David L. Grayck
Law Office of David L. Grayck, Esq.
57 College Street
Montpelier, VT 05602

Telephone: 802-522-0186 • Email:dgrayck@gmail·com

August 10, 2015

HAND DELIVERED

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, 4th Floor
Montpelier, VT 05602-2707

Re: 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

Dear Sue:

Enclosed please find the original and seven (7) copies of the Reply Brief on behalf of Nathan and Jane Palmer. A copy will be served to electronic copy recipients upon electronic service with the Board. In addition, a copy will be mailed to those parties who do not receive service electronically and those attorneys noted below.

Please call if you have any questions.

Sincerely,

David L. Grayck, Esq.

cc: Electronic Service
Louise C. Porter, Esq.
Kimberly K. Hayden, Esq.
John H. Marshall, Esq.
Peter H. Zamore, Esq.

Jim Dumont, Esq.
Sandra Levine, Esq.
Richard H. Saudek, Esq.
Cindy Ellen Hill, Esq.
Adam G. Lougee, Esq.
Mail Copy Recipients

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	)))))))))))

REPLY BRIEF
BY NATHAN AND JANE PALMER

Introduction

Nathan and Jane Palmer (Palmers) submit the following Reply Brief with respect to the pending remand of Docket No. 7970 and the Board's consideration of whether to reopen this docket. In summary, the Palmers request that the Board grant their motion under V.R.C.P. 60(b)(3) because:

I. It is inconceivable that Vermont Gas Systems, Inc., represented by Downs Rachlin Martin PLLC, with consulting services by Pricewaterhouse Coopers LLP, had no idea on October 24, 2014 that the Project cost would increase by $30-$35 million dollars. Rather, the credible evidence is that VGS breached its duty to disclose on or before October 24, 2014 that the Project cost would increase between $30-$35 million dollars, and that the increase was due in substantial measure to VGS' conclusion that its pipeline construction contractor, Over and

Under Piping Contractors, Inc., was both significantly behind schedule and over-budget.

II. As established by Mr. Roam's admissions in cross-examination, and as now confirmed by VGS' factual allegations in its lawsuit against Over and Under Piping Contractors, Inc., VGS knowingly withheld from the Board and parties that the Project cost was going up by $30-$35 million dollars. VGS was obligated to disclose on October 24, 2015 the anticipated cost increase by means of a motion under Rule 59(e). VGS breached its duty to disclose and kept silent for clear strategic reasons.

III. The issue before the Board in Docket No. 8328 and the Rule 60(b)(3) issue pending in this docket share the common questions of what did VGS know, and when did VGS know it? The Board has concluded that "as of January 13, 2014, VGS had incurred a reporting obligation pursuant to Rule 5.409 and the Company should have reported the estimated increase at that time." The Board's conclusion that VGS breached its reporting obligation on January 13, 2014 constitutes fraud, misrepresentation, and other misconduct under Rule 60(b)(3) relative to the Palmers which has denied the Palmers a full and fair opportunity to litigate.

Detailed Analysis

I. THE VGS PROPOSED DECISION OFFERS THE INCONCEIVEABLE EXPLANATION THAT VGS SIMPLY HAD NO IDEA ON OCTOBER 24, 2014 THAT THE PROJECT COST ON DECEMBER 19, 2014 WOULD INCREASE TO $154 MILLION DOLLARS

The VGS Proposed Decision would have the Board believe that, while VGS was aware in September, 2014, that the Project's cost was rising, VGS had no knowledge on October 24, 2014

as to what the cost increase would be. Based on this lack of knowledge, VGS asserts it had absolutely no obligation to disclose that the Board's September 26, 2014 decision was based on evidence that was not accurate. VGS' explanation for why it remained silent on October 24, 2014, and why it did not disclose that it was in the course of preparing what would ultimately become the December 19, 2014 Cost Update, is that it simply had no idea what the cost increase would be until the QRA was completed. This is an inconceivable explanation which contradicts VGS' own proposed findings and conclusions regarding (A) the work done by Clough Harbor & Associates ("CHA") and PricewaterhouseCoopers ("PwC"); (B) the timing of their respective work; and (C) why VGS ultimately concluded that it needed a second, top-to-bottom cost estimate done by PwC less than 60 days after it assured the Board on September 26, 2014 that the Project cost was $121.6 million.

