STATE WARS—THE EMPIRE STRIKES BACK: THE FEDERAL/STATE CONSTITUTIONAL POWER CONFRONTATION

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I. ON THE WAY TO THE SUPREME COURT

> Nothing's riding on this except . . . the Constitution . . . and maybe the future of this country.
>
> ~ Ben Bradlee to Woodward and Bernstein[1]

A significant pending case will carve the contours of United States constitutional governance for the nation regarding our most important technology and its implementation[2] and "will probably be determined by the U.S. Supreme Court. . . . 'These are the kind of issues that the Supreme Court likes. It's a federal preemption case; it's a landmark case.'"[3]

The attorney general concurs that he would "be surprised" if the case is not destined for the Supreme Court.[4] This matter defines Constitutional federalism and the application of two important clauses of the United States Constitution:

- The Constitution's Supremacy Clause, with specific application of the judicially defined "bright line" prohibitions of state regulation of wholesale transactions in power;[5] and

- The Constitution's dormant Commerce Clause prohibitions on burdensome state regulation of interstate commerce of a fundamental technology.[6]

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[1] ALL THE PRESIDENT'S MEN (Warner Bros. Pictures, Wildwood Enterprises 1976).

[2] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, No. 12-791-CV (2d Cir. argued Jan. 14, 2013).

[3] Scott DiSavino, *Entergy Sees Vermont Yankee Fate Up to Supreme Court*, REUTERS (Nov. 8, 2011, 3:52 PM), http://www.reuters.com/article/2011/11/08/utilities-entergy-vermontyankee-idUSN1E7A71G220111108 (quoting J Wayne Leonard, Chairman & CEO, Entergy Corp., Address at the 46th Edison Electric Institute Financial Conference (Nov. 8, 2011)).

[4] Eesha Williams, *Anti-Nuke Activists Celebrate Brattleboro Court Ruling*, VALLEY POST (July 23, 2011), http://www.valleypost.org/node/584 (quoting Bill Sorrell, Vermont Attorney General).

[5] U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[6] *Id.* art. I, § 8, cl. 3.

Further, the split federal/state legal authority regarding our energy future, and particularly nuclear power's future, presents an important issue for Supreme Court review.

This Vermont case, *Entergy v. Shumlin*, is now pending in the Second Circuit Court of Appeals.[7] Vermont is the first and only state to attempt to regulate the continuing operation of an existing nuclear power plant.[8] As part of its regulation, Vermont attempted to extract financial concessions from the private owners as a condition of a continued license to operate.[9] Whether a state can regulate an existing nuclear power operation,[10] or favor in-state consumer interests, without fundamentally violating the Constitution's Supremacy Clause[11] and dormant Commerce Clause, are fundamental legal questions.[12]

Not only do Vermont's actions speak to the core of constitutional governance, but in this particular case, they affect the most significant technology in modern America: Energy. Since humankind first created the wheel and harnessed animals to do productive labor, energy has been the means to organize production and advance civilization.[13] Electricity is a unique form of energy – with no substitutes or alternatives for operating computers, the Internet, medical imaging, national defense, and even electric air-conditioned high-rise buildings accessed by electric elevators.[14] Nuclear power is only a part of power generation in America, involving approximately 100 operating power plants,[15] contributing approximately twenty percent of the nation's energy generation.[16] A large, and increasing larger, majority of United States power now proceeds through a wholesale

[7] *Entergy Nuclear*, No. 12-791-CV.

[8] Hope Babcock, *Can Vermont Put the Nuclear Genie Back in the Bottle?: A Test of Congressional Preemptive Power*, 39 ECOLOGY L.Q. 691, 715 (2012).

[9] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 198–200 (D. Vt. 2012).

[10] *See infra* Part III.

[11] U.S. CONST. art. VI, cl. 2.

[12] *Id.* art. I, § 8, cl. 3.

[13] 1 STEVEN FERREY, THE LAW OF INDEPENDENT POWER §§ 2:1, :5–6 (2012) [hereinafter FERREY, INDEPENDENT POWER].

[14] STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 539–40 (5th ed. 2010) [hereinafter FERRY, ENVIRONMENTAL LAW]; *See* FERREY, INDEPENDENT POWER, *supra* note 13, at § 2:1.10.

[15] FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 543.

[16] FERREY, INDEPENDENT POWER, *supra* note 13, at § 6:16.

power sale prior to its ultimate retail disposition,[17] thereby fundamentally shifting the required legal analysis of what is and is not now constitutional for a state to regulate.[18]

Vermont, at trial, was adjudged to have engaged in unconstitutional actions.[19] This outcome followed a continuing line of Supreme Court precedent. States were on notice about carefully observing the constitutional limits through treatises in the field[20] and in law review articles, both before Vermont amended its now-contested statute[21] and before the current legal challenge was initiated in 2011.[22]

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[17] ELEC. ENERGY MKT. COMPETITION TASK FORCE, REPORT TO CONGRESS ON WHOLESALE AND RETAIL COMPETITION MARKETS FOR ELECTRIC ENERGY 10 (2007), *available at* www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf ("In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative) controlled over 95 percent of the electric generation in the United States. . . . [B]y 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities.").

[18] *See* FERREY, INDEPENDENT POWER, *supra* note 13, at §§ 5:22, :26–28; FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 560–61.

[19] *See* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 190 (D. Vt. 2012).

[20] FERREY, INDEPENDENT POWER, *supra* note 13, at § 5:22; FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 560–61.

[21] *See* Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 289 (1999). *See generally* Steven Ferrey, *Renewable Orphans: Adopting Legal Renewable Standards at the State Level*, 19 ELECTRICITY J. 52 (2006); Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507 (2004); Steven Ferrey, *Constitutional Barriers Confronting State Renewable Energy Programs*, ENERGY COMMITTEE NEWSL. (A.B.A., Chicago, Ill.), June 2006, at 1.

[22] *See* Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 777–78 (2010). *See generally* Steven Ferrey, *Carbon and the Constitution: State GHG Policies Confront Federal Roadblocks*, PUB. UTIL. FORT., April 2009, at 40, *available at* www.fortnightly.com/fortnightly/2009/04/carbon-and-constitution; Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y F. 125 (2010) [hereinafter Ferrey et al., *Fire and Ice*]; Steven Ferrey et al., *FIT in the U.S.A.: Constitutional Questions About State-Mandated Renewable Tariffs*, PUB. UTIL. FORT., June 2010, at 60, *available at* www.fortnightly.com/fortnightly/2010/06/fit-usa; Steven Ferrey, *Goblets of Fire: Potential Constitutional Impediments to the Regulation of Global Warming*, 35 ECOLOGY L.Q. 835 (2008); Steven Ferrey, *Legal Barriers to Sub-National Governance Techniques by U.S. States for Renewable Energy Promotion and GHG Control*, 2010 UNITAR-YALE CONF. ON ENVTL. GOVERANCE & DEMOCRACY, *available at* http://conference.unitar.org/yale/sites/conference.unitar.org.yale/files/Paper_Ferrey_0.pdf.

This article navigates the constitutional fabric surrounding the federal-state conflicts on energy policy and regulation. Section II charts the important timing of Vermont's statutory changes and key facts making it the first and only state to impose state operating control on a pre-existing nuclear power plant, leading to successful constitutional challenge. Section III analyzes whether continued plant operation and spent fuel management of nuclear power can be legally regulated by a state or is federally preempted. Section IV examines whether state conditions imposed on power sale terms and prices violate Constitutional provisions. Section V confronts and resolves whether a state can hold low-cost power commerce captive within the state for the advantage of state consumers, without violating the Constitution. All three of these constitutional issues, examined in Sections III–V, determine the future of American power and governance.

There are potential procedural defenses, even to constitutional challenges. Section VI considers equitable principles of estoppel, laches, and waiver that could provide a procedural shield for otherwise questionable state regulation. Section VII traces and constructs four pillars of constitutional law and fact applied in the unique context of electric power in America, building on the instant case. Each pillar defines the applicable shape of American constitutional law and sculpts our energy infrastructure going forward. We start first with the facts.

II. THE KEY TRANSACTION, THE LAW, THE AMENDMENT

Key facts at issue include the sale of an existing power generation facility and *post-facto* changes to state law asserting authority over the long-term continued operation of the sold facility. At issue were legislative motive and purpose straddling the fault lines of the federal Constitution, 225 years after its enactment.

A. CHANGING LAW AND CIRCUMSTANCES

The Vermont Yankee Power facility was a joint venture of eight New England retail utilities, including two Vermont utilities that held a combined fifty-five percent share of ownership.[23] For forty years, Vermont Yankee produced approximately one-third of the electricity consumed by

[23] *Entergy Nuclear*, 838 F. Supp. 2d at 190.

Vermont.[24] This represents approximately fifty-five percent of the station's total output, with the remaining forty-five percent purchased by utilities in neighboring states.[25] The plant provided 72.2% of all electricity generated in Vermont in 2010.[26]

1. The Substance of the Law Circa 2002

In 2002, the owners of the then thirty-year-old 650 Mw[27] Vermont Yankee nuclear power generation plant sold it for $180 million to a subsidiary of Entergy Corporation, an independent Louisiana-based company, which otherwise did not operate any power generation or engage in other commerce in the state of Vermont.[28] Entergy operates twelve nuclear power reactors at ten sites in numerous states, including one in the bordering state of Massachusetts.[29] A 2001 sale offer and application by AmerGen Corporation was rejected by the Vermont Public Service Board before it accepted the application by Entergy in 2002.[30]

Section 231 of Vermont's statutes then provided that a Certificate of Public Good (CPG) is required to own or operate a business over which the Vermont Public Service Board has jurisdiction.[31] Section 248 of the Vermont statutes, in the form in effect in 2002 when Entergy acquired the Vermont Yankee nuclear facility, applied only to power purchases from outside the state, investments in facilities located outside the state, and site

[24] Nuclear Safety Assocs. to the Vt. Dep't of Pub. Serv., *Reliability Assessment of the Vermont Yankee Nuclear Facility: Redacted Public Version* 1, 1 (Dec. 22, 2008) [hereinafter *Reliability Assessment*], *available at* http://kanat.jsc.vsc.edu/env1060/cvaReport.pdf; RICHARD A. WATTS, PUBLIC MELTDOWN: THE STORY OF THE VERMONT YANKEE NUCLEAR POWER PLANT 61 (2012).

[25] *Entergy Nuclear*, 838 F. Supp. 2d at 190.

[26] U.S. Energy Info. Admin., U.S. Dep't of Energy, *State Nuclear Profiles, Vermont* (April 26, 2012), *available at* www.eia.gov/nuclear/state/vermont/pdf/vermont.pdf.

[27] *Technical Overview*, SAFE. CLEAN. RELIABLE. VERMONT YANKEE, http://www.safecleanreliable.com/about-us/technical-overview/ (last visited Feb. 17, 2013). Vermont Yankee is a BWR-4 boiling water reactor. *Id.*

[28] *See* DiSavino, *supra* note 3, at 1.

[29] Matthew L. Wald, *First Round: Entergy 1, Vermont 0*, N.Y. TIMES: GREEN BLOG (Jan. 20, 2012, 10:13 AM), http://green.blogs.nytimes.com/2012/01/20/first-round-entergy-1-vermont-0/; Entergy Wholesale Commodities Nuclear Generating Assets, ENTERGY.COM (Nov. 2012), http://www.entergy.com/content/operations_information/EWC_Nuclear_Portfolio.pdf (listing an Entergy-owned reactor in Plymouth, Massachusetts).

[30] *Entergy Nuclear*, 838 F. Supp. 2d at 190.

[31] VT. STAT. ANN. tit. 30, § 231 (2008).

and construction preparation for *new* facilities in the state.[32] These Vermont statutes did not apply to the continued operation of existing power generation facilities, whether nuclear powered or otherwise.[33]

As part of its agreement to purchase the Vermont Yankee power facility, the buyer, Entergy, was asked to sign a Memorandum of Understanding (MoU) with the state Public Service Board (PSB), which it did.[34] The MoU provided that a portion of the electricity produced by the reactor would be sold wholesale to three former Vermont utility owners for the next ten years at a discounted price of approximately four cents per kilowatt hour.[35] Between 2002 when the plant was sold, and 2010, the wholesale price of power in New England and Vermont fluctuated between $0.043 and $0.088/kwh.[36] There also was a revenue sharing agreement from Entergy to the state continuing for an additional ten years after 2012 if the facility continued operations.[37] The MoU waived any right of Entergy to contest the authority of the state Public Service Board to grant a CPG to Entergy under then-"current law."[38] Act. No 160,[39] and other provisions now legally contested, were not part of current law in 2002. They were a 2006 addition.[40]

[32] VT. STAT. ANN. tit. 30, § 248 (2003) (current version at VT. STAT. ANN. tit. 30, § 248 (Supp. 2012)).

[33] *Id.*

[34] Vt. Pub. Serv. Bd., *Memorandum of Understanding Among Entergy Nuclear Vermont Yankee, LLC, Vermont Yankee Nuclear Power Corporation, Central Vermont Public Service Corporation, Green Mountain Power Corporation, and the Vermont Department of Public Service*, Docket No. 6545, at 4 (Mar. 4, 2002) [hereinafter *Memorandum of Understanding*], *available at* www.leg.state.vt.us/jfo/envy/6545%20MOU.pdf (discussing the sharing of excess revenue after license extension); WATTS, *supra* note 24, at 26, 61.

[35] WATTS, *supra* note 24, at 61.

[36] *Id.*

[37] *Memorandum of Understanding*, *supra* note 34, at 4. In the MoU, Entergy agreed to share 50% of "excess revenue" above a strike price with the Vermont facility sellers for ten years, should the facility operate beyond 2012. *Id.* "A 2009 report prepared by consultants GDS Associates, Inc. estimated the net present value of the projected total of ten years' excess revenue to the two Vermont utilities (expected to flow to their ratepayers) would be $587.8 million in 2012 dollars." Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 191 n.8 (D. Vt. 2012) (citing GDS Assocs. Report to DPS, at 11–14 (Feb. 27, 2009), Pls.' Ex. 327 (Doc. 4–18)).

[38] *Entergy Nuclear*, 838 F. Supp. 2d at 191–92.

[39] Act of May 18, 2006, No. 160, 2006 Vt. Acts & Resolves 204.

[40] *Id.*

2. The 2006 Amendment

After transfer of the facility to Entergy, this statute was amended by Vermont in May 2006, by adding amendments to Section 248, by Act No. 160, entitled "An Act Relating to a Certificate of Public Good for Extending the Operating License of a Nuclear Power Plant."[41] For existing nuclear power facilities, these amendments added three new substantive elements of state regulation to cover (1) existing rather than only proposed, future new nuclear power facilities, (2) that seek to continue to operate as opposed to the original site construction preparation, (3) by requiring state extension of an existing state operating license.[42] Act 160 added a new multi-level procedural requirement for both: (1) legislative approval; and (2) a CPG issued by the Public Service Board for existing nuclear plants in the state operating pursuant to an existing CPG in force as of January 2006 — of which there was and is only one such plant in the state, Vermont Yankee.[43] The Act specifically requires Vermont Yankee to obtain additional state approval, separately, first from the legislature, and second, from the Board, before operating past March 2012.[44] Prior to these 2006 amendments, under the original Section 231, only the Board, a quasi-judicial semi-independent authority, had approval authority, through its tightly constrained adjudicatory process.[45]

By adding new Sections 248(e)(2) and (m) to existing Title 30, 2006 Act No. 160 effectively created a state operating license for Vermont

[41] *Id.*

[42] The legislative vote required in Act 160 (Section 2e(2)) is a prerequisite additional step: "[T]he board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but *may not issue a final order* or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation." *Id.* at § 2(e)(2) (emphasis added).

[43] *Id.*

[44] *Id.*

[45] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 192 (D. Vt. 2012) (citing VT. STAT. ANN. tit. 30, §§ 11–12 (2008)) ("At the time the 2002 MOU was signed, the Public Service Board was the quasi-judicial entity bestowed with statutory authority to consider petitions and grant CPGs . . . [and] is required to 'make . . . findings of fact,' to 'state its rulings of law when they are excepted to,' and its decisions can be appealed to the Vermont Supreme Court, which is required to accord them deference."). Moreover, there is specific precedent as to what constitutes the Board's public convenience, through a history of determinations and orders. *See* VERMONT PUBLIC SERVICE BOARD, http://psb.vermont.gov/statutesrulesandguidelines (last visited Feb. 17, 2013) (listing the Public Service Board's determinations and orders).

Yankee, based on a new multi-body evaluation by the state.[46] Section 248(e)(2) creates a new discretionary state license for existing nuclear power plant "operat[ion]."[47] It prohibits any nuclear generating plant from operating "beyond the date permitted in any certificate of public good . . . unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section" to continue operation.[48]

Thus, separate approvals of both the state legislature and the state energy regulatory agency are required to continue operation after the initial forty-year federal operating license for Vermont Yankee, even if that federal license is continued or reissued.[49] Through a multi-level state approval, the legislature created a dual veto right for the state over continued operation of the single nuclear power generation facility in the state.[50] The new Section 248(m) of the statute[51] requires that the Vermont Public Service Board, when considering approval of continued "operation" of an existing nuclear energy generating plant under Section 248, must use then-current assumptions for a cost-benefit analysis regarding the facility when deciding whether to issue a new state CPG for continued operation.[52]

3. Administrative Discretion and Disapproval

Entergy, the facility owner since 2002, filed a petition with the Vermont PSB seeking a new state CPG—years in advance of the expiration in March 2012 of its existing licenses.[53] A pipe in a cooling tower broke when the structure of the cooling tower shifted in 2007.[54] Pending such approval, in January 2010, Entergy identified a radioactive tritium leak at the plant, and company officials made some contradictory statements about underground

[46] VT. STAT. ANN. tit. 30, §§ 248(e)(2), (m) (added by 2006 Vt. Acts & Resolves 204).

[47] *Id.* § 248(e)(2); § 2(e)(2), 2006 Vt. Acts & Resolves 204.

[48] VT. STAT. ANN. tit. 30, § 248(e)(2).

[49] *See id.*

[50] *See id.*

[51] *Id.* § 248(m).

[52] *Id.*

[53] Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Before the Vermont Public Service Board (March 3, 2008) (Docket No. 7440) [hereinafter Petition, Docket No. 7440], *available at* http://psb.vermont.gov/sites/psb/files/docket/7440VT_Yankee_Relicensing/PetDocs/Petition.pdf.

