

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of the “Addison Natural Gas Project” consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont

**PROPOSAL FOR DECISION OF
THE VERMONT DEPARTMENT OF PUBLIC SERVICE
ON WHETHER TO REOPEN THE PROCEEDING**

October 2, 2014

I. Introduction

In this Order, the Board determines whether to reopen this proceeding in light of the increased cost estimates of which the Board received notification from Vermont Gas Systems, Inc. (“VGS”) on July 2, 2014. Having reviewed the issue of whether to reopen, we decline to exercise our discretion to do so. It bears emphasis that the scope of our review in this case is limited to the new cost information reported by VGS on July 2, 2014, and its impact on the December 23, 2014 order (“December 23 Order” or “Order”) issued in this proceeding. We did not seek, nor did the Supreme Court grant us, leave to revisit any other matter or issue present in this case. In deciding not to reopen this proceeding, we have reviewed a considerable amount of evidence. We find that this process—and the forum it provided to enable a formal airing of issues pertaining to the revised

cost estimates—served the parties and the public well. As we described in the December 23 Order, the Project is a major infrastructure project in the State and has significant impacts both now and in the future. Given the extent of the revised cost estimates, it was important for us to consider taking the extraordinary step of reopening the proceeding. Having done so, the fundamental conclusion in the December 23 Order is confirmed—the Project remains in the general good of the State as the significant benefits associated with the Project continue to outweigh the costs even in light of the revised cost estimates filed by VGS.

We do not intend to convey the message that we are unconcerned about the extent of the revised cost estimates or the apparent delay in reporting. However, our decision not to reopen this proceeding exists within the context of our plenary jurisdiction over VGS and the opportunities for review of these and other issues associated with the Project in the normal course. For example, we are currently investigating whether VGS violated Rule 5.409 with respect to its reporting of the revised cost estimates. We have also opened an investigation to determine whether an amendment to the certificate of public good (“CPG”) issued in the December 23 Order is necessary in light of the revised cost estimates. Finally, and perhaps most importantly, our decision in this case does not constitute a Board review or approval of the costs associated with the Project. That issue is reserved for future rate proceedings, and the apportionment of the Project’s costs is reserved to future rate design proceedings.

Accordingly, given that the evidence adduced in this proceeding showed a relatively small reduction to the significant benefits associated with this Project, and in light of the overall regulatory context that allows for review of many of these issues in more appropriate settings, we

decline to take the extraordinary step of reopening this proceeding. We will therefore return this matter to the Vermont Supreme Court for resolution of the issues currently on appeal.

II. Procedural History

On December 23, 2013, the Board issued an order (the "Order") and CPG to VGS under 30 V.S.A. § 248 to construct Phase I of the Addison Expansion Project ("Phase I"). In April 2013, Ms. Kristin Lyons ("Lyons"), a landowner affected by a change in the alignment of Phase I imposed by the Board in the Order, appealed to the Vermont Supreme Court.

On July 2, 2014, VGS provided notice to the Board of the increase in estimated capital costs (the "VGS Cost Update"). In response to the VGS Cost Update, the Board sought comments from parties. Comments and various motions were received from the Department of Public Service ("DPS" or the "Department"), the Conservation Law Foundation ("CLF"), Lyons, together with Jane and Nate Palmer (the "Palmer's"), Michael Hurlburt (the "Hurlburts"), and the Vermont Fuel Dealers Association ("VFDA").

On September 4, 2014, the Board issued an order in which it notified the parties that it intended to seek a remand of the docket from the Vermont Supreme Court for the limited purposes of:

- (1) determining whether, in light of the disclosure of new information regarding an increase in the cost of the Project, the December 23rd Order should be reconsidered; and, (2) determining the impact, if any, of the new information on the question of whether to authorize a CPG for the Project to promote the general good of the state.

On September 9, 2014, the Board filed a Motion For Expedited Remand and on September 11, 2014, the Vermont Supreme Court granted the remand request "...to allow the Board thirty

days to determine whether to reopen the proceedings in light of new cost information. If the Board determines that the proceedings will be reopened, it will have an additional thirty days to address the new cost information.”

In a Procedural Order issued on September 12, 2014, the Board set a schedule which provided an opportunity for parties to prefile testimony, followed by a technical hearing and then briefs. Prefiled testimony was submitted on behalf of the Department, the Palmers, the VFDA, VGS and, jointly, Lyons and the Vermont Public Interest Research Group (“VPIRG”). Additionally, VPIRG filed a Motion to Intervene, which motion was subsequently denied.

