STATE OF VERMONT
PUBLIC SERVICE BOARD

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

MOTION BY AARP FOR A BOARD ORDER SEEKING A REMAND TO HEAR THE DEPARTMENT'S RULE 60(B) MOTION AND THE AARP RULE 60(B) MOTION, AND MOTION BY AARP FOR RELIEF FROM THE BOARD'S OCTOBER 10, 2014 ORDER PURSUANT TO VRCP 60(B)(2)

Motion for a Board Order Seeking A Remand. AARP moves that the Board issue an order that it will seek a remand and that the Board then file a motion in the Supreme Court of Vermont seeking a remand so that the Board possesses jurisdiction to hold hearings and rule on the following motions: 1) the Motion for Relief Pursuant to Rule 60(b) filed by the Department of Public Service on December 22, 2014, which pertains to the Board's Order issued on December 23, 2013; and 2) the Motion for Relief Pursuant to Rule 60(b) from the Board's October 10, 2014 Order Pursuant to Rule 60(b) presently being made by AARP.

Motion for Relief Pursuant to Rule 60(b) from the Board's October 10, 2014 Order. AARP moves for relief pursuant to Rule 60(b) from the Board's October 10, 2014 Order pursuant to Rule 60(b).

MEMORANDUM

Under Rule 60(b), if newly discovered evidence would probably change the outcome of the Board's prior decision, the case should be reopened. See the Board's October 10, 2014 Order at p.14 (setting forth the legal standard). Newly discovered evidence probably would change the outcome of both the December 23, 2013 decision and the October 10, 2014 decision. The new evidence consists of VGS' December 19, 2014, letter to the Board and the press release issued by VGS on December 4, 2014, attached to this motion as Attachment A.

Factual Background

On December 23, 2013, the Board issued a Certificate of Public Good to VGS for this project. The project was to cost $86 million. Numerous motions were filed under V.R.C.P. 60(b). On March 23, 2014, the Board ruled on the pending motions and issued its final judgment in this matter.

On July 2, 2014, Vermont Gas Systems, Inc. (VGS) filed with the Board a letter revealing a 40% cost increase. VGS stated that the cost would be $121.6 million.

On July 31, 2014, VGS admitted that sanctions should be imposed upon it for failure to timely notify the Board and parties of the increased construction costs. VGS also committed to "quarterly" assessment of project costs, including "forward and backward looking assessment of the project, its costs, timelines and projections." The purpose of these requirements was "to prevent surprises…" See *July 31, 2014 Letter from Louise Porter to Susan Hudson*; and *July 31, 2014, Letter from John Marshall to Susan Hudson*.

On September 4, 2014, the Board issued an order seeking a remand from the Supreme Court so that it would have jurisdiction to address whether or not to reopen. The Supreme Court remanded the case.

On September 22, VGS submitted prefiled testimony. In the prefiled testimony, VGS President Gilbert stated that VGS had brought in a team that "is taking a hard look" at Phase 1's estimated costs. The statement made clear that the team was already engaged in that task, as the statement was made in the present tense. Gilbert PFT p.3, lines 1-3. Mr. Gilbert also stated that the team "is" establishing an estimating and cost-control framework that leverages industry standards. Gilbert PFT p.3 lines 9-10. These are the methods used by the Association for the Advancement of Cost Engineering (AACE). At the September 26, 2014, hearing, Mr. Gilbert testified about VGS's planned quarterly updates, referring to the commitment it had made in the July 31, 2014 letter. "*We are going to be starting that in the beginning of October* and providing quarterly updates as *we track this very closely*." Tr.112 (emphasis added).

At the hearing, Mr. Gilbert was asked by Mr. Young whether the cost increases arose from unpredictable changes in the market or from inaccuracies in the original submissions. He answered that it was the latter. In hindsight, he said, "there are a number of things" which "I would do differently." Clough Harbor "was not keeping up with some of the areas we wanted them to." 9/26/14 Tr.110.

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.

In its post-hearing brief, VGS referred to Mr. Gilbert's testimony at the hearing as the basis for finding that "*VGS will monitor Project costs continually* and has agreed to provide the Board and the Department with quarterly cost updates going forward." October 2, 2014 VGS Proposal for Decision, Finding #60 (emphasis added).

