from enforcing those Acts by bringing an enforcement action, or taking any other action, to compel Vermont

Yankee to shut down after March 21, 2012 for failure to obtain legislative approval for a CPG for continued operation. S.A. 100-101. The district court also held that conditioning Vermont Yankee's continued operation on the existence of a below-market power purchase agreement violated the Commerce Clause and permanently enjoined Defendants-Appellants from doing so. *Id.* Finally, the district court declined to issue a declaratory judgment that Vermont's regulatory scheme governing Vermont Yankee's power purchase agreements was preempted by the Federal Power Act. *Id.*

Defendants appeal from the district court's entry of judgment in favor of Entergy on preemption grounds. For the reasons that follow, the order of the district court should be affirmed.

SUMMARY OF ARGUMENT

In addition to being preempted on AEA grounds (as the district court correctly found), Vermont's scheme to condition Vermont Yankee's continued operation on below-market power rates for Vermont consumers also runs afoul of the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, which establishes exclusive federal jurisdiction over the wholesale sale of electric energy in interstate commerce. Here, the district judge found specific evidence of Vermont's intent to condition Vermont Yankee's continued operation on below-market PPAs for Vermont utilities. These factual findings cannot be set aside unless they are

clearly erroneous. And under the Federal Power Act's "filed-rate doctrine," States are prohibited from imposing rates other than the rate filed by FERC. Under such circumstances, Vermont's below-market PPA requirement unquestionably stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Power Act and is thus preempted.

Likewise, Vermont's refusal to renew Vermont Yankee's CPG because Entergy failed to enter into favorable below-market PPAs with Vermont retail utilities also violates the Commerce Clause. Under the Supreme Court's Commerce Clause jurisprudence, a state statute that directly regulates or discriminates against interstate commerce is "virtually per se invalid." By requiring Vermont Yankee to provide in-state electric utilities more favorable rates than those provided to out-of-state electric utilities, Vermont's scheme blatantly attempts to give local consumers an advantage over consumers in other States. Such a scheme is per se invalid because it discriminates against interstate commerce on its face.

ARGUMENT

I. THE FEDERAL POWER ACT PREEMPTS VERMONT'S REQUIREMENT THAT VERMONT YANKEE ENTER INTO POWER PURCHASE AGREEMENTS WITH VERMONT UTILITIES AT BELOW-MARKET PRICES.

Having granted judgment in favor of Entergy on preemption grounds under the AEA, the district court declined to enter a declaratory judgment that Vermont's regulatory scheme is also preempted by the Federal Power Act, or to otherwise enjoin Defendants-Appellees on that ground. S.A. 85-86. But this court "may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the District Court." *Ferran v. Town of Nassau*, 471 F.3d 363, 365 (2d Cir. 2006) (per curiam) (citing *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997)). WLF submits that the record below provides ample basis to affirm the district court's judgment on federal preemption grounds under the Federal Power Act.

Whether the federal government has preempted an assertion of authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As the Supreme Court has repeatedly emphasized, pre-emption fundamentally is a question of congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("The purpose of Congress is the ultimate touchstone of preemption analysis."). In discerning Congressional intent, courts are to look to "the

structure and purpose of the statute as whole, . . . as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

Congress’s intent to preempt state and local law may be explicitly stated in its statutory language or implicitly contained in the statute’s structure and purpose. *Cipollone*, 505 U.S. at 516. State law is impliedly preempted if: (1) it actually conflicts with federal law; or (2) federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.” *Id.* (citations omitted). State law actually conflicts with federal law “either because compliance with both federal and state regulations is a physical impossibility, or because the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Ca. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Federal Power Act establishes exclusive federal jurisdiction over the “the sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1) . Under the Federal Power Act, FERC enjoys “exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate

commerce.” *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Specifically, FERC is charged with ensuring that a wholesale electric energy rate, and any “rate regulation, practice, or contract affecting such rate,” is not “unjust, unreasonable, unduly discriminatory or preferential.” 16 U.S.C. § 824e(a). As the Supreme Court has explained, by enacting the Federal Power Act, “Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates.” *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). Simply put, “States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.” *Id.*