A. CHA's work was reasonable but PwC needed to rescue the Project.

VGS would have the Board find that the original Project cost methodology used by CHA was a "reasonable methodology."[1] But VGS then admits PwC was retained to create the Work Breakdown Structure ("WBS") and the Critical Path Method ("CPM") so that Vermont Gas could "monitor and control costs through progress updates during the Project's life."[2] Clearly, CHA had not used a reasonable methodology, VGS knew this was so, and, as a consequence, VGS engaged PwC to rescue the Project and get it back on track.

B. PwC begins its work in February, 2014 and is Producing Reasonable Cost Projections in September, 2014.

Once PwC began its work, VGS claims that it "used the baseline budget developed by PwC to monitor and control Project costs beginning after permits were obtained in June 2014,"

[1] VGS Proposed Decision at p. 11, Finding of Fact 2.
[2] VGS Proposed Decision at p. 11, Finding of Fact 5, and p. 12, Finding of Fact 7.

and that with these monitor and control procedures in place, VGS was all set, and "construction began in July."[3] However, now it is known (because of the July 31, 2015 Order in Docket No. 8328) that, as early as January 13, 2014, CHA provided VGS "with a new Project cost estimate of $112.2 million," and that "CHA updated its cost estimate again on January 17, 2014, increasing it to $121.2 million,"[4] and that on March 18, 2014 PwC estimated $121.6 million dollars[5], but that VGS remained silent about these cost updates.

Instead, VGS waited to disclose the $121 million dollar cost until July 2, 2014, and then only after PwC had performed a new cost update.[6] And while "the updated cost projections in July were prepared by the previous firm, CHA, whose performance in managing cost projections proved unsatisfactory to the Company over time, VGS' president testified under oath at the September 26th hearing that the Project is now under new management that is capable *and is producing reasonable cost projections*."[7] But VGS maintains in its Proposed Decision that, even though in September, 2014, VGS was producing reasonable cost projections with PwC as its consultant, and even though Mr. Roam admitted to the "a-ha" moment as occurring on September 27, 28, 29, or 30,[8] VGS had no idea that the Project's cost was about to rise from $121 million dollars to $154 million dollars.

---

[3] VGS Proposed Decision at p. 12, Finding of Fact 8.
[4] *Order Re Violation of Board Rule 5.409*, Docket No. 8328, at 13.
[5] Id. at 6 (finding of fact 6, "In March 2014, PwC provided VGS with a re-baselined budget of $121.6 million."); and 14 (". . . the Company received a re-baselined budget from PwC, confirming the 40 percent increase in estimated Project costs.").
[6] Id at 15.
[7] *Order Re: Rule 60(B) Reconsideration*, 10/10/2014, Docket No. 7970, at 21. (Italics added.)
[8] Transcript, 6/22/2015 at 112:14-25.

C. VGS' explanation of why it needed the December 19, 2014 cost estimate is not credible based upon what it knew on or before October 24, 2014.

In the Proposed Decision, at Finding of Fact 11, page 12, VGS states: "In September 2014, Vermont Gas observed cost-performance trends of concern for one component of the Project, mainline construction, which informed the Company's decision to re-estimate the Project's cost from the ground up." The Proposed Decision then offers the scenario that the second cost estimate then commenced "in October" and was not completed until "December 2014."[9] However, the "concern" over "one component of the Project, mainline construction," is now a lawsuit by VGS against its former contractor, Over and Under Piping Contractors, Inc., Vermont Gas Systems, Inc. v. Over and Under Piping Contractors, Inc., Docket No. 688-7-15 Cncd, Civil Division, Chittenden Unit (July 16, 2015) (the "VGS/OU Complaint").[10]

Based on VGS' factual allegations in the VGS/OU Complaint, as of October 24, 2014, VGS knew that the contractor responsible for 37% of the $121.6 million dollar cost was performing without an executed fixed-price contract, and that the contractor's "work on the [Project] was inefficient, slow and fell short of meeting the installation schedule targets for construction of the pipeline."[11] Yet, VGS maintains in its Proposed Decision that, as of October

---

[9] Proposed Decision, at Finding of Fact 14, page 12.