On September 26, 2014, the Board held a hearing at which it heard evidence as to whether it should exercise its discretion to reopen this proceeding. Appearances were entered by Vermont Gas, the Department, the Palmers, CLF, AARP, VPIRG and Lyons. A representative of VFDA was in attendance.

III. Findings of Fact

1. In its December 12, 2012 petition, VGS provided a cost estimate of \$83.8 million. On February 28, 2013, VGS filed a realignment of the Project, together with a revised budget of \$86.6 million. A second realignment was submitted on June 28, 2013, but this filing did not include a budget revision. Exhibit Petitioner Supp. EMS-1 at pg. at 1-2.
2. In the VGS Cost Update, VGS presented a revised cost estimate of \$121.6 million, which represents an increase of \$35 million, or approximately 40%. *Id.*
3. The largest single contributor to the cost increase was the increase in construction costs. These accounted for \$19.5 million of the total \$35.0 million. Exhibit Petitioner Supp.

EMS-1; Tr. 9/26/14 at pg.108 (Gilbert).

4. These increases were driven by market forces as the demand for natural gas increased, with a corresponding need for additional infrastructure. The cost of infrastructure construction increased with a resulting increase in overall prices. Tr. 9/26/14 at pg.108 (Gilbert), at pg. 293 (Peyser).
5. In addition to market forces, design modifications and increased oversight/enhanced safety procedures were significant factors in the cost increase. Exhibit Petitioner Supp. EMS-1.
6. The impacts of the revised cost estimates are not sufficient to result in a different outcome for evaluation under 30 V.S.A. §248(b)(4), and the Order should not be reconsidered. Poor pf. at 1.
7. The Department conducted a REMI analysis of the impact on the Vermont economy of the decreased residential consumer spending and increased natural gas costs for commercial and industrial consumers and the results are shown in the table below.

Impacts of Revised Cost Estimates on Economic Impacts of Phase I			
Discount Rate	3.00%	7.69%	9.75%
Phase I base impact	\$89.79	\$60.35	\$52.09
VT economy impacts of revised cost estimates	-\$17.9	-\$11.5	-\$9.6
Revised Economic Impact	\$71.89	\$48.85	\$42.49

These REMI results show the general impact on the Vermont economy from these revised cost estimates. Removing these impacts from the original estimated impacts continues to show positive economic impact from the Project, under varying discount rates, even without the assumed aggressive energy efficiency programs or greenhouse gas benefits as

estimated previously in the Project, and with none of the increased costs accruing to local industry. Poor pf. at 5.

8. Using a 3% discount rate, the Department calculates benefits in excess of \$70 million before considering the aggressive energy efficiency programs required by the Board as a condition to the CPG or greenhouse gas benefits found by the Board to be likely to occur as a result of the Project. Tr. 9/26/14 at pg. 181 (Poor).
9. The Project is more mature today than it was a year ago during the time of the technical hearings. Many more costs are known as opposed to being estimates. Tr. 9/26/14 at pg.52-53 (Simollardes) at pg. 112 (Gilbert).
10. The Department has required that VGS provide quarterly updates in both Docket Nos. 7970 and 8180. The Department has urged the Board to require that these updates be provided to the Board and other parties, as well, and Vermont Gas has agreed to do so voluntarily. The first such report is due to be delivered in early October 2014. Tr. 9/26/14 at 165-168(Gilbert).

IV. The Legal Standard

The standard that we apply in circumstances such as these is grounded both in this Board's precedent and in our Motion and the Supreme Court's Order leading up to this proceeding. In our Motion to the Supreme Court, we made two requests. The first request, and the only one relevant at this stage of the proceeding, is "that the Court remand the case to the Board to allow the Board 30 days to determine whether to reopen the proceedings in light of the new cost information...." Board Motion for Expedited Remand, Sup. Ct. Docket No. 2014-135, at 2. We explained to the

Court that our request for remand was similar to the request made by parties to the Northwest Reliability Project (NRP) proceeding. *Id.* (citing *In Re Vermont Electric Power Co.*, 2006 VT 69 (8/25/05)).

