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October 27, 2015

Mrs. Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street  
Montpelier, Vermont 05620-2701

RE: Docket No. 7970 – Department Comments on VGS Motion to Admit MOU

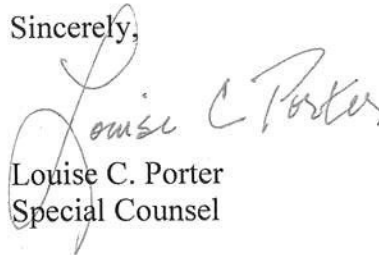
Dear Mrs. Hudson:

On October 16, 2015, the Public Service Board issued a Procedural Order establishing October 22 as the deadline for comments on Vermont Gas Systems, Inc. (“Vermont Gas”) motion to admit a Memorandum of Understanding (“MOU”) between Vermont Gas and the Department into the evidentiary record in this proceeding.

On October 19, 2015, the Palmers moved to extend the comment deadline to October 28. The Board responded by extending the deadline to October 27, 2015 in an Order dated 19, 2015. Attached are the Comments of the Department.

Please let me know if I can be of further assistance.

Sincerely,



Louise C. Porter  
Special Counsel

cc: Service List



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 (On Remand Two)

**COMMENTS OF THE DEPARTMENT OF PUBLIC SERVICE RESPONDING TO THE  
VGS MOTION TO ADMIT MOU**

Introduction

On October 7, 2015, Vermont Gas Systems, Inc. (“Vermont Gas” or “VGS”) filed with the Board a Memorandum of Understanding (“MOU”) it entered into with the Department on that same date. On October 7 and October 8, 2015, the Palmers and AARP, respectively, filed objections to the MOU filing. The Board convened a status conference on October 15, 2015, and, thereafter on October 15, VGS submitted a motion to admit the MOU into the evidentiary record in this proceeding (the “VGS Motion”).

On October 16, 2015, the Board set a deadline of October 22, 2015, for parties to file written comments responding to the VGS Motion. On October 19, 2015, the Palmers requested an extension of this deadline, which the Board extended to October 27, 2015. Also on October 19, 2015, Vermont Gas requested that (1) any comments address not only whether the MOU

should be admitted but also any further requested process if it is admitted, and (2) that Vermont Gas have until November 2 to reply to the comments. On October 23, 2015, the Board granted VGS's October 19, 2015 request.

### Background and Context of the MOU

In December 2013, the Addison Natural Gas Project (the "Project") was granted a Certificate of Public Good ("CPG").<sup>1</sup> The case was thereafter appealed to the Vermont Supreme Court. Following a significant increase in the capital cost estimate, in September 2014, the Board sought a remand of the docket from the Vermont Supreme Court to consider whether or not to reopen the CPG (the "First Remand"). This First Remand was concluded in approximately thirty days, with the Board determining not to reopen the docket and returning the matter to the Supreme Court in October 2014.<sup>2</sup>

In December 2014, VGS announced a second significant increase in the capital cost estimate of the Project. In January 2015, the Board sought a second remand from the Vermont Supreme Court (the "Second Remand"). The docket was remanded to the Board in February 2015, technical hearings were convened in June 2015 and to date—some eight months following the remand—no resolution has been reached.

As conveyed in the letter from Commissioner Recchia filed with the Board on October 7, the continuing regulatory uncertainty engendered by the length of this proceeding is, in itself, having an effect on both the budget and schedule of the Project. For this reason, and given its ongoing supervisory jurisdiction over Vermont Gas and the Project, the Department executed the MOU with Vermont Gas. The MOU pertains to cost recovery matters not directly at issue here, but which will be effectuated in upcoming rate cases, contingent on a timely resolution of this proceeding.

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<sup>1</sup> Docket No. 7970, Order of 12/23/13 (Final CPG Order).

<sup>2</sup> Docket No. 7970, Order of 10/10/14 (First Remand Order).

In evaluating whether to admit the MOU into this proceeding, and what, if any, additional process is necessary, it is essential to place the MOU in the context of this proceeding. A plain reading of the MOU demonstrates that it is focused squarely on future rate proceedings. Nevertheless, the Board has devoted considerable attention to the Project's potential rate impacts in this docket, describing the scope of this review as limited, non-conclusive, and non-binding.<sup>3</sup> Of course, the limited scope of review makes sense given the absence of evidence in this proceeding upon which to make any definitive conclusions about future rate impacts. For this reason, the Board appropriately limited the extent to which it would consider potential future rate impacts of the Project to the most general level.

