STATE OF VERMONT
PUBLIC SERVICE BOARD

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| 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 | ) | Docket No. 7970 |
| Petition of Conservation Law Foundation For a Declaratory Ruling that an Amendment to the Certificate of Public Good Issued to Vermont Gas Systems, Inc. In Docket 7970 Is Required Because of a Substantial Change in the Approved Project | ) | Docket No. 8330 |

**POST-HEARING MEMORANDUM SUBMITTED BY AARP, INCLUDING JOINDER IN CLF PETITION DATED JULY 14, 2014**

AARP submits this memorandum to address the record of the evidentiary hearings held on June 22 and June 23, 2015. This submission is filed both under the Board's supervisory authority and under Vermont Rule of Civil Procedure 60(b). AARP also moves to intervene in Docket 8330.

1. **The Project Has Changed In a Manner That Has the Potential for Significant Impact on Criteria 248(b)(2) and (b)(4) and the General Good of the State under Criterion 248(a) and Cannot Lawfully Proceed Forward Without a Permit Amendment**

Projects which have been approved under § 248 not infrequently experience changes after they were permitted. Rulemaking under Act 250

created an explicit standard for determining whether changes require a permit amendment under that statute. In 1997, in the Citizens' Utility case, the Public Service Board adopted the approach which had already been developed under Act 250 by rulemaking. Docket Nos. 5841/5859, Investigation into Citizens Utilities, Order of 6/19/97, 179 P.U.R. 4th 16, 94-95.

> In the current proceeding, to determine whether Citizens' changes to the 120 kV line require an amended CPG, the DPS recommends that we use the 'substantial change' test applied under Act 250.[145] Citizens agrees with the Department that the Act 250 substantial change test provides a reasonable standard for determining when changes to a Section 248 certificated project require an amended CPG. We concur with the parties, and conclude that Act 250's substantial change test provides us and parties with useful guidance for when changes to a certificated project require an amended certificate. There are two reasons for our concurrence in the applicability of the substantial change test. First, that test is entirely consistent with our own precedent from the *Vicon* case.
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> Second, it will promote regulatory consistency, and thus greater understanding among the regulated community, to use the same test in Act 250 and Section 248 for determining when changes to a certificated project must obtain approval. This is also consonant with the legislature's determination to integrate significant aspects of Act 250 and Section 248; the legislature has incorporated some of the Act 250 criteria into Section 248, and has provided that review under Section 248 will substitute for that of Act 250.
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> Rule 34(A) of the Environmental Board Rules require an Act 250 permit amendment for any 'substantial change' to a permitted project. Environmental Board Rule 34. Those rules define 'substantial change' as 'any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10). '[146]
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> Thus, in Act 250, to determine whether a permit amendment is required for a permitted project, the Environmental Board first determines whether there has been a change, and second, whether any change may have a significant impact under the Act 250 criteria. This second determination focusses on the *potential* for impacts under the criteria, and thus substantial change is not limited to

> change that produces an actual impact. *In re Barlow*, 160 Vt. 513, 517-18, 521-22 (1993).
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> Consequently, we agree with the DPS that, under the second step of the substantial change analysis, the issue is whether the change in the project has the potential for significant impacts, and not whether the change has actual impacts.[147] This follows not only Act 250's practice but also our own prior practice, which requires changes in a certificated project to be approved in an amended CPG if the changes are *potentially* significant under the Section 248 criteria.[148] We can determine whether the changes *actually* comply with the criteria only in a Section 248 proceeding.[149]

The Board ruled in the Citizens Utilities case that Citizens Utilities' projects that had received permits under § 248 had been changed to the extent that there were potential impacts on statutory criteria. For example, one of the economic benefits of the project which had justified its § 248 permit was reduction of line losses through replacement of double-circuit wiring by single-circuit. The project, as built, was comprised of double-circuits. The economic benefits of the project, therefore, were affected. Because the need for the project and the economic benefit of the project under § 248(b)(2) and (b)(4) potentially were affected, a permit amendment was required. The Board ordered Citizens Utilities to file a permit application for the changed project. 179 P.U.R. 4th at 92, 93, 96, 99, 100, 104.

These issues came to a head again in the Northwest Reliability Project case. VELCO reported to the Board that the cost of the project had substantially increased after Board approval had been granted. The disclosure sparked motions under Rule 60. The Board held that even if each of the factual contentions of the moving parties turned out to be correct, that would not change

the § 248 judgment the Board had made because the § 248 decision had not been based on project cost. Re: Vermont Electric Power Company, Inc., Docket 6860, Order 9/23/05 at 11.

In the NRP decision, the Board specifically determined that it was not considering whether the project needed an amended CPG under the "substantial change test" but instead concluded "that given the limited scope of the remand from the Court, the issue before us — whether to reopen our previous approval of the Project — properly falls under the provisions of Rule 60, and not the standards that govern amendments to projects." *Id.* at 19. As explained in the remand decision, the Rule 60(b) standard is stricter and requires that the "the revised cost estimate is 'of such a material and controlling nature as will probably change the outcome.'" *Id.* at 21-22.