[10] The factual allegations in court pleadings filed on behalf of a person or corporation are admissible against that person or corporation. They are not hearsay. Vermont Rule of Evidence 801(d)(2); *U.S. V. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984). The Palmers request that the Board admit the VGS/OU Complaint, a copy of which is attached as Appendix A. The Palmers note that the Board, on its own motion also may admit the complaint, and the Palmers request that the Board do so herein. For example, in Docket No. 8328, in its July 31, 2015 Order, the Board has admitted documents not filed by any party, with the proviso that any party may object within 10 days of the Order. See footnotes 4 and 30 therein.

[11] VGS/OU Complaint, ¶¶ 25 and 26 at p. 4. The amounts and percentages are as follows, based on ¶ 26: $9,187,654 divided by 20% equals $45.93 million which is 37.77% of $121.6 million dollars.

24, 2014, it had no idea what the revised Project cost would be, and that it would not know until the QRA was completed in December, 2014.[12]

D. The credible evidence is that VGS knew on October 24, 2014 that the Project cost would increase $30-$35 million dollars but VGS remained silent to gain a strategic advantage.

In considering the VGS Proposed Decision the Board should evaluate the veracity of VGS' testimony and exhibits regarding what VGS knew on September 26, October 10, and October 24, 2014. In so doing, the Board is entitled to draw reasonable inferences from the testimony it received, including the cross-examination of Mr. Roam, and the factual allegations set forth by VGS in the VGS/OU Complaint. *In re Nash*, 158 Vt. 458, 462, 614 A.2d 367, 369 (1991). Based on the evidence, the Board should reject VGS' Proposed Decision that it had no idea on October 24, 2014 that that the Project cost would rise by $30-$35 million dollars. Rather, the evidence is that VGS knew by October 24, 2014 that the Project cost would increase by $30-$35 million dollars.

First, Mr. Roam testified that, in September, 2014, he knew that the Project costs were going to increase "quite a bit more" and that the range of the increase was $30-$35 million dollars. Transcript, 6/22/2015 at 109:23-111:1.

Second, the factual allegations in the VGS/OU Complaint establish that pipeline construction was both significantly behind schedule and over-budget. The pipeline construction cost was 37% of the $121.6 million dollar Project cost, yet VGS represented the $121.6 million dollar Project cost as accurate to the Board on September 26, 2014. VGS made this representation, and did nothing to correct the Board's October 10, 2014 Order, even though VGS

[12] VGS Proposed Decision at p. 18, Finding of Fact 58.

believed that the work by Over and Under Piping Contractors, Inc. "was inefficient, slow and fell short of meeting the installation schedule targets for construction of the pipeline."[13]

Notwithstanding this evidence, VGS would have the Board conclude that it simply had no idea about future Project cost increases such that it was completely justified in remaining silent on October 24, 2014. This simply is not credible given VGS' substantial economic resources, knowledge of the Project and its implementation, and access to professional services for the Project's permitting and construction.

II. VGS WAS UNDER AN OBLIGATION TO TELL THE BOARD AND PARTIES BY OCTOBER 24, 2014 THAT IT KNEW THE PROJECT'S COST WAS GOING TO INCREASE BY $30-$35 MILLION DOLLARS

The VGS Proposed Decision summarily reduces the Rule 60(b)(3) issue to a failure by the Palmers to produce evidence that VGS "knowingly engaged in a falsehood." However, VGS has erroneously stated the Rule 60(b)(3) standard.[14] In any event, even if VGS has stated the standard under Rule 60(b)(3), the Palmers have shown that VGS knowingly engaged in a falsehood. As established by Mr. Roam's admissions in cross-examination and VGS' factual allegations in the VGS/OU Complaint, it is reasonable to conclude that VGS knowingly withheld from the Board and parties that (i) the Project cost was going up by $30-$35 million dollars; (ii)

---

[13] VGS/OU Complaint ¶ 25 at p. 4.

[14] *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) (""Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions —elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. Cf. *United States v. One Douglas A-26B Aircraft*, 662 F.2d 1372, 1374-75 n. 6 (11th Cir.1981) (to avoid redundancy, "misrepresentation" in Rule 60(b)(3) must encompass more than false statements made with intent to deceive). We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents — at least avoidable ones — should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." *Bros. Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir.1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852 (1966)."