In the NRP case, we held that Rule 60 of the Vermont Rules of Civil Procedure (VRCP) applied in a case where estimated Project costs were revised upward following the issuance of a CPG. *Petitions of Vermont Electric Power Co., Inc.*, Order on Remand re Reopening Proceedings, Docket No. 6860, Order of 9/23/2005, at 19 (“We conclude that given the limited scope of the remand from the Court, the issue before us—whether to reopen our previous approval of the Project—properly falls under the provisions of Rule 60, and not the standards that govern amendments to projects.”). Accordingly, given the factual similarities between the NRP case and the instant proceeding, we apply the standard of Rule 60(b), which applies to Board proceedings pursuant to Board Rule 2.221.

We set forth the relevant Rule 60(b) standards in the NRP Remand Decision:

Rule 60(b)(2) allows the Board to grant relief from a final order on the basis of newly discovered evidence. To do so, however, requires that the new evidence be ““of such a material and controlling nature as will probably change the outcome.”” *In re Petition of Ryegate Wood Energy Co.*, Docket No. 5217, Order of 11/30/90 at 4, quoting Moore's Federal Practice § 60.23[4] (2d ed. 1990).

Rule 60(b)(3) allows the Board to reopen a final order for “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” A party proceeding under Rule 60(b)(3) must show such misconduct “by clear and convincing evidence,” *Gavala v. Claassen*, 2003 VT 16 ¶ 5, 175 Vt. 487 (2003), and demonstrate that the misconduct prevented the moving party from fully and fairly presenting its case. *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002).

Rule 60(b)(6) allows reopening a final order for any other reason justifying relief. Rule 60(b)(6) only applies when the basis for relief does not fall within any of the other five subsections of Rule 60. *Perrott v. Johnston*, 151 Vt. 464, 466 (1989).

The reopening of a prior decision under VRCP 60(b) is discretionary with the tribunal. *Lyddy v. Lyddy*, 173 Vt. 493, 497 (2001). In its consideration as to whether to reopen, the tribunal may consider the prejudice that would arise from setting aside the judgment. *Teamsters, Chauffers, Warehousemen, and Helpers Union Local No. 59 v. Superline Transport. Co.*, 953 F. 2d 17, 20 (1st Cir. 1992). At the same time, “[Rule 60(b)] is not an ‘open invitation to reconsider matters concluded at trial,’ but should be applied only in extraordinary circumstances.” *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24 (1999) (citing *Olde & Co. v. Boudreau*, 150 Vt. 321, 324 (1988)). “The burden is on the party seeking relief under Rule 60(b) to plead facts ‘with sufficient particularity to warrant a hearing and potential relief.’” *Spencer v. Spencer*, 2014 VT 63, P 13 (citing *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 2013 VT 115).

V. Application of the Legal Standard

Given the evidence before us, we decline to exercise our discretion to reopen this proceeding under any of the relevant subsections of Rule 60(b). First, as was the case in the NRP proceeding, the basis upon which the final order would be reopened is newly discovered evidence, i.e., the new cost information reported by VGS on July 2, 2014. Because reopening a final judgment to consider newly discovered evidence is clearly encompassed in Rule 60(b)(2), the catchall provision of Rule 60(b)(6) is inapplicable. See *Peirce v. Vaughn*, 2012 VT 5, P 10 (“Relief under V.R.C.P. 60(b)(6) is available only when a ground justifying relief is not

encompassed within any of the first five classes of the rule.” (citing *Alexander v. Dupuis*, 140 Vt. 122, 124 (1981))). Second, Rule 60(b)(3) is also inapplicable, not as a matter of law, but simply due to the dearth of any evidence alleging fraud, misrepresentation, or misconduct in the reporting of the new cost information, let alone “clear and convincing evidence” that would indicate such malfeasance. Even when asked directly, a witness urging the Board to reopen declined to allege bad faith on the part of VGS with respect to the revised cost estimates. Tr.9/26/14 at 294 (Peysner). Accordingly, Rule 60(b)(3) is not applicable here.

Having eliminated Rules 60(b)(3) and (6) as potential grounds for reopening this proceeding, all that remains is Rule 60(b)(2). As explained above, the newly discovered evidence must be of such a material and controlling nature as *will probably change the outcome*. None of the parties seeking to reopen this proceeding have carried the burden of showing that the revised cost estimates have the potential to change any of the fundamental conclusions reached in the December 23 Order, let alone that they are of such a material and controlling nature as will probably change the outcome. This result is similar to the NRP proceeding, in which we observed that “[w]hile the near doubling of projected costs for the NRP may, at some visceral level, seem to call for reexamination of the Project, the cost increase in fact is not likely to change the outcome of our [final order].” *Petitions of Vermont Electric Power Co., Inc.*, Order on Remand re Reopening Proceedings, Docket No. 6860, Order of 9/23/2005, at 22.