[54] WATTS, *supra* note 24, at 45.

pipes related to that leak.[55] It also transferred some spent fuel to "dry-storage" casks on site; most of the spent fuel continues to be stored in the spent fuel pool.[56] In February 2010, the state senate, then headed by Peter Shumlin, President Pro Tempore, who is now Governor Shumlin, voted to deny the Vermont Public Service Board the right to issue the certificate that would allow the plant to operate beyond 2012, by a vote of twenty-six to four, citing radioactive tritium leaks from the plant, misstatements in testimony by plant officials, a cooling tower collapse in 2007, and other issues.[57]

Hearings in Vermont on the PSB agency petition advancing in an adjudicatory forum[58] were halted when the state senate voted not to approve or permit such a new CPG in early 2010.[59] Without an affirmative vote from the legislature, pursuant to the revised 2006 law, the PSB had no authority to issue a CPG to an existing nuclear power plant. Two days after Senator Shumlin was elected governor in November 2010, Entergy offered the plant for sale,[60] but it was not purchased or sold.

Without any guarantee of continued operation, to avoid other large financial penalties, Entergy attempted to remove the facility from those plants required to be available to supply power to the New England

[55] *See* DiSavino, *supra* note 3.

[56] Andrew Stein, *Vermont, New York Regulators Urge Review of Spent Nuclear Fuel Storage*, VTDIGGER (Jan. 3, 2013), http://vtdigger.org/2013/01/03/vermont-new-york-regulators-urge-review-of-spent-nuclear-fuel-storage/.

[57] Matthew L. Wald, *Vermont Senate Votes to Close Nuclear Plant*, N.Y. TIMES, Feb. 25, 2010, at A14, *available at* http://www.nytimes.com/2010/02/25/us/25nuke.html?pagewanted=all.

[58] For discussion of administrative law adjudicatory proceedings, *see* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 45–48. Proceedings before a state electric energy regulatory agency have the attributes of a trial to protect all participants. Formal legal rules govern the trial-like process. *Id.* at 47–48. There is formal presentation of sworn evidence, cross-examination by counsel, procedural motions, discovery of documents, briefs filed by the parties, and a decision that must be based on the formal transcribed record and based on the weight of substantial evidence. *Id.* Appeal is allowed to the courts based on either procedural issues or a decision not based on formal substantial evidence. *Id.* at 48. This is in contrast to a decision of a state legislature, which has no such formal legal protections.

[59] *Senate Votes to Close Vermont Yankee Nuclear Plant in 2012*, BURLINGTONFREEPRESS.COM (Feb. 24, 2010), http://www.burlingtonfreepress.com/viewart/20100224/NEWS02/100224050/Senate-votes-close-Vermont-Yankee-nuclear-plant-2012.

[60] Matthew L. Wald, *Vermont Nuclear Plant Up for Sale*, N.Y. TIMES, Nov. 5, 2010, at B9, *available at* http://www.nytimes.com/2010/11/05/business/energy-environment/05nuke.html.

transmission grid to ensure adequate supplies for consumers.[61] Twice, Entergy was not allowed to 'delist' the Vermont Yankee from continuing operation as a capacity resource in the New England system, under federal law:

> The studies completed so far have shown that with or without Vermont Yankee, the system in Vermont has reliability issues that must be addressed; without Vermont Yankee in service, those issues are more severe and could affect neighboring areas. The potential reliability issues could include thermal overloads on high-voltage transmission lines and voltage instability, either of which could damage equipment, compromise grid stability, or cause uncontrolled outages.[62]

This required the unit to remain available to generate power for federally-regulated system reliability purposes, despite being within months of having no state permission to continue operations past March 2012.[63] This contraposed requirements of the federally regulated New England interstate grid operator, ISO-NE, to the state of Vermont decision on the future non-operation of this facility.[64] On January 27, 2006, Entergy Vermont Yankee had applied to the Nuclear Regulatory Commission

[61] Press Release, ISO New England, FERC Filing Confirms New England's Sixth Capacity Auction Procured Resources Needed for 2015–2016 (April 30, 2012), *available at* http://www.iso-ne.com/nwsiss/pr/2012/final_fca6_release_04302012.pdf.

[62] Press Release, ISO New England, Final Capacity Auction Results: Surplus Resources Available for 2013–2014, at 2 (Aug. 30, 2010), *available at* http://www.iso-ne.com/nwsiss/pr/2010/fca4_filing_release.pdf.

[63] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 193 (D. Vt. 2012). ("The interstate transmission system 'must meet mandatory reliability standards set by the North American Electric Reliability Corporation, the Northeast Power Coordinating Council, ISO-NE [ISO-New England], and the region's transmission owners.' ISO-New England, *Summary of Vermont/New Hampshire Transmission System 2010 Needs Assessment* at 1 (Feb. 17, 2011), Pls.' Ex. 343 (Doc.4-34)."). For a discussion of the ISO-NE forward capacity market, *see Forward Capacity Market (FCM)*, ISO NEW ENGLAND, http://www.iso-ne.com/markets/othrmkts_data/fcm/index.html (last visited Feb. 17, 2013).

[64] FED. ENERGY REGULATORY COMM'N, FERC FINANCIAL REPORT FERC FORM NO. 1: ANNUAL REPORT OF MAJOR ELECTRIC UTILITIES, LICENSEES, AND OTHERS AND SUPPLEMENTAL FORM 3-Q: QUARTERLY FINANCIAL REPORT, at i, *available at* http://www.ferc.gov/docs-filing/forms/form-1/form-1.pdf.

(NRC) for a license extension of twenty years.[65] The plant's federal NRC license was scheduled to expire March 21, 2012; the NRC renewed Vermont Yankee's federal operating license in March 2011 for an additional twenty years past its scheduled expiration.[66] In 2012, the facility was finally allowed to 'delist' as a capacity resource within the regional grid for the period beginning not until 2015 and after, which still required the plant to operate until mid-2015, even without state approval to do so past March 2012.[67] In this federal-state conflict of contraposed authority, judicial relief was sought by the facility owner.[68]

B. THE LEGAL CHALLENGE

Entergy continued to work with state officials in an attempt to allow the plant to continue operating beyond March 2012. About a month after the NRC extended the operating license for another twenty years until 2032,[69] Entergy sued on April 18, 2011, to block the state from shuttering the plant.[70] Entergy had already purchased and had delivered new uranium fuel rods in anticipation of a continuation of operations.[71]

The federal constitutional issues raised by Entergy regarding the three new Vermont legislative provisions, Act 74, Act 160, and Act 189, which each only applied, *de facto*, to the operation of the Vermont Yankee nuclear facility, were structured in three counts in the district trial court complaint:[72]

[65] *Vermont Yankee Nuclear Power Station—License Renewal Application*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reactors/operating/licensing/renewal/applications/vermont-yankee.html (last updated March 29, 2012). For the five-year history for this federal application leading to the March 21, 2011 approval, *see id.*

[66] *Id.*

[67] FERC Docket No. ER12-1678-000 (2012); *see also* Press Release, *supra* note 61. The application is available at: http://www.nrc.gov/reactors/operating/licensing/renewal/applications/vermont-yankee/vermont-yankee-lr.pdf; *see also Forward Capacity Auction 5*, ISO NEW ENGLAND, http://www.iso-ne.com/markets/othrmkts_data/fcm/cal_results/ccp15/fca15/index.html (last visited Feb. 17, 2013).

[68] Complaint for Declaratory and Injunctive Relief at 32, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (2012) (No. 11-CV-99), 2011 WL 1459011.

[69] *Id.* at 2.

[70] *See* DiSavino, *supra* note 3, at 1.

[71] *See* Wald, *supra* note 29.

[72] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 26–33.

- Count I contested state exercise of nuclear safety regulation as preempted;

- Count II contested whether the state of Vermont is preempted by the Federal Power Act from compelling Vermont Yankee to enter into a favorable wholesale power purchase agreement at below-market rates with Vermont utilities, as a condition of an operating license; and

- Count III alleged a dormant Commerce Clause violation and a violation of 42 U.S.C. § 1983 in Vermont's attempts to compel a favorable power purchase agreement for in-state residents, rather than allow the plant to operate to sell its power in interstate commerce.[73]

The federal district court trial took place in September 2011, before United States District Judge J. Garvan Murtha of the District Court for Vermont.[74] At trial, Entergy lawyers asked the court to overturn the three state statutes as reaching beyond the state's jurisdiction under the 1954 federal law that established the United States government's authority over nuclear health and safety.[75] In rebuttal, Vermont Assistant Attorney General Bridget Asay, representing the state, argued that it was not the court's job to review the legislative record and its "cacophony of voices" in an attempt to parse true state motive.[76] Instead, the court should look only at the statutes and their officially stated purpose, she argued, stating: "There's nothing pre-emptive about a [legislator's] conversation."[77] Asay also argued that Entergy had broken its contract with the state by filing a lawsuit after the company waived its right to sue as part of the 2002 Memorandum of Understanding that accompanied the state Public Service Board's approval allowing Entergy to buy the plant.[78]

[73] *See id.* at 26–32.

[74] *See* DiSavino, *supra* note 3, at 1.

[75] *See* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 188–89 (D. Vt. 2012).

[76] Olga Peters, *Both Sides Rest in Entergy v. Vermont Trial*, THE COMMONS (Sept. 21, 2011), http://www.commonsnews.org/site/site05/story.php?articleno=4123&page=2.

[77] *Id.*

[78] *Id.*

Early local handicapping of the case favored Vermont: "If the [f]ederal courts say that states have no authority over economic regulation of merchant [power] plants—that's stunning," said Professor Pat Parenteau.[79] He surmised that Entergy would not prevail because of unclean hands negating injunctive relieve against the state:[80]

> The upshot is that Entergy basically wants a ruling that it can run Vermont Yankee for as long as the NRC allows even though it never sells another electron to any Vermont customer. This is truly extraordinary relief. No court has ever done anything this radical. If Entergy's theory of federal preemption is correct, it would apply to hundreds of merchant power plants, both nuclear and non-nuclear, all across the nation.[81]

Professor Cheryl Hanna stated "that the relief Entergy is requesting is extraordinary. . . . It is essentially saying that federal law requires Vermont to host a nuclear power plant it doesn't want."[82] Initially, Vermont prevailed on a motion; in July 2011, the court denied the Entergy request for

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[79] *Id.*

[80] *Id.*

> [T]he equitable maxim that he who comes into equity must come with clean hands . . . is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of iniquity. Thus while equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

Precision Instrument Mfg. Co. v. Auto. Maint. Machinery Co., 324 U.S. 806, 814–15 (1945) (citations omitted) (internal quotation marks omitted).

[81] Pat Parenteau, *Pat Parenteau: The Meaning of Judge Murtha's Questions*, VERMONT YANKEE LAWSUIT (Sept. 16, 2011), http://vtyankeelawsuit.vermontlaw.edu/the-meaning-of-judge-murthas-questions/.

[82] Cheryl Hanna, *Cheryl Hanna: Agreeing with Pat (Sort of, but Don't Tell Him That)*, VERMONT YANKEE LAWSUIT (Sept. 16, 2011), http://vtyankeelawsuit.vermontlaw.edu/agreeing-with-pat-sort-of-but-dont-tell-him-that/; s*ee Court Denies Preliminary Injunction in Vermont Yankee Case*, VERMONTBIZ.COM (July 19, 2011), http://www.vermontbiz.com/news/july/court-denies-preliminary-injunction-vermont-yankee-case/ [hereinafter *Court Denies Preliminary Injunction*].

preliminary injunctive relief to allow it permission to operate if it refueled the plant on its normal schedule.[83]

III. NUCLEAR SAFETY AND RESIDUAL STATE AUTHORITY?

A. The Key Statutory Changes

When Act 74 was proposed, as well as at the time that the ownership of the project was transferred in 2002, the then-existing Section 6522 of the Vermont statute established a process pursuant to which Vermont Yankee was to go only to the Vermont Public Service Board to obtain approval for the use of any new waste storage facility for spent nuclear fuel and to allow for continued operation.[84] Act 74 added a new amendment in 2005 which required an added legislative approval for waste storage after the then-permitted date of operation of Vermont Yankee (March, 2012), before the original separate track requiring the Public Service Board to issue a Certificate of Public Good for continued operation.[85] Act 74 regulated the dry cask storage of spent nuclear fuel at Vermont Yankee and required Entergy to seek permission from the state to store additional fuel past 2012.[86]

During hearings on Act 74 in 2005, the Vermont Senate Finance Committee was told that radiological safety issues were beyond state jurisdiction.[87] Nevertheless, Vermont senators stated: "Our goal in Natural Resources and Energy was to review and provide the *safest* possible storage for spent fuel rods while they're in Vermont," and "[i]n January when we began talking about this, it was quite obvious that the issue of *public safety* was going to be of paramount concern."[88]

Once Act 74 was enacted, the owners of the Vermont Yankee facility petitioned for fuel storage, and the Public Service Board held hearings and conferences to determine if the nuclear facility should receive a new certificate.[89] Prior to the state Board taking any action, the federal NRC had already approved pre-licensing the Vermont Yankee facility for twenty

[83] *See Court Denies Preliminary Injunction*, *supra* note 82.

[84] Entergy Nuclear Vt. Yankee LLC v. Shumlin, 838 F. Supp. 2d 183, 196–97 (D. Vt. 2012).

[85] *Id.* at 195.

[86] *See* Act of June 21, 2005, No. 74, 2005 Vt. Acts & Resolves 599.

[87] *Entergy Nuclear*, 838 F. Supp. 2d at 195.

[88] *Id.* at 197–98 (emphasis added).

[89] *Id.* at 200.

years of extended operation.[90] The Atomic Energy Act of 1954 vests the federal government with sole authority in regulating most nuclear-related matters, including licenses, acquisitions, and the possession and use of nuclear materials.[91] In 1959, Congress amended the Atomic Energy Act to authorize agreements between the NRC and state governors to allow states to have limited regulatory roles regarding byproduct materials, source materials, and special nuclear materials insufficient to form a critical nuclear mass.[92]

B. IMPLIED PREEMPTION—STATE NUCLEAR AUTHORITY

The Nuclear Regulatory Commission is exclusively responsible for nuclear power plant operating licenses and for all elements of radiological health and safety regulation.[93] These limits of state authority over nuclear power plant regulation were previously applied specifically to the state of Vermont for the specific Vermont Yankee facility at issue in the *Shumlin* litigation.[94] In reviewing the original federal licensing of the Vermont Yankee nuclear generation facility, the Supreme Court held that the NRC "was given broad regulatory authority over the development of nuclear energy."[95]

State regulation of nuclear plant operation is impliedly federally preempted, as articulated by the Supreme Court three decades earlier:

> At the outset, we emphasize that the [state] statute does not seek to regulate the construction or operation of a nuclear power plant. It would clearly be impermissible for [the state] to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.[96]

[90] *See id.* at 200, 217.

[91] *Id.* at 218–19.

[92] *Id.* at 219.

[93] N. States Power Co. v. Minnesota, 447 F.2d 1143, 1152 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

[94] *See* Vt. Yankee Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 550–55 (1978).

[95] *Id.* at 526.

[96] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983).

The Supreme Court also noted that, pursuant to 42 U.S.C. § 2021(c), the NRC "shall retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility."[97] Therefore, the continued operation of an existing nuclear power generation facility is federally regulated to the exclusion of state or local legislative or regulatory authority.[98]

In addition to the front end of construction and operation, there is also the "back" end of waste disposal. The Atomic Energy Act[99] and the Nuclear Waste Policy Act[100] establish exclusive federal authority over storage and management of spent nuclear fuel from power generation reactors. Radioactive spent waste handling is part of the federal licensing authority of the federal NRC.[101] State or local attempts to condition or control the storage or transportation of spent nuclear fuel from nuclear power generation facilities is federally preempted by the Supremacy Clause of the Constitution.[102]

Thus, there is a clear division of legal authority between states and the federal government over the authority to regulate nuclear power generation facilities. The federal government is vested with exclusive authority over nuclear plant operation and its associated radiological health and safety-related issues, while the state government retains authority over "need, reliability, cost, and other related state concerns,"[103] to the extent such issues have not become subject to FERC's exclusive federal jurisdiction as a result of wholesale power transactions increasing dramatically in the last few decades.[104]

[97] *Id.* at 209.

[98] *See id.* at 212.

[99] 42 U.S.C. § 2011–286 (2006).

[100] *Id.* § 10101–270.

[101] *Pac. Gas*, 461 U.S. at 205–06.

[102] U.S. CONST. art. VI, cl. 2; Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1254 (10th Cir. 2004); Unites States v. Kentucky, 252 F.3d 816, 823 (6th Cir. 2001); Jersey Cent. Power & Light Co. v. Twp. of Lacey, 772 F.2d 1103, 1104 (3d Cir. 1985); Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982); Me. Yankee Atomic Power Co. v. Bonsey, 107 F. Supp. 2d 47, 55 (D. Me. 2000).

[103] *Pac. Gas*, 461 U.S. at 205–06.

[104] *See infra* Part III.D.

C. THE VERMONT DISTRICT TRIAL COURT ANALYSIS AND HOLDING

1. Legislative History and 'Sausages': The Application of *PG&E*

The federal trial court in Vermont analyzed both Act 160 and Act 74.[105] The state of Vermont declared that Act 189 was no longer in effect before the court decision was rendered,[106] but after Entergy's challenge, thereby rendering the claim moot.[107]

The court construed the Vermont statute in the context of the Federal Power Act, the Atomic Energy Act, and constitutional provisions.[108] The state of Vermont argued to the court that it should only examine Section 1 of Act 160, which set forth the policy and purpose clause announcing the officially articulated purpose of the statute.[109] Vermont attorney Asay cited the *PG&E* precedent upholding the economic rationale stated in the text of California's previously challenged statute:[110] "Therefore, we accept California's avowed economic purpose as the rationale for enacting [the moratorium]."[111] According to attorney Asay, the Supreme Court in *PG&E* chose to not consider legislative history because how could a court pinpoint the motivation of every lawmaker voting on a bill?[112] Statutes, she said, were the product of a process of deliberation.[113] Entergy's evidence citing

[105] Entergy Nuclear Vt. Yankee LLC v. Shumlin, 838 F. Supp. 2d 183,194–211 (D. Vt. 2012).

