News Release

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

FOR IMMEDIATE RELEASE **September 7, 2012**

COURT URGED TO INVALIDATE VERMONT'S EFFORT TO SHUT DOWN POWER PLANT

(*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Second Circuit to hold that federal law preempts an effort by Vermont lawmakers and regulators to effectively shutter operations at the Vermont Yankee Nuclear Power Station ("Vermont Yankee") in Vernon, Vermont.

In a brief filed in *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 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.

"Although Congress has granted the Nuclear Regulatory Commission exclusive authority over the safety, licensing, and operation of nuclear power plants, Vermont politicians devised a plan to halt Vermont Yankee's continued operation," said WLF Senior Litigation Counsel Cory Andrews after filing WLF's brief with the court. "Beyond being preempted under the Supremacy Clause," Andrews added, "Vermont's blatant attempt to extract below-market power rates for Vermont consumers also runs afoul of the Federal Power Act and the dormant Commerce Clause."

The case arises 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 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.

In its brief defending that decision on appeal, WLF argued that Vermont's scheme to extract below-market power rates for Vermont consumers also runs afoul of the Federal Power Act, which establishes exclusive federal jurisdiction over the wholesale sale of electric energy in interstate commerce. Under the Federal Power Act's "filed-rate doctrine," States are prohibited from imposing rates other than the rate filed by FERC. Under such circumstances, WLF argued, Vermont's below-market PPA requirement unquestionably stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Power Act and is thus preempted.

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

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.

* * *

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.