Further, as the Board noted in the Vermont Electric Power Company, Inc. remand decision: "If a substantial change has occurred, without an amended CPG the permittee would not be authorized to proceed with the modified project, regardless of whether the original CPG were on appeal." *Id.* at 20 fn. 28. As recommended by the Public Service Department in the Re: Vermont Electric Power Company, Inc. remand proceedings "the substantial change test will not be limited to physical changes, but could also apply to costs increases for permitted projects." *Id.* at 20 fn. 29.

After the Board issued its decision in the Northwest Reliability Project case, it promulgated rules making explicit the post-C.P.G. duties of a regulated utility. In effect, it adopted as Rule 5.408 its holding from Citizen's Utilities governing

substantial *changes to project*. It also adopted a second rule, Rule 5.409, to govern *reporting* of cost increases.

> **5.408 Amendments to Projects Approved under Section 248**
> An amendment to a certificate of public good for construction of generation or transmission facilities, issued under 30 V.S.A. § 248, shall be required for a substantial change in the approved proposal. For the purpose of this subsection, a substantial change is a change in the approved proposal that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a).
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> **5.409 Costs of Section 248 Projects**
> Where a Vermont utility is the petitioner, or the costs of a project or a portion thereof are eligible to be recovered from ratepayers, the petitioner shall regularly monitor and update the estimated capital costs of any project it has proposed for or received approval under Section 248. When the estimated capital costs of such a project increase by 20 percent, and the increase is at least $25,000, or such other amount as the Board may order in a given proceeding or prescribe in a Procedure, prior cost estimates submitted by the petitioner to the Board, the petitioner shall notify the Board and parties of the new capital cost estimates for the project and the reasons for the increase. This requirement to monitor, update, and report shall continue until construction of the project has been completed.

The plain meaning of the two rules is that any change in a project approved under § 248 project that has the "potential" to affect any of the § 248 criteria "shall" require a permit amendment, and regardless of whether an amendment is sought every 20% cost increase requires notice to the Board and the parties. The second rule, on reporting, does not address when changed project cost triggers the need for a permit amendment; that issue is disposed of by the first rule.

The duties imposed by Citizens Utilities and Board Rule 5.408 are implicit in every § 248 approval issued by the Board. A utility that accepts a § 248

certificate accepts these duties as unwritten terms of the approval it has received. As the Board held with regard to Entergy Nuclear Vermont Yankee, "A C.P.G. is not an a la carte menu." A utility must either accept or reject a CPG. If it accepts the C.P.G, the utility "must abide by all of its terms." Investigation Into General Order 45 Notice, Docket 6545, July 11, 2002, *Order re Motions to Alter or Amend.*

Under current law, therefore, a utility that has obtained § 248 approval has accepted a continuing duty to seek a permit amendment if it discovers that the project has changed in a manner that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a). Cost may be, but is not necessarily, one such factor. In the NRP case, it was not.

Board Rule 5.408 does not require that a permit amendment be denied and that the project be cancelled. The Board Rule requires that the permit amendment be *applied for*. See Citizens Utilities, 179 P.U.R. 4th at 95. A hearing would then be held and a ruling issued, on the merits.

Here, as in Citizens Utilities, evidence of the need for an amended permit comes from the mouths of the utilities' own witnesses. There are no issues of credibility. There are no disputes about the material facts. According to VGS itself, the cost of the project has blossomed from $86 million to $156 million, while the intended purpose of the project has been curtailed because roughly half of the proposed replacement of oil and propane by gas no longer will occur. Instead, piped natural gas would replace Compressed Natural Gas. Compare 12/23/13 Order Finding 221 at p.49 with AARP Cross Exhibit 44, Simollardes

testimony 6/22/15 pp.235-238 and Hopkins testimony 6/23/15 pp.259-160. , No reasonable reader of the Board's Order of December 23, 2013 would dispute that these changes have the *potential* for significant impact with respect to criteria of 248(b)(2) and (b)(4) and on the general good of the state under criterion 248(a). Dr. Dismukes' May 8, 2015 testimony and May 27, 2015 rebuttal testimony address, in detail, the potentially devastating impacts of these changes on these criteria. Dr. Hopkins' prefiled testimony questions whether the impacts will be as severe as Dr. Dismukes IMPLAN modeling predicts but he does not dispute markedly reduced benefits. It is the *potential* for impact on the criteria that triggers the need for permit amendment, not whether the Board believes there is adequate proof of *actual* impacts[1]. The Board's duty under the law therefore is to order VGS to apply for a permit amendment.