[106] Vermont Act 189 required specific studies on safety-related systems. *See* Act of June 5, 2008, No. 189, 2008 Vt. Acts & Resolves 478.

[107] *Entergy Nuclear*, 838 F. Supp. 2d at 233.

[108] *Id.* at 233–43.

[109] Act 160, Section 1(a) states:

> It remains the policy of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly expressed in law after full, open, and informed public deliberation and discussion with respect to pertinent factors, including the state's need for power, the economics and environmental impacts of longterm storage of nuclear waste, and choice of power sources among various alternatives.

Act of May 18, 2006, No. 160, 2006 Vt. Acts & Resolves 204.

[110] Olga Peters, *Entergy v. Vermont Trial Concludes*, VTDIGGER (Sept. 15, 2011), http://vtdigger.org/2011/09/15/entergy-v-vermont-trial-concludes.

[111] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983).

[112] Peters, *supra* note 110.

[113] *Id.*

specific legislative history to determine a statute's final intent "contradicted" precedent, she said.[114]

Instead of pointing to the bill's official preamble, Entergy highlighted legislative history and asked the court to find that Vermont's 180-member citizen legislature had misrepresented true facts in its statutes.[115] In response to Entergy's lawyer, state witness Peter Bradford noted: "[T]he fact that you have this cacophony of ostensibly preempted inputs and an unpreempted output, doesn't mean that somebody's dealing in pretexts or trickery, it means the product worked, and the prohibited beginning became an accessible end. That's not trickery, that's legislation."[116] Or, as Chancellor von Bismarck observed, "[t]o retain respect for sausages and laws, one must not watch them in the making."[117]

In resolving these contrary perspectives on the legislative "sausage," the court refused to consider only the single express legislative bill statement, and instead, reviewed the entire act's effect, as a whole.[118] The court noted that Act 74, when first introduced, did not require Vermont Yankee to affirmatively seek legislative approval for storage of spent nuclear fuel rods after the initially permitted forty-year operation permit in force to March 2012.[119] During committee hearings, the Vermont legislature heard over a dozen witnesses who expressed concerns regarding Vermont Yankee safety issues.[120] A certain Vermont legislator noted that the major issue with dry cask storage of spent nuclear fuel waste is safety, and the Committee's expert responded by advising that the legislature should not address or characterize these concerns as issues of safety, as it was outside the legislature's realm of state jurisdiction.[121]

At least with regard to prohibition of *new* nuclear plant construction, in the *PG&E* matter, the Court decided that which particular state body made the decision was not determinative:

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[114] *Id.*

[115] *Id.*

[116] Transcript of Record at 495–96, Entergy Nuclear Vt. Yankee LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012) (No. 12-707).

[117] *In re* Graham, 104 So. 2d 16, 18 (Fla. 1958).

[118] *See* Entergy Nuclear Vt. Yankee LLC v. Shumlin, 838 F. Supp. 2d 183, 226–33 (D. Vt. 2012).

[119] *Id.* at 195.

[120] *Id.*

[121] *Id.*

> [P]etitioners note that there already is a body, the California Public Utilities Commission, which is authorized to determine on economic grounds whether a nuclear powerplant should be constructed. While California is certainly free to make these decisions on a case-by-case basis, a State is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases. The economic uncertainties engendered by the nuclear waste disposal problems are not factors that vary from facility to facility; the issue readily lends itself to more generalized decisionmaking and California cannot be faulted for pursuing that course.[122]

2. Operation of a Facility

In enacting Act 160, the Vermont legislature made it clear that Vermont Yankee would not be able to operate beyond its then-permitted date of March 2012 without a new state Certificate of Public Good.[123] In the same Act, the Vermont General Assembly grafted on to the existing Public Service Board process a second legislative branch prerequisite approval for the operation of the facility.[124] The chairman and CEO of Entergy characterized the effect of this change:

> The Public Service Board is an independent, expert body that uses impartial professional judgment to make such decisions and, its decisions can be reviewed by a court.
>
> But four years later in 2006, Vermont passed a law that prohibited the Public Service Board from issuing a Certificate of Public Good to Vermont Yankee unless the General Assembly first approved the plant's continued operation. . . .
>
> This is obviously entirely different from what we agreed to back in 2002. We agreed to a process in which an independent expert agency would decide Vermont Yankee's future based on evidence and facts developed

[122] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 215 (1983).

[123] Act of May 18, 2006, No. 160, 2006 Vt. Acts & Resolves 204.

[124] *Id.* at 205.

> through an impartial process with the possibility, if necessary, of court review. We did not agree to a process involving the Legislature, which is inherently political.
>
> . . . We believe it substantially changed our agreement with the State and deprived us of certain critical rights that we relied upon in purchasing the plant.[125]

The court concluded that, under this amendment, the Vermont legislature has discretion to deny future approval, and therefore the future operation, of Vermont Yankee simply by ignoring approval, or by taking no action whatsoever:

> Because Act 160 requires the passage of a special law affirmatively approving continued operation, the General Assembly has a virtually unreviewable power to allow Entergy's current [Certificate of Public Good] to lapse and effectively deny a pending petition for renewal, even if it does so for reasons preempted under federal law.[126]

One of these reasons not to act could be radiological safety and public health, which are both issues preempted by federal law.[127] The court ruled that the effect of Act 160, specifically its sections 248 and 254, was to allow state consideration and regulation of issues of public health and radiological safety.[128] The court also considered the legislative purpose behind Act 160, looking to the "'plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history,' as well as the 'specific sequence of events leading to its passage.'"[129] Beyond its stated purpose,[130] the court concluded that Act 160 evidenced clear signs of concerns with radiological safety because the primary mechanism of the act is to give the legislature the power to take no action

[125] Letter from J. Wayne Leonard, Chairman & CEO, Entergy Corp., to Vermonters, *available at* http://www.entergy.com/global/VY/VY_Wayne_letter.pdf (last visited Feb. 18, 2013).

[126] *Entergy Nuclear*, 838 F. Supp. 2d at 227.

[127] *See* VT. STAT. ANN. tit. 30, § 254(b)(2)(B) (2008) (authorizing the Public Service Board to conduct studies and collect information on a variety of topics including: "long-term environmental, economic, and public health issues").

[128] *Entergy Nuclear*, 838 F. Supp. 2d at 226–31.

[129] *Id.* at 228 (quoting McCreary Cnty., Ky. v. A.C.L.U. of Ky., 545 U.S. 844, 861 (2005)).

[130] *Id.*; *see also* Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 108 (2d Cir. 1999) ("We do not blindly accept the articulated purpose of an ordinance for preemption purposes.").

so as to deny a Certificate of Public Good,[131] which operates as a passive veto of approval to operate, and is otherwise preempted by the federal Atomic Energy Act.[132] Construing *PG&E*, the Vermont court noted:

> [W]hile "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns[,] . . ." []"[i]t would clearly be impermissible for California to attempt to do so [regulate the construction or operation of a nuclear power plant], for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation."[][133]

In reviewing the history of Act 160, title 30, section 231, subsection (c), which required a Certificate of Public Good from the legislature for continued operation, the court concluded that one of the fundamental objectives embedded in this section's design was "environmental and safety issues relating to the operation of a nuclear facility."[134] In passage of Act 160, one senator said that the issue of radiological safety for the next forty years was a concern.[135] The court observed that the Vermont Senate Finance Committee Chairman actively tried to pursue issues of "safety," but kept searching for another word to describe safety.[136]

In resolving Count I of the complaint,[137] the court engaged in a review of constitutional precedent to frame the scope of the preemption analysis applied to the Vermont statutes.[138] There are three circumstances in which federal law may preempt state law: (1) federal law could explicitly establish the lines for state preemption;[139] (2) in the absence of explicit preemption, state law "may be preempted if it regulates conduct in a field Congress

[131] *Entergy Nuclear*, 838 F. Supp. 2d at 229.

[132] *See id.* at 230–31.

[133] *Id.* at 221 (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205, 212 (1983)).

[134] *Id.* at 202; *see also* S. 124, 2005–2006 Vt. Gen. Assemb. (as passed by Senate, 2006), *available at* www.leg.state.vt.us/docs/2006/bills/senate/S-124.htm.

[135] *Entergy Nuclear*, 838 F. Supp. 2d at 205.

[136] *Id.* at 203.

[137] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 7–10.

[138] *Entergy Nuclear*, 838 F. Supp. 2d at 218.

[139] *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

intended the federal government to occupy exclusively, either because the federal regulatory scheme is 'so pervasive' that a court may infer Congress left 'no room for the States to supplement it;'"[140] or (3) state law could clearly conflict with the federal law.[141]

3. Storage of Nuclear Material

The state of Vermont argued that it could condition and control the storage of spent fuel rods from Vermont Yankee since the Atomic Energy Act ("AEA") does not expressly refer to spent fuel.[142] The Atomic Energy Act of 1954, as amended, vests the federal government, through the Nuclear Regulatory Commission with exclusive jurisdiction over radiological safety and public health.[143] And the court concluded "it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel."[144]

The court analyzed the "purpose and effect" of the challenged legislative enactment.[145] Plaintiffs asserted that, instead of using the "purpose and effect" standard to examine the reach of a state statute, the court could use a more lenient "but-for causation" standard, as employed in the Supreme Court decision in *PG&E*.[146] Given the legislative history, the court in *Entergy* evaluated Vermont's legislative enactments as a whole under the "purpose and effect" standard.[147] Since the Vermont Yankee facility sells its electricity in the interstate wholesale power market, unlike the exclusively retail sale situation in California confronting the court thirty

[140] *Entergy Nuclear*, 838 F. Supp. 2d at 218; *see also English*, 496 U.S. at 79.

[141] *Entergy Nuclear*, 838 F. Supp. 2d at 218 (citing *English*, 496 U.S. at 79).

[142] *See id.* at 220, 232–33.

[143] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207 (1983) (noting that individual states are responsible for regulating electrical utilities regarding need, reliability, cost, and other state-related concerns); *see* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984).

[144] Bullcreek v. Nuclear Regulatory Comm'n, 359 F.3d 536, 538 (D.C. Cir. 2004) (citing *Pac. Gas*, 461 U.S. at 207).

[145] *Entergy Nuclear*, 838 F. Supp. 2d at 226 (citing Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 108 (2d Cir. 1999)).

[146] *Id.* at 225. Under this standard, if the challenged enactment had been motivated by an impermissible purpose among other permissible purposes, the burden shifts to the defendants to show that the same decision on the statute would have persisted given that the impermissible purpose would not have been considered from the beginning. *Id.*

[147] *Id.* at 225–26.

years before in the *PG&E* case, the permissible range of state regulation over wholesale power plant activities is much narrower in Vermont now, rather than parallel with the commercial transactions involved at the time of *PG&E*.[148]

Act 74 states that Vermont Yankee must obtain a Certificate of Public Good from the Public Service Board before it erects any new storage facility for spent nuclear fuel,[149] and the storage of any spent nuclear fuel after March, 2012, requires prior approval from the Vermont General Assembly.[150] The court compared this section to Act 160's section 248(e)(2), whereunder the General Assembly had the power to take no action and effectively deny Vermont Yankee the right to continue to operate.[151] The effect of Act 74, like Act 160, was found to be enacted in violation of a federally preempted purpose.[152]

In analyzing the legislative purpose of Act 74, the court found clear evidence that the Vermont legislature exercised an intent to regulate radiological safety and public health issues in conditioning the storage of spent nuclear fuel rods.[153] The court was convinced by evidence of legislative statements that the legislature wanted to exercise affirmative oversight of dry cask spent nuclear fuel storage, with little confidence in the authority of the federal Nuclear Regulatory Commission over this issue: "References, almost too numerous to count, however, reveal legislators' radiological safety motivations and reflect their wish to empower the legislature to address their constituents' fear of radiological risk, and beliefs that the plant was too unsafe to operate, in deciding a petition for continued operation."[154] Such state action addressing radiological safety was preempted by the Atomic Energy Act.[155]

[148] *Id.* at 227.

[149] VT. STAT. ANN. tit. 10, § 6522(a) (2011).

[150] *Id.* § 6522(c)(4).

[151] *Entergy Nuclear*, 838 F. Supp. 2d at 231.

[152] *Id.* at 232–33.

[153] *Id.* at 231.

[154] *Id.* at 229, 232 ("The record reflects witnesses also urged 'the Legislature to maintain oversight over dry cask storage,' because there was 'very little faith in the Nuclear Regulatory Commission.'")

[155] *Entergy Nuclear*, 838 F. Supp. 2d at 232–33.

D. THE SCOPE AND CONTOUR OF RESIDUAL STATE AUTHORITY

1. Subject Matter

This is not to say that a state retains no jurisdictional authority over nuclear power facilities in fairly narrow areas not preempted by federal law and regulation. States may exercise their traditional police powers to impose reasonable zoning requirements and requirements to prevent nuisances – as long as such requirements do not have a "direct and substantial effect" on the radiological safety aspects of constructing or operating nuclear facilities.[156] Some states are delegated authority by the federal Environmental Protection Agency to administer federal laws on air quality,[157] water quality,[158] or similar environmental statutes. Pursuant to its police powers, a state can also impose reasonable zoning requirements[159] and prevent nuisances.[160]

However, the extent of this authority has been called into question recently in a Supreme Court decision.[161] The Court unanimously held that once it was clear that Congress had delegated the power to act in an area involving the environmental effects of electric power plants to the EPA, agency action and that authority preempted common law tort actions.[162] The executive branch, and not the judiciary, was held to have exclusive authority to regulate emissions of carbon into the air.[163] The claims not allowed were based on common law state or federal "unreasonable"

[156] English v. Gen Elec. Co., 496 U.S. 72, 85 (1990).

[157] FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 161–216.

[158] *Id.* at 217–58.

[159] *Id.* at 464–71.

[160] *See id.* at 23–27.

[161] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

[162] *Id.* at 2538–39. Originally, the district court had dismissed the cases based on non-justiciable political question. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005). The Second Circuit, in a panel with Justice Sotomayor, vacated this trial court decision, holding that federal common law nuisance was an appropriate avenue for claim. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 315 (2d Cir. 2009). After this decision, the *Massachusetts v. EPA* decision was issued, and the EPA issued its endangerment finding. *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The Supreme Court unanimously reversed the opinion of the panel on which Justice Sotomayor served. *Am. Elec.*, 131 S. Ct. at 2531.

[163] *Am. Elec.*, 131 S. Ct. at 2536.

nuisance, from the operation of power plants permitted pursuant to, and operating under, the Clean Air Act, and seeking a decreasing cap judicially imposed on GHG emissions.[164] Prior decisions on the interface of federal environmental regulation and state common law remedies involving the Clean Water Act[165] and nuclear licensing[166] had preserved state common law claims, although these are left somewhat in limbo by the 2011 decision of the Court.[167]

In certain circumstances involving nuclear power, the states may also regulate in the interest of power need, cost, and reliability.[168] The AEA contains two express savings provisions, one of which states that "[n]othing in this Act shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards."[169] The PG&E court cited this in noting: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[170] The Supreme Court upheld California's law imposing a moratorium on new nuclear power plant construction until the

[164] *Id.* at 2534–36. This opinion, upheld on a 4-4 vote, stated that government plaintiffs still had standing to bring the claim, consistent with *Massachusetts v. EPA*, at least as to federal common law nuisance claims. *Id.* at 2535. The Court declined to address the issue of state common law claims. *Id.* at 2540.

[165] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498 (1987).

[166] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 241 (1984).

[167] *See Am. Elec.*, 131 S. Ct. at 2540.

[168] Pac. Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

[169] 42 U.S.C. § 2021(k) (2006). The Atomic Energy Act includes two savings clauses. Section 271 of the Act provides that:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: *Provided*, That this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission.

Atomic Energy Act of 1954, amendment, Pub. L. No. 89-135, § 271, 75 Stat. 551, 551 (codified as amended at 42 U.S.C. § 2018 (2006)). Section 274(k) states that: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." Atomic Energy Act of 1954, amendment, Pub. L. No. 86-373, § 274, 73 Stat. 688, 691 (codified as amendment at 42 U.S.C. § 2021(k) (2006)).

[170] *Pac. Gas*, 461 U.S. at 206.

"unpredictably high costs" of long-term storage of spent reactor fuel had been resolved through federal agency action.[171] Congress acknowledged that the AEA had a broad preemptive sweep.[172]

The Court contrasted such economic factors with the radiological safety aspects of the construction and operation of nuclear power plants, the latter of which it found Congress preempted in enacting the Atomic Energy Act, and the former it found within the traditional responsibility retained by the states "in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns."[173] The Court noted: "Need for *new* power facilities, their economic feasibility, rates and services, are areas that have been characteristically governed by the States."[174]

The United States Supreme Court held that "[s]tates may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power."[175] Because the radiological health and safety aspects pertaining to nuclear power use and storage are preempted, this leaves to states primarily the proper land areas for, and environmental standards on location of, a new power generation facility.[176] Once a project has been permitted and constructed on a particular land area, these decisions have, for essentially all practical purposes, already been made.[177]

States also retain some authority in directing their regulated retail public utilities in what mix of power generation resources to procure for retail supply.[178] Referring to traditionally regulated retail utilities, FERC acknowledged that a "state may choose to require a utility to construct generation capacity of a preferred technology or to purchase power from the

[171] *Id.* at 198, 205, 214.

[172] *See* United States v. City of New York, 463 F. Supp. 604, 611 (S.D.N.Y. 1978) (quoting *Hearings on Atomic Energy on Federal-State Relationships in the Atomic Energy Field Before the Joint Committee*, 86th Cong. 307–08 (1959) (letter to the chairman of the Joint Committee)).

[173] *Pac. Gas*, 461 U.S. at 205; *see also* Solid Waste Agency of N. Cook Cnty. v. United States, 531 U.S. 159, 174 (2001) (holding that permitting federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the "States' traditional and primary power over land and water use").

[174] *Pac. Gas*, 461 U.S. at 205 (emphasis added).

[175] Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 277 (1977).

[176] *See Pac. Gas*, 461 U.S. at 205.

