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August 21, 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 RESPONSE BY NATHAN AND JANE PALMER TO MOTION BY AARP TO REOPEN THE EVIDENTIARY RECORD ON PENDING MOTIONS.

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

Susan Hudson, Clerk
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Louise C. Porter, Esq.
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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Petition of Vermont Gas Systems, Inc. for a)
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New distribution mainlines in Addison County,)
together with three new gate stations in)
Williston, New Haven and Middlebury,)
Vermont)

**RESPONSE BY NATHAN AND JANE PALMER TO
MOTION BY AARP TO REOPEN THE EVIDENTIARY
RECORD ON PENDING MOTIONS**

Introduction

Nathan and Jane Palmer (Palmers) request that the Board grant the Motion by AARP to reopen the evidentiary record on pending motions (the “AARP Motion”). In addition, the Palmers join in the motion.¹ As set forth below, the Board should:

I. Admit the complaint filed by Vermont Gas Systems, Inc. (“VGS”) against Over and Under Piping Contractors, Inc. (“OUPC”), Vermont Gas Systems, Inc. v. Over and Under Piping Contractors, Inc., Docket No. 688-7-15 Cned, Civil Division, Chittenden Unit (July 16, 2015) (the “VGS Complaint”). The VGS Complaint is reliable, probative, relevant, admissible evidence pertaining to the proposed pipeline at issue in this docket, including the issues of cost

¹ The Palmers also have moved the admission of the VGS Complaint as set forth in their August 10, 2015 Reply Brief, at p. 5. The two complaints should be admitted for the reasons set forth in the Palmers’ Reply Brief. The arguments made by the Palmers in their Reply Brief are incorporated herein.

and necessity. The VGS Complaint also pertains to the Palmers' pending Rule 60(b)(3) motion as set forth in their Reply Brief.

II. Admit the complaint filed by OUPC against VGS, Over & Under Piping Contractors, Inc., v. Vermont Gas Systems, Inc., Docket 2:15-cv-00169, U.S. District Court Vermont (July 21, 2015) (the "OU Complaint"). The OU Complaint is reliable, probative, relevant, and admissible evidence of a claim against VGS for \$11.2 million in damages, and a request for an attachment of the property owned by VGS which is necessary for the completion of the proposed pipeline. This evidence pertains to the issues of cost and necessity. In particular, the parties and Board were entitled to know on or before October 24, 2014 that VGS did not have a signed contract with its pipeline contractor for its pipeline project.

Analysis

I. THE TWO COMPLAINTS ARE ADMISSIBLE AS PROBATIVE EVIDENCE REGARDING THE PIPELINE COST AND NECESSITY ISSUES RELATIVE TO THE PENDING RULE 60(b)(2) AND (b)(3) MOTIONS

The two complaints are admissible in this docket under the Vermont Rules of Evidence (VRE) as non-hearsay evidence. As a general matter, the factual allegations in court pleadings filed on behalf of a person or corporation are admissible against that person or corporation. The factual allegations by VGS, whether in the VGS Complaint or the answer to the OU Complaint, are not hearsay. VRE 801(d)(2); *U.S. v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984).

Next, under VRE 401, evidence is relevant if the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The complaints' factual allegations meet

the test of VRE Rule 401 because the allegations pertain to the cost and construction of the pipeline, and these issues are central to the pending Rule 60(b)(2) and (b)(3) motions.

In addition, the OU Complaint is probative to the existence of claims against VGS. That is, the factual allegations made by Over & Under Piping Contractors, Inc. are admissible for the limited purpose to show that there are pending claims against VGS. The admission into evidence for this limited purpose is probative as to whether VGS has (i) properly disclosed all potential, known factors which could lead to, or cause, future project cost increases; and (ii) set aside appropriate financial resources to cover the risk of an adverse judgment relative to the OU Complaint. These issues are probative to the issues of pipeline cost and necessity now pending before the Board.

Ultimately, the issue is one of disclosure. What did VGS know about the work performance by Over & Under Piping Contractors, Inc., and when did it know it? The factual allegations in the two complaints demonstrate that VGS had reason to disclose its great dissatisfaction with its contractor's performance on September 26, 2014, and certainly by October 24, 2014.

If VGS had properly disclosed, the parties and the Board would then have been able to assess the merits of VGS' contention that the overall budget was not being affected by the dispute with Over & Under Piping Contractors, Inc. It is not up to VGS to decide what the Board and parties need to know; rather, it is VGS' obligation to timely disclose what it knows, and then let the parties and the Board decide what weight should be accorded to the disclosed evidence. But, once again, instead of opting for transparency and admitting that there were

serious problems with the pipeline contractor (in what is a pipeline project), VGS made the strategic litigation decision to remain silent.

II. HAVING AN UNSIGNED CONTRACT WITH THE PIPELINE CONTRACTOR FOR A PIPELINE PROJECT RAISES LEGITIMATE CONCERNS

The submission of the VGS Complaint and the OU Complaint has established that VGS did not have a signed contract with Over & Under Piping Contractors, Inc. This raises a legitimate issue of concern over project cost. It would seem that having a signed contract with the pipeline contractor for a pipeline project would be standard practice.² Even if it is not standard practice to have a signed contract with the pipeline contractor for a pipeline project, it certainly raises an issue as to how project cost can be properly contained if there is no signed contract.

As the Palmers have explained in their Reply Brief, 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."³ Evidently VGS believes that it is not significant that it commenced construction without a signed contract with Over & Under Piping Contractors, Inc.

The Palmers, however, disagree. The Palmers believe that their vital strategic litigation interests would have been served if they had had an opportunity to know about the factual allegations in the two complaints. In particular, this includes the failure by VGS to have a signed

² On the wisdom of having a signed contract see *Catamount Slate Products v. Sheldon*, 2003 VT 112 ¶ 16, 845 A.2d 342, 329 ("The freedom to determine the exact moment in which an agreement becomes binding encourages the parties to negotiate as candidly as possible, secure in the knowledge that they will not be bound until the execution of what both parties consider to be a final, binding agreement.")

³ VGS 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.

contract, and whether a signed contract is part of what is necessary to make accurate evaluations and assessments of project cost, including cost containment.

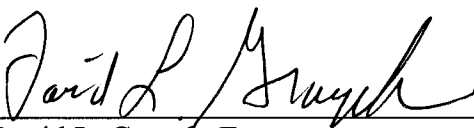
The Palmers believe that the absence of a signed contract at least would entitle them to question whether proceeding without a signed contract was a risky business practice. The Palmers were denied the opportunity to litigate this issue before the Board because VGS did not disclose that it lacked a signed contract with the pipeline contractor for a pipeline project that crosses the Palmers' land. The failure by VGS to disclose on or before October 24, 2014 that it did not have a signed contract is grounds in and of itself for grant of the Palmers' Rule 60(b)(3) motion.

IV. SUMMARY AND REQUEST FOR RELIEF

WHEREFORE Nathan and Jane Palmer request that the Board grant the Motion by AARP to reopen the evidentiary record on pending motions.

Dated this 21st day of August 2015.

NATHAN AND JANE PALMER

By: 

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