From: Kunin, Lisa [Lisa.Kunin@vermont.gov]
Sent: Monday, February 13, 2012 4:47 PM
To: London, Sarah
Subject: FW: Confidential Memo for Governor Shu re: VY
Attachments: Shumlin memo 2 8 2012.rtf

From: Benson Scotch [mailto:benson1791@gmail.com]
Sent: Monday, February 13, 2012 1:54 PM
To: Kunin, Lisa
Subject: Confidential Memo for Governor Shu re: VY

Dear Governor Shumlin,

Attached is the memo we discussed by telephone.

For good order's sake I have sent a copyto the Attorney General, time now being of the essence.

I would be very happy to help you and your team on any other matters where you think I might be of help.

Thanks for asking me to do this. Like you, I feel very devoted to our unique State.

Sincerely,

Ben Scotch

Memorandum

To: Governor Shumlin, Attorney General Sorrell
From: Ben Scotch
Re: Some Thoughts about the *Yankee* decision
Date: February 10, 2012

This memorandum is limited to Count I of the ENVY action. It is not meant to be an additional legal analysis—the State's briefing is exemplary —but rather a bird's eye view of how this case looks to a lawyer on the outside, followed by a brief concluding section—again as someone on the outside. (I may have failed to keep my promise to put my thoughts down on a single page.)

I. Remarks About the Trial Court Decision

1. The leading Supreme Court precedent in cases relating to nuclear power preemption (or not) is still *PG&E v. State Commission.*[1] The main message of that case is a presumption against preemption, but the trial court decision gives little more than lip service to *PG&E*: a) It states that the *PG&E* Court does not spell out any coherent test for applying the presumption; b) suggests that the case is out of touch with the times; and c) reads *PG&E* through the lens of later, lower-court decisions which are not close enough to the facts in *ENVY* to be persuasive, and in any case do not read *PG&E* in a manner that is supportive of the outcome in *ENVY*.

Summary: Judge Murtha comes close to bypassing *PG&E*. He tries a work-around, which is unpersuasive.

Qualification: While *PG&E* reigns as the leading preemption precedent in cases dealing with nuclear power, "[T]he [Supreme] Court has not reliably applied this presumption, and Justices frequently disagree about when the presumption applies and what result it requires in any given case. This inconsistency has led to accusations that the Court is

[1] 461 U.S. 190 (1983).

simply imposing its substantive preferences in preemption cases."[2]

In my view this observation is particularly apt in cases involving nuclear power, because the issue is controversial and divisive. Consequently it is risky to try to foreshadow the outcome of *ENVY* on appeal, based on *PG&E*. While Judge Murtha may be disregarding *PG&E* from a juridical point of view, if federal courts lean in favor of nuclear power interests more than they support the interests of state regulation, no preemption precedent, including *PG&E* ,is a hard case to distinguish.

Summary: Appellate courts are not at the peak of judicial consistency in preemption cases and may ignore the trial court's ignoring *PG&E*.

2. The Trial Court's Reliance on Pre-Enactment Statements by Legislators and Committee Witnesses. In my view this area is the most legally questionable and most vulnerable of the trial court's findings and conclusions. It is true that a statute which on its face has a notable safety effect (for example, a statute that would create a state agency to evaluate and rule on compliance with nuclear safety standards) could not be transformed by a statement of purpose stating an economic rationale for passage. ("If it walks like a duck . . . ")

But the voluminous references to statements reflecting safety concerns are not probative. Federal-State programs impose sometimes onerous burdens on states,[3] and it is not uncommon for legislators to vent at some of these burdens before adopting legislation complying fully with federal law. Even if a counting of heads were to reveal that a majority of legislators were concerned with VY's safety and feared a nuclear accident or other radiation-related event and so stated on tape, that poll would not

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[2] "New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions," 120 Harv.L.Rev.1204, 1204 (2007).

[3] See, for example, "Is it time for a new fiscal balance between states and the feds?" Pew Center on the States, *Stateline*, February 11, 2012. http://www.stateline.org/live/details/story?contentId=454040 (Viewed Feb.8, 2012)

be at all inconsistent with the same body—admonished and with deep frowns—adopting legislation eschewing safety altogether and dealing only with concerns like need, reliability, and cost.