[177] *Id.*

[178] *See* S. Cal. Edison Co., 70 FERC ¶ 61,215, ¶ 61,676 (1995).

supplier of a particular type of resource."[179] Twenty-nine states currently control the type of generation resources deployed through renewable portfolio standards, which require retail utilities or other sellers of retail power in the state each year to obtain and sell at retail a certain specified percentage of renewable power.[180] Each of the states defines eligible renewable power resources somewhat differently and uses different rules on the trading and banking of these credits.[181] This retail requirement on mix of power resources procured is within state authority.[182] However, RPS regulates the retail mix of power and retail utilities' supply requirements; it does not create nor exercise state authority over operation or power sale by wholesale power entities within the state.[183]

Therefore, Vermont could direct its regulated retail utilities to procure renewable power, nuclear power, energy efficiency, or some combination of these to decrease power sector carbon emissions, or for that matter, any other power supply combination. And Vermont has done so.[184] Vermont has an RPS program and mandated renewable energy goals.[185] Within reasonable limits and implemented by state jurisdictional means, the particular mix of power to be purchased by regulated retail distribution utilities is within a state's regulatory jurisdiction.[186] This would regulate the decision of utilities as to what type of power to purchase, but not affect directly the decision of Vermont-sited wholesale generators as to their operation and sale of power in other interstate markets.

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[179] *Id.*

[180] Ferrey et al., *Fire and Ice*, *supra* note 22, at 146.

[181] *Id.* at 147–50.

[182] *Id.* at 202.

[183] *See id.*

[184] Vt. Dep't of Pub. Serv., *Comprehensive Energy Plan 2009*, A-205–09 (2009). This makes a series of recommendations for the future composition of power generation serving retail customers in Vermont: To expand Vermont's portfolio of local low-carbon resources (Strategy C), to pursue more in-state hydroelectric projects (Recommendation 8), wind project development (Recommendation 9), to continue to purchase Vermont-produced nuclear power beyond the 2012 period (Recommendation 11), and supporting the Regional Greenhouse Gas Initiative (RGGI) program to reduce carbon emitted by the production of power from power generators greater than 25 MW (Recommendation 17). *Id.*

[185] VT. STAT. ANN. tit. 30 §§ 8001, 8004 (2008 & Supp. 2012); 30-054 VT. CODE R. §§ 4.302–.319 (2012).

[186] *See* S. Cal. Edison Co., 70 FERC ¶ 61,215, ¶ 61,676 (1995).

2. Structural Changes in Power Since *PG&E* — Legal Implications

However, as discussed at length below,[187] state authority over operation is limited to matters of retail rates and sales, and not wholesale rates and terms. When the Supreme Court allowed certain limited state discretion on power economic issues three decades ago, it was construing 1976 amendments to a California statute, the Warren-Alquist Act.[188] This Act predated even the earliest California restructuring of the electric sector, ushered in two decades later.[189] At the time of the *PG&E* case, virtually all electric generating facilities were owned by vertically integrated utilities that both operated generating facilities and distributed the output as a monopoly from those facilities directly to their own retail customers.[190] Retail customers of each such state-regulated retail utility had to pay all of the costs of building and operating such generating facilities through the retail rates that the states regulated.[191] Traditional state regulation consequently ensured that there was a real need for each such facility before the cost of building it was incurred and that such facilities were operated reliably and in a cost-efficient manner.[192]

Restructuring and deregulation of the retail electric power sector, commencing at the state level in approximately 1997, dramatically changed the regulatory paradigm.[193] About 40% of the states restructured prior to the electric sector problems in California in 2000–2001, whereafter the other 60% of the states retained traditionally structured retail electric sectors.[194] In

[187] *See infra* Part IV.

[188] Pac. Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 194 (1983).

[189] *See* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 569–70; STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 299 (2000) [hereinafter FERREY, THE NEW RULES].

[190] *See* FERREY, THE NEW RULES, *supra* note 189, at xiii, 269.

[191] *See* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 556–57.

[192] *See id.* at 569–70.

[193] *See* FERREY, THE NEW RULES, *supra* note 189, at 149–50.

[194] *See* Steven Ferrey, *Sale of Electricity*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 217, 218–19 (Michael B. Gerrard ed., 2011) [hereinafter Ferrey, *Sale of Electricity*]. Vermont is the one state in New England that did not engage in electric sector restructuring or creating an RPS system. However, ten years later than the 1997–1998 restructuring in New England, Vermont has one of the cleanest portfolios of power and the lowest electricity rates in New England. Power comes from the large Vermont Yankee Nuclear Power Plant owned by Entergy and importation of power from Canada. *See* Vt. Dep't of Pub. Serv.,

the New England states, large scale generation today is generally not owned by the retail utilities that deliver power to retail customers, but instead was sold to, and now owned by, independent wholesale power producers.[195] These independent generators sell their power in wholesale markets to the distribution retail utilities and others that thereafter resell that power to their retail customers:[196]

> When combined with federal preemption law, one crucial result of these energy market regulatory reforms has been "a massive shift in regulatory jurisdiction from the states to FERC." . . . The upshot of these federal and state innovations in electricity regulation is that state regulators, despite their continued authority over rates charged directly to consumers, have much less actual authority over those rates than they did [earlier]. Local utilities now obtain power largely through wholesale contracts subject to FERC's exclusive regulation, rather than through self-generated and transmitted power. . . . Although state regulators formerly took an extremely active role so as to ensure the just and reasonable retail power rates, FERC has exclusive jurisdiction over the wholesale rates that now drive the electric power market and, as a practical matter, largely determine the rates ultimately charged to the public.[197]

In this newly deregulated environment in some states, the cost of building and operating generating facilities is no longer recovered directly

Vermont Comprehensive Energy Plan 2011, vol. 1, p. 2 (2011), *available at* http://www.vtenergyplan.vermont.gov.

[195] *See* Ferrey, *Sale of Electricity*, *supra* note 194, at 217–18. This spun generation assets, including nuclear generation, out into independent ownership not subject to state regulation. *See id.* The costs of these independent wholesale power entities are not recovered through state-regulated retail rates, but rather through wholesale rates subject to FERC's exclusive jurisdiction. *See id.* For information relevant to the area in which this facility operates, *see 2012 GIS Load Asset Listing*, ISO-NE.COM (February 27, 2012), http://www.iso-ne.com/stlmnts/gis/gis_asset_list_2012_eff01012012_v1.xls (last visited Feb. 22, 2013).

[196] *See* FERREY, THE NEW RULES, *supra* note 189, at 269–70.

[197] Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1066–67 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008).

through retail rates.[198] Instead, retail customers pay for the retail distribution utility's cost of buying wholesale power in a wholesale transaction, subject to FERC's exclusive jurisdiction over wholesale power transactions.[199] As a result, much of the traditional state responsibility for regulating need, cost, and reliability of power generating facilities has now shifted to FERC through its exclusive regulatory authority over the rates, terms, and conditions of wholesale sales,[200] and to the competitive power market in approximately one-third of the states.[201] The United States Supreme Court has repeatedly held that states are preempted by the Supremacy Clause of the United States Constitution[202] from directly or indirectly interfering with the price of those wholesale power purchases or from refusing to allow the retail distribution utilities to recover the cost of those purchases through their retail rates.[203]

Regarding decisions to construct a *new* nuclear power generation plant by a traditional vertically integrated electric utility in a traditionally structured state, where the plant's construction costs will be recovered directly through the rates charged by the utility to its monopoly retail consumers, the state may consider issues of cost and reliability in determining whether to permit such construction.[204] As to *existing* power plants, state authority is more limited.[205] The Warren-Alquist Act, construed in *PG&E*, did not in any way affect California's several already-operating nuclear plants, their operating licenses, or the terms or prices of their sale of power output.[206] Nor, did that case address nuclear generation plants like Vermont Yankee in the post-restructuring environment of wholesale sellers of power to state retail utilities.[207] And, in this new regulatory structure

[198] *See* Ferrey, *Sale of Electricity*, *supra* note 194, at 219–20.

[199] *Id.*

[200] 16 U.S.C. § 824a-3 (2006); *see also* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 569.

[201] *See* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 567.

[202] U.S. CONST. art. VI, cl. 2.

[203] *See infra* Part IV.

[204] Pac. Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

[205] *See id.* at 197–98.

[206] *See id.*

[207] *See generally id.* In the 1976–1990 period, no state had even thought about restructuring the generating assets of retail utilities. *See* FERREY, THE NEW RULES, *supra* note 189, at xiii, 267–70. The first restructuring was not accomplished until almost two decades later in 1997. *See* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 569. Therefore, this decision construed state

where states have elected to restructure state-regulated retail power sales into federally-regulated wholesale power sales, the new structure defines the regulatory and constitutional "bright line" between state and federal jurisdiction.[208]

State regulation is not allowed to stand as an obstacle to Congressional objectives.[209] A state cannot create a conflict or obstacle to federal licensing of nuclear power generation facilities that is within the exclusive federal authority of the NRC.[210] State law is not allowed to overrule or supplant federal determinations by adding requirements not consistent with those in federal law.[211]

IV. THE SPREMACY CLAUSE, THE FILED RATE DOCTRINE, AND THE PRICE OF WHOLESALE POWER IN THE U.S.

Count II of the Entergy Vermont Yankee complaint[212] claimed that Vermont cannot regulate Vermont Yankee's power transactions because the Federal Power Act preempts such state authority.[213]

A. FEDERAL PREEMPTION OF STATE WHOLESALE ENERGY PRICING REGULATION

I start by reviewing the precedent, primarily of the United States Supreme Court, delineating the respective legal jurisdiction of federal and state governments to regulate electric power generators such as Vermont Yankee. Preemption operates in two modes, not only regarding implied preemption of state nuclear power regulation,[214] but also expressly

power over retail utility ownership and siting of new nuclear power facilities, which was the only model in place at the time. *See Pac. Gas*, 461 U.S. at 207. It did not construe operating nuclear power facilities or power plants owned by entities not operating as retail utilities. *See id.* at 197–98.

[208] FERC v. Mississippi, 456 U.S. 742, 760–61 (1982).

[209] *Pac. Gas*, 461 U.S. at 204, 212; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[210] 42 U.S.C. § 2019 (2006); N. States Power Co. v. Minnesota, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035.

[211] Granite Rock Co. v. Cal. Coastal Comm'n, 768 F.2d 1077, 1082 (9th Cir. 1985); Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 969 (2012) (deciding unanimously that federal law prohibits states from enforcing requirements regarding "premises, facilities and operations" that are "in addition to or different from" those in federal law).

[212] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 29.

[213] U.S. CONST. art. VI, cl. 2.

[214] *See infra* Part III.

distinguishing wholesale from retail regulation, and the extremely precise respective federal and state authority thereunder.[215] The Supremacy Clause of the United States Constitution establishes preemption of federal law: "[T]he laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[216]

There is an express legal distinction demarcating precisely what state government, as opposed to federal government, legally can regulate regarding power transmission and sale of the power output of an electric generating facility. This creates a well-established legal dividing line in United States law between federal and state government authority to regulate transactions of the private electric power industry. The United States Supreme Court held that Congress meant to draw a "bright line," easily ascertained and not requiring case-by-case analysis, between state and federal jurisdiction.[217] It does not make any difference whether a state acts through its legislature or its energy regulatory agency:[218] A state must stay on the demarcated "state" side of this legal "bright line."

First, by virtue of the Commerce Clause of the United States Constitution, the federal government has exclusive authority to regulate interstate commerce involving sales, and interstate transmission of, electric power,[219] which was endorsed by the Vermont trial court.[220] Federal jurisdiction arises because electricity moves almost at the speed of light in interstate commerce across an interconnected grid in the forty-eight continental states,[221] according to Kirchhoff's Law.[222] In 1982, the United States Supreme Court held that "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in

[215] *See infra* Part III.

[216] U.S. CONST. art. VI, cl. 2.

[217] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

[218] Pac. Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 215 (1983).

[219] Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 86, 89 (1927).

[220] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233 (D. Vt. 2012).

[221] *See* STEVEN FERREY, UNLOCKING THE GLOBAL WARMING TOOLBOX: KEY CHOICES FOR CARBON RESTRICTION AND SEQUESTRATION 149 (2010).

[222] Steven Ferrey, *Efficiency in the Regulatory Crucible: Navigating 21st Century 'Smart' Technology and Power*, 3 GEO. WASH. J. ENERGY & ENVTL. L. 1, 5 n.87 (2012); *see* Jon Pumplin, *Statement of Kirchhoff's Laws*, MICH. ST. UNIV., *available at* http://www.pa.msu.edu/courses/2000spring/phy232/lectures/kirchhoff/kirchhoff.html.

virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect."[223] The courts have determined that electrons in interstate commerce cannot be traced.[224]

The Federal Energy Regulatory Commission exercises that exclusive federal authority pursuant to the Federal Power Act ("FPA").[225] This statute expressly demarcates the extent of federal regulation of this commerce, and as one of the first federal laws regarding power, has been in place for almost ninety of the 115 years during which electric power has been distributed over any significant distances, since first being harnessed by Edison approximately 135 years ago.[226] Sections 205 and 206 of the FPA empower FERC to regulate rates and related terms for all wholesale sales of electricity and any transmission of electricity in interstate commerce.[227] The Act creates this "bright line" [228] between state and federal jurisdiction with wholesale power sales falling on the affirmative *federal* side of the line.[229]

[223] FERC v. Mississippi, 456 U.S. 742, 757 (1982).

[224] *See, e.g.*, New York v. FERC, 535 U.S. 1, 7–8 & n.5 (2002); Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 460 (1972).

[225] 16 U.S.C. §§ 824–824v (2006).

[226] FERREY, INDEPENDENT POWER, *supra* note 13, at 2–6.1.

[227] 16 U.S.C. §§ 824d–824e.

[228] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

[229] Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008) (criticizing the reasoning of the Ninth Circuit's decision, but nonetheless upholding that FERC has exclusive authority, and responsibility, to review long-term power crises, wholesale market manipulation by a party to the power sale contract that would negate existing contract protections, and wholesale rates). The Supreme Court criticized the reasoning of the Ninth Circuit instituting a rate "zone of reasonableness" on FERC determinations, which would be "a reinstitution of cost-based rather than contract-based regulation." *Morgan Stanley*, 554 U.S. at 550. The Court did not want to impose this cost calculation burden on FERC regarding every market-based contract. *Id.* at 551. The 5-2 decision by Justice Scalia upheld the tougher "public interest" standard to only abrogate contracts in those "extraordinary circumstances where the public will be severely harmed," as articulated by the *Mobile-Sierra* doctrine, with a new affirmative twist regarding market manipulation, FERC was told to "amplify or clarify its findings." *Id.* Market turmoil or chaos, even rendering a power market dysfunctional, alone are not sufficient to negate existing wholesale power contracts, which are designed, in part, to hedge against certain market risks. *Id.* at 547. Of the four wholesale contracts at issue in this litigation, one with Dynegy had already expired by its terms at the time of this Supreme Court 2008 decision, and three with Shell, PPM and Sempra had not yet terminated. For a discussion of the California and Western energy crisis that spawned this litigation, *see generally* Steven Ferrey, *Soft Paths, Hard Choices: Environmental Lessons in the Aftermath of California's Electric Deregulation Debacle*, 23 VA.

The rates, terms, and provisions of any wholesale sale or transmission of electricity in interstate commerce are exclusively within federal jurisdiction and control, not state authority, under the FPA, according to United States Supreme Court precedent.[230] "FERC has exclusive authority to set and to determine the reasonableness of wholesale rates."[231] States, however, retain authority over retail electric sales because "FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market."[232]

What is the wholesale sale of power, subject to exclusive federal jurisdiction? The FPA defines "sale at wholesale" as any sale to any person for resale.[233] Wholesale sales can occur within state boundaries, pursuant to the FPA when an in-state generator sells power to another entity in the same state, for ultimate resale in a retail transaction. The Supreme Court addressed that situation and found that "Congress meant to draw a bright line easily ascertained between state and federal jurisdiction" by granting FERC "plenary" federal jurisdiction over wholesale sales, making unnecessary a case-by-case analysis of the impact of state regulation on national interests.[234] If a utility or independent power producer is subject to FERC jurisdiction and regulation over its wholesale power sales, state regulation of the same operational aspects is preempted as a matter of federal law.[235]

Congress, in the FPA, "adopt[ed] the test developed in the *Attleboro* line [of cases] which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'"[236] As the Court explained, Congress enacted the FPA based on testimony that *Attleboro* "has been accepted by everyone as establishing . . . the fact that the State cannot regulate wholesale

ENVTL. L.J. 251 (2004) (discussing the California and Western energy crisis that spawned this litigation).

[230] New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

[231] Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988); *accord Snohomish Cnty*, 471 F.3d at 1066.

[232] New York. v. FERC, 535 U.S.1, 20 (2002) (italics omitted).

[233] 16 U.S.C. § 824(d) (2006).

[234] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

[235] *E.g.*, Ark. Power & Light Co. v. Fed. Power Comm'n, 368 F.2d 376, 284 (8th Cir. 1966); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Appeal of New England Power Co., 424 A.2d 807, 813–14 (N.H. 1980).

[236] *S. Cal. Edison Co.*, 376 U.S. at 214 (citing Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co., 314 U.S. 498, 504 (1942)).

transactions, although it can regulate retail service and rate."[237] Therefore, when a generator of power does not directly sell power to ultimate consumers of that power, but instead sells power to a distribution utility in the same state for its subsequent resale of the power to ultimate consumers, the original sale of power from the owner of the power generation unit is a wholesale power sale subject to exclusive federal jurisdiction and outside state authority to regulate, whether or not any meaningful quantities of electricity from out-of-state are part of the sale.[238] This describes the power sale activities of the Vermont Yankee facility since its acquisition by Entergy in 2002.[239]

The Supreme Court in 2008 reiterated that the FPA creates a "'bright line' between state and federal jurisdiction with wholesale power . . . falling on the federal side of the line."[240] Pursuant to the FPA and the federalist system established by the United States Constitution, the federal government, with FERC as its implementing executive agency, has even broader federal authority on the movement of power.[241] The transmission of electricity in interstate commerce is defined as electricity transmitted from one state and consumed at any point outside the state.[242] FERC's jurisdiction is established when a generator's power is delivered to a transmission system that commingles power with other power moving over transmission facilities interconnected to other states, even though the generator and its customer are both within one state.[243] FERC has jurisdiction under the FPA over "electricity transmissions . . . without regard to whether the transmissions are sold to a reseller or directly to a consumer."[244] These precedents describe the power transmission activities of the Vermont Yankee facility since its acquisition by Entergy in 2002.[245]

[237] *Id.* at 213 n.8.

[238] *Id.* at 209 n.5.

[239] *Id.*

[240] Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008) (citing the separate Supreme Court opinions in *Nantahala*, 476 U.S. 953; *S. Cal. Edison Co.*, 376 U.S. 205; and Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988)).