VGS believed its pipeline contractor "was inefficient, slow and fell short of meeting the installation schedule targets for construction of the pipeline;" and (iii) by not disclosing this information VGS continued with Project construction while shifting the burden to the Palmers to prove by clear and convincing evidence what VGS should have voluntarily disclosed on October 24, 2015.

Accordingly, even under VGS' erroneous statement of the Rule 60(b)(3) standard, the Palmers have shown how VGS' conduct deprived them of a full and fair opportunity to litigate the issues of cost and necessity. In addition, the evidence demonstrates that VGS' litigation strategy has been to keep silent for as long as possible regarding cost increases, and contend with the consequences of delayed cost increase disclosure through the benefit of shifting the burden to the Palmers to show by clear and convincing evidence what VGS was voluntarily obligated to disclose in the first instance.

III. THE BOARD'S JULY 31, 2015 ORDER IN DOCKET NO. 8328 ESTABLISHES THAT VGS' BREACH OF ITS DUTY TO DISCLOSE UNDER RULE 5.409 IS GROUNDS TO REOPEN UNDER RULE 60(b)(3)

The issue before the Board in Docket No. 8328 and the Rule 60(b)(3) issue pending in this docket share the common questions of what did VGS know, and when did VGS know it? In Docket No. 8328 the Board has concluded that "as of January 13, 2014, VGS had incurred a reporting obligation pursuant to Rule 5.409 and the Company should have reported the estimated increase at that time." Order at 13. The Board's conclusion that VGS breached its reporting obligation on January 13, 2014 constitutes fraud, misrepresentation, and other misconduct under Rule 60(b)(3) relative to the Palmers.

Rule 60(b)(3) is met because on January 13, 2014 there was no final judgment in Docket No. 7970. The Board's December 23, 2013 Order was not a final judgment because of the post-judgment motions which the Palmers had filed. In addition, the Department of Public Service had also filed a post-judgment motion with the Board. The pendency of these motions caused there to be no final judgment until March 10, 2014. VGS had every opportunity to come forward to the Board between January 13, 2014 and March 10, 2014 and disclose that the Project had increased to $121 million dollars. But VGS remained silent. Implicit in this conduct is that VGS never supplemented its discovery answers, to the Palmers' detriment. VGS' silence is fraud, misrepresentation, and other misconduct for purposes of Rule 60(b)(3).[15]

VGS cannot hide behind the burden shifting that its own silence has caused. The Palmers have met their burden to prove by clear and convincing evidence that there was fraud, misrepresentation, and other misconduct for purposes of Rule 60(b)(3) as a matter of law due to the Board's Order that VGS violated Rule 5.409.

The Palmers were denied a full and fair opportunity to litigate their interests as a result of VGS' conduct. The Palmers had raised cost and related economic and cross-subsidy issues, but

---

[15] In addition to a breach of obligation under discovery rules relative to Rule 60(b)(3), other jurisdictions have found fraud, misrepresentation or other misconduct where a party breaches a duty to disclose imposed under a statutory or regulatory provision. For example, in *Weinstein v. Weinstein*, 275 Conn. 671, 882 A.2d 53 (Conn. 2005), the Connecticut Supreme Court held that the defendant committed fraud and misrepresentation in his financial disclosure in a divorce proceeding where he valued stock at $40,000, but then received an offer to purchase his shares for $500,000 while defendant's motion to alter was pending, and that he ultimately sold the shares for $1.45 million dollars as part of a $6 million dollar transaction without ever updating his financial disclosure of $40,000 dollars. In rejecting the defendant's argument that the plaintiff failed to meet the high burden of evidence of fraud or misrepresentation by clear and convincing evidence, the Connecticut Supreme Court stated: "With respect to nondisclosure, it bears repeating that the reason the plaintiff is saddled with the burden of having to demonstrate fraud by clear and convincing evidence is because the defendant did not disclose timely material information that bore on the truthfulness of his financial affidavit." Id., 275 Conn. at 702, 882 A.2d at 72. Another discussion of the intersection of a breach of a duty and Rule 60(b)(3) is *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65 (Ind. 2006) where the Supreme Court of Indiana discussed its own ruling that Rule 60(b)(3) may be based on a violation of the Code of Professional Responsibility, even if the conduct at issue does not violate the rules of civil procedure (citing to *Allstate Ins. Co. v. Watson*, 747 N.E. 2d 545, 548 (Ind.2001)), and the duty to supplement discovery answers under Rule 26 and comparable F.R.C.P. 26(e).

were only able to litigate these issues in a highly circumscribed manner, as set forth in the Palmers' July 8, 2015 Proposed Findings of Fact, Conclusions of Law, and Order. The Palmers were forced to make strategic litigation decisions based on what has turned out to be fraud, misrepresentation, or other misconduct by VGS. As a result, the Board should conclude that the Palmers have shown that they were denied a full and fair opportunity to litigate the cost and necessity issues due to VGS' violation of Rule 5.409.