Even if the use of transcripts of legislative hearings had been probative, there is no indication in Judge Murtha's opinion that his reliance on the numbers of witnesses—members of the General Assembly and members of the public—testifying about their health and safety concerns over the re-licensing of VY was subject to any meaningful, judicially warranted standard. There was no empirical study of the numbers of health-and-safety witnesses as a total of all witnesses or the impact of these witnesses. At what point—at which percentage of the whole—did legislators' expressed concerns about health and safety constitute a number sufficient to convince the trial court that "legislators' concerns were a primary motivating force for giving the legislature the power to take no action to approve a certificate of public good for continued operation"?[4]

Was that number of legislators greater than the of legislators in the following sentence of the decision: "Some of the *numerous references to safety* reflect legislators' responsible recognition that Vermont is preempted regulating radiological health and safety and indicate their desire to avoid invalidating their work on that ground"? (Emphasis supplied.) Picking up on Judge Murtha's reference to some "legislators responsible recognition" of the legal line between permissible and impermissible legislation, how might it have been possible to discuss or debate this distinction without an extensive discussion of preempted state prerogatives? Might legislators deeply concerned about safety and health have chosen, after such discussion, to support a bill that did *not* address these concerns but went as far as federal law allowed the Legislature to go in adopting a text that did *not* "cross the line?"[5]

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[4] Slip opinion at 74.

[5]The trial court cites *Village of Arlington Heights v. Metropolitan,* 429 U.S. 252 (1977), a case in which plaintiffs sued the municipality because of allegedly racially discriminatory zoning. In ruling for defendant on appeal, the Supreme Court stated that "In making its findings on this issue, the District Court noted that some of the opponents of [the development sought by plaintiffs] who spoke at the various hearings might have been

There is also a reasonable policy argument that determining legislative purpose from legislators' personal statements or the testimony presented to committees by witnesses will discourage diverse debate. Committee chairs are less likely to invite witnesses opposing the positions favored by committee members if courts were allowed to equate such views with the ultimate purposes of the legislation finally voted on by a committee or the full House or Senate.

Also, witnesses who are not invited to testify before a legislative committee because of the committee's concerns about possible subsequent judicial interpretations of some testimony may miss an opportunity to participate in the legislative process.

And the obverse is possible: A "head count" of pro and con witnesses on a given subject that will be noted and honored by the courts invites various interests to game the system.

Summary: Even if the trial court were right that some legislators would have wanted to deal with radiological safety in writing Acts 160 and 74, it was error for the court to rely on evidence of pre-enactment discussions in striking down laws not preempted on their face.

Qualification: If we exclude evidence of safety concerns during the legislative process, Acts 160 and 74 are still subject to a viable argument that their effects, and therefore their purpose, are safety-related. Act 160 in particular is not general and does not establish standards for future power plant applications. Instead, it relates only to VY, and unlike a PSB ruling on a CPG application, whatever the text of the Act, there is no discrete and incontestable record supporting conclusions about need, reliability, or cost, though the trial court erred in saying that there was no record at all.

The underlying motivation of both Acts, but especially so with Act

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motivated by opposition to minority groups. The court held, however, that the evidence 'does not warrant the conclusion that this motivated the defendants.' "

160, is necessarily indeterminate.[6] The indeterminacy may open the door on appeal to an argument that in a culture where nuclear power is disfavored or at least has sizeable opposition, a statute with clear effects (non-renewal of the VY state authorization) but with indeterminate motivation should be seen as based on radiological safety concerns and so preempted, despite the presumption against preemption that *PS&G* sets forth. In sum, the trial court's error in relying on disparate pre-enactment conversations may not insure reversal on appeal.

4. Intent and Effects. The trial court decision first finds "intent" in the conversations about radiological safety and health prior to the enactment of Acts 160 and 74. *See (2), above.* However the court goes on to state that "numerous precedents, and logic, indicate that a law enacted for an impermissible purpose must have a preempted effect in order to be invalid under the Supremacy Clause."[7]

But the trial court uses the concept of "effects" in different, and inconsistent, ways. First the court finds a preempted effect in the requirement in Section 248(e)(2) because this provision gives the "unreviewable power to allow Entergy's current CPG to lapse and effectively deny a pending petition for renewal, even if it does so for preempted reasons under federal law."[8] Given this "effect," the trial court goes on to search out Act 160's purpose.[9] This the court does by going back to the *same rationale* used to demonstrate intent: "The legislative history of Act 160 reflects that legislators' concerns regarding the radiological safety of Vermont Yankee were a primary motivating force for giving the legislature the power to take no action to approve a certificate

[6] "Indeterminacy" is not used here as a synonym for "part safety- and part-economic." The trial court is correct that a statute based on mixed motives that includes nuclear safety concerns is preempted. Indeterminancy is used in its usual sense of vague or unable to be ascertained, not containing a mix of Part A and Part B.

[7] Slip opinion at 69.

[8] Slip opinion at 71-72.

[9] Slip opinion at 73.

of public good for continued operation."[10] Circular, circular, circular.

Again reducing every aspect of legislative history to radiological safety, the trial court concludes that the "demand for a favorable power purchase agreement was itself rooted in safety concerns . . . "[11] The "overwhelming evidence in the legislative record that Act 160 was grounded in radiological safety concerns . . ."[12] rests generally on pre-enactment conversations about radiological safety.