Here, the district judge found specific “evidence of intent to condition continued operation on the demonstration of some marked ‘economic benefit,’ or ‘incremental value,’ beyond that reflected in market rates for long-term contracts.” S.A. 88. This conditioned benefit, the court found, conveniently took “the form of below-wholesale-market long-term power purchase agreements for Vermont utilities.” *Id.* These factual findings cannot be set aside unless they are clearly erroneous. *See, e.g., Smith v. State Univ. of N.Y. at Buffalo*, 14 F. App’x 66, 68 (2d Cir.2001) (“The clearly erroneous standard

applies whether the district court’s factual findings were based on oral or documentary evidence, and ‘there is a strong presumption in favor of a trial court’s findings of fact if supported by substantial evidence.’”) (quoting *Travellers Int’l A.G. v. Trans World Airlines Inc.*, 41 F.3d 1570, 1574 (2d Cir. 1994)). The district judge also specifically found that Vermont legislators told Entergy executives that a favorable power purchase agreement (PPA) was a prerequisite for continued operation. S.A. 89-92.

The district court’s factual findings—based on documentary and testimonial evidence—are fully supported by the record in this case. Vermont Yankee applied for, and received, authorization from FERC to sell its power at wholesale into the interstate market at market-based rates. S.A. 9.

Nevertheless, Vermont’s Department of Public Service (DPS)² admitted that the “primary” obstacle to its recommendation for Vermont Yankee’s continued operation was the lack of a favorably priced PPA with the State. *Id.* at 89. In a brief submitted to the Public Service Board, the DPS refused to support Vermont Yankee’s continued operation “because they have not produced any PPA for consideration by the Board, *much less one with favorable rates, terms and conditions* for Vermont utilities and their ratepayers.” *Id.* (emphasis added).

² Vermont’s Department of Public Service (DPS) represents the State in the procurement of energy and in hearings before the Public Service Board.

Emphasizing that Vermont Yankee was “in a position to provide unique benefits,” including “first and foremost a [power purchase agreement] with Vermont utilities with prices that are below market expectations,” the DPS went on to insist that any suggestion that Vermont Yankee “cannot provide a price below long-term market expectations should be roundly rejected by the Board.” *Id.* DPS’s recommendation to the Public Service Board was unequivocal: “Accordingly, the Board should require that a favorably-priced PPA be made available to Vermont utilities before it makes an affirmative finding” to issue a CPG. *Id.* “No CPG should issue until a satisfactory contract is available to all Vermont utilities.” *Id.* at 90.

Under the Federal Power Act’s “filed-rate doctrine,” States are preempted from imposing rates other than the filed rate. “When the filed-rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause.” *Entergy La. Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003). Indeed, the “filed-rate doctrine requires ‘that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.’” *Id.*

The district court declined to find preemption under the Federal Power Act, suggesting that any such claim is premature because Vermont Yankee has not yet entered into a below-market PPA with Vermont utilities (and because

FERC has not yet ruled that those below-market rates are unjust or unreasonable). S.A. 85-86. But the Supreme Court has squarely held that “the pre-emptive effect of FERC jurisdiction” under the filed-rate doctrine is *not* limited to matters “actually determined” in FERC proceedings. *Miss. Power & Light Co.*, 487 U.S. at 374-75. Moreover, the “reasonableness of rates and agreements regulated by FERC may not be collaterally attacked” through state regulatory proceedings. *Id.* Rather, as that Court reiterated in *Entergy*, State policies that “second guess” implementation of FERC’s filed rate are always preempted. *Entergy*, 539 U.S. at 50. As a result, a de novo review of the merits of Entergy’s preemption claim under the Federal Power Act should result in a clear finding of preemption.

By effectively imposing rates other than the market-based rates approved by FERC, Vermont’s below-market PPA requirement is unquestionably preempted by the Federal Power Act, which requires that all wholesale electricity rates must be “just and reasonable.” 16 U.S.C. § 824d(a). Having approved a market-based rate for the sale of Vermont Yankee’s power on the interstate market, FERC enjoys exclusive authority to regulate those rates, which were filed and authorized by FERC on the understanding that they would be negotiated at arm’s length. Under such circumstances, Vermont’s below-market PPA requirement stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of the Federal Power Act.

Like all States, Vermont “must . . . give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates” and “ensure that [Vermont] do[es] not interfere with this authority.” *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). Accordingly, any scheme by Vermont to extract below-market rates from Entergy for Vermont retail electric utilities necessarily interferes with FERC’s exclusive authority to regulate wholesale electricity and therefore run afoul of the Federal Power Act.