IV. SUMMARY AND REQUEST FOR RELIEF

WHEREFORE Nathan and Jane Palmer request that the Board reject the VGS Proposed Decision as set forth above, and that the CPG issued to VGS for the Project be voided or stayed, as appropriate, until such time as the Board has concluded all necessary proceedings for the full and fair adjudication of the Project.

Dated this 10th day of August 2015.

NATHAN AND JANE PALMER

By: _____

David L. Grayck
Law Office of David L. Grayck, Esq.
57 College Street
Montpelier, VT 05602
(802) 522-0186
dgrayck@gmail.com

cc: Service List (electronic and US Mail)

APPENDIX A

SHEEHEY FURLONG & BEHM
PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

DAVID T AUSTIN
R JEFFREY BEHM
DEBRA L BOUFFARD
IAN P CARLETON
ARLINE P. DUFFY
MICHAEL G FURLONG
KEVIN A. LUMPKIN
DIANE M McCARTHY
OWEN J McCLAIN
CRAIG S NOLAN
JAMES W SPINK
PETER H ZAMORE

PAUL D SHEEHEY (1918-2004)

GATEWAY SQUARE
30 MAIN STREET
POST OFFICE BOX 66
BURLINGTON, VERMONT 05402
TELEPHONE (802) 864-9891
FACSIMILE (802) 864-6815
www.sheeheyvt.com

HAND DELIVERED
July 16, 2015

Carmen Cote, Court Manager
Vermont Superior Court, Chittenden Civil Division
175 Main Street
P.O. Box 187
Burlington, VT 05402

Re: Vermont Gas Systems, Inc. v. Over and Under Piping Contractors, Inc.
Dkt No. _____

Dear Carmen:

I enclose for filing in the above-referenced matter a Complaint, together with a check in the amount of $295.00 for the filing fee.

If you have any questions, please do not hesitate to contact me.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.

R. Jeffrey Behm

RJB/srr
Enclosure

STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Chittenden Unit **Docket No. _____**

Vermont Gas Systems, Inc.,)
Plaintiff)
)
v.)
)
Over and Under Piping Contractors, Inc.,)
Defendant)

COMPLAINT

The Parties

1. Plaintiff Vermont Gas Systems, Inc., ("VGS") is a Vermont corporation with a principal place of business in South Burlington, Vermont.

2. Over and Under Piping Contractors, Inc. ("O&U") is a New York corporation with a principal place of business in Auburn, New York.

Background Facts

3. In or about October, 2013, VGS sent an "invitation to bid" dated October 8, 2013 to various contractors regarding the planned construction of a natural gas transmission pipeline of about 42 miles in length running between Colchester and Middlebury, Vermont, and known as the Addison Natural Gas Pipeline Project ("ANGP Project").

4. The bid documents sent to the potential bidders contained a draft form of contract that informed bidders of the general content of the contract that VGS expected to enter with the contractor selected from the bid process.

5. On or about December 4, 2013, O&U submitted a bid to act as the contractor on the construction of the ANGP Project.

6. In April 2014, after further communications with O&U, VGS notified O&U of its intent to enter a contract with O&U for the ANGP work.

Attempts to Negotiate and Execute a Final Written Contract

7. The work that O&U was to complete in constructing the ANGP Project was set forth in significant detail in a lengthy set of project work specifications.

8. O&U was to be paid approximately $45 million in total for its work in constructing the ANGP Project.

9. In connection with the submission of its bid, O&U reviewed the bid documents including the form of contract, terms and conditions provided to it by VGS during the bid process. The bid documents made clear that the successful bidder was required to negotiate in good faith a contract substantially consistent with the material terms of the form of contract and conditions included with bid documents.