The Board's Order dated January 16, 2015, at pages 6-7, held that notwithstanding the presence or absence of a remand order from the Supreme Court, the Board possesses supervisory authority over Vermont Gas Systems. The Board also ruled that "it is not clear" whether it would have jurisdiction to *modify* the C.P.G. absent a remand. However, it *is* clear that the Board has the authority to declare that the $154 million project constitutes a substantial change from the 2013 $86 million project – *without entertaining an amended*

[1]"Consequently, we agree with the DPS that, under the second step of the substantial change analysis, the issue is whether the change in the project has the potential for significant impacts, and not whether the change has actual impacts…. We can determine whether the changes *actually* comply with the criteria only in a Section 248 proceeding." 170 P.U.R. 4th 94-95.

*application.* The Board's supervisory authority is broad, and issuing a declaration that a regulated utility is acting outside its legal limits falls within that broad authority. 30 V.S.A. § 209(a) states:

> (a) **General jurisdiction.** On due notice, the Board shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under this chapter, and shall have like jurisdiction in all matters respecting:…
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> (3) the manner of operating and conducting any business subject to supervision under this chapter, so as to be reasonable and expedient, and to promote the safety, convenience, and accommodation of the public;…
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> (6) to restrain any company subject to supervision under this chapter from violations of law, unjust discriminations, usurpation, or extortion;

See Investigation into Central Vermont Public Service Company's Staffing Levels, August 20, 2009, Docket No. 7496; and In re Petition of Verizon New England, 173 Vt. 327, 332 (2003), treating this authority as "broad."

Once the Board issues that ruling, if VGS believes the Board lacks jurisdiction to entertain the amendment application and if VGS wishes to pursue the $154 million version of the project, VGS may then apply to the Supreme Court for a further remand order.

However, the Supreme Court has already ruled that there are no limits on the scope of this remand. The Supreme Court, in response to Ms. Lyons's request that the remand be without limitation in scope, explicitly held that it would leave to the Board all decisions as to the scope of the remand. In re Amended Petition

of Vermont Gas Systems, Inc., Docket No. 2014-135, Entry Order Feb. 9, 2015.

As a result, it is now clear that the Board does possess jurisdiction to order that a permit amendment be applied for. Once the Declaratory Ruling is issued, Vermont Gas Systems would be risking the sanctions similar to those which were imposed upon Citizens Utilities were it to proceed forward with its $154 million project without a permit amendment.

AARP therefore joins in the Petition for Declaratory Ruling filed by the Conservation Law Foundation on July 14, 2014, supplemented on July 24, 2014, which has been assigned Docket No. 8330. AARP asks for a declaratory ruling that the project as described by Mr. Rendall and Ms. Simollardes in their prefiled testimony and in their live testimony on June 22, and June 23, 2015, constitutes a substantial change under Rule 5.408 and the Board's precedents. AARP submits that in light of Dr. Dismukes' and Dr. Hopkins' testimony, Board Rule 5.408 and the Board's precedents leave it no discretion but to issue the requested Declaratory Ruling. AARP also agrees with C.L.F. that injunctive relief should be issued after notice to Vermont Gas Systems and an opportunity to be heard.

## 2. VGS' § 248 Approval Must Be Reopened Under Civil Rule 60(b) Because Newly Discovered Evidence Reveals That the Cost, Need for and Economic Benefit of the Project Would Have Led to a Different Rulings on December 23, 2013 and October 10 2014.

### *A. Utilities Holding § 248 Approvals Have Only a Conditional Expectation of Finality, Subject to the Duty to Monitor, Review and Assess Whether or Not to Proceed Forward With the Project*

Section 248 proceedings are deemed to be "legislative," "policy-making"

and "conceptual" rather than adjudicatory. In re Petition of Twenty-Four Vermont Utilities, 159 Vt. 339, 357 618 A.2d 1295, 1306 (1992) ("In a §248 proceeding, the Board is engaged in a legislative policy-making process."); Auclair v. VELCO 133 Vt. 22, 26 (1974) ("At the Section 248 hearing, the Public Service Board is engaged in a legislative, policy-making process."); Auclair v VELCO, 132 Vt. 519, 521 (1974) (Section 248 approval is "purely conceptual in nature.)" It is because § 248 proceedings are legislative, policy-making and conceptual, and not adjudicatory, that landowners over whose property a project is planned to be constructed have no statutory or constitutional right to notice of the proceedings. Auclair v. VELCO, 133 Vt. 26.[2]

Section 248 approvals, being legislative, policy-making and conceptual in nature, confer no vested rights to recovery of project expenses from ratepayers. A project may receive unreserved § 248 blessing from the Board and subsequently be found to have been imprudently entered into or imprudently continued, or may be found to be prudently entered into and continued, but not economically used and useful. Re: Green Mountain Power, Docket No. 5983, Feb. 27, 1998 Order, 184 PUR 4th 1; In re Tariff Filing of Green Mountain Power, Docket 6107, Order Entered January 23, 2001, 207 P.U.R. 4th 1, n.180, 181.