[241] *See id.*

[242] Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61, 71 n.9 (quoting Federal Power Act of 1935, § 201, 49 Stat. 847 (1935)).

[243] Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 461 (1972).

[244] New York. v. FERC, 535 U.S. 1, 20 (2002).

[245] *See id.*

B. VERMONT AND 'FILED RATES'

Applying this to the region of the United States involved in the present dispute: In New England, generators like Vermont Yankee deliver their power to the regional transmission grid operated by ISO-New England, Inc. (ISO-NE) which commingles the power from the various suppliers and transmits it across state lines to all of the states in New England and to interconnections and interties beyond.[246] The Vermont Department of Public Service recognized that the Vermont Yankee plant commingles its power with other power on the ISO-NE interstate system,[247] and that:

> [T]here is a competitive wholesale market for electricity with dispatch determined by the bid-in prices . . . . Vermont does not operate as an island, but is connected to a regional power pool that is operated and managed by a regional entity, currently the Independent System Operator for New England (ISO-NE).[248]

Because of that interstate transmission of power, Vermont Yankee's power transmission is subject to FERC's exclusive federal jurisdiction under the FPA. When a transaction is subject to exclusive federal FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the U.S. Constitution's Supremacy Clause, according to a long-standing and consistent line of rulings by the U.S. Supreme Court.[249]

The courts enforce this exclusive federal authority through the Filed Rate Doctrine.[250] The Filed Rate Doctrine establishes that state legislatures or regulatory agencies may not second-guess or overrule on any grounds a

[246] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233 (D. Vt. 2012) ("ISO-New England is a non-profit independent system operator, regulated by FERC, that administers New England's wholesale electricity markets. *ISO-New England, ISO-New England—An Overview of Markets, Planning and Vermont Issues* at 4, 6 (Jan. 21, 2010)."). *See also Overview*, ISO–NEW ENGLAND, http://www.iso-ne.com/aboutiso/co_profile/overview/index.html (last visited Feb. 22, 2013). ISO-NE develops and oversees "administration of New England's wholesale electricity marketplace, through which bulk electric power has been bought, sold and traded since 1999." *Id.*

[247] *Comprehensive Energy Plan 2009*, *supra* note 184, at I-10, III-65 (2009).

[248] Vt. Dep't of Pub. Serv., *Comprehensive Electric Plan 2005*, at i–ii (2005).

[249] Montana-Dakota Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951); *see* Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003); Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963 (1986); New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

[250] *Entergy La., Inc.*, 539 U.S. at 47; *see* 16 U.S.C. § 824e (2006).

wholesale rate determination made by FERC pursuant to federal jurisdiction, or substitute their own determination of what would be an appropriate wholesale rate.[251] The Filed Rate Doctrine thereby preempts any attempt to require a wholesale power sale at a rate or on terms different than those authorized by FERC.[252] The U.S. Supreme Court determined that Congress, in enacting the FPA, intended to vest exclusive jurisdiction in FERC to regulate rates and related terms for interstate wholesale electricity sales.[253] The Supreme Court in 1986,[254] and again in 1988,[255] 2003,[256] and 2008,[257] reaffirmed and enforced the Filed Rate Doctrine when states attempted to assert jurisdiction inconsistently with FERC's exclusive authority. The 1986 Supreme Court decision concluded that the Filed Rate Doctrine limitations also apply "to decisions of state courts."[258]

The Filed Rate Doctrine is an absolute prohibition of state regulation over wholesale power rates, contracts and terms that are reserved exclusively to federal authority: "[T]he filed rate doctrine is not limited to 'rates' *per se*: 'our inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.'"[259] As the Court later explained in a related context, "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached."[260] Within this federalist constitutional scheme, the states are allowed no latitude under the Filed Rate Doctrine to interfere with the rates and terms under which a power generator sells power at wholesale.[261] The Ninth Circuit Court of Appeals has held that the Filed Rate Doctrine precludes any state interference with rates established under federal law:

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[251] *Nantahala*, 476 U.S. at 970.

[252] *See Montana-Dakota Co.*, 341 U.S. at 251.

[253] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 216 (1964).

[254] *Nantahala*, 476 U.S. at 963.

[255] Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 372 (1988).

[256] Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 49–50 (2003).

[257] Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 531 (2008).

[258] *Nantahala*, 476 U.S. at 963.

[259] *Id.* at 966–67 (quoting N. Natural Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 90–91 (1963)).

[260] Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998).

[261] Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc., 379 F.3d 641, 650–51 (9th Cir. 2004) (citations omitted) (quoting Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929–30 (9th Cir. 2002)) (internal quotation marks omitted).

> At its most basic, the filed rate doctrine provides that state law . . . may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question . . . [T]he filed rate doctrine has prohibited not just a state court . . . from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC.[262]

The Supreme Court has been equally clear, reiterating again in the past decade, that the Filed Rate Doctrine precludes all state interference, whether discretionary or mandatory, with FERC-regulated wholesale power transactions.[263] For example:

> In *Nantahala* and *MP&L*, this Court applied the doctrine to hold that FERC-mandated cost allocations could not be second-guessed by state regulators . . . [where] the state order "trapped" a portion of the costs incurred by Nantahala in procuring its power.
>
> . . . .
>
> The [agreement at issue in *Entergy Louisiana*] differs from the tariffs in *MP&L* and *Nantahala* because it leaves the classification of . . . units to the discretion of the [utility's] operating committee, whereas in *Nantahala* and *MP&L* the cost allocations were specific mandates. . . . We see no reason to create an exception . . . for tariffs of this type . . . .[264]

The Filed Rate Doctrine does not leave the states without recourse to protect themselves in such situations. States are free to intervene as parties in FERC proceedings where wholesale rates are being considered.[265] FERC has a statutory duty to ensure that the wholesale rates that it authorizes are

[262] *Id.*

[263] Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 49–50 (2003); Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988); *Nantahala*, 476 U.S. at 964.

[264] *Entergy La., Inc.*, 539 U.S. at 40, 49–50.

[265] *See Nantahala*, 476 U.S. at 957.

just and reasonable,[266] and to continually monitor and police wholesale power markets against impermissible actions or mistakes.[267] The Filed Rate Doctrine therefore expansively preempts state interference with the terms, conditions, prices, or implementation of any federally regulated wholesale transaction, specifically including any aspects of wholesale power sales.

C. REQUIRED PRICE CONCESSIONS FOR THE CPG

Count II in the Vermont case claimed that the Federal Power Act preempts Vermont from imposing the condition for Vermont Yankee to enter into a power purchase agreement with Vermont retail utilities at below-market, unfavorable rates in order to gain state permission to continue to operate Vermont Yankee.[268] Several Vermont legislators sought to condition the future operation of Vermont Yankee on a prerequisite concession to a long-term, below-market, wholesale power-sale rate and agreement that would benefit in-state residents, rather than allow the facility to sell power generally in the multi-state ISO-New England interstate wholesale power market.[269] The Vermont Department of Public Service, in 2009 argued against granting a license extension to Vermont Yankee without a discounted long-term sale of wholesale power to state utilities.[270]

Plaintiffs asserted that no state has shut down an operating wholesale nuclear plant for want of a favorable, below-market power purchase agreement.[271] The court recognized that FERC has exclusive jurisdiction over the regulation of the terms of wholesale electricity, interstate transmission, and rates[272] and agreed with Entergy's assertions of federal preemption of the Vermont statutes.[273] The court articulated the Supremacy Clause application:

> Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the

[266] Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1081 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008).

[267] *Id.* at 1069, 1080.

[268] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 29–31.

[269] *See infra* notes 276–280.

[270] WATTS, *supra* note 24, at 72–73.

[271] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233 (D. Vt. 2012).

[272] *Id.* (quoting New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)).

[273] *Id.*

> regulation of agreements that affect wholesale rates. 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.[274]

Vermont legislators required Vermont Yankee to provide discounts from the future market-based wholesale price of power to in-state utilities as a requirement for granting a CPG for future operation of Vermont Yankee as an existing wholesale power generation facility.[275] This is evident in letters sent from legislative leaders to the Company, prior to the filing of the complaint.[276] Members of the state legislature publicly stated that they would condition any approval for continued operation of this wholesale electric power generation plant on selling wholesale power to Vermont utilities at below-market prices established under market-based rates by ISO-NE in the New England interstate wholesale market.[277]

Witnesses for the state during hearings on this matter before the Vermont Public Service Board reiterated the intent of the State to extract concessions in wholesale power sales from this particular power generation facility as a condition of CPG approval.[278] These witnesses also

[274] *Id.* (quoting Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 374 (1988)).

[275] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 30.

[276] Letter from Peter Shumlin, Vt. Senate President Pro Tem, and Shapleigh Smith, Speaker of the Vt. House, to Jay Thayer, Vice President of Entergy Nuclear Vt. Yankee, LLC (Feb. 9, 2009) [hereinafter Shumlin & Smith Letter], *in* Joint Appendix—Vol. II of VII, Plaintiffs' Trial Exhibit 367, at A-572 to A-573, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, Case No. 12-791 (2d Cir., argued Jan. 14, 2013). This February 9, 2009, letter from leaders of the Vermont General Assembly was addressed to Jay Thayer, an executive with the owner of Vermont Yankee. *Id.* It states that the price of a power purchase agreement for the sale of future wholesale power from the Vermont Yankee facility for the period post-dating the current 2002 CPG, is critical for the legislature to assess whether to approve continued operations of Vermont Yankee facility beyond March 21, 2012. *Id.* The letter states that the terms of such a power purchase agreement are essential for the legislature to make a judgment on allowing the continued operation of the plant. *Id.*

[277] A Vermont newspaper reported that the Chair of the Vermont House Committee on Natural Resources and Energy had stated that Vermont Yankee's refusal to provide discounts to Vermont utilities on wholesale power sales after 2012 would be a "deal-breaker." Stephanie Kraft, *Vermont, Entergy Square Off*, VALLEY ADVOCATE, Jan. 22, 2009, *available at* http://www.valleyadvocate.com/article_print.cfm?aid=9080.

[278] There will be "no obligation, post-2012, to provide power at costs below market price. . . . Because of the permitting requirements to obtain a Certificate of Public Good . . ., Vermont

acknowledged that the extraction would be made against a wholesale, not retail, seller of power in interstate commerce.[279] Other witnesses corroborated that this was the view of the Vermont Department of Public Service, not just the view of particular witnesses.[280]

To the degree that any state legislative or regulatory power is exercised in an inconsistent manner by requiring Vermont Yankee involuntarily to make wholesale sales at discounted prices compared to FERC-established rates, it crosses the line into prohibited and preempted state action.[281] A significant discount below wholesale market price would be grounds to find the facility "convenient and necessary" for continued operation under a CPG, according to several Vermont legislators, who denied CPG approval

utilities retain significant leverage to negotiate favorable contract terms." Prefiled Testimony of Scott M. Albert at 9–10, Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Before the Vermont Public Service Board (Nov.14, 2008) (Docket No. 7440), *available at* http://psb.vermont.gov/sites/psb/files/docket/7440VT_Yankee_Relicensing/DPSact160/Albert_testimony_Final.pdf.

Mr. Jacob Thomas in Testimony estimates that these "favorable contract terms" may be worth between $1.5 billion and $5.1 billion. Direct Testimony of Jacob M. Thomas at 4, Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Before the Vermont Public Service Board (Nov. 14, 2008) (Docket No. 7440), *available at* http://psb.vermont.gov/sites/psb/files/docket/7440VT_Yankee_Relicensing/DPSact160/Thomas_Testimony_Final.pdf.

The pre-filed testimony of David Lamont, Director of Regulated Utility Planning for the Vermont Department of Public Service, states that "a favorably-priced Purchase Power Agreement" is necessary to assess benefits to Vermont. Prefiled Direct Testimony of David Lamont at 8–10, Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Before the Vermont Public Service Board (Feb. 11, 2009) (Docket No. 7440), *available at* http://psb.vermont.gov/sites/psb/files/docket/7440VT_Yankee_Relicensing/Supplemental/DPS_Lamont_Direct_Final.pdf. He testified that "the lack of a [future] PPA which promises to deliver power to Vermont ratepayers under favorable terms relative to alternatives is such a major shortcoming" regarding the determination of "the general good of the state." *Id.* at 21. Mr. Lamont testifies that a favorable below-market PPA is necessary or otherwise "continued operation of the plant fails to promote the general good." *Id.* at 23.

[279] Prefiled Direct Testimony of David Lamont, *supra* note 278, at 4, 13. Mr. Lamont, in his testimony, acknowledges that Vermont Yankee is a merchant plant selling "its output into the New England power market and into the New England power grid." *Id.* Those sales are all wholesale transactions. *Id.*

[280] Direct Testimony of Uldis Vanags at 7, Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Before the Vermont Public Service Board (Feb. 11, 2009) (Docket No. 7440), *available at* http://psb.vermont.gov/sites/psb/files/docket/7440VT_Yankee_Relicensing/Supplemental/DPS_Vanags_Direct_Final.pdf.

[281] *See supra* Part IV.A.

when this discount was not forthcoming from Entergy.[282] In some ways, this presents a case of first impression because no other state has attempted to do what Vermont did. The United States Supreme Court held that state regulation is not allowed to conflict with federal regulation by layering additional state requirements as obstacles where the federal government has regulatory jurisdiction.[283] Federal courts hold that a state cannot, through legislative or regulatory action, change or regulate the price for transactions of wholesale power sales to regulated utilities.[284]

This longstanding federal precedent was reaffirmed and clarified in a FERC declaratory order in 2010 when California argued that its environmental purposes should make it exempt from preemption in setting non-market-conforming wholesale rates.[285] The affected utilities and others countered that federal law does not allow state regulation of wholesale sales to achieve state environmental goals, that federal preemption cannot be avoided based on an environmental purpose of the preempted state regulation, and that states may not under the guise of environmental regulation adopt an economic regulation that requires purchases of electricity at a wholesale price outside the framework of the Federal Power Act.[286] FERC held that wholesale generators can receive no more (or impliedly, less) than system-wide wholesale prices (avoided cost) for power sales.[287]

Vermont Yankee filed for and received authorization from FERC to sell its wholesale power at market-based rates, initially effective February 17, 2002 and subsequently renewed.[288] In its original 2002 order granting a

[282] *See supra* notes 276–281.

[283] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983); *see* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[284] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964); Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 859 (9th Cir. 1994); S. Cal. Edison Co., 70 FERC ¶ 61,215, ¶¶ 61,676–,677 (Feb. 23, 1995).

[285] Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047, ¶¶ 61,337–61,339 (July 15, 2010) (order), *clarified on rehearing by* 133 FERC ¶ 61.059 (Oct. 21, 2010).

[286] FERC rejected all of California's arguments regarding generic environmental rationales for wholesale rates in excess of limits under federal law or set by FERC. *Id.*

[287] *See* Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, ¶ 61,265, (Oct. 21, 2010) (clarifying order), *available at* 2010 WL 4144227.

[288] *See* Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 12. This authorization has remained in effect to date. *See also* Letter from Michael C. Laughlin, FERC Dir. of Div. of Tariffs and Rates – Central, to William R. Hollaway, Attorney for Entergy Nuclear Vt. Yankee, LLC (Feb. 5, 2002), *in* Joint Appendix—Volume III of VII, Pls.' Trial Ex. 379, at A-616

Certificate of Public Good ("CPG") and approving transfer of ownership of the facility to Entergy, the Public Service Board stated that the state had no regulatory jurisdiction over wholesale power sales from the facility,[289] although it could still review prudency of the decision of regulated Vermont retail utilities to purchase power from a particular wholesale source.[290] That authority can only be applied, however, to the regulated Vermont retail utilities, not to Vermont Yankee as an independent wholesale seller of power.

There is no legal ability for a state to force future discounted prices for wholesale power by requiring Vermont Yankee to sell power to the Vermont retail utilities at prices below the market price established for wholesale power transactions by ISO-NE's FERC-approved tariff.[291] When applied to electric power issues, the Supremacy Clause of the Constitution[292] is embodied in the Filed Rate Doctrine,[293] which establishes an absolute line the states may not cross to regulate electric power.[294] The court held that the Federal Power Act invests the Federal Energy Regulatory Commission with "'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'"[295] A state cannot compel a wholesale generator authorized by FERC to sell at market-based rates to sell at any rate other than the market rate: "[States] had traditional authority to determine 'need,' 'economic

to A-618, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, Case No. 12-791-CV (2d Cir. argued Jan. 14, 2013); Entergy Nuclear Generation Co., 116 FERC ¶ 61,101, ¶ 61,527 (July 31, 2006); Letter from Steve P. Rodgers, Dir. of the Div. of Tariffs and Mkt. Dev. – West, to Andrea Weinstein, Assistant Gen. Counsel of Entergy Servs., Inc. (Jan. 7, 2009), *in* Joint Appendix—Vol. III of VII, *supra*, at A-608 to A-611.

[289] Vt. Pub. Serv. Bd., *Certificate of Public Good Issued Pursuant to 30 V.S.A. § 231*, Docket No. 6545 (June 13, 2002) at 2 [hereinafter *Certificate of Public Good*] (granting a Certificate of Public Good and approving transfer of ownership of the facility), *available at* http://www.state.vt.us/psb/orders/2002/files/6545cpg.pdf.

[290] *Id.* at 100.

[291] Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 50 (2003); Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964 (1986).

[292] U.S. CONST. art. VI, cl. 2.

[293] *See supra* text accompanying notes 250–267.

[294] *Entergy La., Inc.*, 539 U.S. at 49–50; *Miss. Power & Light*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 964.

[295] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233 (D. Vt. 2012) (quoting New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)); *see also* 16 U.S.C. § 824(b)(1) (2006).

feasibility,' and 'rates and services,' . . . [but] traditional authority over the economic aspects of generation was subject to an exception, where FERC had 'broad authority, ' 'over the need for and pricing of electrical power transmitted in interstate commerce.'"[296]

D. THE MoU: A CREATURE OF ITS OWN LIMITATIONS

Even without reaching these constitutional legal issues, there is a factual issue presented as to exactly what state authority the MoU signed by the parties in 2002 obligated Entergy to follow.[297] The critical provision of the Memorandum of Understanding, executed among various parties in 2002 and referenced in the 2002 order of the Public Service Board approving the Vermont Yankee sale, provides that "(a) . . .the Board has jurisdiction *under current law* to grant or deny approval of operation . . . beyond March 21, 2012" for the Vermont Yankee facility.[298] This important provision commits the purchaser of the nuclear asset to submit to the Public Service Board exercising jurisdiction to grant or deny the CPG for continued operation.[299] The Public Service Board is a quasi-judicial authority, operating as a board independently of the legislative and executive branches, which grants petitions based on the application of rules of law and precedent, appealable to the courts if decisions are not executed rationally based on rules of process.[300] Legal questions follow therefrom:

- Are the commitments of parties in the MoU, as a contractual agreement, limited to its precise terms?