10. The $45 million to be paid to O&U for completing work under the contract was a fixed price that was to be paid to O&U in provisional progress payments measured against schedule of values. The provisional progress payments were subject to final acceptance of the full scope of the work by VGS.

11. The progress payments were not intended to and did not exactly track the actual value of the work performed by the contractor, however, full payment of the fixed contract price was conditioned upon full completion and acceptance of all contract work. Had O&U completed the full scope of work, progress payments ultimately would have equaled the fixed contract price.

12. In the event that VGS terminated the contract prior to the completion of the ANGP Project work, compensation for work completed by the contractor was to be determined upon a cost basis rather than through progress payments measured against a schedule of values.

13. Condition 15.4 of the contract form in the bid documents provided VGS with authority to terminate the contract without cause. In the event VGS terminated the contract without cause, VGS was to compensate O&U for acceptable work it had performed in accordance with the Project work specifications by paying O&U for reasonable costs it incurred in performing the work, plus a reasonable sum for overhead and profit on such work.

14. On May 23, 2014, VGS provided O&U with a proposed written contract conformed, among other things, to account for a revised date for starting work on the ANGP project.

15. The May 23, 2014 proposed contract contained the same Condition 15.4 as contained in the contract form included in the bid documents. It provided that VGS could terminate the contract without cause and, in doing so, would be obligated to pay O&U for its reasonable costs in performing acceptable work in accordance with project work specifications plus a reasonable sum for profit and overhead on such work.

16. Although O&U did suggest certain revisions to the proposed contract, at no time did O&U ever object to or suggest revisions to the language in Condition 15.4.

17. VGS was unable to obtain O&U's execution of the contract by June 26, 2014 when earth moving on the AGNP Project began. Thereafter, VGS performed its obligations as defined in the proposed written contract, and O&U represented that it was complying with the material terms of that document.

18. Between June 26 through September 2014, VGS continued unsuccessfully to attempt to obtain formal execution of the proposed written contract.

19. Between the start of work on June 26 until VGS terminated its agreement with O&U in November 2014, O&U failed to comply with its obligation to act in good faith to finalize and execute a written contract with VGS.

Performance Of The Agreement

20. O&U began laying pipe for the ANGP Project on or about July 21, 2014.

21. During the Summer and Fall of 2014, O&U represented it was performing its work consistently with the contract specifications and its warranties.

22. During the course of its work the Summer and Fall of 2014, O&U submitted applications for progress payments from VGS consistent with the May 23, 2014 contract document.

23. O&U also requested change order payments pursuant to the terms of the May 23, 2014 contract document.

24. VGS responded to O&Us applications for payment and change order requests consistently with the May 23, 2014 contract document.

25. O&U's work on the ANGP Project was inefficient, slow and fell short of meeting the installation schedule targets for construction of the pipeline. By November, 2014, O&U had installed 5.65 miles of pipe, less than14 percent of the 42 miles of transmission pipeline to be constructed in the ANGP Project.

26. By November, 2014, O&U had been paid $9,187,654 in progress payments, which represented 20 percent of the total that O&U was to receive for constructing the entire ANGP Project.

27. The amounts paid by VGS were in response to O&U's payment applications 1-9.

28. In November 2014, VGS notified O&U that it was terminating its ANGP agreement with O&U without cause.

29. O&U continued to submit payment applications and requests for change orders so that, as of May, 2015, it had submitted 12 payment applications and 61 requests for change order payments. Its claims for payment, including what it has already been paid, total $18,858,881 (over 40 percent of the entire ANGP Project price), even though it has constructed only 14 percent (5.65 miles) of the ANGP pipeline.

30. VGS has repeatedly requested O&U to provide it with information reflecting the costs and expenses O&U has incurred in performing the work underlying its claims for payment, and O&U has consistently refused to provide VGS with that information.

31. VGS has offered to pay O&U for all acceptable work it has properly performed based upon the reasonable costs it has incurred in performing the work, but O&U has rejected any cost based method of payment.

32. VGS has determined that it is entitled to payments or credits for back charges from O&U due to work that O&U over billed, failed to complete, or improperly performed and for damage it inflicted on the property of VGS and third parties during the performance of the ANGP work.

33. In or about May 2015, O&U recorded contractors liens pursuant to 9 V.S.A. § 1921 *et seq.* on easements and pipeline facilities owned by VGS in the Town of Williston.