When a plaintiff or defendant obtains a judgment from a trial court the prevailing party enjoys legally protected expectations of finality. All issues that

[2] Subsequent eminent domain proceedings are adjudicatory in nature. Affected landowners enjoy the right to notice and the opportunity to be heard in eminent domain proceedings. Auclair v. VELCO, 133 Vt. 26.

were litigated or that could have been litigated are foreclosed under claim preclusion, and all issues that actually were litigated may be foreclosed under issue preclusion.[3] In re Tariff Filing of Central Vermont Public Service Corp., 172 Vt. 14, 769 A.2d 668 (2001).

Nonetheless, every court judgment later may be reopened and set aside for a broad variety of reasons under federal and Vermont Rule of Civil Procedure 60(b):

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

As the underlined portions of Rule 60(b) demonstrate, a prevailing party may lose the benefit of his or her judgment even though the prevailing party acted in complete good faith and with complete transparency at all times. Mistake, inadvertence, surprise, excusable neglect by the losing party, or newly discovered evidence that could not have been discovered with due diligence, or the inequity of the situation going forward may justify overturning the ruling,

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[3] An eminent domain proceeding before the Board, being adjudicatory in nature, is protected by these legally enforced expectations of finality.

Although Rule 60(b) was promulgated to address adjudicatory proceedings, not legislative, policy-making or conceptual proceedings, Board Rule 2.221 adopts the rule generally. See F.R.C.P. 60(b), Advisory Committee's Notes, and V.R.C.P. 60(b), Reporter's Notes and Board Rule 2.221.

Application of Civil Rule 60(b) to Board proceedings requires consideration of the type of proceeding at issue. On the one hand, an eminent domain judgment, being adjudicatory in nature, must result in the same expectation of finality as a Superior Court judgment. A landowner who receives a monetary judgment from the Board should be entitled to rely upon the Board's damages award to the same extent as a civil plaintiff relies on a civil damage award. It is only if newly discovered evidence about the landowner's damages could not have been discovered with due diligence, and only if the outcome more likely than not would have been different if the evidence had been known prior to the judgment, that the matter may be reopened. Moore's Federal Practice § 60.23[4].

On the other hand, the legislative, policy-making and conceptual nature of Public Service Board § 248 judgments calls for substantially different expectations of finality. A utility that has obtained a § 248 Certificate of Public Good cannot rest on its laurels. Vermont precedent holds that utilities have a duty to continually re-examine the basis for § 248 approvals they have obtained in order to protect the interests of ratepayers who will end up paying for those decisions. A project that initially was approved by the Board may, as it is being constructed or implemented, turn out not to be in ratepayers' best interests and therefore should be cancelled.

> A utility's obligations include continued monitoring, review, and assessment of its participation in specific power projects. These assessments must, at least, consider the likelihood of the project's coming on-line at expected times and within estimated costs, options available in case of failure to meet expected operating criteria, alternative power sources or conservation efforts that might replace the power project and the effect of continued investment on ratepayers and stockholders. This continuing review and assessment process should be documented so that its prudence can be evaluated when challenged. [FN351]

Re: Green Mountain Power, Docket No. 5983, Feb. 27, 1998 Order, 184 PUR 4th 1.

The Board's discussion of Green Mountain Power's behavior after it obtained § 248 approval for purchasing Hydro-Quebec power illustrates the standard. The Board approved of the purchase, but after the C.P.G. was issued, predictions of the future market prices of alternative sources of electricity plummeted. The New York Power Authority, which had a similar contract, utilized its rights of cancellation and stepped away from its Hydro-Quebec contract. Green Mountain Power did the opposite. It "locked-in" its Hydro-Quebec contract by waiving its right of cancellation. GMP's decision compelled it to come to the Board later, seeking a large rate increase. It argued that the Board had already approved of the purchase, so the Board was barred from challenging the prudence of the purchase. The Board responded:

> GMP argues that the issues in this Docket are the same as those raised in Docket 5330; i.e., that once the Board reviewed the Contract for compliance with section 248 criteria in Docket 5330, 'the issue of justness and reasonableness of the power costs contained in that contract necessarily had been settled.' [FN43] In this statement, GMP incorrectly equates a section 248 review with a prudence review. [FN44] The logical implication of GMP's position is that a section 248 approval necessarily constitutes rate approval for costs of the underlying project or contract, a proposition that is unsupported in Vermont law.

