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October 19, 2015

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

HAND DELIVERED

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 REPLY BY NATHAN AND JANE PALMER TO THE MOTION BY VERMONT GAS SYSTEM, INC. TO ADMIT MEMORANDUM OF UNDERSTANDING. Service has been made electronically. Service will be made by mail to those parties who do not receive service electronically and to the persons 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.
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David and Claudia Ambrose, *Pro Se*
Matthew T. Baldwin, *Pro Se*

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 BY NATHAN AND JANE PALMER TO THE MOTION BY VERMONT GAS SYSTEM, INC. TO ADMIT MEMORANDUM OF UNDERSTANDING

Introduction

Nathan and Jane Palmer (Palmers) submit the following reply to the October 15, 2015 motion by Vermont Gas Systems, Inc. (VGS) to admit a Memorandum of Understanding entered into by and between VGS and the Department of Public Service on October 7, 2015 (the "VGS-DPS MOU"). As set forth below, the Palmers request that the Board:

I. Rule on the pending Rule 60(b) motions based upon the evidence and arguments presented as of August 21, 2015. If the Board denies the pending Rule 60(b) motions, then the motion to admit the VGS-DPS MOU is moot. The motion is moot because the denial of the Rule 60(b) motions and the resulting finality of the December 23rd Order is the relief sought by VGS and DPS. Alternatively, if the Board grants one or all of the pending Rule 60(b) motions, and orders that the

December 23rd Order be re-opened, then, as part of the re-opened hearing, the Board can consider additional evidence, including the VGS-DPS MOU, as appropriate, to reconsider whether and on what terms to authorize the Project.

II. Deny the VGS motion to admit the VGS-DPS MOU on the terms and conditions set forth by the VGS motion. The Board's admission of the VGS-DPS MOU as VGS requests would violate the essentials of due process. The admission of the VGS-DPS MOU as requested by VGS would violate Board Rules 2.103, 2.105, 2.106, 2.203, 2.208, and 2.216; Vermont Rules of Civil Procedure 11(a) and 43(a); Vermont Administrative Procedure Act 3 V.S.A. §§ 809(c) and (g), and 810(1), (3) and (4); and Vermont Rules of Evidence 402, 403 and 802. As a result, the filing of the October 7, 2015 letters, with the VGS-DPS MOU attached, was an egregious, improper attempt to influence the Board and subvert the hearing process, and has resulted in the wavier of the attorney-client privilege, work-product privilege, and exception to disclosure under 1 V.S.A. §§ 315-320, with respect to all matters set forth in the letters filed on October 7, 2015 and the VGS-DPS MOU.

Detailed Analysis

I. THE FILING OF THE VGS-DPS MOU SHOULD NOT DELAY THE BOARD FROM RULING ON THE PENDING 60(B) MOTIONS

At the status conference held on October 15, 2015 Acting Chair Cheney asked the parties what they want to happen next. As stated at the conference, and as set forth below, the Palmers request that the Board promptly issue a ruling on the pending Rule 60(b) motions without reference or consideration of the VGS-DPS MOU. The Rule 60(b) issues have been extensively

litigated and briefed. As a practical matter, the Rule 60(b) motions have been under advisement as of July 8, 2015. It is now simply up to the Board to decide the Rule 60(b) motions. If the Board denies the Rule 60(b) motions, then the motion to admit the VGS-DPS MOU is moot. Alternatively, if the Board grants one of the pending Rule 60(b) motions, then the issue of the motion to admit the VGS-DPS MOU would be resolved as part of the re-opened hearing process.

A. The pending Rule 60(b) motions have been, for all practical purposes, under advisement since July 8, 2015.

The Board's March 25, 2015 *Procedural Order Re: Second Remand* established that the parties would file briefs on July 6, 2015, and that there would be no reply briefs. The parties' expectation was that there would be a single filing of post-hearing written submissions. The Board granted the Palmers' request for a two-day extension to file the Palmers' brief such that the Rule 60(b) motions went under advisement on July 8, 2015.

On July 24, 2015 the Board issued an order allowing the parties to file reply briefs on August 10, 2015. The Rule 60(b) motions would have gone under advisement on August 10, 2015 but for the failure by VGS to timely disclose that it had sued Over and Under Piping Contractors, Inc., in Chittenden Superior Court on July 16, 2015 (and that Over and Under had sued VGS in U. S. District Court on July 21, 2015). Had VGS been transparent in its dispute with Over and Under, the admissibility of the two complaints, and their relevance, if any, would have been addressed by the parties in their reply briefs filed on August 10, 2015. This would have been so because the *Order Re: Reply Briefs* was issued on July 24, 2015, that is, *eight days after* VGS filed suit in Chittenden Superior Court. The parties could have easily addressed the issue of the two complaints in their reply briefs, but instead VGS kept silent.

