

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT	)	
YANKEE, LLC and ENTERGY NUCLEAR	)	
OPERATIONS, INC.,	)	
Plaintiffs	)	
	)	
v.	)	Docket No. 1:11-cv-99
	)	
PETER SHUMLIN, in his official capacity as	)	
GOVERNOR OF THE STATE OF	)	
VERMONT; WILLIAM SORRELL, in his	)	
official capacity as the ATTORNEY	)	
GENERAL OF THE STATE OF VERMONT;	)	
and JAMES VOLZ, JOHN BURKE, and	)	
DAVID COEN, in their official capacities	)	
as members of THE VERMONT PUBLIC	)	
SERVICE BOARD,	)	
Defendants	)	

MOTION FOR ATTORNEY’S FEES, EXPENSES, AND COSTS,  
AND FOR LEAVE TO FILE SUPPLEMENTAL EVIDENCE IN SUPPORT OF MOTION

Pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 54(d), Plaintiffs, through their attorneys, hereby move for their attorney’s fees, expenses and costs in this action.

Background

On April 18, 2011, Plaintiffs filed a three count Complaint. Count I alleged a claim for federal preemption under the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* Count II alleged a claim for federal preemption under the Federal Power Act, 16 U.S.C. §791a *et seq.* Count III alleged a claim under the Commerce Clause, U.S. Const. art. I, § 8, and 42 U.S.C. § 1983.

On January 20, 2012, this Court entered Judgment for the Plaintiffs in the above captioned case after issuing a 102 page Decision and Order on the Merits of Plaintiffs' Complaint (the "Decision"). In the Decision, the Court granted the relief that Plaintiffs were seeking, including the relief that Plaintiffs requested in their Commerce Clause claim under 42 U.S.C. § 1983.

### Argument

#### I. PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES, EXPENSES, AND COSTS.

Plaintiffs are entitled to an award of attorney's fees under Section 1988 because they prevailed on their Commerce Clause claim. Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in any action to enforce a provision of Section 1983. The Supreme Court has held that rights secured by the Commerce Clause may be enforced under Section 1983. *Dennis v. Higgins*, 498 U.S. 439, 444 (1991). As a result, courts have repeatedly held that enforcement of Commerce Clause rights can give rise to a claim for attorney's fees under Section 1988. *BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911, 914 (9th Cir. 1993); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 285 (8th Cir. 1993).

A court may award attorney's fees for all fees incurred by the prevailing party in the lawsuit even where the action involved only one claim that is eligible for fees under Section 1988. Both the Second and Ninth Circuits have held that plaintiffs are "prevailing part[ies]" under Section 1988 and eligible for attorney's fees in cases involving both Commerce Clause claims and Supremacy Clause claims. *Automobile Club of New York, Inc. v. Dykstra*, 520 F.3d 210, 217 (2d Cir. 2008); *Gerling Global Reinsurance Corp. of America v. Garamendi*, 400 F.3d 803, (9th Cir. 2005) *aff'd as modified* 410 F.3d 531 (9th Cir. 2005). In *Automobile Club*, the

Second Circuit affirmed an award of attorney's fees where the plaintiff prevailed on a preemption claim and the appellate court did not reach the Commerce Clause issues. *Automobile Club of New York, Inc.*, 520 F.3d at 217 (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). In *Gerling*, the Ninth Circuit awarded attorney's fees in a case remanded from the Supreme Court where the Supreme Court did not reach either the Commerce Clause or Due Process claims. The Ninth Circuit stated that "for the purposes of qualifying as a prevailing party, an unaddressed, fee-supporting claim supports an award of fees if it is both substantial and arises from a common nucleus of operative fact with a dispositive, non-fee-supporting claim addressed by the court." *Gerling Global*, 400 F.3d at 808. The Court also held that a claim is constitutionally insubstantial if it is essentially fictitious, wholly insubstantial, obviously frivolous, or obviously without merit. *Id.* "Claims arise from a common nucleus of operative fact where the fee-supporting claims are so interrelated with non-fee claims that plaintiffs would ordinarily be expected to try them all in one judicial proceeding." *Id.*; see also *Southwestern Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 551 (5th Cir. 2003).

In determining whether a party is a prevailing party entitled to attorney's fees for enforcing a right under Section 1983, the Second Circuit has also held that "a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but that change must also be judicially sanctioned." *Perez v. Westchester County Dep't of Corrections*, 587 F.3d 143, 149 (2d Cir. 2009). A judgment entered in favor of the plaintiffs can meet this threshold requirement for entitlement to attorney's fees. *Id.*

In this case, Plaintiffs meet all of the requirements for attorney's fees under Section 1988. The Commerce Clause claim is substantial because it is neither fictitious nor frivolous. Plaintiffs prevailed on the claim and the Decision of this Court substantially limited the power of the

Public Service Board. (Decision at 101.) The Commerce Clause claim also arises from the same set of operative facts as the Supremacy Clause claims. All of the claims in this case arose out of the actions that the General Assembly took in passing Acts 74 and 160. (*See* Decision at 5-55.) The negotiations over the power purchase agreement were tied to the General Assembly's actions with respect to Acts 74 and 160. (*See, e.g.*, Decision at 33; *see id.* at 77 (“The legislative history makes clear that the demand for a favorable power purchase agreement was itself rooted in safety concerns, because the General Assembly wanted financial compensation for the perceived safety risk of having Vermont Yankee within the same state.”)) The claims were so interrelated that the common underlying facts were presented together in a single trial. Finally, Plaintiffs meet the requirements for fees under the *Perez* case. The legal relationship between the parties was materially altered when the Court invalidated portions of Acts 74 and 160. (Decision at 100-101.) That alteration was judicially sanctioned by the Court and would not have occurred without this Court's intervention.

Plaintiffs currently estimate that their claim for attorney's fees, expenses and costs will be in excess of \$4.62 million. That amount is likely to increase if the fee petition is extensively litigated and/or Defendants appeal the Judgment.

II. PLAINTIFFS REQUEST A SCHEDULING ORDER TO GUIDE SUBMISSION OF EVIDENTIARY MATERIAL TO SUPPORT THEIR REQUEST FOR FEES, EXPENSES AND COSTS.

The Advisory Committee Notes to Rule 54 acknowledge that the evidentiary support for a motion for attorney's fees does not need to be submitted at the same time as the original motion. Fed. R. Civ. P. 54 advisory committee's note (“The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on fees.”). In addition, it is unknown at this point whether Defendants intend to appeal the Judgment, which may render

substantial effort on the fee petition premature. Accordingly, Plaintiffs request that the Court enter a scheduling order that allows Defendants sufficient time to consider their options and Plaintiffs sufficient time to prepare the relevant evidentiary material to support their fee petition.

Conclusion

This Court should award Plaintiffs their attorney's fees as prevailing plaintiffs under Section 1988 and set a briefing schedule to allow full evidentiary submissions to be presented to the Court.

Dated: Burlington, Vermont  
February 3, 2012

/s/ Matthew B. Byrne

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