In the Docket 5330 § 248 review, we considered whether the Contract should be approved, not as a general matter, but under specific enumerated criteria. [FN45] These criteria -- including section 248(b)(2) and (b)(4) -- do not mandate a prudence review. [FN46] A § 248 review is concerned with certification of a potential obligation that a utility will undertake. *It neither directs the utility to choose to undertake the obligation, nor does the Board assume any managerial status by virtue of having issued a CPG.* [FN47]

A prudence review, on the other hand, determines whether a utility's management decisions, based upon what it knew or should have known, were reasonable in light of all the circumstances that existed at the time the actions in question were taken. If the Company was aware of, or should have been aware of, material information that was not disclosed to the Board, or if prudent managers should have considered relevant matters outside the scope of section 248, it is obvious that a section 248 approval cannot substitute for a prudence determination. *Moreover, it does not supplant the responsibility that management has to respond to changing circumstances even after a section 248 approval is granted: a utility's obligations include continued monitoring, review, and assessment of participation in power projects*, and, this continuing review and assessment process needs to be documented 'so that its prudence can be evaluated when challenged.' [FN48]

In this Docket parties have challenged the prudence of GMP's negotiation and structuring of the Contract. Those parties also have focused upon the prudence of GMP's contract management throughout 1991, including the decision to lock- in. Although much of the evidence in Docket 5330 may be relevant to a prudence review of the Contract, we did not review the prudence of the Contract when conducting the 5330 proceeding.

More significantly, the August 1991 lock-in occurred more than a year after the last evidentiary hearing in Docket 5330; it was not and could not have been considered during the initial review. Because Docket 5330 reviewed the Contract under the criteria of section 248, and because at issue in this Docket are questions of prudence of the Contract and GMP's activity surrounding the early lock-in, we cannot conclude that these two Dockets considered the same issue.

Re: Green Mountain Power, Docket No. 5983, Feb. 27, 1998 Order, 184 PUR 4th 1 (emphasis added).

The law imposes no such duty upon prevailing parties in adjudicatory

proceedings. A successful party in a damages case, or a successful party in an eminent domain proceeding, has no duty to monitor the ongoing extent of damages and, if they turn out to be substantially less or more than was adjudicated, submit the new information to the court or the Board for reconsideration of the judgment.

### *B. The Duty to Monitor, Review and Assess Protects Ratepayers from Projects Which Were Economically Beneficial When Permitted But Are No Longer Beneficial Due to Changed Circumstances*

The ongoing duty to monitor, review and assess assumes compelling importance once one recognizes the position of the Vermont ratepayer under Board precedents – the Vermont ratepayer is, in effect, a surety who protects shareholders against some of the utility's losses. While it is true that § 248 approvals do not guarantee that a project will be placed in rate base, the Board's long-established policy is to place half of the cost of an uneconomic (or not "used and useful") project on ratepayers. In re Tariff Filing of Central Vermont Public Service Co., Docket 6460, 6/26/01 at p. 23[4].

The testimony of Mr. Neme, Dr. Dismukes, Dr. Hopkins, Mr. Rendall and Ms. Simollardes provides troubling evidence that the Phase 1 project will turn out to be uneconomic. Too few customers may sign up for gas to cover the investment even over the 35 year period that VGS estimates is the break-even

[4] "Under traditional ratemaking, the Board has generally not required utility shareholders to absorb the entire uneconomic costs arising from investments found not to be used-and-useful, but instead has required a sharing of those costs. In most cases, this has been accomplished by having ratepayers and shareholders share those costs equally."

point because heat pumps provide the same or greater benefits at less cost or because gas prices have escalated while oil and electric prices remain steady or decline. The project was approved when cold climate heat pumps were a novelty, but now they are on the market and provide energy at a price that is competitive with gas according to both Mr. Neme and Dr. Hopkins. And the price of electricity is predicted to rise in the future at a lower rate than the price of gas. The project was approved when oil sold at over $100 a barrel, leading to a 40% price advantage for consumers who switch to gas – but now the price differential is 25%. Rendall testimony 6/22/15 pp. 55, 65, 70. Consumers are likely to be reluctant to spend the many thousands of dollars needed to convert to gas for only a 25% price advantage. Cota prefiled testimony; Hopkins testimony, 6/23/15 118-122. When the project was initially approved, the SERF fund was predicted to suffice to avoid any significant rate increase – but now, as Vermont Gas Systems has conceded, even with full usage of the SERF fund rates are predicted to increase by 15%, and by 19.8% if the SERF funds are not used, further worsening the comparative advantage, if any, of gas over heat pumps or oil. Simollardes 6/23/15 pp. 77-78; Rendall testimony 6/22/13 pp. 18-20.

Ratepayers are likely to be held responsible for half of the uneconomic cost of the project. A hearing under Rule 60(b), to address these issues, would be ratepayers' only opportunity to avoid that risk (other than a hearing under Rule 5.408).

### *C. Under Board Precedent, the Board Can Protect Both the Utility and the Ratepayer by Holding a Hearing Under Rule 60(b).*

One might ask whether it is fair to Vermont Gas to schedule a hearing the result of which could be cancellation of the project, forcing Vermont Gas to lose its roughly $60 million investment. The Board has already addressed an analogous question. In 1986, Central Vermont Public Service sold its investment in the Seabrook nuclear power project. It lost many tens of millions of dollars. It sought to recover the loss from ratepayers. In Re Central Vermont Public Service Corp., 83 P.U.R. 4th 832, Docket 5132, Order entered May 15, 1987, the Board determined that some of the losses had been imprudently incurred, while others were prudently incurred losses that provided no economic use to ratepayers, because the investment had been sold. These losses did not satisfy the economic used and useful test. Nonetheless, the Board ruled that 50% of these noneconomic losses should be placed in rate base and paid by ratepayers. Otherwise, the Board reasoned, there would be an undue incentive to utility managers to continue to invest in uneconomic projects in order to satisfy the used and useful test.

