

Entergy case was
about the 'facts'
and Vermont lost

Vermont got its butt kicked Thursday. U.S. District Court Judge J. Gavin Murtha ruled that not only could Entergy keep operating after the purported March, 2012 shutdown date, but that the state erred in almost all of its legislative efforts to shut the plant down. His ruling was not ambiguous; his 102-page decision was a point-by-point refutation of almost every claim that Attorney General Bill Sorrell raised in the state's defense.

Cheryl Hanna, a Vermont Law School professor who has followed the case from the outset, said it best: "Judge Murtha did an incredibly careful analysis of the legislative record, and the bottom line is that they [legislators] were primarily motivated by safety. ...Vermont lost on every argument, that's the short of it... I think [Kathleen] Sullivan [Entergy's counsel] was the superior lawyer and with her framing of the case she got the judge to look at the long legislative history. The case was primarily about facts, not law, and the facts were on her side."

Patrick Parenteau, also a Vermont Law School professor, put it more bluntly: "Kathleen Sullivan cleaned the deck and the state got out-lawyered...she put on a better case."

But the case is more than who was the better lawyer; Entergy prevailed because it had the facts on its side. Federal law is crystal clear that the safety of a nuclear power plant is not within a state's purview. It was ridiculously naïve to think that the Legislature's determination to shut the plant down did not have safety as its primary underpinning. There was no other issue.

Judge Murtha saw this, and not just once, but repeatedly. He ruled the memorandum of understanding between Entergy and the state as practically irrelevant.

Not only did the judge strip Mr. Sorrell of this pretense, he went further and said the state also violated the Constitution's Commerce Clause in trying to force Entergy into selling power at rates advantageous to the state. Interestingly, Ms. Hanna said this would also open the state to Entergy's being able to sue the state for legal costs.

As with any U.S. District Court ruling, it can be appealed, although the legal experts see little hope of Mr. Murtha's ruling being overturned. The judge also stated the obvious, which is that the Public Service Board still has the power to deny Entergy a Certificate of Public Good. The limitation, however, is that the board could not use any of the Legislature's efforts to justify a denial of the certificate. Entergy could also fight the denial, should the board decide to pursue it.

But the legal experts don't see a clear, easy path for the board to justify a denial. What we will see is both Mr. Sorrell and the department spending a lot of time trying to figure out the best case forward. It's also hard to believe that the Attorney General will opt to pack his bags and not appeal. The issue has strong appeal with the Democratic base and Gov. Peter Shumlin has a visceral dislike of the Louisiana-owned nuclear power plant. It's a safe bet that every legal option will be explored and that an appeal will be pursued.

That likelihood is unfortunate. The state lost, and it wasn't close. It doesn't make

sense to pour good money after bad, which we've been doing a lot of lately. This is the third major case the state has lost, including data mining and public finance.

Most important, however, is the fact that the continued operation of the plant in Vernon is in the state's best interests. It continues to give us power that doesn't pollute. It continues to give us power at prices far below anything the renewable energy sector can offer. It continues to provide employment for 600 highly paid employees. And it continues to be a plant with one of the strongest safety records in the industry.

As Judge Murtha might have said: These are the facts.

Undoubtedly, the anti-nuc forces in the Legislature will react with predictable outrage. There will be the wringing of hands and the lament that we're near earth's end if we cannot control what happens within our own borders. That may be, but Judge Murtha's responsibility is to interpret the law, and he did. What the Legislature needs to figure out is that they are either getting lousy advice, or they are not following directions.

And let's not allow ourselves to be misled by the headlines; the governor may be upset with the judge's ruling, but he's also been saved from himself. There are 600 people who still have jobs and the town of Vernon and surrounding municipalities have been spared an economic catastrophe [at least for the moment.] He continues to be the state's luckiest politician; he can continue to rally the left with his anti-nuc rhetoric and yet can avoid the "loss of jobs" charge that would have come his way had the plant been shut down.

Who knows, a year from now he may be touring the plant and taking credit for protecting the economic stability of that part of Vermont.

by Emerson Lynn