- Can the State base granting a CPG on agreement by the applicant, Entergy, to state-demanded discount rates for the sale of wholesale power?

- Can the State base its granting of a CPG on isolating geographically cheaper wholesale power for sale only inside the state of its origin?

[296] *Entergy Nuclear*, 838 F. Supp. 2d at 221–22 (citations omitted) (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205–06 (1983)).

[297] *See id.* at 240.

[298] *Memorandum of Understanding*, *supra* note 34, at 6, ¶ 12.

[299] VT. STAT. ANN. tit. 30, § 248(e)(2) (Supp. 2012).

[300] *Entergy Nuclear*, 838 F. Supp. 2d at 192.

- As part of this process, did the parties concede that federal law or state law ultimately governs the power sale and activities of this particular Vermont Yankee facility?

- Does federal law preempt state regulatory authority?

1. Timing Matters

Entergy, in fact, submitted such a required application for a post-2012 CPG to the Public Service Board.[301] The PSB was not able to act on this Entergy application due to the amendment to its statute by Act 160 in 2006,[302] and the subsequent action of the state legislature, pursuant to this new Act 160, to deny its necessary prerequisite approval of the legislature to not approve permission for the Board to consider an extension of the CPG for Entergy.[303] The MoU executed in 2002 by all parties did not contemplate or agree to any such then-non-current additional layer of legislative approval for a CPG.[304] This was a subsequent change of then-current law to which changes the parties did not agree in the MoU and was not incorporated by reference in the grant of the 2002 CPG to Entergy.[305]

Timing matters. By its own recitations and terms, the 2002 Memorandum of Understanding between the State of Vermont and Entergy recites that it *post*-dates the Purchase and Sale Agreement under which Entergy agreed to buy the Vermont Yankee facility from the former Vermont regulated utility owners, which earlier Agreement presumably incorporated all the terms to which the State, the selling utilities, and Entergy as purchaser, as signatory parties, had voluntarily committed.[306] The MoU also *post*-dates the start of the Vermont regulatory proceeding convened to approve the purchase of the facility, and it expressly states, that it post-dates the Vermont Department of Public Service's filing of testimony raising concerns about the purchase.[307]

The Memorandum of Understanding is specifically referenced in the eventual approval order issued by the Public Service Board in 2002, thus

[301] *See generally* Petition, Docket No. 7440, *supra* note 53.

[302] VT. STAT. ANN. tit. 30, § 248(e)(2).

[303] Shumlin & Smith Letter, *supra* note 276, at A-572.

[304] *See Memorandum of Understanding*, *supra* note 34, at 6, ¶ 12.

[305] *See generally id.*

[306] *See id.* at 1.

[307] *Id.* at 2.

pre-dating and being incorporated by reference in the final approval.[308] These various documents evidence a chronology where the sellers and buyer of Vermont Yankee agreed to the terms of sale, the State began its approval process sanctioning the sale, and the MoU was created as a prerequisite to final approval of the sale by the state Public Service Board.[309] The final state order approving the sale of the plant to Entergy included a requirement that any future 2012-effective approvals would only be made by the same Public Service Board approving the CPG in 2002. [310]

2. Agreement on Applicable Law

The parties seemed to be on the same page in 2002 as to what law ultimately applied. In the 2002 approval and CPG issued by the Board for this Entergy transaction as new owner of the Vermont Yankee facility, Vermont Section 248 of Title 30 must be implemented consistently with federal agencies' exercise of jurisdiction pursuant to the Federal Power Act, the Atomic Energy Act, and the U.S. Constitution.[311] The Supremacy Clause of the Constitution[312] requires that the state yield to federal determination of all wholesale prices.[313] The 2002 CPG issued by the Board repeatedly affirms the role of federal, rather than state, jurisdiction over Vermont Yankee's operations and power sale rates and terms:

- Vermont Yankee may file for federal "Exempt Wholesale Generator status."[314]

- Vermont Yankee has power sale "rates that are subject to FERC's jurisdiction under Section 203 of the Federal Power Act."[315]

[308] Vt. Pub. Serv. Bd., *Order of Final Approval*, Docket No. 6545 (June 13, 2002), at 16 [hereinafter *Order of Final Approval*] (stating the Public Service Board's finding and conclusions relating to its approval of the Vermont Yankee sale), *available at* www.state.vt.us/psb/orders/2002/files/6545fnl.pdf; VT. STAT. ANN. tit. 30, § 248(e)(2) (Supp. 2012).

[309] *Memorandum of Understanding*, *supra* note 34; *Certificate of Public Good*, *supra* note 289, at 2.

[310] *Order of Final Approval*, *supra* note 308, at 9, 69–71.

[311] *Id.*

[312] U.S. CONST. art. VI, cl. 2; *see supra* Part III.

[313] New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

[314] *Certificate of Public Good*, *supra* note 289, at 2, ¶ 8.

[315] *Id.* at 2, ¶ 7.

- Vermont Yankee will "comply fully with Vermont law to the extent that its requirements are not inconsistent with specific requirements imposed by FERC, NRC, the Securities and Exchange Commission and any other federal agencies exercising authority over [it]."[316]

- The Vermont Public Service Board acknowledged that there was no state authority over Vermont Yankee's wholesale power sales after FERC had authorized Vermont Yankee to sell at market-based rates.[317]

- The Vermont Yankee facility, to the extent that it is still operating past March 21, 2012, has the right to sell energy and capacity to "any third party."[318]

The Vermont Department of Public Service (DPS) Comprehensive Energy Plan 2009 notes that the Vermont Yankee plant sells its power output entirely in wholesale transactions, with about 46% of its output sold to Vermont utilities for resale to their ultimate consumers and about 54% of its output sold in wholesale interstate transactions to utilities or distributors in other states in the region.[319] All of these power sales are through the wholesale electricity markets approved by federal FERC and administered by FERC orders governing the operations of ISO-NE.[320] These market-based wholesale rates that FERC authorized for Vermont Yankee have the same constitutionally preemptive effect on state regulation pursuant to the Filed Rate Doctrine as any other FERC-authorized rates: "[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine."[321] "Even in the context of market-based rates, FERC

[316] *Id.* at 2, ¶ 9.

[317] *See id.* at 2, ¶ 7.

[318] *Memorandum of Understanding*, *supra* note 34, at 2, ¶ 1(a).

[319] *Comprehensive Energy Plan 2009*, *supra* note 184, at III-65.

[320] *See id.* at III-41.

[321] Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP, Inc., 379 F.3d 641, 651 (9th Cir. 2004).

actively regulates and oversees the setting of rates" and market-based rates are within "FERC's exclusive jurisdiction over wholesale rates."[322]

Therefore, provisions of both the 2002 MoU agreed to with Entergy and the 2002 CPG issued by the State to Entergy, acknowledge that federal law and administrative decisions of federal agencies govern all terms of wholesale sales of power from the Vermont Yankee facility, state law cannot conflict with this, and the facility is free to sell power in interstate commerce as it so chooses.[323] Any additional state-required revenue sharing with Vermont of FERC-approved rates for sale of wholesale power output denies Entergy the full realization of the FERC-authorized wholesale market-based rates.

3. State Contract Common Law confronts Federal Energy Law

Notwithstanding this plenary preemptive role of federal law, the State's argument focused on the 2002 contractual obligations to the State rather than the effect of federal preemption. The 2002 MoU commitments of the parties did not include subsequent 2006 amendments, and all parties acknowledged the preeminent control of federal, rather than preempted state, authority.[324] Vermont is prohibited under the Federal Power Act and the U.S. Constitution from playing any regulatory role, directly or indirectly, in imposing conditions on the terms or prices of such sale exclusively and solely regulated by federal authorities.[325]

A state is preempted from interfering with the wholesale rates that resulted from the wholesale seller's exercise of its discretion.[326] The State withholding a Certificate of Public Good until Vermont Yankee entered a below-market power purchase agreement with state entities crossed this "bright line" separating federal and state authority pursuant to the Supremacy Clause[327] and also potentially violates the dormant Commerce

[322] *Id.* at 649; *accord* Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Fed. Energy Regulation Comm'n, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008); Town of Norwood, Mass. v. New Eng. Power Co., 202 F.3d 408, 419 (1st Cir. 2000).

[323] *Memorandum of Understanding*, *supra* note 34, at 2, ¶ 7; *Certificate of Public Good*, *supra* note 289, at 6, ¶ 12.

[324] *See supra* text accompanying notes 314–318.

[325] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233 (D. Vt. 2012).

[326] *Id.* at 233–34.

[327] *Id.* at 233.

Clause restricting state regulation unduly burdening articles in interstate commerce.[328] The court agreed with Entergy that any precondition on approval that called for Vermont Yankee to provide power to Vermont at below-market rates was not permitted under the dormant Commerce Clause because states cannot take actions to burden interstate commerce, although ultimately, its injunctive order did not rest on this claim.[329]

V. RESTRICTING POWER FLOW IN-STATE – ASSESSMENT UNDER THE DORMANT COMMERCE CLAUSE

A. AS WHOLESALE POWER FLOWS

Count III of the Entergy complaint raised a dormant Commerce Clause violation by the State conditioning a Vermont Certificate of Public Good on a below-market power purchase agreement to sell power specifically to in-state utilities at prices favorable to the state, rather than otherwise in interstate commerce.[330] Entergy's attorney argued that Vermont's decision to shut down Vermont Yankee, through its 2010 Senate vote, violated the dormant Commerce Clause.[331] The decision, she said, "discriminated" against the other New England states because it did not allow them to purchase the power output in interstate commerce from Vermont Yankee after March 2012.[332]

Since its original sale to Entergy in 2002, because Entergy has no retail customers in New England, Vermont Yankee has sold 100% of its net power output exclusively in wholesale power sale transactions to retail suppliers of power through the ISO-New England interstate market.[333] The Vermont Department of Public Service reported that Hydro Quebec supplied power to Vermont utilities for about seven cents/Kwh, and in the 2002–2012 period, the Vermont Yankee nuclear facility in Vermont supplied power to Vermont utilities for about four cents/Kwh.[334] Between

[328] *See infra* Part V.

[329] *Entergy Nuclear*, 838 F. Supp. 2d at 239.

[330] Complaint for Declaratory and Injunctive Relief, *supra* note 68, at 31.

[331] Peters, *supra* note 110.

[332] *Id.*

[333] This is true even for those approximately half of the sales made to Vermont utilities; they were wholesale sales.

[334] *Comprehensive Energy Plan 2009*, *supra* note 184, at App. B-217; WATTS, *supra* note 24, at 61.

2002 when the plant was sold, and 2010, the wholesale price of power in New England and Vermont fluctuated between $0.043-$0.088/kwh.[335] Because of what is identified as these wholesale "favorable prices," the agency noted that Vermont enjoys the lowest retail power rates in New England significantly because of these reduced Vermont Yankee power prices to in-state utilities.[336]

Provisions for discount rates for power sold by Vermont Yankee to Vermont utilities were agreed to as an integral component of the original agreement to transfer the Vermont Yankee facility to Entergy in 2002.[337] However, the 2002 MoU recognized the right of Entergy to sell power outside the state at wholesale to others in 2012 and after:

> In the event [Entergy] and [the agent for power buyers] do not reach agreement as to such energy and capacity, and the PPA is otherwise neither modified nor extended, ENVY shall thereafter be free to sell the same without giving VYNPC any further notice and right to negotiate.[338]

That 2002 agreement contained no additional requirement imposed on Entergy beyond March 2012, except that it negotiate to continue power sale to Vermont utilities and request from the Public Service Board a new CPG for future operation.[339] There was no provision of the 2002 MoU, 2002 Board order, or any other provision of law, that required any supply of power by Entergy to Vermont at discounted rates past March 2012.[340] Absent such contractual agreement or condition in the 2002 Board order, one would assume that the Board would need to consider a new CPG on its merits under applicable legal precedent, rather than on any *sue sponte* determinations on discounted power.

A nuclear safety evaluation prepared for the Vermont Department of Public Service, concluded that the Vermont Yankee facility has been historically reliable in providing one-third of Vermont electricity.[341] It

[335] WATTS, *supra* note 24, at 61.

[336] *Id.*

[337] *See generally* Power Purchase Agreement between Entergy Nuclear Vermont Yankee LLC and Vermont Yankee Power Corp. (Aug. 15, 2001) [hereinafter Power Purchase Agreement], *available at* http://pbadupws.nrc.gov/docs/ML0128/ML012880195.pdf, at Exclosure 4, at Exh. E.

[338] *See Memorandum of Understanding*, *supra* note 34, at 2.

[339] *See generally* Power Purchase Agreement, *supra* note 337.

[340] *See Memorandum of Understanding*, *supra* note 34, at 2.

[341] *Reliability Assessment*, *supra* note 24, at 1.

concluded that while there may be areas for improvement, "[t]he station is operated and maintained in a reliable manner" and can continue this status.[342] Direct testimony of the Vermont Department of Public Service witness regarding an additional twenty years operation, past March 2012, concludes that continued operation of the Vermont Yankee facility represents a substantial economic value to the State of Vermont and its citizens.[343]

B. PLACE OF ORIGIN REGULATION OF COMMERCE – THE LEGAL TEST APPLIED AND CONSEQUENCES

Geographically-based restriction on interstate commerce, whether discriminating for or against local commerce, raises dormant Commerce Clause concerns under Article I of the U.S. Constitution:[344] "Congress may regulate Commerce . . . among the several States . . . ."[345] The so-called dormant Commerce Clause prohibits actions that are facially discriminatory against or unduly burden interstate commerce.[346] The dormant Commerce Clause precedent is driven by concern about "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[347]

A court first determines whether regulation or legislation is facially discriminatory against interstate commerce and will only uphold that law if "a legitimate local purpose" can be found.[348] In *Dean Milk Co. v. City of Madison*, the Supreme Court noted that an agency of government cannot discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[349] Geographically discriminatory statutes are subject to judicial "strict

[342] *Id.* at 2.

[343] Direct Testimony of Jacob M. Thomas, *supra* note 278, at 4. This testimony sets forth a base case of approximately $2.5 billion of value to the state (not including additional potential electric rate discounts and their added value) and indicates that not extending operation of the Vermont Yankee facility would potentially have considerable negative impact in the local towns and counties. *Id.*

[344] *See* FERREY, ENVIRONMENTAL LAW, *supra* note 14, at 150–55.

[345] U.S. CONST. art. 1, § 8, cl. 3.

[346] *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

[347] *Id.* at 337–38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

[348] *Id.* at 338 (quoting *Or. Waste Sys.*, 511 U.S. at 101).

[349] 340 U.S. 349, 354 (1951).

scrutiny;" for such a statute or regulation to be upheld, the state must establish that there is a compelling state interest for which the statute is the least intrusive means to achieve that interest.[350]

The scope of commerce among the states for purposes of a dormant Commerce Clause analysis is broadly defined,[351] and all objects of interstate trade merit Commerce Clause protection, which includes the transmission of electric energy in interstate commerce.[352] Except for the necessity to quarantine certain products, this is rarely found. Courts have held that statutes found to discriminate against out-of-state interests based on geography or favoring local interests are *per se* invalid.[353] If the statute is geographically even-handed, the courts apply the *Pike* balancing test to determine whether the state's interest justifies the incidental discriminatory effect of the regulatory mechanism as applied.[354]

State and local laws are deemed unconstitutional under the dormant Commerce Clause when a law differentiates between in-state and out-of-state economic interests in a manner that benefits the former and burdens the latter.[355] State limitations requiring the holding of low-cost power in-state have been found unconstitutional by the courts.[356] Requirements to use indigenous fuel supplies to produce electricity were stricken under the dormant Commerce Clause.[357] Income tax credits cannot be given by a state only to in-state producers of fuel additives.[358] In-state coal cannot be required to be used by a state even if it was passed to satisfy federal Clean

[350] Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL'Y J. 33, 60–61 (2009) (outlining a history of the dormant Commerce Clause).

[351] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 621–22 (1978).

[352] *See id.*; *see also* New York v. FERC, 535 U.S. 1, 16 (2002) (stating that transmissions on the interconnected national grids constitute transmissions in interstate commerce).

[353] *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997); *City of Philadelphia*, 437 U.S. at 624 (noting that if a statute is facially discriminatory, it is virtually *per se* invalid); Patrick R. Jacobi, Note, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079, 1102 (2006) (proposing that a court will likely strike down as unconstitutional any regulation that discriminates geographically or through point-of-origin); Stiles, *supra* note 350, at 60–61.

[354] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental").

[355] *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

[356] *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

[357] *See* Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992).

[358] *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 271, 278–80 (1988).

Air Act requirements.[359] The courts have determined that electricity in interstate commerce cannot be traced.[360] A state cannot regulate to favor, or require use of, its own in-state energy resources,[361] nor can it prevent energy-related resources originating in the state from leaving the state.[362]

In 2008, public groups began branding energy as an "out-of-state" company, and press coverage of the licensing debate picked up this "out-of-state" characterization.[363] Vermont claimed a basis for granting a CPG would be if Vermont receives below-market power prices making a contribution to the state.[364] However, rationale for geographic discrimination based on place of origin of the commerce does not resolve dormant Commerce Clause concerns. In *West Lynn Creamery, Inc. v. Healy*, the Supreme Court found that "even if environmental preservation were the central purpose" of the regulation, it "would not be sufficient to uphold a [geographically] discriminatory regulation."[365] There is litigation in New Jersey,[366] Colorado,[367] Missouri,[368] California, and elsewhere

[359] *See* Alliance for Clean Coal v. Miller, 44 F.3d 591, 596–97 (7th Cir. 1995).

[360] New York v. FERC, 535 U.S. 1, 8 n.5 (2002).

[361] *See Wyoming*, 502 U.S. at 454–55; *see also* Alliance for Clean Coal v. Craig, 840 F. Supp. 554, 560 (N.D. Ill. 1993).