> A literal application of the "used and useful" test would note that the Seabrook project will not be "used" to provide electricity to Central Vermont's ratepayers and that its "usefulness" to them is limited to the purchase price and tax benefits that the Company has already received. It would, as a result, deny any recovery. Such a rigorous application is probably counter-productive to ratepayers' interests. For example this Board has historically encouraged research and planning, even if the net result is to decide that a project should not be built. See, e.g., Docket No. 4803, Order of 112884 (Essex Transformer); Docket No. 4782, Order of 41086 (Chester-Londonderry Transmission Line). In addition, an absolute rule of no collection for abandoned projects might encourage utilities to remain in unfortunate investments long after the point where ratepayers would benefit from their abandonment.

83 P.U.R. 4th 589.

> … Most importantly "completion" of a project, whether by the original investor or by another, should have no talismanic effect. If we were to treat completion of a plant as insulating investors against the risks of uneconomic investment, we would be creating all the false incentives for completion that have, quite rightly, been raised as criticism of anti-CWIP provisions.

83 P.U.R. 4th 596-597.

Consistent with the Seabrook decision, the Board should now reopen this proceeding. Ratepayers deserve a hearing at which the Board can determine whether sharing the roughly $60 million cost of the cancelled project 50/50 between shareholders and ratepayers would better serve ratepayers than placing a $154 million investment in rate base and imposing a 15 to 20% rate increase on all customers, new and old, in order to pay for it.

### *D. The 12/23/13 and 10/10/14 Orders Should Be Reopened for Reconsideration Under Rule 60(b)*

Project cost and its effect on existing and new ratepayers were contested issues that were ruled upon by the Board under statutory criteria in its first decision. *Reply Brief Submitted on Behalf of Nathan and Jane Palmer*, October 25, 2013 at 14-16; 12/23/13 Order pp.101-103. The Board found that a project's $86 million cost would not cause undue cross-subsidies of new customers by existing customers. Now, however, the evidence is uncontested, from VGS itself, that even with use of the SERF fund the project may cause a 15% rate increase, and without SERF funds the rate increase will be 19.8% unless some other means is found to protect ratepayers. Simollardes 6/23/15 pp. 77-78; Rendall testimony

6/22/13 pp. 18-20. The project was approved on the understanding that gas would be 40% less expensive than oil and propane. Now the differential is 25%. Hopkins testimony 6/23/15 pp. 1112-113. The project was approved prior to introduction of cold climate heat pumps. Now, heat pumps are cost-competitive with gas and the legislature has made their promotion into state policy. See Act 56 of the Laws of 2015 and Neme prefiled testimony and rebuttal. The project was approved of on the basis that the Middlebury area commercial and industrial entities such as Agrimark would continue to burn expensive greenhouse-gas producing oil unless the pipeline were constructed; nearly half of the project's projected use would be for those commercial and industrial customers. Now those customers have access to Compressed Natural Gas. AARP Cross Exhibit 44. Simollardes testimony, 6/22/15 p.227-237. CNG costs them roughly 75% more than piped gas would cost them (Rendall testimony 6/22/15 p.70) -- but substantially less than the cost of oil per BTU which was the basis of the Board's Order in 2013, and with the same alleged greenhouse gas benefits as piped gas. Vermont Gas Systems says it does not know how much money CNG customers are saving or the greenhouse gas emission customers are already achieving from the conversion, which Vermont Gas has decided not to consider as the baseline for evaluating the costs and benefits of the project. Simollardes testimony 6/22/15 pp.234-237. The project was approved of on the basis of a 20-year Net Present Value calculation of positive $52 to $140 million using varying discount rates, and depending on whether a gas company efficiency program is included. 12/23/13 Order Finding 246, p.56. No 35-year or 50-year NPV projections were

considered. Now the only 20-year NPV calculations are either deeply negative, as Dr. Dismukes testified, or low, as Dr. Hopkins testified. Dr. Dismukes did not run an IMPLAN model of CNG use as the baseline, but his spreadsheet calculations of the NPV of the project with CNG as the baseline found the NPV of the project now to be well below zero. Neither Vermont Gas nor the Department analyzed the NPV of the project with CNG as the baseline, but Dr. Dismukes testimony revealed that Dr. Hopkins' also had performed spreadsheet analyses which used CNG in Middlebury as the baseline, and Dr. Hopkins' calculations confirmed his own calculations of an NPV well below zero. Dismukes May 27, 2015 Rebuttal, pp. 39-40, Exhibit DED-6. Hopkins testimony 6/23/15 pp. 139-140. . And the cost of the project has ballooned from $86 million to $154 million, a cost no one predicted or hinted at during the initial proceedings.