Ultimately, the issue regarding the two law suits was addressed by the parties so that, at the very latest, the pending Rule 60(b) motions have been under advisement as of August 21, 2015. The only new issue related to the Rule 60(b) motions since the parties made their filings on July 8 was the failure by VGS to disclose on July 16 that it had brought suit against Over and Under Piping Contractors, Inc., and the relevancy, if any, of the two suits. Thus, for all practical purposes, the Rule 60(b) motions have been under advisement as of July 8, 2015, and the Board's ruling on the Rule 60(b) motions will properly determine what happens next relative to the VGS-DPS MOU.

B. The decision on the Rule 60(b) motions will determine what happens next relative to the VGS-DPS MOU based on the statement of "Scope" and footnote 3 in the Board's March 25, 2015 *Procedural Order Re: Second Remand*

The Board's March 25, 2015 *Procedural Order Re: Second Remand*, at page 3, Section III, Scope, states in the first sentence: "The threshold determination on remand is to determine whether to reopen the December 23rd Order or not." Significantly footnote 3 to this sentence states: "Should we conclude that the evidence presented requires us to re-open the December 23rd Order, *we will then consider additional evidence, as appropriate, to reconsider whether and on what terms to authorize the Project.*" (Italics added.) In other words, if the Board grants any one of the pending Rule 60(b) motions, the Board would convene hearings to "consider additional evidence, as appropriate, to reconsider whether and on what terms to authorize the Project." In all likelihood the VGS-DPS MOU would be offered by VGS and DPS as part of their evidence, and the remaining parties, in turn, would have full opportunity to address the VGS-DPS MOU through discovery, evidentiary objection and testimony.

Alternatively, if the Board denies all of the pending Rule 60(b) motions, then the motion to admit the VGS-DPS MOU is moot. The motion would be moot because VGS and DPS would have been granted the relief that they seek in this Second Remand, that is, the denial of the pending Rule 60(b) motions, and the finality of the Board's December 23rd Order.

For example, as DPS stated at page 4 of its August 10, 2015 Reply Brief (italics added): "For the foregoing reasons and for the reasons set forth in its initial brief, the Department respectfully recommends that the Board *not reopen the final order* and return this matter to the Vermont Supreme Court for resolution of the issues currently on appeal. This will allow Vermont Gas to continue and conclude construction of the Project on schedule and within the current budget."

And as VGS stated at page 15 of its August 10, 2015 Reply Brief (italics added): "Ultimately, although the estimated cost of the Project is significant, the benefits of the Project to the state and its residents are significantly higher. Based upon the foregoing and the facts and analysis set forth in VGS' Proposed Decision, VGS respectfully asks that the Board find that there is *no basis under V.R.C.P. 60(b) to reopen the December 23rd Order.*"

Accordingly, if the Board grants the relief which VGS and DPS request regarding the pending Rule 60(b) motions—deny the Rule 60(b) motions—then the motion to admit the VGS-DPS MOU is moot because "a case is moot if the reviewing court can no longer grant effective relief." *In re Grievance of John Moriarty,* 156 Vt. 160, 163, 588 A.2d 1063, 1064 (1991) citing and quoting *Sandidge v. Washington*, 813 F.2d 1025, 1025 (9th Cir.1987); see also *In re Chandler*, 2013 VT 10, ¶¶ 8 and 15, quoting and citing to *Moriarty* that "To remain a live controversy, the court must be capable of affording a petitioner relief" and that a "case is moot if

the reviewing court can no longer grant effective relief." In short, if the Board denies the Rule 60(b) motions which have been properly under advisement, then there is no necessity—nor even a pending, open proceeding—by which to rule upon the motion to admit the VGS-DPS MOU.[1]

C. The Palmers request that the Board rule on the pending Rule 60(b) motions.

In summary, the Palmers request that the Board rule on the pending Rule 60(b) motions based upon the evidence and arguments presented as of August 21, 2015. If the Board grants one or all of the pending Rule 60(b) motions, and orders that the December 23rd Order be re-opened, then, pursuant to the Board's March 25, 2015 *Procedural Order Re: Second Remand*, the Board would take additional evidence, including the VGS-DPS MOU (subject to the parties' rights to respond to the VGS-DPS MOU through discovery, evidentiary objection and testimony), and would decide whether to authorize the Project, and if so, on what modified or new conditions or terms. Alternatively, if the Board denies the pending Rule 60(b) motions, then the motion to admit the VGS-DPS MOU is moot.

II. GRANTING THE VGS MOTION WOULD VIOLATE THE ESSENTIAL REQUIREMENTS OF DUE PROCESS

Admission of the VGS-DPS MOU as requested by the October 15, 2015 VGS motion would result in multiple errors of law. Admission as VGS requests would be in violation of Board Rules 2.103, 2.105, 2.106, 2.203, 2.208, and 2.216; Vermont Rules of Civil Procedure 11(a) and 43(a); Vermont Administrative Procedure Act 3 V.S.A. §§ 809(c) and (g), and 810(1), (3) and (4); and Vermont Rules of Evidence 402, 403 and 802.