[362] *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

[363] WATTS, *supra* note 24, at 76.

[364] *See supra* notes 276–280 and accompanying text.

[365] 512 U.S. 186, 204 n.20 (1994) (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978)).

[366] In 2011, New Jersey enacted legislation to encourage the acquisition by utilities of the output of 2000 Mw of new in-state power projects. *See generally* PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 (April 12, 2011) (order). New Jersey faces a pending lawsuit by several existing independent power generators asserting that the state law is in violation of the Constitution's Commerce Clause because it is predicated on in-state "favoritism," and the New Jersey act is an explicit effort to promote the construction of new generation facilities in New Jersey and alleging discrimination in New Jersey's statute ordering utilities to sign long-term contracts only with in-state generation facilities participating in multi-state PJM ISO capacity. *Id.*; Mary Powers, *PJM Generators File Complaint with FERC Seeking Relief from NJ In-State Generation Law*, ELECTRIC UTIL. WK., Feb. 7, 2011, at 11, 13. FERC, on April 12, 2011, eliminated a PJM rule that allowed a prior exemption for projects to make minimum offer prices when tempered by state energy programs. Mary Powers, *Rebuffed by FERC Ruling, New Jersey BPU Plans to Look Again at How to Attract New Generation*, ELECTRIC UTIL. WK., May 23, 2011, at 4, 6 [hereinafter Powers, *Rebuffed*]. *See generally PJM Interconnection*, 135 FERC ¶ 61,022. In response, FERC amended the PJM ISO rules to prevent New Jersey state law from attempting to encourage construction of in-state power generation by, in part, causing them to bid power into the PJM system at suppressed prices in order to win capacity right auctions. Powers, *Rebuffed*, *supra*.

contesting dormant Commerce Clause violations involved with state energy/electric power regulation:

- California setting wholesale tariffs;[369]
- A challenge by conventional power generators of New Jersey's in-state energy facility preferences;[370]
- Suit on renewable power RPS in Colorado;[371]
- A state court ruling that a Missouri energy program was illegal,[372] since reversed by the intermediate court and still on appeal;
- TransCanada's suit against Massachusetts on discrimination against out-of-state energy projects;[373]
- California regulation of out-of-state energy products based on the

[367] Complaint for Injunctive and Declaratory Relief, Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222 (D. Colo. 2011), *available at* http://americantradition.org/wp-content/uploads/2011/04/ATI-RPS-Complaint-ATI-v-Colorado.pdf. There also was a complaint at FERC. American Tradition Institute's ("ATI") Environmental Law Center filed a lawsuit in federal court challenging the constitutionality of Colorado's renewable energy standard, based upon evidence that the state's law violates the Commerce Clause. *Id.* at ¶ 1. ATI's complaint argued that because the state mandate provides economic benefits to Colorado's renewable electricity generators that are not available to out-of-state power generators, the program violates the dormant Commerce Clause. *Id.* at ¶ 62.

[368] Missouri *ex rel.* Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n, No. 10AC-CC00512, at 12 (19th Cir. Ct. of Cole Cnty, Mo. June 29, 2011). A state court in 2011 ruled that the Missouri RPS program was illegal because it required RECs to be generated by in-state projects or projects that delivered the power to in-state customers. The opinion held that the RPS program "takes the cash property of utilities (and their ratepayers) and transfers it to certain customers" without due process. *Id.* at 14. The decision is now being appealed.

[369] Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047, ¶¶ 61,337–61,339 (July 15, 2010) (order), *clarified on rehearing by* 133 FERC ¶ 61,059 (Oct. 21, 2010).

[370] *See generally* PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 (April 12, 2011) (order).

[371] *See* Complaint for Injunctive and Declaratory Relief, *supra* note 367.

[372] *Missouri ex rel. Mo. Energy Dev. Ass'n*, Case No. 10AC-CC00512, at 14–15 (holding that the RPS program "takes the cash property of utilities (and their ratepayers) and transfers it to certain customers" without due process).

[373] Complaint at 1, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070-FDS (D. Mass. Apr. 16, 2010).

> distance it must travel and the greater carbon-intensity of electricity in the Midwest to produce renewable fuel.[374]

A limited exception occurs when a state participates directly in the market as a purchaser, seller, or producer of articles of commerce: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[375] However, this exception does not apply to this Vermont matter, in which the State is acting as a regulator, rather than as an owner of the Vermont Yankee facility. The Supreme Court found state wholesale power regulation as an impermissible violation of the dormant Commerce Clause of the U.S. Constitution as well as a violation of the Federal Power Act: "Our cases consistently have held that the Commerce Clause of the Constitution 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."[376]

C. THE DISTRICT COURT DETERMINATION

As noted in the court's opinion, the Shumlin Administration and the Department of Public Service were on record in P.S.B. Docket 7440, arguing that discounts in wholesale prices were necessary first, to result in granting a CPG.[377] Vermont cannot, through legislative or agency regulatory action, legally isolate inside the state the power output of a

[374] Order on NPRA Plaintiffs' Summary Adjudication Motion at 2, 6, Rocky Mountain Farmers Union v. Goldstene, No. CV-F-09-2234 LJO DLB (E.D. Cal. Dec. 29, 2011). The court reiterated that only the federal government can regulate commerce between the states, and California, attempting to regulate commerce outside its borders, violates exclusive federal authority to regulate interstate commerce. *Id.* California gave less value to the identical energy fuel, ethanol, when produced in the Midwest, because of the latter region's use of coal-fired power for electricity in the Midwest used to produce ethanol and other products, and the longer transportation distance for trucks to transport ethanol from there to California. *Id.* While such discrimination did reflect the total embedded energy emissions and transportation costs of different means to produce the energy products and to move them to market from geographically distance production sources, the court held that states cannot elect to discriminate against more-distant out-of-state products. *Id.*

[375] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (footnote omitted); *see* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[376] New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982) (citation omitted).

[377] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 237 (D. Vt. 2012).

lower-cost independent wholesale power generation source, such as power from Vermont Yankee.[378] The court followed the Supreme Court's decision in *New England Power Co. v. New Hampshire*, which previously addressed this exact question in New England.[379] *New England Power* overturned as a violation of the dormant Commerce Clause an order of the New Hampshire Public Utilities Commission (PUC) that restrained the sale of energy within the state for the financial advantage of in-state ratepayers, low-cost, low-carbon power produced within the state.[380] The PUC had ordered New England Power to sell its power only to New Hampshire utilities on the ground that this would save New Hampshire customers $25 million annually:[381]

> [We] consistently have held that the Commerce Clause of the Constitution 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. . . . [A] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.[382]

In that case, the power that New Hampshire sought to control for in-state benefit otherwise would have been sold in wholesale interstate transactions from the New Hampshire power generation facility to retail distribution utilities of other New England states.[383] The Supreme Court specifically held that a state legally cannot do the economic equivalent of restraining low cost power from leaving the state, *i.e.*, require a wholesale generator to sell to in-state utilities "at special rates adjusted to reflect the entire savings attributable to the low-cost" supply.[384]

The federal court in the instant *Entergy* matter ruled that Entergy would

[378] *Id.* at 243.

[379] *Id.* at 235 (citing *New England Power Co.*, 455 U.S. at 339).

[380] *See New England Power Co.*, 455 U.S. at 344; *see also* U.S. CONST. art. I, § 8, cl. 3.

[381] *New England Power Co.*, 455 U.S. at 336.

[382] *Id.* at 338 (citations omitted) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978) (internal quotation marks omitted).

[383] *Id.* at 333.

[384] *Id.* at 336.

be irreparably harmed if the state of Vermont did not issue a Certificate of Public Good for want of keeping below-market power in state, placing an unreasonable burden on interstate wholesale markets, and violating the dormant Commerce Clause.[385] The prior 2002 CPG of the Vermont Public Service Board acknowledged as much by recognizing that Vermont Yankee can only be required to comply with "Vermont law to the extent that its requirements are not inconsistent with specific requirements imposed by FERC, NRC . . . and any other federal agencies exercising authority."[386] The court found a dormant Commerce Clause violation:

> Defendants are permanently enjoined, as prohibited by the dormant Commerce Clause, from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states.[387]

VI. EQUITABLE DEFENSES AND UNCONSTITUTIONAL STATE ACTION

The defendants additionally argued that Entergy and Vermont Yankee waived their preemption claims by executing the 2002 Memorandum of Understanding when it purchased the facility, granting recognition to, and allowing, the Public Service Board to approve the future operation of Vermont Yankee past its March, 2012 deadline,[388] which provision stated:

> [Buyers] waive any claim each may have that federal law preempts the jurisdiction of the Board to take actions and impose the conditions agreed upon in this paragraph to renew, amend, or extend the . . . [Entergy/Vermont Yankee certificate of public good] to allow operation . . . after

[385] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 239 (D.Vt. 2012).

[386] *See Certificate of Public Good*, *supra* note 289, at 2, ¶ 9.

[387] *Entergy Nuclear*, 838 F. Supp. 2d at 243.

[388] *Id.* at 239. Entergy argued there was no waiver "because the state Legislature changed the rules when it passed Act 160 stripping the Vermont Public Service Board (PSB) of its authority to issue a new certificate of public good (CPG) without the approval of the Legislature." *Parenteau*, *supra* note 81. Entergy also argued that it cannot "waive federal preemption." *Id.*

> March 21, 2012, or to decline to so renew, amend, or extend.[389]

Under careful examination, the court found this not as definitive as it may appear. First, it does not purport to waive any preemption claim against actions of the legislature that cross the "bright line" of permissible state jurisdiction; it expressly only includes the quasi-judicial, independent Public Service Board,[390] a different branch of government than the legislature. It was only through 2006 amendments, after the power plant was conveyed to Entergy, that an approval from the legislature was added, with no concurrence for this change from Entergy.[391] The Supreme Court precedent prohibits state legislatures, as well as state executive agencies, from crossing the jurisdictional line that demarcates exclusive federal jurisdiction.[392]

Second, the MoU limits its waiver provision to state actions provided "in this paragraph" under then-"current law."[393] The 2006 amendments in Act No. 160 to the 2002 then "current law" are not within the express terms of this waiver provision. There is no language in the MoU waiving preemption claims against any later amendments of the legislature.[394]

Third, neither a state nor a private party, nor both together, can waive federal jurisdiction or create state jurisdiction over subject matter.[395] Opinions of the U.S. Supreme Court,[396] a New England federal court construing waiver of federal jurisdiction over a New England nuclear power facility,[397] and the Vermont Supreme Court,[398] all recognize that subject

[389] *Entergy Nuclear*, 838 F. Supp. 2d at 192; *see also Memorandum of Understanding*, *supra* note 34, at 6.

[390] *Id.*

[391] VT. STAT. ANN. tit. 30, § 248 (2008); Act of May 18, 2006, No. 160, 2006 Vt. Acts & Resolves 204, ("An Act Relating to a Certificate of Public Good for Extending the Operating License of a Nuclear Power Plant.").

[392] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

[393] *See Memorandum of Understanding*, *supra* note 34, at 6.

[394] *See generally id.*

[395] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[396] *Id.* ("[S]ubject-matter jurisdiction . . . can never be forfeited or waived." (quoting United States v. Cotton, 535 U.S. 625, 630 (2002))).

[397] Me. Yankee Atomic Power Co. v. Bonsey, 107 F. Supp. 2d 47, 50 (D. Me. 2000) ("[E]ven if [Maine Yankee] purported to 'waive' federal authority, the state would not thereby obtain any ability to regulate in those areas since Congress has reserved that power to itself.").

matter jurisdiction cannot be created by agreement or waiver. A state law may not frustrate the operation of federal law, even if the state legislature has valid purposes for the legislation and intended no frustration.[399] State law is not allowed to supplant federal determinations by adding conflicting requirements not consistent with federal law.[400]

The record here, reveals that in September 2001, less than a year before it issued the initial CPG to approve the sale of the facility to Entergy,[401] the Vermont Public Service Board issued an order regarding whether federal law preempted the Board's jurisdiction to modify wholesale power sale contracts with Vermont independent power producers that had been mandated under the PURPA amendments to the Federal Power Act.[402] The Board rejected the argument that state jurisdiction to modify these power sale contracts could be established, by waiver, contrary to federal law.[403] The Board specifically recognized that, "To the extent that the Board is preempted from modifying the Rule 4.100 contracts, the Board is preempted from modifying the contracts on any state-law basis, including principles of estoppel."[404] The Board also held that federal preemption of state jurisdiction can be raised at any time and is not subject to equitable defenses.[405]

The Vermont Public Service Board, the only state body that had authority over the Company under the then-current 2002 law or the 2002 MoU[406] when the plant was transferred, had previously issued orders that held that private party waiver could not create state jurisdiction where federal law otherwise created none.[407] The trial court in the *Entergy* matter

[398] Columb v. Columb, 633 A.2d 689, 693 (Vt. 1993) ("[S]ubject matter jurisdiction cannot be conferred by agreement or consent of the parties when it is not given by law." (quoting Shute v. Shute, 607 A.2d 890, 894 (Vt. 1992)) (internal quotation marks omitted)).

[399] Perez v. Campbell, 402 U.S. 637, 651–52 (1971), *superseded by statute*, Act of Nov. 6, 1978, ch. 5, Pub. L. No. 95-598, 92 Stat. 2593, *as recognized in* Saunder v. Reeher (*In re* Saunders), 105 B.R. 781, 787 (Bankr. E.D. Pa. 1989).

[400] Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580–81 (1987).

[401] *Certificate of Public Good*, *supra* note 289, at 1.

[402] Vt. Pub. Serv. Bd., *Order Re: Motion for Declaration of Board Jurisdiction*, at 28–29, Docket No. 6270, (Sept. 18, 2001) [hereinafter *Declaration of Board Jurisdiction*]; *see also* 16 U.S.C. § 824a-2 (2006).

[403] *Declaration of Board Jurisdiction*, *supra* note 402, at 46–47.

[404] *Id.* at 21 n.24.

[405] *See id.* at 22.

[406] *Memorandum of Understanding*, *supra* note 34.

[407] *Declaration of Board Jurisdiction*, *supra* note 402, at 46–47.

rejected defendant's waiver argument.[408] This waiver executed by the parties only construed the jurisdiction of the Board related to a grant or denial for future operation, and did not include the legislature,[409] and did not and could not exclude or waive the jurisdiction of the federal government.[410]

The *PG&E* precedent, limiting state safety jurisdiction, is not negated by any bilateral contractual waiver.[411] The state of Vermont also argued that Entergy waived any challenge to Act 74 because it lobbied for this enactment to pass.[412] However, this support by Entergy was before the state later amended the statute in 2006 to add the additional layer of currently-contested legislative approval.[413]

Defendant's raised equitable and judicial estoppel arguments against preemption of state authority[414] because "the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct."[415] This was rejected by the court because Entergy did not "ma[k]e a definite misrepresentation of fact" that inevitably led to the other party's harm.[416] Judicial estoppel was rejected because the defendants did not demonstrate how the plaintiffs changed their position from the commitments they had made since Vermont changed state law.[417]

Defendants raised laches and unclean hands[418], claiming that Entergy

[408] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 239–40 (D. Vt. 2012).

[409] *Id.* at 240.

[410] *Id.*

[411] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983).

[412] Defendant's Post-Trial Brief at 15, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012) (No. 1:11–cv–99 (jgm)).

[413] Act of May 18, 2006, No. 160, 2006 Vt. Acts & Resolves 204.

[414] The State argued that Entergy has consistently taken the position before the PSB, the legislature and the courts that the decision of whether to issue a new CPG for the plant belonged to the legislature. Defendant's Post-Trial Brief, *supra* note 412, at 16.

[415] *Entergy Nuclear*, 838 F. Supp. 2d at 241 (quoting Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 725 (2d Cir. 2001)).

[416] *Id.*; *see also* Rich v. Associated Brands, Inc., 379 F. App'x 78, 81 (2d Cir. 2010) (quoting Kavowras v. N.Y. Times Co., 328 F.3d 50, 56 (2d Cir. 2003)).

[417] *Entergy Nuclear*, 838 F. Supp. 2d at 241.

[418] *Id.* at 239; *see also* Motorola Credit Corp. v. Uzan, 561 F.3d 123, 127 (2d Cir. 2009) ("[T]he concept of 'clean hands' originated in 'the moralistic, rule-less, natural-law character of the equity jurisprudence created by the Lord Chancellors of England when the office was filled by clerics,' and observing that '[t]oday, "unclean hands" really just means that in equity as in law the

should have filed suit no later than 2006, when the amendment at issue was enacted.[419] The court noted that this doctrine "bars a claim if a party failed to assert it for an unreasonable period of time and the delay prejudiced the other party."[420] However, Entergy waited only until the NRC issued its federal re-licensing order in 2011 for the plant.[421] Without this necessary federal license, a suit "may have been moot."[422] Moreover, the defendant did not show how the delay prejudiced it.[423]

VII. LEGAL PILLARS, CONSEQUENCES, AND THE FUTURE

This is a decision that ultimately "will probably be determined by the U.S. Supreme Court. . . . 'These are the kind of issues that the Supreme Court likes. It's a federal preemption case; it's a landmark case.'"[424] And the stakes have been already raised: When the suit was initiated in 2011, Governor Shumlin argued initially that Entergy should pay the State's, as well as its own, legal expenses of the litigation.[425] However, the reverse allocation of costs has transpired: In taking an unconstitutional action that established scholarship cautioned against,[426] and losing, the State may be responsible for reimbursing Entergy's legal fees, which are $4.62 million at the trial court level and, with appeal, continuing to mount.[427]

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plaintiff's fault, like the defendant's, may be relevant to the question of what if any remedy the plaintiff is entitled to'" (quoting Shondel v. McDermott, 775 F.2d 859, 867–68 (7th Cir. 1985))); 27A AM. JUR. 2D *Equity* § 98 (2008) ("The equitable doctrine of clean hands expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies." (footnotes omitted)).

[419] *Entergy Nuclear*, 838 F. Supp. 2d at 242; *see also* Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318, 326 (2d Cir. 2004).

[420] *Entergy Nuclear*, 838 F. Supp. 2d at 242.

[421] *Id.*

[422] *Id.*

[423] *Id.*

[424] DiSavino, *supra* note 3 (quoting J. Wayne Leonard, Chairman and CEO of Entergy).