II. VERMONT’S SCHEME TO EXTRACT LOWER PRICES FOR IN-STATE UTILITIES THAN FOR OUT-OF-STATE UTILITIES VIOLATES THE COMMERCE CLAUSE

As the district court correctly determined, Vermont’s refusal to renew Vermont Yankee’s CPG because Entergy failed to enter into favorable below-market PPAs with Vermont retail utilities also violates the Commerce Clause. While Commerce Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” U.S. Const. art. I, § 8, cl. 3, it also “embodies a negative command forbidding the States to discriminate against interstate trade.” *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994). By refusing to countenance local favoritism, the Commerce Clause checks the very natural tendency toward parochialism among State and local policymakers and forces State legislators to

consider broader national concerns.

Indeed, the Supreme Court has held that “a state statute that directly regulates or discriminates against interstate commerce” is “virtually per se invalid.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). The per se proscription of state laws or regulations that discriminate against interstate commerce specifically “reflects the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.” *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335-36 (1989).

This per se rule of invalidity especially applies where, as here, a State brazenly seeks “to favor in-state economic interests over out-of-state interests.” *Brown-Forman Distillers*, 476 U.S. at 579. By requiring Vermont Yankee to provide in-state electric utilities more favorable rates than those provided to out-of-state electric utilities, Vermont’s scheme blatantly “attempts to give local consumers an advantage over consumers in other States.” *Id.* at 580. Such a scheme is per se invalid because it discriminates against interstate commerce on its face.

Here, the case of *New England Power Co. v. New Hampshire* is especially instructive. In *New England Power*, a New Hampshire hydroelectric

interstate wholesaler joined two neighboring states in bringing a dormant Commerce Clause challenge to the New Hampshire public utilities commission's effort to require the wholesaler to sell its electrical output from New Hampshire facilities to in-state retail utilities at discounted rates. 455 U.S. at 333-35. Reasoning that the Commerce Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom," the high court held that the utility commission's demand was "precisely the sort of protectionist regulation" that violates the Commerce Clause. *Id.* at 338-39.

The same result should obtain here, where Vermont's DPS has refused to permit Vermont Yankee's continued operation "because they have not produced any PPA for consideration by the Board, much less one with favorable rates, terms and conditions for Vermont utilities and their ratepayers." S.A. 89. As the district judge expressly found:

Here, there is evidence Vermont Yankee would be required to sell a portion of its output to Vermont utilities at below-market rates, rates that would not otherwise be available to the utilities if they were negotiating on the same footing as customers in other states, or the plant must suffer the consequences of closure.

S.A. 93. But, as *New England Power* makes clear, a State's requirement that an interstate electricity wholesaler must provide intrastate consumers with a

special “economic benefit” unavailable to interstate consumers impermissibly burdens interstate commerce.

Defendants-Appellees argue on appeal that the district court misunderstood Vermont’s “intent” and that it is perfectly legitimate for state lawmakers to guard the interest of Vermonters. But the Supreme Court has long held that even the absence of a protectionist motive cannot excuse interstate discrimination where it otherwise exists. In any event, the judiciary cannot confine its constitutional analysis to a challenged statute’s mere assertion of valid purpose. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (emphasizing that a court is not bound by “[t]he name, description or characterization given [a statute] by the legislature or the courts of the State,’ but will determine for itself the practical impact of the law”); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (“The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effect.”).

Because “the evil of protectionism can reside in legislative means as well as legislative ends,” the Supreme Court “has consistently found parochial legislation of this kind to be constitutionally invalid,” no matter how “legitimate” the ultimate aim of the legislation may be. *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (“But whatever New Jersey’s ultimate

purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”). For that reason, even “a presumably legitimate goal” cannot be “achieved by the illegitimate means of isolating the State from the national economy.” *Id.*

The problem with allowing Vermont authorities to extract favorable electricity rates for in-state utilities lies in the impact such a decision has on the broader interstate community. By securing below-market rates for its own residents, Vermont is effectively forcing residents from neighboring states to subsidize Vermont’s power consumption. The Supreme Court has long recognized that where “the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally averted when interests within the state are affected.” *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945). Since consumers from neighboring States are unrepresented in the Vermont legislature, this case is a clear reminder of the principle that our constitutional system was “framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 3,769 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Richard A. Samp
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