Given the scope of the prefiled testimony offered in this remand proceeding and the subjects discussed at the technical hearing, it is our judgment that the new cost information could fairly be seen to affect three of the determinations we made in the December 23 Order: (1) that

the Project is needed for present and future demand for services (section 248(b)(2)); (2) that the Project results in an economic benefit to the State (section 248(b)(4)); and (3) that the Project is in the general good of the state (section 248(a)(3)).

With respect to section 248(b)(2), we held that the “need” for this Project is primarily the demand for natural gas in Addison County. December 23 Order at 75. No evidence was provided in this proceeding that would suggest that the revisions to the Project’s capital costs would increase the cost of natural gas to the point that it would drive down the demand for natural gas service in the Addison County market. To the contrary, the evidence continues to suggest that the demand upon which the Department’s analysis is based is conservative when compared to historic adoption rates in new markets. Tr. 9/26/14 at pg. 176,178 (Poor). Furthermore, the evidence demonstrates that VGS used depreciation rates that, if anything, are shorter than the useful life of the Project, having the effect of increasing the annual depreciation expense (and associated rates) attributable to the Project. Tr. 9/26/14 at pg. 179 (Poor). We therefore find that our determination as to the market demand in the December 23 Order was sufficiently conservative, such that the increased capital costs, spread over the useful life of the Project, are unlikely to dampen that demand in any measurable way.

We also concluded that this demand cannot realistically be met by efficiency or demand-side management measures. *Id.* We explained that “at the present time, there is no evidence that would suggest that any entity could or would be willing to provide a level of energy efficiency measures in Addison County at a quantity or pace that would cost-effectively meet the demand for natural gas that the project would address in the Addison County market.” *Id.* at

75-76. No evidence has been provided that would suggest that the new cost information that is the subject of this proceeding (and its associated increase to the cost of delivered natural gas) would change this conclusion.

Even the best evidence that was offered in this proceeding—that related to the potential for heat pumps—would not impact the decision. First, as acknowledged by Witness Neme, multi-nodal heat pumps capable of serving multiple rooms in the home are not yet available. Tr. 9/26/14 at pg. 224 and pg. 231 (Neme). Second, even with a heat pump, a back-up heating source is mostly still necessary. *Id.* at 213. Third, heat pumps cannot serve industrial process needs and are not yet practical for larger commercial and industrial heating needs. *Id.* at 222-223.

Given that the new cost information has almost no potential to change our key holdings determining that this project is “needed” to serve the Addison County market demand, the newly discovered evidence cannot be said to “probably change the outcome” such that reopening the proceeding would be appropriate.

With respect to section 248(b)(4), we found that the evidence showed that the Project will result in a net economic benefit. December 23 Order at 83. Of course, at the time we made this finding, the estimated capital costs were approximately \$35 million less than they are estimated to be now given the new cost information. So the question here is whether this new cost information reduces the net economic benefit to such a degree that it is probable that the costs would outweigh the benefits. On that point, no party has offered evidence that would suggest such a remarkable shift in the economic analysis of the Project.

First, we note that our finding that the Project will result in a net economic benefit in the

December 23 Order was made after excluding the greenhouse gas and efficiency benefits that are likely to accrue as a result of this Project. *Id.* at 84. Notwithstanding the uncertainty in the amount of greenhouse gas benefits, the best estimates showed a net greenhouse gas reduction. These greenhouse gas reductions will continue to result in an increase to the quantified economic benefits.

Second, we have reviewed and are persuaded by the analysis of Department witness Poor. The testimony of Mr. Poor was consistent with the type of testimony we relied on in the underlying proceeding (i.e., the results of a REMI modeling exercise). Further, Mr. Poor's testimony provides the best method of isolating the effect of the new cost information. This is important given the limitations set forth in our request for a remand and in the Supreme Court's order granting the limited remand. Poor's modeling demonstrated the impact of the new cost information on the Vermont economy by reference to decreased residential consumer spending and increased natural gas costs for commercial and industrial consumers. As is immediately clear from his results, even with the increased cost estimates, the quantified economic benefits continue to outpace the costs by a significant margin. When considering the unquantified economic benefits associated with associated greenhouse gas reductions and efficiency gains, it is clear that the newly discovered evidence is unlikely to change the outcome of the proceeding on this point, thereby falling well short of the standard required by Rule 60(b)(2).