The Board's evaluation of future potential rate impacts associated with the Project has been limited to one aspect of the section 248(a) inquiry, specifically as it pertains to the potential for the Project to result in an undue geographic cross-subsidization. In the First Remand Order, the Board characterized its initial review of the Project's potential rate impacts as a general recognition that the Project is "likely to cause existing ratepayers to pay more for a period of time than they would if the Project were not constructed," and an evaluation as to whether or not these payments would constitute an impermissible cross-subsidy.<sup>4</sup> With respect to the increased cost estimate at issue in the First Remand, the Board looked at whether the change in the Project's projected cost (and its effect on future rates) made it probable that the Board would modify its initial decision concluding that it would not.<sup>5</sup>

In conducting this limited analysis, the Board observed that "[a]t this stage, we have no competent basis for concluding that existing ratepayers actually will pay more."<sup>6</sup> The Board continued, "[h]owever, based on the record before the Board in this proceeding, there appears to be a reasonable possibility of existing ratepayers incurring higher charges for a period of time."<sup>7</sup> The Board emphasized that its analysis was limited and therefore does not constitute a

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<sup>3</sup> Id. at 25 & n.72.

<sup>4</sup> Id. at 25.

<sup>5</sup> Id. at 25-26.

<sup>6</sup> Id. at n.72.

<sup>7</sup> Id.

conclusive or binding review of the actual rate impacts of the Project.<sup>8</sup>

### Admissibility of the MOU

It is against this backdrop that an inquiry into the admissibility of the MOU takes place. The MOU is certainly relevant to this proceeding insofar as it evidences an agreement between Vermont Gas and the Department that places a cap (albeit with limited exceptions) on future rate recovery of the Project's costs. Even though the Board's analysis of this issue is unavoidably limited in the context of a certificate proceeding, it has been present throughout this proceeding and therefore the MOU is "relevant evidence" by the standards set forth in Rule 401 of the Vermont Rules of Evidence. All things equal, the existence of the MOU tends to make rate recovery of anything over \$134 million much less likely than it would be otherwise.

Moreover, the timing of the MOU—filed after the close of the evidentiary record—is unremarkable, as there is ample precedent in this proceeding for evidence offered after the close of the formal record. In October and November 2013, following the close of the evidentiary record in the original case, Vermont Gas filed two MOUs with the Board. An MOU with the Chittenden Solid Waste District was filed on October 11, 2013, and an MOU with the Town of Middlebury was filed on November 7, 2013. In the final order granting the CPG, the Board found good cause to reopen the evidentiary record and admit the MOUs, but given the timing of the submissions, the Board gave parties ten days to object to the entry of the MOUs into the record. The Board advised precisely what form any such objection should take: (1) be in writing with notice to all the parties; (2) clearly state the evidentiary basis for the objection; and (3) articulate how the objecting party's interests are negatively impacted by its entry into the record.<sup>9</sup> To the best of the Department's knowledge, no such objections were filed.

Again in August 2015, AARP and the Palmers each filed motions to reopen the evidentiary record to admit civil complaints filed by VGS against its former contractor, Over and

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<sup>8</sup> Id.

<sup>9</sup> Final CPG Order at 14.

Under Piping Contractors, Inc., and by Over and Under Piping Contractors, Inc. against Vermont Gas, together with a Vermont Gas press release regarding the selection of a new mainline contractor.<sup>10</sup> Not only did no one object to the admission of these documents after the close of the evidentiary record, some parties—notably the Palmers and Conservation Law Foundation—supported their admission. And again on August 19, 2015, the Town of New Haven submitted an MOU between the Town and Vermont Gas, which MOU resolved all remaining issues between the Town and Vermont Gas.<sup>11</sup>

In the instant case, VGS initially filed the MOU with the Board on October 7, 2015, with no reference to its inclusion in the evidentiary record. Following discussions held at the October 15, 2015, status conference with the Board and parties, VGS submitted a formal Motion to Admit MOU into the Evidentiary Record. In this way, the MOU joins numerous other post-record evidentiary submittals that have been filed in various stages of this proceeding.

#### Process Going Forward

Once admitted, the question then goes to how the MOU should be considered in this proceeding and what, if any, additional process is necessary to ensure a fair hearing. The answers to these questions are straightforward.

First, the MOU should be considered by the Board for what it is—an agreement between two parties to this proceeding that speaks for itself and directly pertains to future ratemaking proceedings. By its plain terms, it demonstrates the existence of an agreement between Vermont Gas and the Department to limit the possibility that Vermont Gas will recover more than \$134 million of Project costs from ratepayers in future rate proceedings, absent extraordinary circumstances. And it guarantees Vermont Gas nothing. While the MOU's impact on future

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<sup>10</sup> Motion by AARP to Reopen the Evidentiary Record on Pending Motions, dated August 3, 2015, and Response by Nathan and Jane Palmer to Motion by AARP to Reopen the Evidentiary Record on Pending Motions, dated August 21, 2015. The Palmers had previously moved for the admission of the VGS Complaint in their August 10, 2015 Reply Brief.