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[1] Indeed, if the Board denies the Rule 60(b) motions and next rules on the motion to admit the VGS-DPS MOU, then the Board's ruling on the motion to admit the VGS-DPS MOU would be an illegal advisory opinion. See *In re 232511 Investments, Ltd.*, 2006 VT 27, ¶ 19, 179 Vt. 409, 417 (2006).

The manner by which VGS and DPS presented the VGS-DPS MOU to the Board on October 7, 2015 has put the Board in jeopardy of violating the essential requirements of due process. "The question on review is not adequacy of the original notice or pleading but is the fairness of the whole procedure." *Petition of Green Mountain Power Corporation*, 131 Vt. 284, 293, 305 A.2d 571 (1973). The fairness of the whole procedure on this second remand has been cast in doubt due to the submission of the October 7, 2015 letters and the VGS-DPS MOU.[2]

The two letters and the VGS-DPS MOU were filed by a "representative of the client" (V.R.E. 502(a)(2)) of a party before the Board with the offer of substantive information but without any reference to the basis for the submission, including, notably, citation to a Board rule or statutory provision which would establish a relevant reason for the submission of the letters and attached VGS-DPS MOU (not to mention the failure to be signed and submitted by a person who had entered an appearance). The only purpose of the letters and the VGS-DPS MOU was to influence the Board with respect to the pending Rule 60(b) motions.[3]

Instead of making a filing by its respective counsel, in proper compliance with the Board's rules, and additional rules of practice and procedure incorporated by the Board's rules, the Chief Executive Officer of VGS and the Commissioner of the DPS have made filings as the direct "representative of the client" under V.R.E. 502(a)(2). Whereas the communications and

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[2] In addition, the VGS-DPS MOU seeks to impose upon the Board and parties the determination that the Project is used and useful with a $134 million "Rate Cap." The consequence of this provision in the VGS-DPS MOU is that the parties will be compelled to litigate the used and useful determination since now VGS and DPS are trying to establish a claim and issue preclusion bar against future consideration of whether the Project is used and useful. See *In re Tariff Filing of Central Vermont Public Service Corporation*, 172 Vt. 14, 16, 769 A.2d 668 (2001) (CVPS brought interlocutory appeal asserting res judicata, collateral estoppel and equitable estoppel relative to the prudence and used and useful determinations regarding power purchased from Hydro-Quebec).

[3] For example, the VGS letter asserts that the VGS-DPS MOU "will help achieve an important, shared goal: capping pipeline construction costs and providing energy value to natural gas customers in Vermont," and VGS will not "seek to recover costs above $134 million from customers (as compared to the project's current estimated cost of $154 million) except for certain costs beyond our control if they occur." VGS letter of October 7, 2015.

negotiations between the representative of the client may have been protected under V.R.E. 502(a)(5), or the work-product privilege, or as an exception to the public records act, the filing of these letters in violation of the Board's rules renders all the communications which gave rise to the letters, as evidenced in or by negotiations, conversations, spreadsheets, analyses, or emails, not "confidential" communication as defined in V.R.E. 502(a)(5), nor excepted from disclosure under the public records act, 1 V.S.A. §§ 315-320. Because VGS and DPS violated multiple Board rules, they are now obligated to disclose all communications which gave rise to the VGS-DPS MOU, including the basis for the DPS determination that the Project is used and useful, the analyses made by DPS relative to the concession that the Project is used and useful, and whether DPS' consent to the used and useful determination was done for purposes which are contrary to the best interest of the ratepayers.

It is unfortunate that VGS and DPS have jeopardized the fairness of this Second Remand through their conduct on October 7, 2015. The submission of the VGS motion on October 15, 2015 does nothing to cure the conduct of October 7, 2015. In fact, the motion filed on October 15, 2015 is an admission by VGS that its conduct on October 7, 2015 was improper. If VGS believed what it did on October 7, 2015 was proper, why did VGS file its motion on October 15, 2015? If VGS thought it could make an oral motion for admission of the VGS-DPS MOU at the October 15, 2015 status conference, why did it file a written motion after the status conference?

By their conduct on October 7, 2015 VGS and DPS waived the attorney-client privilege, the work product privilege, and the right to withhold documents as an exception under the public records act with respect to all matters related to the October 7, 2015 letters and the VGS-DPS MOU. If the Board is going to consider the merits of the VGS motion made on October 15,

2015, then the Board must first order VGS and DPS to submit to full and complete discovery by the parties regarding the filings made on October 7, 2015, without any benefit of privilege, confidentiality, or statutory exception to disclosure, and thereafter allow the parties an opportunity to respond to the motion based on the evidence obtained through discovery, including, if need be, technical hearings.

III. SUMMARY AND REQUEST FOR RELIEF

WHEREFORE Nathan and Jane Palmer request that the Board (i) rule on the pending Rule 60(b) motions based upon the evidence and arguments presented as of August 21, 2015; and (ii) deny the VGS motion to admit the VGS-DPS MOU on the terms and conditions set forth by the VGS motion, all as set forth above.

Dated this 27th day of October 2015.

NATHAN AND JANE PALMER

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