Finally, as part of our discussion into whether the Project is in the general good of the State, we addressed concerns that the Project would result in an impermissible geographic cross-subsidy. *Id.* at 142-44. We found that, notwithstanding our policy generally disfavoring

cross-subsidization, some amount of it exists to make ratemaking feasible. *Id.* at 143. We further found that in this case, there was sufficient evidence showing that any cross-subsidization that may result from the Project does not rise to the level of being impermissible. As discussed below, there has been no testimony offered to demonstrate that the increase in estimated costs has the potential to change that determination, let alone making it probable that the determination would change.

While much of the discussion in the technical hearing revolved around whether and when the Project would “pay for itself,” it is important to remember that projecting natural gas rates 20 or 30 years in the future involves a significant degree of speculation. Accordingly, while the testimony contains a significant amount of discussion pertaining to the year in which the Project will pay for itself, such statements must be taken for what they are—best guesses based on current information. Two big variables that are clearly outstanding are the Phase II project currently pending in Docket No. 8180 and whether to use the System Expansion and Reliability Fund (Fund) for this Project. Evaluating the new cost information in light of these assumptions and uncertainties, we find that it does not measurably change the timing or extent of any cross-subsidy that may result from this project after its costs are put into rates. As demonstrated by Exhibit Petitioner Supp.EMS-2 (which is the update to Exhibit Board-1), the variance in cost recovery due to the impact of the increased capital cost estimates is relatively small and provides no basis for us to reverse or reconsider our earlier findings. Furthermore, nothing in the new cost information changes the enhanced reliability that the expansion will bring to the Chittenden County system, the reductions in greenhouse gases, or the benefits from increased economies of scale. *Id.* at 144.

Moreover, as we noted at the outset, our decision here and in the December 23 Order should not be read to approve or opine on whether certain costs are properly recoverable in rates and, if so, under what ratemaking methodology. As we have recently explained in a case involving the siting of a solar facility, section 248 proceedings are neither rate cases nor least-cost plan reviews. *Petition of NextSun Energy Rutland, LLC*, Docket No. 8195, Order of 9/15/2014, at 35. Such cases should not be read to constitute a Board review or approval of the utility's decision to incur the costs associated with a facility or the amount of those costs. Thus, while it is important to generally consider matters of ratemaking and cross-subsidization that are likely to result from a particular project—especially a significant project such as this—at the certificate stage, statements and findings on these issues are not binding on the Board or the parties. Other proceedings exist in which issues of rate recovery and cost allocation will be addressed—i.e., rate cases for cost recovery, rate design cases for cost allocation, and any Fund case for use of the system expansion funds. As our underlying order did not bind any party thereto to a particular rate treatment or methodology, relief from judgment under Rule 60(b)(2) is, as a matter of law, inappropriate. Simply put, there is no cause for a party to be relieved of a judgment under Rule 60(b) where that judgment does not bind the party with respect to the issue raised.

We again emphasize that the new cost information filed by Vermont Gas is not something that we take lightly. Indeed, the seriousness with which we take this issue should be apparent in light of the extraordinary step we took to request a limited remand from the Supreme Court to evaluate this issue. However, after reviewing the evidence submitted in this proceeding and the arguments of the parties, we find that the new cost information is not of such a material and

controlling nature as will probably change the outcome. Moreover, we again call the parties' attention to the other proceedings in which issues associated with the new cost information will be evaluated, specifically: Docket No. 8328 (investigating whether VGS violated Rule 5.409 with respect to its reporting of the revised cost estimates); Docket No. 8330 (opening an investigation to determine whether an amendment to the CPG issued in the December 23 Order is necessary in light of the revised cost estimates; future rate proceedings; future rate design proceedings; and future proceedings to address the use of the Fund.

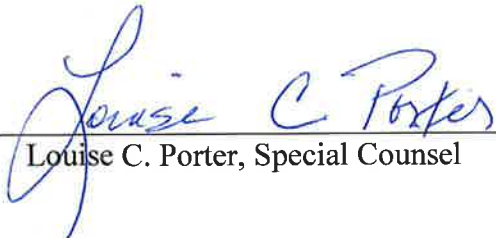
VI. Conclusion

Based on the foregoing, the Board declines to exercise its discretion to reopen this proceeding. Accordingly, we will return this matter to the Vermont Supreme Court for resolution of the issues currently on appeal.

Dated at Montpelier, Vermont this 2nd day of October, 2014

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: 
Louise C. Porter, Special Counsel