<sup>11</sup> Email from Counsel Cindy Ellen Hill, Esq. on behalf of the Town of New Haven to Susan M. Hudson, dated August 19, 2015.

proceedings is significant, its impact here is much less so, given that its relevance is to an inquiry that the Board's prior orders describe as limited, non-conclusive, and non-binding. The Board should therefore consider the existence of this MOU in this limited context and evaluate it against the wealth of evidence presently before the Board evaluating the Project at estimated costs ranging from \$86 million to \$122 million to \$154 million. Viewed as such, the existence of the MOU can be reasonably understood to limit the likelihood that ratepayers may be responsible more than \$134 million of the Project's costs, notwithstanding that the currently projected \$154 million estimate stands. As described below, parties should be free to comment on how this MOU can or should affect the Board's limited review of the future rate impacts associated with the Project in this proceeding.

Second, in order to ensure a fair hearing, the Board should generally follow the principles established in this case for post-record evidentiary submittals, albeit with slight variances given the different procedural postures. With respect to the Chittenden Solid Waste District MOU, the Board first admitted it in the final order, but thereafter allowed for objections that are (1) in writing with notice to all the parties; (2) clearly state the evidentiary basis for the objection; and (3) articulate how the objecting party's interests are negatively impacted by its entry into the record.<sup>12</sup> The Board could certainly proceed in the same manner here, i.e., it could issue a final order and allow parties the opportunity to object after the fact. However, in light of the additional concerns raised about the present MOU when compared against other post-record evidentiary submittals, and the process afforded by the Board thus far, it makes sense to proceed on a slightly different course here. Given that parties have already had a significant amount of time to consider the MOU and comment on its admissibility, the Board should make an admissibility determination, or at the very least a provisional determination, in short order. Once admitted (finally or provisionally), the Board should allow parties a brief period to brief the weight, if any, the MOU should be accorded in the Board's consideration of this matter. The Department submits that in light of the circumstance, this course of action is preferable to simply admitting the MOU in a final order and allowing for objections to be filed thereafter, as it gives parties a better opportunity to address its merits in advance of a final decision.

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<sup>12</sup> Final CPG Order at 14.

The Department submits that there is no basis for any further factual development of the record in light of the MOU. The MOU should be admitted simply for the fact that an agreement exists between Vermont Gas and the Department in which Vermont Gas commits to a cap of \$134 million (with limited exceptions). Of course, this is not a determination of what amounts Vermont Gas will ultimately be allowed to recover in rates. The Board remains the ultimate arbiter of that issue, is not bound by the MOU, and can authorize any rate treatment consistent with Vermont law and traditional ratemaking standards. But this is all beside the point. The MOU is not a statement of what Vermont Gas will recover for the Project. Rather, it is an agreement between Vermont Gas and the Department that sets the table for upcoming rate proceedings, and that does so in a way that is relevant to the limited inquiry on potential cross-subsidies—a high-level inquiry that “occurred in the context of [the Board’s] overall obligation under Section 248(a) to determine whether the Project promoted the general good,” and therefore took many other factors into account as well.<sup>13</sup>

Notwithstanding, to the extent that the Board determines that a hearing is necessary, the Department respectfully requests that the Board clearly articulate the scope and purpose of such hearing, that it does so in a manner that is not an open invitation to relitigate this matter, and that establishes a schedule that moves this case toward swift resolution. This proceeding has lasted more than 8 times as long as the First Remand and the Final CPG Order in this proceeding was issued more than 22 months ago. It is the significant duration of this proceeding that brought Vermont Gas to the negotiating table, and the resulting MOU contains a condition precedent of a final Board order in this proceeding by January 8, 2016. At this late hour of the proceeding, all parties need some measure of finality. A Rule 60(b) proceeding “balances the needs for both fairness and finality, and serves as a safety valve to the doctrine of res judicata.”<sup>14</sup> In order to achieve this balance, the Board should indicate whether the MOU will be admitted (or at least provisionally so) and then allow a brief period for parties to brief its weight. Thereafter, Board should move swiftly to issue a final order in this proceeding.

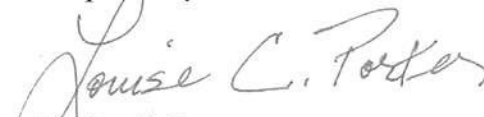
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<sup>13</sup> First Remand Order at 27.

<sup>14</sup> *Tudhope v. Riehle*, 167 Vt. 174, 178 (1997).

Dated at Montpelier, Vermont this 27<sup>th</sup> day of October, 2015.

Respectfully submitted



Louise C. Porter  
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cc: Attached Service List

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