[425] Anne Galloway, *Shumlin Wants to "Bill Back" Legal Expenses in Entergy Suit to Entergy*, VTDIGGER.ORG (April 30, 2011), http://vtdigger.org/2011/04/30/shumlin-wants-to-%e2%80%9cbill-back%E2%80%9D-legal-expenses-in-entergy-suit-to-entergy/.

[426] *See supra* notes 20–22 and accompanying text.

[427] Motion for Attorney's Fees, Expenses, and Costs, and for Leave to File Supplement Evidence in Support of Motion at 4, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012) (No. 1:11-cv-99-jgm), *available at* http://vtdigger.org/vtdNewsMachine/wp-

"'When it gets to the Supreme Court, we certainly like our position in a federal preemption case,'" stated the CEO of Entergy.[428] There are four pillars which support the legal structure on appeal and the eventual outcome.

A. PILLAR ONE: WHICH FACTS?

In the Second Circuit and on any appeals thereafter, there will be no trial on the facts *de novo.* The facts already are finally determined by the trial court in a lengthy opinion construing thousands of pages of trial exhibits.[429] The trial court opinion spends the bulk of its discussion weighing and resolving the facts, in more than half of the 102 page trial court opinion:

- Factual conflicts between the state statute and federal law;
- Findings of state demands for below-market wholesale power contracts as a *quid pro quo* for continued CPG state permission to operate to manufacture electricity within the state;
- Findings of state requirements restricting a portion of power sales to occur in state at below-market prices in order to be permitted continued operation within the state;
- Findings of state statutory regulation of spent nuclear fuel handling, storage, and continued nuclear facility operation and generation of power; and
- Determination of Vermont's actual legislative purpose in the challenged statutes.[430]

On any appeal, these factual determinations are not reviewed *de novo*.[431]

content/uploads/2012/02/EntergyAttorneyClaims-2-3-12.pdf.

[428] DiSavino, *supra* note 3.

[429] *See generally* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012). In this 102-page trial court opinion, its first fifty-four pages provide a thorough summary of the relevant facts in the record, including fifty pages just on the legislative actions of the state and Entergy. *Id.* This detailed summary of record facts is longer than most opinions. *Id.*

[430] *See generally id.*

[431] Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1374 (2d Cir. 1993) (explaining that factual findings will be upheld unless clearly erroneous).

The State, for appeal, has hired outside counsel to shift to procedural prerequisites rather than the constitutional merits of the state statutes.[432] On appeal, the State argues, having not argued before, that the Vermont statute is a 'process' statute entitled to judicial process deference, rather than substantive, and that the court injunction against Vermont was premature prior to any actual March 2012 loss of a state license.[433]

The boundaries of constitutional federalism in the energy arena were well demarcated by precedent before Vermont amended its statute in 2006.[434] Vermont's regulatory rationale of pursuing purchase of renewable energy instead of nuclear energy as to why it did not want to continue operation of Vermont Yankee, is now itself in doubt: Green Mountain Power, a Vermont utility, recently replaced its expiring Vermont Yankee power purchase with a long-term contract for Seabrook nuclear power.[435] This twist underscores the constitutional right of an unregulated private nuclear power generation facility, such as Seabrook or Vermont Yankee, to sell its power interstate in wholesale transactions, free of state regulation.[436] Nonetheless, the facts from thousands of pages of evidence in the Entergy matter are now settled and no longer in dispute on appeal.

B. PILLAR TWO: NO CO-EQUAL LEGAL AUTHORITY REGARDING 'OLD' VERSUS 'NEW' POWER

Vermont has other support on appeal. It has been joined by nine states which filed a consolidated *amici* brief in support of its appeal.[437] Many of these states[438] have been defendant targets in recent successful litigation or

[432] *See* Brief of Cross-Appellees and Reply Brief of Appellants at 3–7, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, Case No. 12-791-CV (2d Cir., argued Jan. 14, 2013).

[433] *Id.* at 1–4.

[434] *See supra* Parts III, V and notes 20–22 and accompanying text.

[435] "In May 2011, Green Mountain Power announced it had reached a 23-year power purchase agreement to buy electricity from a nuclear plant in Seabrook, New Hampshire, subject to approval by Vermont regulators." (noting DPS had commented favorably on the deal)." Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 217–18 (D. Vt. 2012) (citations omitted).

[436] *See supra* Part IV.

[437] *See* Press Release, The State of Vermont, Office of the Attorney General, Nine States and the National Conference of State Legislatures Join Attorney General's Appeal of Vermont Yankee Case (June 11, 2012) *available at* http://www.atg.state.vt.us/news/nine-states-and-the-national-conference-of-state-legislatures-join-attorney-generals-appeal-of-vermont-yankee-case.php.

[438] The states include New York, Connecticut, Iowa, Maryland, Massachusetts, Mississippi,

settlements contesting these states' allegedly unconstitutional or unpermitted state regulation of energy.[439] These nine states' *amici* brief emphasizes that "[s]tates are never required to authorize a given power plant," and the district court's analysis, if upheld, "would undermine the 'dual regulation' structure of state and federal authority under the Atomic Energy Act."[440]

First, however, the 'dual regulation' of nuclear power is not co-equal regulation, but is rigorously separated, with the states not able to regulate nuclear safety. "Dual" has become a federalist "duel." Judge Murtha's decision enumerated and found that when one reviews Vermont's legislative deliberations on the issue, references to nuclear safety are "too numerous to recount."[441]

Second, while *amici* are correct that "States are never required to authorize a given [*new*] power plant" under state environmental and siting provisions, this is not a *new* facility. [442] Vermont Yankee is an operating business for four decades in the state.[443] It was sited with state approvals.[444] In *PG&E*, the holding is qualified to "the *construction* of *new* nuclear plants."[445]

Third, PG&E did not permit states to limit the sale of power from, or operation of, existing nuclear power plants, which were previously authorized and sited.446 No state other than Vermont has attempted to do this.447 Therefore, key aspects of this unique state regulation are fundamentally different than past legal matters confronting the courts.

The unique Vermont matter is not factually analogous to the PG&E precedent or other matters. Vermont's amended statute attempts to

Missouri, New Hampshire, and Utah. *Id.*

[439] *See supra* notes 366–374 and accompanying text.

[440] Brief for the States of New York, Connecticut, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, and Utah as Amici Curiae in Support of Appellants at 18, 33, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, Case No. 12-791-CV (2d Cir., argued Jan. 14, 2013) [hereinafter Amici Curiae Brief].

[441] Wald, *supra* note 29.

[442] Amici Curiae Brief, *supra* note 440, at 18.

[443] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 190 (D. Vt. 2012).

[444] *Id.*

[445] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983) (emphasis added).

[446] *Id.* at 211.

[447] *Id.* at 233.

countermand long-ago permissions for existing operating facilities, rather than address only future plant economics, as California did.448 And since the California PG&E decision three decades before, the electric power industry and its regulation has changed fundamentally in both California and Vermont, with a much more pervasive federal role over more wholesale power transactions.449 The shared jurisdiction over electricity between state and federal authority is not co-equal or overlapping; each is distinct.450 The robust record before the trial court led it to conclude that the state regulated an area committed to federal regulation.451

C. PILLAR THREE: CONTEXT MATTERS LEGALLY

The legal issue of whether a trial court factual determination of actual state legislative purpose controls, rather than defer to literal acceptance of a legislative preamble, will be litigated on appeal. In the trial court opinion holding the state statute to be preempted, *PG&E* is identified as first among "key precedent."[452] The State argued that a court cannot look at legislators' "true" or "actual" purpose, but must accept "avowed economic purpose" for its moratorium and expressly refused—despite some discussion of safety in the legislative history—to "become embroiled in attempting to ascertain California's true motive." [453]

Placing *PG&E* in context, its holdings on legislative purpose and preemption are the two key elements of the opinion. In the three decades since its issuance, *PG&E* has been cited 929 times by separate federal courts and agencies, including in twenty-eight cases by the Supreme Court,

[448] *Id.* at 220.

[449] *Entergy Nuclear*, 838 F. Supp. 2d at 234; Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC, 471 F.3d 1053, 1066–67 (9th Cir. 2008), *aff'd in part and rev'd in part sub nom.*, Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty, 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008).; *see supra* Part III.D; *supra* notes 193–194 and accompanying text; *see also* FERREY, THE NEW RULES *supra* note 189.

[450] *See Entergy Nuclear*, 838 F. Supp. 2d at 218.

[451] *Id.* at 239; *see, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105, 107 (1992) (stating that the court looked beyond "professed purpose" of challenged state statute because it "directly, substantially, and specifically regulate[d]" matters committed to federal regulators); Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 108 (2d Cir. 1999) (stating that the statute's "effect" was "clearly" an intrusion into exclusively federal matters), *abrogated by* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[452] *Entergy Nuclear*, 838 F. Supp. 2d at 220.

[453] *Id.* at 223 (quoting *Pac. Gas & Elec. Co.*, 461 U.S. at 216); Defendant's Post-Trial Brief, *supra* note 412 at 1.

in 235 cases by federal circuit courts of appeal, in 537 cases by federal trial courts, and in twelve administrative determinations by FERC.[454] However, the part of the opinion that figures most prominently in the instant *Entergy v. Shumlin* case, regarding how to determine legislative purpose, has not been primarily cited or relied on by the federal judiciary.

Of these total 929 federal opinions citing the 1983 *PG&E* opinion, only fifty-five — approximately five percent — have cited this particular holding determining legislative purpose, including in three subsequent cases by the Supreme Court, twenty-one cases by federal circuit courts, thirty-one cases by federal trial courts, and no administrative determinations by FERC. Of these fifty-five citations, most appear to cite this holding either in *dicta* or only as a very general reference to the mechanics of the preemption doctrine.[455] Of the remaining few opinions that construe this holding at any level of depth or application, many cases make factual distinctions from examining facts behind the stated purpose in the preamble of the actual legislation, including distinctions based on the actual effect the nuclear legislation has on Congress' ability to carry out its objectives[456] and whether the stated purpose is "merely a cover-up" for prohibited state actions.[457] Very few opinions appear to have followed the holding from *PG&E* to the effect that the language in a piece of legislation is the final authority as to the actual purpose of that legislation.[458] The Supreme Court has cited this particular holding from *PG&E* three times in the past three decades, and in the most recent case, the Court refused to rely solely on the stated purpose of a piece of legislation in determining whether a state action was preempted.[459]

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[454] *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 80 (1990); Pennsylvania v. Lockheed Martin Corp., 684 F. Supp. 2d 564, 584 (M.D. Pa. 2010).

[455] *See, e.g.*, Ishikawa v. Delta Airlines, Inc., 343 F.3d 1129, 1134 n.22 (9th Cir. 2003); Crystal Bay Marina v. Sweeden, 939 F. Supp. 839, 841 (N.D. Okla. 1996); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1517, 1519 (C.D. Cal. 1986).

[456] *See, e.g.*, Nevada v. Watkins, 914 F.2d 1545, 1561 (9th Cir. 1990) (concluding that a state legislative action was preempted by federal law because it had "the actual effect of frustrating Congress' intent" even though "the professed motivation" for the state's action was "the economic and environmental effects of nuclear waste disposal").

[457] Drnek v. City of Chicago, 192 F. Supp. 2d 835, 844–45 (N.D. Ill. 2002) (distinguishing the applicability of the holding in *PG&E* to the Atomic Energy Act with the Age Discrimination in Employment Act).

[458] *See, e.g.*, Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1150 (1st Cir. 1989).

[459] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's

Past has not been prologue: Federal courts addressing nuclear power recently have searched the record for facts on the actual purpose of state nuclear regulation, including the Second Circuit, relying on the Supreme Court 1992 *Gade* opinion rather than the 1983 *PG&E* opinion:

> The Second Circuit has held that courts cannot "blindly accept" a challenged statute's "articulated purpose," because doing so would enable legislatures to "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law."[460]

Moreover, over thirty years since the *PG&E* decision, the types of sales of power involved and the context in which the principles must be applied have altered fundamentally, as the court recognized:

> This Court is mindful that the energy landscape has changed since the Supreme Court's decision in *Pacific Gas*, and notes that Vermont Yankee is a merchant plant free to sell electricity wholesale to any customer in the interstate market. While this status has not entirely displaced state regulation, the range of issues subject to state regulation may have narrowed.[461]

One size does not fit all, and the transactions involved in Vermont are on the other side of the state-federal line as those in the *PG&E* dispute, three

professed purpose and have looked as well to the effects of the law."); English v. Gen. Elec. Co., 496 U.S. 72, 73 (1990) (holding that field preemption did not apply to the state tort law at issue because that law was not motivated by safety concerns and the actual effect of the law on Congress' objectives was "not sufficiently direct and substantial"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984) (finding that the federal pre-emption of state regulation of the safety aspects of nuclear energy does not extend to a state-authorized award of punitive damages for conduct related to radiation hazards).

[460] Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 224 (D. Vt. 2012) (quoting Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 108 (2d Cir. 1999)); *accord* Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1247–48 (10th Cir. 2004) (discussing state regulation of nuclear materials); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262 n.8 (1977) (zoning and the Constitution's Equal Protection Clause); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977).

[461] *Entergy Nuclear*, 838 F. Supp. 2d at 227.

decades earlier.[462] For electricity, the nature of the transaction is the most important single fact to determine regulatory jurisdiction between state and federal authority.[463]

D. PILLAR FOUR: OTHER CONSTITUTIONAL DIMENSIONS

Notwithstanding the trial court's conclusions regarding the factual record and a "bright line" division of legal authority, legislators continue to declare that the State can regulate as its policies motivate it.[464] Senator Bernie Sanders pronounced the trial court decision "ripe for appeal."[465] He stated, "I believe the law is very clear, and that states have the right to reject nuclear power for economic and other non-safety reasons."[466] Here in Vermont, Vermont utility Green Mountain Power did not reject nuclear power, but rather it switched its third-party source of nuclear power from purchasing nuclear power made in Vermont to nuclear power made in neighboring New Hampshire.[467]

This is not a one-dimensional legal dispute. There are multifaceted constitutional Supremacy Clause and dormant Commerce Clause violations featured in the trial court opinion.[468] It has been observed that courts handling both dormant Commerce Clause and Supremacy Clause claims often elect to resolve the case on the latter, which is contrary to what the federal trial court did here.[469] However, the Supremacy Clause claims remain viable under Supreme Court precedent, even if not resolved yet here.

Even though the Vermont trial court did not reach a final determination as to constitutional preemption pursuant to the Federal Power Act or permanently enjoin defendant pursuant to Count II—which it didn't need to do, having already found two other constitutional violations—the court did reiterate that:

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[462] *Compare id.*, *with* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

[463] *Entergy Nuclear*, 838 F. Supp. 2d at 219.

[464] Wald, *supra* note 29.

[465] *Id.*

[466] *Id.*

[467] *See generally Entergy Nuclear*, 838 F. Supp. 2d. 183.

[468] *See generally id.*

[469] *See* Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 322–23, 345 (2012).

Under the Federal Power Act, 16 U.S.C. § 791a et seq:

> 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. 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. . . . [A] state must . . . give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority. . . .
>
> Under the filed-rate doctrine, state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the federal filed rate.[470]

With four relatively recent, sequential decisions of the Supreme Court upholding the Filed Rate Doctrine as a "bright line" prohibition on state action, the ultimate resolution of Count II claims is cast in precedent. [471] On Count III of the complaint, the court permanently enjoined defendants from conditioning Vermont Yankee's continued operation on it entering a below-market PPA with Vermont utilities.[472] The dormant Commerce Clause (Count III) and the Supremacy "bright line" of jurisdiction (Count II) are legally intertwined in the state regulation of wholesale power by Vermont:

> 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. The *New England Power* decision makes clear that a state's requirement that a wholesale plant satisfy local demands and provide its residents an "economic benefit" not available to customers

[470] *Entergy Nuclear*, 838 F. Supp. 2d at 233 (citations and quotation marks omitted).

[471] *See, e.g.*, Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003); Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

[472] *Entergy Nuclear*, 838 F. Supp. 2d at 239.

> in other states runs afoul of the Commerce Clause, because it impermissibly burdens interstate commerce.[473]

The court opinion cites *New England Power,* which involved wholesale power sales in New England found to violate both the dormant Commerce Clause and Supremacy Clause, the key precedent:[474]

> [S]tates are "without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State," . . . a "protectionist regulation" violating the Commerce Clause.[475]

The state statute is preempted if any provision challenged in any count of the Complaint—let alone multiple counts—is found to have a preempted purpose.[476] Federal courts hold that a state-mandated give-back of some of the price of federal power rates is preempted by exclusive federal authority over federally-regulated wholesale rates, contracts, and terms.[477] Further, federal courts have prevented the states from playing any role, no matter how well intentioned, in using any regulatory techniques to alter the federally-established wholesale price of power,[478] pursuant to the Filed Rate Doctrine and the "bright line" restricting state authority.[479] Moreover, states cannot restrict the flow of power in interstate commerce to benefit in-state consumers.[480]

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[473] *Id.*

[474] *Id.*

[475] *Id.* at 236 (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 338–39 (1982)).

[476] *Id.* at 224. "[I]f an allegedly preempted statute is enacted with multiple purposes, some permissible, others impermissible, the impermissible purposes will doom the statute and it will be preempted." *Id.*

[477] *See, e.g.*, *New England Power Co.*, 455 U.S. at 339–40; Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP, Inc., 379 F.3d 641, 650 (9th Cir. 2004).

[478] *See supra* Part IV.

[479] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

[480] *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008); *see also* Stiles, *supra* note 350; City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (noting that if a statute is facially discriminatory, it is virtually *per se* invalid); *see also* New York v. FERC, 535 U.S. 1, 16 (2002) (holding that transmissions on the interconnected national grids constitute transmissions in interstate commerce); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994); Wyoming v. Oklahoma, 502 U.S. 437,

Each of the four pillars creates constitutional impediments to the Vermont statute. With Congress now persistently embroiled in the proper exercise of federal power, what the states may and may not do in our federalist system of law is an increasingly crucial concern. [481] This ultimate decision here will shape the future of energy infrastructure in the U.S. under American constitutional governance.

454 (1992); *New England Power Co.*, 455 U.S. at 339; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental"); Patrick R. Jacobi, *supra* note 353, at 1102 (proposing that a court will likely strike down as unconstitutional any regulation that discriminates geographically or through point-of-origin);.

[481] Some of the highest profile recent 2012 Supreme Court decisions have involved the proper exercise of federal and state power with regard to health care and the Affordable Care Act, state enforcement of federal immigration laws, and other matters.