These changes make it more likely than not that the Board would have reached a different conclusion if it knew in 2013 what it now knows. The conclusion would have been either denial of the C.P.G. or dismissal without prejudice on the basis that too many uncertainties precluded approval of the project.

It is also more likely than not that the Board would have reached a different conclusion on October 10, 2014 if it knew then what it knows now. On September 26, 2014, Mr. Gilbert testified he was confident that the $121 million figure was reliable. Ms. Simollardes testified that she had reduced the contingency built into the budget submitted on July 2 because the project was more mature and she was more confident of the cost estimates. Specifically, she testified that "we

have this project out to bid," and the project is now "more mature." She testified "the pipe is purchased so we know what the cost of the pipe is." She testified "We have 70 percent of the landowners under contract. So we know what that piece is." She testified ""It is fully engineered except for maybe some onesies and twosies in response to individual landowners." She concluded "So the project is far more mature today than it was a year ago. So the contingency was reduced accordingly." Tr. 52-53.

In their post-hearing briefs, AARP and Ms. Lyons argued that the July 2, 2014 submission to the Board by VGS was the tip of the iceberg, and would likely be followed by another $35 million in cost increases. AARP and Ms. Lyons referred to the record evidence that when asked whether any of the existing contracts had fixed prices or other means to protect against cost increases, Mr. Gilbert and Ms. Simollardes – after assuring the Board they were confident there would be no further substantial increases -- did not know the answer to that critical question. See 9/26/14 Tr.94-95 (Simollardes); 127-130 (Gilbert). AARP and Ms. Lyons argued that the evidence showed that VGS had not demonstrated that then-current cost estimating was reliable. AARP and Ms. Lyons argued that VGS had not used the AACE methodology in arriving at the 40% increase. AARP Post-Hearing Memorandum pp.2-3; Lyons Post-Hearing Memorandum pp.2-3.

Sometime before the end of September, PriceWaterhouseCooper realized that the cost of the project was going to be "quite a bit more" than had been reported by Vermont Gas Systems to the Board. PWC notified VGS. Roam testimony 6/22/13 pp.108-110, 113. PWC's expert did not "know" what the

discrepancy would be until months later. Roam 6/22/15 p.114.

Vermont Gas kept PWC's concerns under wraps. Vermont Gas allowed the Board to rely on Vermont Gas System's testimony that the project was mature and that their executives were confident of their estimates.

On October 10, 2014, the Board decided not to reopen the proceedings. In doing so, it accepted Mr. Gilbert's and Ms. Simollardes' testimony. The Board summarized AARP's and Ms. Lyons' arguments that the record showed that more cost increases were likely, and rejected them. "We find that there is a reasonable basis to conclude that the revised cost projections are reliable." The Board listed three reasons for this conclusion. "First, many of the cost elements in the revised budget are no longer projections, but reflect actual costs." Second, the revised budget included a contingency. Third, Mr. Gilbert had "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." October 10, 2014 Order pp. 20-21.

The Board also found that cold climate heat pumps at residences provide the same financial savings to homeowners and the same environmental benefits as conversion to natural gas. Finding # 10 stated:

> From a residential customer perspective and a societal perspective, the net benefits of switching from oil and propane to cold climate, ductless heat pumps are comparable to the net benefits of switching to natural gas. Christopher Neme, Lyons ("Neme") remand pf. at 2; tr. 9/26/14 at 216 and 226 (Neme).

Heat pumps can be installed without any expenditure of ratepayer funds; they don't require a new transmission line, ratepayer subsidies, a SERF, or any rate

increases – all of which the project would require. The Board found, however, that heat pumps would not address the projected need for gas by industrial and large commercial users in Middlebury (and would require keeping existing furnaces in homes as backup). The Board also found that the least-cost advantages and economic benefits of the project were not -- yet -- lost due to cost increases. Order at p.16-19.

Now the Board knows that before it issued its Order on October 10, 2014 PWC had informed Vermont Gas that they had doubts about the reliability of the cost estimate Vermont Gas had been using, which Vermont Gas had assured the Board were reliable. Now the Board knows that after the hearing, Vermont Gas installed CNG facilities in Middlebury, so the introduction of heat pumps to residential customers will not leave Middlebury's commercial and industrial users reliant on oil. And now the Board knows that, in fact, the cost estimates provided by Vermont Gas Systems were wrong, by $33 million.