On October 7, 2014, VGS submitted a quarterly report on costs, apparently to comply with its commitment to provide a "forward and backward looking assessment of the project, its costs, timelines and projections." As for costs, it consisted of a one page spreadsheet showing the *identical* expected project cost, of $121.6 million, unchanged from July 2, 2014, plus a summary of actual expenditures to date. The representations in the prefiled testimony and the live testimony that VGS would be using the methods used by the Association for the Advancement of Cost Engineering were neither affirmed nor disclaimed.

In the October 7, 2014 filing, the contingency was split exactly in half, so that one half ($4,490,183) was assigned to projected increases in several items and the other half ($4,490,183) remained in the contingency fund. The filing did not explain whether it was pure coincidence that the cost variations happened to add up to exactly one half of the contingency, or whether that variation itself was another projection. If it was, itself, a projection, the filing did not explain the basis for the projection or why it was reliable.

The October 7, 2014, filing contained no assessment of the accuracy of its past project cost projections, and no assessment of its forward looking projections.

Three days after VGS submitted its quarterly report, on October 10, 2014, the Board decided not to reopen the proceedings. In doing so, it accepted Mr. Gilbert's and Ms. Simollardes' testimony. Finding of Fact #13 stated:

> The updated Project cost estimate of $121.6 million includes many cost items that are no longer projections but reflect actual costs. VGS has negotiated costs for 70% of the right-of-way easements, has purchased the pipe needed for construction, has put the Project out to bid, and has entered into contracts for some aspects of the Project. It is possible that additional cost increases may occur, and VGS has committed to providing the Board and the Department with quarterly cost updates. Tr. 9/26/14 at 51-53 (Simollardes); Simollardes remand pf. supp. at 9.

The Board then 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 this project would require 32 years of cross-subsidies by existing ratepayers in Chittenden and Franklin Counties, that VGS's analysis showed that the project would require a rate increase of over 10%, and that it was only "[o]ver the 70-year life of the project" that "it is likely that the new ratepayers will provide a net contribution to the fixed costs of VGS's existing system." October 10, 2014 Order at pp.24-25.

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.

No further assessments of costs or projections were filed by VGS until the letter of December 19, 2014. In that letter, VGS informed the Board that the AACE methodology had revealed to VGS another $33 million cost increase. VGS stated that it was "immediately" reporting this to the Board. It stated that that VGS was "currently in the process of developing supporting analysis and testimony," and planned to submit these in January.

The December 19 letter reveals that the Board had erred in relying on VGS's testimony to conclude that the July 2, 2014 cost estimate was reliable, that many of the cost elements in the revised budget were no longer projections, but reflected actual costs, that the contingency was sufficient, and that the project was now under new management that was capable and was producing reasonable cost projections. Each of these conclusions was wrong.

The letter does not address why the testimony relied on by the Board, and the Board's conclusions, were 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? Was this because, as AARP and Ms. Lyons had argued, Mr. Gilbert and Ms. Simollardes had not known if the contracts they were explicitly relying upon were fixed price contracts and it turned out the contracts were not fixed price contracts? Or was this because, as AARP and Ms. Lyons had argued, VGS was continuing to rely upon the same faulty estimating methods it had been using previously? Why did VGS submit a quarterly report in October that used an arbitrary number -- precisely 50% of the contingency – to represent to the Board and the public VGS' updated cost assessments, and then in December submit a budget increase that was seven times greater than the amount of the contingency fund needed as set forth in October, if VGS had been "tracking very closely" its cost projections as its witness testified?

This week VGS informed the Addison Independent that it did not begin using the new cost estimating techniques until *after* July 2 when it filed its cost update with the Board, *after* September 22 when it filed its prefiled testimony, *after* September 26 when its witnesses testified, *after* October 2, 2014 when it submitted its post-hearing memorandum, and *after* October 7, 2014, when it submitted its quarterly report. According to the Addison Independent, VGS's spokesperson told the Independent that the information provided in October "was not informed by the new AACE-consistent methodology, which was just getting underway at the time." The Addison Independent also reports that VGS President Rendall told the newspaper that he could not rule out another significant cost hike in the future. The January 8, 2015 article is attached.

