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

SUPPLEMENTAL COMMENTS ON SCOPE and SECOND RULE 60(B) MOTION BY KRISTIN LYONS

In response to the Board's Order dated March 2, 2015, Ms. Lyons submits this memo to address the scope of the remand. Ms. Lyons submits that the Board should consider all of the statutory criteria, including new information applicable any of the criteria, and in particular new information applicable to 30 V.S.A. §§ 248(a), 248(b)(1), 248(b)(2), 248(b)(4) and 248(b)(5). Ms. Lyons also hereby adds to her previous Rule 60(b) motion by asking that the Board reopen its March 10, 2014 order under V.R.C.P. 60(b)(1) and 60(b)(3).

Three compelling reasons require a broad scope to the proceedings, and also support the supplemental Rule 60(b) motions.

The first reason that the scope must be broad is to protect ratepayers. VGS has argued that impacts on ratepayers are not an appropriate consideration in a § 248 proceeding. It is true Section 248 approvals do not guarantee that a project will be placed in rate base. However, it is also true that the Board's long-established policy places half of the risk of an uneconomic project on ratepayers. *In re Tariff Filing of Central Vermont Public Service Co.*, Docket 6460, 6/26/01 at p.

23[1]. When a project is approved under § 248 but turns out to be uneconomic -- for example, because heat pumps provide the same or greater benefits at enormously less cost than a $154 million gas line construction project to serve 3,000 customers, or because gas prices have escalated while alternative energy sources have remained steady in cost or become less costly -- ratepayers are likely to be held responsible for half of the cost of the entire $154 million project. Once that $77 million is placed into rate base, VGS will be entitled to return *on* the $77 million from ratepayers and to return *of* the $77 million from ratepayers. The present proceedings are ratepayers' only opportunity to avoid that risk.

The second reason is one the Board has heard already. The Board's duty is to weigh project cost against project benefits in the context of numerous other factors, including the costs and benefits of alternatives to the project, and to determine whether the project as a whole promotes the public good, under 30 V.S.A. §§ 248(a), 248(b)(1), 248(b)(2), 248(b)(4) and 248(b)(5). At no phase of the proceedings would it make sense for the Board to consider only one factor, such as cost, without considering the other factors. Nor would it make sense to consider current and reliable information about only one factor, such as cost, while relying on stale and unreliable information about other important factors, such as alternatives to natural gas.

VGS's submissions, and the Board's response, during the first remand proceedings illustrated the need for a broad scope that utilized current and reliable information about all of the relevant factors. VGS argued that the Board should bar all testimony from intervenors that was not related to cost. However, it turned out that most 0f VGS' own prefiled testimony relied on

[1] "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."

updated information that was not restricted to cost. Ms. Simollardes testified on page 4 that all of her exhibits were based on new information other than the increased cost of the project. She also testified on page 9 that Mr. Bluestein had reevaluated the benefits of greenhouse gas reductions from the conversion from fuel oil to natural gas. Based on the initial ruling by the Board that only new information about cost would be considered, Ms. Lyons moved to strike all of Ms. Simollardes' exhibits and her Answers 5, 6, 7, 8, 9, 10 and 11, and the Conclusion, all of which were based on new facts other than project cost increase. The Board then amended its ruling and decided not to restrict the scope of the proceedings to cost increases. Ms. Lyons respectfully submits that the purpose of the statute requires that the Board consider all of the statutory criteria in light of current information.

The third reason is that admissions by VGS in the sanctions case, Docket 8328, have demonstrated by clear and convincing evidence that VGS violated its duties of full disclosure *before* a final appealable order was issued in this Docket. Ms. Lyons has just obtained copies of VGS's Answers to the Board's questions, filed on December 19, 2014, and of the Department's Answers, filed February 17, 2015. In its submission in Docket 8328, VGS has admitted that it knew of a cost increase of 30% by January 13, 2014 and of 40% on January 14, 2014. The Department's testimony in Docket 8328 is that it urged VGS to inform the Board of the cost increase in February of 2014. The Board's December 23, 2013 Order was not a final judgment on January 13 or in February. On January 6, 2014, Mr. and Mrs. Palmer had filed a motion under V.R.C.P. 52 and 59 to alter or amend the December 23, 2013 order. On January 8, 2014, the Department had filed a Motion to Alter or Amend. On January 9, 2014, the Board issued an order setting a schedule to reply to the two post-judgment motions. It was not until March 10, 2014, that the Board issued an order denying the Palmers' post-judgment motion, granting the