Count I – (Declaratory Judgment – Breach of Contract)

34. The allegations set forth in paragraphs 1-33 above are realleged and incorporated herein.

35. VGS and O&U agreed that O&U would construct the AGNP Project in return for payment from VGS.

36. VGS and O&U understood and agreed that VGS had authority to terminate their agreement without cause.

37. Both VGS and O&U understood and agreed that in the event VGS terminated their agreement without cause, O&U would be paid for its work based on the methodology set forth in Condition 15.4 of the May 23, 2014 contract document.

38. Condition 15.4.1-4 provides that O&U should be paid for its costs and expenses in performing acceptable work consistent with the ANGP Project specifications plus a reasonable sum of profit and overhead for such work.

39. VGS requests the Court to enter a judgment pursuant to 12 V.S.A. § 4711 *et seq.* declaring that VGS and O&U agreed that:

(i) VGS could terminate without cause its ANGP Agreement with O&U and any rights O&U had to construct the ANGP Project;

(ii) O&U is entitled to compensation only for acceptable work it performed in accordance with the work specifications prior to VGS's termination of the ANGP agreement; and

(iii) Any compensation that O&U is entitled to receive for the work described in subparagraph (ii) above should be determined based upon the reasonable costs O&U incurred to perform the work plus a reasonable sum of profit and overhead for such work, less any back charge due VGS from O&U.

40. VGS further requests the Court to enter judgment declaring that O&U breached its agreement with VGS by refusing to provide VGS with the cost information it requested in order to determine the amount of compensation O&U should receive for the work it performed under the ANGP Project prior to the termination without cause.

Count II – (Alternative Request for Declaratory Judgment - Quasi Contract)

41. The allegations set forth in paragraphs 1-40 above are realleged and incorporated herein.

42. In the alternative to the Request for Declaratory Relief set forth in Count I of this Complaint, if it is found there was no agreement between VGS and O&U in their ANGP contract for determining the compensation that should be paid to O&U for acceptable work it completed in accordance with the project work specifications, prior to VGS's termination of the ANGP Agreement without cause the Court should enter a declaratory judgment implying such an agreement and apply equitable principles to determine the appropriate amount of payment O&U should have received for acceptable work prior to the termination without cause.

43. The Court should also declare in its judgment that under principles of quantum meruit and unjust enrichment, O&U was entitled to receive no more than the reasonable costs it incurred to complete acceptable work in accordance with the agreed upon specifications, plus a reasonable amount for profit and overhead less any back charges due to VGS.

Count III – Breach of Contract (Back Charges)

44. The allegations in paragraphs 1-43 above are realleged and incorporated herein.

45. O&U warranted that all work it performed on the ANGP project would be performed in a good and satisfactory manner, in accordance with the work specifications, and

would not be defective. In performing work on the ANGP Project, O&U damaged property belonging to VGS, private land owners and the State.

46. O&U billed VGS and received payments for work that was later discovered to be incomplete and improperly performed.

47. O&U breached its ANGP contract with VGS by overbilling VGS for certain items of work and improperly performing or failing to complete other work. O&U submitted bills for certain of its work that were excessive and unwarranted.

48. As a result of the property damage caused by O&U in performing its work, and its failure to complete or properly perform work for which O&U was paid, VGS has and will be required to pay for repairs.

Prayer for Relief

WHEREFORE, Plaintiff VGS respectfully requests this Court to grant the following relief:

A. Enter judgment for Plaintiff and grant the declaratory relief requested in Count I of this Complaint.

B. In the alternative, enter judgment and grant the declaratory relief requested in Count II of this Complaint.

C. Under both Counts I and II, order O&U to provide a full accounting of all costs and expenses it incurred in performing work on the ANGP Project in accordance with the work specifications, and the overhead and profit reasonably allocated to such work.

D. Enter judgment for Plaintiff on Count III.

E. Grant such other relief as the Court deems just and reasonable.

Dated at Burlington, Vermont this 16th day of July, 2015.

VERMONT GAS SYSTEMS, INC.

By: R. Jeffrey Behm /DRP

R. Jeffrey Behm
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
P.O. Box 66
Burlington, VT 05402-0066
(802) 864-9891
jbehm@sheeheyvt.com