Argument

The integrity of these proceedings, and the public's trust in the Board, now hang in the balance. In reviewing the evidence pertaining to the $121 million version of the project, the Board has already found that this project would require a 10 % rate hike and 32 years of cross-subsidies by existing ratepayers in Chittenden and Franklin counties. At $121.6 million, it was only by the end of the 70-year life of the project that it was likely that new ratepayers will have provided a net contribution to the fixed costs of VGS's existing system, according to the October 10, 2014 Order.

The rate increase now will be at least 13% and the period of cross-subsidy has just increased to 35, 36, 37 or 38 years, and promises to continue to extend further into the future[1].

The Board's October 10, 2014 ruling made clear that the long period of time over which existing ratepayers would be subsidizing new ratepayers was already cause for concern. "We want to be clear that we are concerned by the increase in cost projections as well as the amount that existing ratepayers will have to pay in rates over the next 32 years." This raised "intergenerational equity concerns." The Board wrote that it was doubtful that over their lifetime, existing ratepayers would be "made whole" because of the 70-year delay until new ratepayers make a net positive contribution. Nonetheless, the Board concluded that 32 years of cross-subsidy was not impermissible "in the context of the overall merits of this Project." Order, p.27. With another $33 million in costs, a 13% rate increase, cross-subsidies for 38 or more years, and with no reason to believe that the cost increases have come to an end, the net positive contribution to fixed costs by new ratepayers will be so far into the future that it cannot be meaningfully discounted to present value. What was doubtful before is now clear. Most of the ratepayers who will have subsidized the project will be dead by the time new ratepayers will have made a net positive contribution to

[1] Each $10 million increase in cost is predicted to increase rates by 1%. October 10, 2014 Order p. 12. The projected cross-over date for the project, using the lower cost submitted on July 2, 2014, was 32 years into the future. Each $10 million increase adds one to two years before the project carries its own weight without rate changes or withdrawals from the SERF fund. October 10, 2014 Order p. 12.

the system -- *more than 70 years from now*[2]. If there exists *any* limit beyond which intergenerational inequity becomes unjust and contrary to the public good, that line has been crossed.

With snowballing project costs, on the one hand, and with the growing availability of heat pumps and the growing state recognition of the cost savings and greenhouse gas savings of heat pumps for residences, on the other hand, there is no longer a credible basis to conclude that the project would be has be the least-cost alternative for any users other than industrial and large commercial customers. Even for industrial and large commercial users, the evidence no longer supports a conclusion that the project would be the least-cost alternative. In the December 4, 2014, press release, VGS announced that it and its partner NG Advantage had opened a "gas island" in Middlebury. The gas island provides low-cost natural gas to industrial and large commercial users in Middlebury.

AARP submits that there is no reasonable alternative to re-opening this docket under Rule 60. The Board's decisions probably would have been different, both on December 23, 2013 and on October 19 2014.

The Board and the public no longer can accept the credibility of VGS's witnesses or accept VGS's justifications for going forward with the project. VGS' witnesses were so confident that costs were under control in July and September that they *reduced* the project's contingency fund. VGS promised close monitoring of costs and forward looking and backward looking assessments of its projections and then submitted a quarterly report with the identical overall project cost, an

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[2]. The greatest amount of subsidies will be paid by now-living ratepayers; almost all of those ratepayers will have deceased by the time that new ratepayers have made a net positive contribution more than 70 years from now. Assuming most ratepayers are 18 years old by the time they assume responsibility for utility bills, the youngest living VGS ratepayers will be in their 90s.

arbitrarily assigned use of precisely half of the contingency, and no forward or backward looking assessments -- followed nine weeks later by disclosure that the project cost had increased by $33 million. No reasonable person at this point would conclude that costs will not continue to rise. There remains no credible basis for concluding that the project is the least-cost alternative, or that it provides a net economic benefit under criterion (b)(4), or that its rate increases and 38-plus year dependence on cross-subsidies is consistent with the public good.

Request for Relief

AARP asks that the Board again file a motion in the Supreme Court of Vermont seeking a remand. AARP will join in that motion. AARP hopes that the Department and VGS will join in that motion, as failure to reopen at this juncture is necessary to protect VGS's ratepayers. If the Board chooses not to file such a motion, AARP intends to do so on its own. If a remand is granted, the Board is asked to consider this motion, the Rule 60(b) motion already filed by the Department, and AARP's motion, and then to reopen the proceedings.

Dated at Bristol, Vermont, this 12th day of January, 2015.

AARP

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