The court correctly cites *Village of Arlington Heights*[13] as illustrating a true distinction between intent and effects. Where minority citizens petitioned the nearly-all-white municipality for a zoning amendment, based on an equal protection theory, and the municipality refused the petition, the *effect* was clear and palpable: There would be no new zoning regulation. The remaining question was whether Arlington Heights refrained from acting based on an intent to prevent integration of the village—a question clearly independent of the issue of effect. What's "in the minds" of lawmakers is almost uniquely important in discrimination cases. In cases like *ENVY*, on the other hand, legislators may "hold their noses" while voting and still produce a statute whose effect does not invite preemption.

Summary: As I read the trial court decision, intent is effect; effect is intent—all based on pre-enactment conversations. The trial court has not found any preempted effects—effects that palpably stray into preempted territory.

Qualification: An appellate court might find that in bypassing the PSB, like the Village of Arlington's failing to pass a diversity-friendly zoning bylaw, the Legislature was motivated by radiological concerns. Though in

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[10] Slip opinion at 74.

[11] Slip opinion at 77.

[12] Idem.

[13] 429 U.S. 252 (1977); see footnote 4.

my view evidence to that effect would have to be independent of pre-enactment talk, the very act of "forum shopping" (i.e., electing the Legislature over the PSB) might be deemed a fatal effect.

Additionally, the intertwining of safety and economic rationales makes it easier for a court leaning toward affirmance to both discount as erroneous the trial court's substantial reliance on the expression of health and safety concerns by legislators and committee witnesses as the dominant element in legislative histories, yet conclude that these statutes on their face fail to evince purposes other than radiological safety.

5. Equitable Defenses. The District Court was probably correct to conclude that the State's equitable defenses were without merit, based primarily on the 2002 MOU, in which ENVY agreed to forego a preemption challenge to the jurisdiction of the PSB—not the Legislature—under then-current law. ENVY (1) may well have given the State mixed signals about its stance concerning Acts 74 and 260, and (2) baiting and switching, which Defendants' briefs make very clear. But the trial court's narrow and literal reading of the 2002 MOU has intuitive appeal. It is further likely that an appellate court will assume that the Legislature knew, or should have known, that the 2002 MOU was put in jeopardy as to legislative action regarding the re-licencing issue. Both the State and ENVY had to be aware that given its role, the PSB would be a more favorable forum on the issue of renewal than the Legislature, and this awareness weakens the equitable defenses.

Qualification. ENVY argues[14] that it could not legally waive federal preemption, which is generally correct as a Y/N question, but subject to the circumstances of a particular case, as asserted in Vermont's post-trial brief. ENVY's absolute position against a party's power to waive federal preemption is, in effect to argue a mutual mistake of law in 2002. But I don't see this issue as playing a significant role in the instant case.

Conclusions

[14] Post-trial brief at 2.

There are obviously legal and institutional issues to be considered in deciding whether to appeal some or all of *ENVY v. Vermont*. The trial court's acceptance of essentially anecdotal evidence to inform legislative purpose is error, in my view. But given the breadth and inconsistency of preemption jurisprudence, an appellate court might a) disagree, b) agree, but affirm, in the manner I relate in this memo, or c) agree and remand for further proceedings centering on legislative purpose and the effects of Acts 160 and 74 on federal preemption of radiological safety issues. Theoretically the 2d Circuit could simply reverse, but the only outcome on which I will offer an opinion (Lawyers never guess.) is that the Circuit will not simply reverse.

My view is that as a matter of public interest, the economic cost of an appeal or appeals should not deter the State from going forward. The legal and intellectual work product is complete, and an appeal should not consume the time and resources involved in defending the ENVY suit at trial. An appeal will take a long time to conclude, but if there is a more expeditious way to terminate VY's operating license, I am not aware of it. Nor am I in any position to evaluate the State's chances before the PSB and the possible appeals from its decision.

Taking my objective hat off for a moment, where a trial court decision on a major issue contains significant errors, I would come close to saying that it is a civic duty to appeal, even if the outcome of the appeal teeters on the line and may reenforce the popular sense of loss.

Qualification:

The options facing the State are indeed complex. The opportunity cost of appealing—the time spent and perhaps lost, the resources committed to an appeal, postponing what might be the most immediate and best chances before the PSB, and getting VY offline at the earliest likely date—must be weighed.

I proffer this standard: If there are *clear and convincing* reasons to believe that an appeal would not be the likeliest way to advance the long-term interests of closing down VY and clearing the way for an economically sound and durable energy policy for Vermont, I would

consider not appealing. I think the burden is on those counseling against an appeal and that the most thorough critical-path study of the alternatives is in order.