



August 14, 2013

## Appeals Court Invalidates Vermont's Effort To Shut Down Power Plant

*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*

U.S. Court of Appeals for the Second Circuit

The U.S. Court of Appeals for the Second Circuit today upheld a lower court's holding that federal law preempts a recent effort by Vermont lawmakers and regulators to effectively shutter operations at the Vermont Yankee Nuclear Power Station ("Vermont Yankee") in Vernon, Vermont. The decision was a victory for the Washington Legal Foundation ("WLF"), which filed a brief in the case in support of Vermont Yankee's challenge.

In its opinion, the appeals court agreed with WLF that Vermont's proffered reasons for its legislative scheme to put Vermont Yankee out of business could not be reconciled with the oversight already provided by the Nuclear Regulatory Commission. The court criticized Vermont's attempt "to evade court review" by shifting decision-making responsibility for nuclear power plants from a review board, whose decisions are subject to review by the Vermont Supreme Court, to the Vermont Legislature, where no judicial review of its actions is available. In the court's view, Vermont provided "an inadequate and misleading legislative record," failed "to provide plausible legislative rationales," and sought to impose "impermissible safety-related obligations" through non-statutory means.

"Because Congress granted the Nuclear Regulatory Commission exclusive authority over the safety, licensing, and operation of nuclear power plants, the Second Circuit rightly held that Vermont's scheme to halt Vermont Yankee's continued operation violates the Supremacy Clause," said WLF Senior Litigation Counsel Cory Andrews after reading the court's opinion. "As the Supreme Court has held, the one avenue Vermont may *not* pursue is to enact a state moratorium on nuclear energy grounded in safety concerns," Andrews said, "but that is precisely what it attempted to do here."

The case arose in connection with an effort by the Vermont General Assembly to effectively shut down the Vermont Yankee power plant, which began operating in 1972 under a 40-year license by the Atomic Energy Commission, the predecessor to the Nuclear Regulatory Commission (NRC). Set to expire on March 21, 2012, Vermont Yankee's license was renewed in 2011 by the NRC for another 20 years—through March 21, 2032. But in 2005, the Vermont General Assembly passed Act 74, which requires affirmative approval by the General Assembly for the storage of all spent nuclear fuel generated after March 21, 2012. Then, in 2006, the General Assembly passed Act 160, which divests Vermont's Public Service Board of the authority to issue a new "certificate of public good" (CPG) for any nuclear energy generating plant without the express approval of the General

Assembly.

Taken together, these laws effectively placed Vermont Yankee's continued existence at the sole discretion of the General Assembly. Seeking to condition Vermont Yankee's survival on the existence of below-market power purchase agreements with Vermont utilities, Vermont's legislature refused to approve the issuance of a CPG for Vermont Yankee or otherwise approve the storage of spent nuclear fuel for Vermont Yankee beyond March 21, 2012. Entergy, which owns and operates Vermont Yankee, filed suit seeking a permanent injunction and a declaration that Acts 74 and 160 are preempted by the Atomic Energy Act. The district court agreed, declaring the Vermont laws preempted by federal law. The appeals court's ruling today affirms that holding.

In its brief filed in the case, WLF argued that under the Federal Power Act, Congress granted the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over the wholesale sale of electric energy in interstate commerce. As a result, Vermont's plan to condition Vermont Yankee's continued operation on special below-market power rates for Vermont consumers is preempted by the Supremacy Clause. WLF also argued that, by requiring Vermont Yankee to provide in-state electric utilities with more favorable rates than out-of-state electric utilities, Vermont's scheme runs afoul of the dormant Commerce Clause.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending economic liberty, free enterprise, and a limited and accountable government.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).