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 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	)
In Re: Second Remand	)

CONSERVATION LAW FOUNDATION'S BRIEF REGARDING MEMORANDUM OF UNDERSTANDING IN SECOND REMAND

The Memorandum of Understanding (MOU) between the Public Service Department (PSD) and Vermont Gas Systems, Inc. (VGS) fails to provide any actual benefits on which the Board can rely. It fails to present credible evidence that costs will be contained, and instead locks in exorbitant cost increases for the proposed project. The Board should reject VGS's claims as unsupported and should re-open the proceeding to evaluate the Certificate of Public Good (CPG) in light of the ballooning project costs.

As stated in Conservation Law Foundation's previous brief, the cost increases demonstrate that the proposed project is a bad bet for Vermont. It will lock Vermont in to relying on fossil fuels long past the time that climate change demands we move away from polluting fossil fuels. The significant cost increases exacerbate the already bad economics of the proposed project. As explained in CLF's previous brief, many facts have changed regarding the availability of other power sources, including CNG and cold climate heat pumps, that affect the overall

economics of the proposed project. Rather than actually evaluate the proposed project in light of these changed facts, the MOU simply brushes them under a rug and ignores them. Both the VGS and the PSD analysis fail to update the economic evaluation to account for the fact that oil prices are lower and that CNG is now available to large industrial customers. (Dismukes Prefiled at 5 (11/23/15); Tr. 12/1/15 at 136-38 (Hopkins); Tr. 12/9/15 at 119 (Recchia)).

By the terms of the MOU, it fails to create an obligation to contain costs. The MOU is not to be approved by the Board. (MOU at 3; Tr. 12/1/15 at 59 (Rendall)). Also, by the terms of the MOU, it relates only to the PSD and VGS, who both reserve the right to advocate different positions in future proceedings. (MOU at 3). At best, the MOU is an agreement between two parties. Both of these parties already oppose the Board re-examining the CPG approval in light of the new cost information. (Tr. 12/1/15 at 59 (Rendall)). There is nothing in the terms of the MOU that makes it binding or enforceable going forward except by the PSD and VGS. (Tr. 12/1/15 at 59 (Rendall)). In fact, a day after the Board issues an order, the two parties could abandon or re-negotiate the MOU and completely eviscerate even the claimed, though illusory, benefits that VGS and PSD suggest the MOU has.

Additionally, by the terms of the MOU, there are numerous exceptions to the proposed cost cap. (MOU at 2, para. 2). In light of these, the Board cannot rely on the MOU providing any helpful evidence about its impact on rates, or the overall economics of the proposed project. As demonstrated by AARP's questions of VGS witnesses, there continues to be litigation regarding construction contracts and parts of the project needed to be removed and replaced adding costs to the already too costly project and continuing to call into question the overall management of the proposed project and its construction. (Tr. 12/9/15 at 33-35, 79 (Rendall)).

Based on the terms of the MOU, the Board cannot determine that it is more likely than not that it will have the claimed effect of capping costs or affecting in any way the overall costs or benefits of the total project.

Rather than present an actual commitment to cap costs, VGS and PSD ask the Board to find value in the claimed good intentions of the parties. The specific language of the MOU states only that "[i]t is the Parties' *intent* that recovery of any above-Rate Cap costs will be limited in scope...." (MOU at 2, para. 2 (emphasis added)). In testimony in support of the MOU, Mr. Rendall refused to change the terms of the MOU to make it a binding commitment instead of an intention. (Tr. 12/1/15 at 61 (Rendall)). As noted by Mr. Rendall, the agreement "speaks for itself. It's fully negotiated, it's executed, and there is no need to modify it." (Tr. 12/1/15 at 61 (Rendall)). Based on the text of the MOU, and supported by Mr. Rendall's testimony, the MOU merely identifies an "intent" to limit cost recovery. That intent alone is insufficient for the Board to determine that the MOU provides real benefits or cost containment.

The Board has evaluated many MOUs in the past. Based on the Board's experience with Entergy and the Vermont Yankee Nuclear Energy facility, the Board should be very wary of placing any reliance on a party's good intentions alone. (*In re Vt. Yankee Nuclear Power Corp.*, Docket No. 6545, 2002 WL 1997942, at *1 (Vt. PSB. June 13, 2002); *Entergy v. Shumlin*, 733 F.3d 393 (2d Cir. 2013)). As was shown in those cases, courts and the Board cannot enforce the intent of parties. The Board must look at the clear commitments and obligations that are in an agreement and determine whether they provide sufficient assurances on which the Board and the people of Vermont can rely.

In this case, the MOU simply expresses an intent to contain costs. That alone fails to create a commitment and fails to demonstrate that any additional benefits are being provided by

the MOU that should encourage the Board to re-affirm its previous approval. On the contrary, the high costs and continued poor performance and poor management of the proposed project demonstrate the need to re-evaluate the project in light of the higher costs and changed circumstances.

The MOU also fails to address which customers would be affected by the cost increase or the illusory cost cap. The impact on the large industrial users compared to the residential users should be evaluated in determining whether the claimed cost cap provides any actual benefits that justify the Board not re-opening the CPG proceeding.

The Board should reject the claims of any benefits from the MOU and re-open the proceedings and reconsider its approval for the proposed project. Since the project was initially approved in September 2013 there have been a number of changes to the project and to the facts and circumstances affecting the proposed project that clearly demonstrate the proposed project does not "promote the general good of the State." 30 V.S.A. § 248(a)(3). Fundamentally, if the Board knew in 2013 all the information it knows now, it would not have approved the project.

As demonstrated by Conservation Law Foundation (CLF) and others, the proposed project failed to promote the general good of the State in 2013. (7970 CLF Proposed Findings of Fact and Brief at 1-14 (10/11/13)). Although the Board rejected some of CLF's claims, it acknowledged the need for the project to provide actual benefits in order to meet the statutory requirements. (7970 Final Order at 137 (12/23/13)). The increased project costs, availability of other energy resources, and the failure of the proposed project to advance Vermont's climate change needs all combine to show that this project falls far short of demonstrating required benefits sufficient to support approval of a Certificate of Public Good (CPG). The MOU fails to alter this conclusion. Instead, the facts presented during the two days of hearings demonstrate

clearly that project management and costs are uncertain and that many facts have changed since 2013 and a full and thorough evaluation is required.

As shown in CLF's previous filings, and during the hearings, since the CPG was granted in 2013, the cost of the project increased significantly, good management of the project has been lacking, significant changes in the energy resources and markets occurred, and the greenhouse gas (GHG) emissions impact are more negative. These combine to demonstrate that the proposed project continues to be a bad bet for Vermont customers and the environment.

The information presented at the hearings demonstrates the MOU fails to present any actual benefits. The proposed project falls far short of providing actual cost or environmental benefits over the life of the project. Based on these failures, it is unlikely the Board could approve the proposed project based on the new facts that have come to light since the initial approval. The Board should re-open the proceedings to allow a full and fair evaluation of the proposed project.

Dated at Montpelier, Vermont, this 17th day of December 2015.

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