The Board found in its Order that this project would require 32 years of cross-subsidies by existing ratepayers in Chittenden and Franklin Counties. At $121.6 million, VGS's analysis showed that the project would require a rate increase of over 10%, and that it was only over the 70-year life of the project that it was likely that new ratepayers would provide a net contribution to the fixed costs of VGS's existing system. The Board's October 10, 2014 ruling made clear that at some point the cross-subsidy could not be justified. The Board wrote that it doubted that over their lifetime, existing ratepayers would be "made whole." This raised "intergenerational equity concerns." Order, p.27. The Board now

knows that the rate increase could be 15 to 19.8% and that its intergenerational equity concerns have worsened by another $33 million.

All of this newly discovered evidence would probably change the outcome of the October 10, 2014 decision. See the October 10, 2014 Order at p.14. If the Board knew then what it knows now, it is inconceivable that the Board would have stated: "We find that there is a reasonable basis to conclude that the revised cost projections are reliable." A hearing should be scheduled, under Rule 60(b), to decide whether or not to grant the pending Rule 60(b) motions.

### 3. AARP Was Denied A Full and Fair Opportunity to Litigate the First Remand

Vermont Gas knew, by the end of September, that the prefiled testimony and live testimony submitted to the Board prior to and on September 26, 2014, was materially misleading. Vermont Gas knew this prior to the entry of the Board's final judgment on October 10, 2014.

Vermont Gas had a duty as a regulated utility to submit truthful and complete testimony, and to promptly correct any misleading testimony, as set forth by the Board in In re Citizens Utilities, 179 P.U.R.4th 16 at 168 (duty to deal "forthrightly" with regulators) and 180 (failure to file application for amended § 248 permit when the approved project changed) and 181-182 ("…the Board and Department must rely upon regulated companies to provide accurate information upon request"). The Board specifically found that submission of misleading information under Act 250 could be grounds for revocation of a CPG

to exist as a regulated utility. 179 P.U.R.4th 16 at 105. See also LeFlore Broadcasting Co. v. F.C.C., 636 F.2d 454, 461-62 (D.C. Cir. 1980) ("[E]ffective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees…"); Continental Broadcasting, Inc. v. F.C.C., 439 F.2d 580, 582 (D.C.Cir. 1970) (the licensee's principal officers had been uninvolved with and ignorant of the general manager's misrepresentations but they had "tardily acted to clear the Augean stable" and therefore the F.C.C. denied license renewal and the Court of Appeal affirmed) and In re Entergy Nuclear Vermont Yankee, LLC, Docket No. 6812, Order re NEC Motions for Sanctions and Schedules, October 7, 2003, 2003 WL 22361729, slip op at 7-8 (parties have a duty under Rule 11 to correct statements in written submissions to the Board if they later discover the submissions were misleading).

For this reason, AARP adds to its prior Rule 60(b) motion to seek relief pursuant to V.R.C.P 60(b)(1) and 60((b)(3). VGS had an affirmative duty of disclosure. It violated that duty. AARP need not prove that the outcome probably would have been different (the standard under Rule 60(b)(1)), although the outcome probably would have been different if these facts were known. Under Rule 60(b)(3), AARP need prove only that it was deprived of a full and fair opportunity to litigate the first remand because of VGS's knowing nondisclosure. Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1287 (11th Cir.) (the standard under Rule 60(b)(3) is whether a party was deprived of the opportunity to fully and fairly litigate their claim). See also Bardill Land & Lumber v. Davis, 135 Vt. 81, 82, 370 A.2d 212, 214 (1977) (knowingly false answer to pretrial interrogatory

on a material subject required new trial under Rule 60(b)(3)).

AARP notes that Ms. Lyons and Mr. and Mrs. Palmer already have alleged misconduct under Rule 60(B)(3) because of failure to timely update costs. The Board rejected the Palmers' claim in its October 10, 2014 order, *because the Palmers lacked any evidence that VGS or its subcontractor had failed to timely inform the Board and the parties of any cost increases they knew of*. Board Order, 10/10/14, n. 14. The Board now possesses that information.

## 4. Conclusion

AARP submits that public trust in the regulatory process leaves no choice but to reopen. The economic fundamentals the Board relied upon in December of 2013 have changed dramatically. And Vermont Gas still has not addressed *why* the testimony relied on by the Board in October was wrong. If the cost of the pipe was known by July 2, and if the project was already out to bid by July 2, and if 70% of the landowners were under contract by July 2, and if the project was "fully engineered except for maybe some onesies and twosies" by July 2, how did the budget subsequently rise by $33 million? And why did Vermont Gas fail to disclose that PWC doubted the reliability of the cost estimate Vermont Gas had submitted to the Board?

AARP respectfully asks that the Board: 1) issue a Declaratory Ruling that the $154 million project requires a permit amendment and enjoin further construction and expenditure until such an amendment is granted; 2) schedule a

hearing at which the December 23, 2013 Order will be reconsidered under Rule 60(b)(2), and 3) schedule a hearing at which the October 10, 2014 ruling will be reconsidered under Rule 60(b)(1), (2) and (3).

Dated at Bristol, Vermont, this 8th day of July, 2015.

AARP

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