Department's post-judgment motion, granting, in part, a motion filed by the Town of New Haven, and granting a new, Amended Certificate of Public Good. That March 10, 2014 order stated that the 30-day appeal period would commence on that date, March 10, 2014. That March 10, 2014, order was the final, appealable judgment in this docket. By March 10, 2014, VGS had kept the Board in the dark about the cost increase for two months while VGS knew that it did not possess an appealable final judgment.

The record leaves no room for doubt that VGS knew that the information submitted to the Board was materially misleading and that VGS knew this prior to the entry of the Board's final judgment on March 10, 2014. Because the case was not over on January 13, 2014 and on January 14, 2014, the duty to supplement discovery answers under V.R.C.P. 26(e) remained in effect and VGS' duty as a regulated utility to submit truthful and complete testimony, and to promptly correct any misleading testimony, set forth by the Board in *In re Citizens Utilities*, 179 P.U.R.4th 16, 1997 WL 582155 and *In re Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6812, Order re NEC Motions for Sanctions and Schedule, and in other Board orders, remained in effect. Contrary to that affirmative duty VGS waited until after the post-judgment motions had been ruled upon, and after the case had been appealed by Ms. Lyons to the Supreme Court and the Board no longer had jurisdiction, to notify the Board of the cost increase[2].

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[2] The Board's recent history, unfortunately, has been much preoccupied with the duty of a regulated utility to promptly correct misleading testimony. Entergy Nuclear Vermont Yankee's failure to promptly correct misleading testimony resulted in extended litigation before the Board and the federal court, and an investigation by the Attorney General of Vermont. Entergy defended itself against the claim that it had failed to submit corrected testimony on the grounds that it had not been aware that its testimony had been misleading, that it believed that the issue of leaking underground pipes was not within the Board's jurisdiction to begin with, that it had commissioned an internal investigation by outside counsel in order to ensure it knew what had gone wrong and that the error would not be repeated, and that it had disciplined those employees involved. In contrast, the cost information that VGS failed to correct was required by explicit Board rule to be corrected, VGS knew that the information it had provided was inaccurate, VGS knew that project

VGS's culpable and reckless disregard of its duties of full disclosure drains all of the Board's Docket 7970 order of credibility. The scope of the proceeding needs to be as broad as the scope of VGS' initial prefiled testimony in this docket. VGS should be tasked with reviewing all of its prefiled testimony to ensure that it is complete, accurate and up to date. For example, Mr. Heaps' prediction of economic benefit was developed on the basis of predictions given to him by VGS of the percentage of workers who would be Vermonters. Did VGS base that prediction on a reliable information-gathering process, and do those predictions remain accurate?

For this reason, Ms. Lyons also hereby moves pursuant to V.R.C.P 60(b)(1) and 60((b)(3) for an order setting aside the March 10, 2014 order and the Certificate of Public Good. VGS had an affirmative duty of disclosure. It violated that duty. Ms. Lyons 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), Ms. Lyons need prove only that she was deprived of a full and fair opportunity to litigate the case because of VGS's knowing nondisclosure, as she was (and as all of the other intervenors were). *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)).

Ms. Lyons notes that Mr. and Mrs. Palmer already have alleged misconduct under Rule 60(B)(3) because of failure to timely update costs. The Board rejected that claim in its October

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cost was relevant and within the Board's jurisdiction, VGS was repeatedly told by the Department to inform the Board to inform the Board, and VGS has performed no internal investigation of its misconduct or disciplined any of its employees.

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.

Dated at Bristol, Vermont, this 9th of March, 2015.

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