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 TO STRIKE OCTOBER 7, 2015 FILINGS BY DPS AND VGS

AARP moves for an order striking from the record the letter to the Board dated October 7, 2015 from Vermont Gas Systems, Inc., President Donald Rendall, the letter to the Board dated October 7, 2015 from Commissioner Christopher Recchia, and the Memorandum of Understanding dated October 7, 2015. These filings violate Board Rules 2.103, 2.105, 2.106, 2.203, 2.208, and 2.216, Vermont Rules of Civil Procedure 11(a) and 43(a), Vermont Administrative Procedure Act § 809(c) and (g), Vermont Administrative Procedure Act § 810(1), (3) and (4), and Vermont Rules of Evidence 402, 403 and 802.

1. The Facts

The pending motions under V.R.C.P. 60(b) have been the subject of prefiled testimony, extensive discovery, cross-examination, rebuttal testimony and briefing. The Board set a deadline for prefiled testimony before the hearing. After the hearing, the Board set deadlines for briefing. Those deadlines have long since passed. During the hearing, the Board was called upon to make and did make rulings on numerous objections under the Vermont Rules of Evidence.

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On October 7, 2015, the Department filed a letter signed by Commissioner Christopher Recchia. The letter was served electronically on counsel. The letter contains factual allegations and policy arguments in support of the Department's position on the pending Rule 60(b) motion. The allegations and arguments include some of the details of a Memorandum of Understanding executed by the Commissioner earlier in the day. The letter urges that the Board rely on the facts and arguments submitted in the letter and the MOU to "resolve" the "pending Rule 60(b) proceeding to clearly conclude that this Project remains in the public good."

Later on October 7, Vermont Gas Systems, Inc. filed a letter from President Donald Rendall, and a copy of the MOU. The letter summarizes the MOU and states "The parties have negotiated the MOU at this time based on their mutual interest in completing the Project on time and on budget for the benefit of customers and the general good of Vermont." It concludes "The Company has made excellent progress on the Project. We are near completion of the segment through Colchester, Essex and Williston, which will achieve our 2015 construction goal on time and on budget."

The MOU states that VGS commits to refraining from seeking rate recovery for costs in excess of $134 million – except for "extraordinary events outside the control of Vermont Gas (e.g., vandalism, protests, other unreasonable interferences with construction, or force-majeure type events)." It also says "VGS may also seek to recover amounts in excess of the Rate Cap resulting from material delays in rights-of-way construction access." The MOU repeats the factual allegations in the Rendall letter about the Project being on time and on budget. The MOU commits the Department to the position that the Project is "used and useful" in future rate proceedings if it is constructed consistent with the plans submitted to the Board – i.e., committing the Department to advocate for having ratepayers shoulder the full $134 million even if none of the project ever is

placed in service (absent evidence of imprudence). The MOU states that the MOU is not to be submitted for Board approval and is effective without Board approval.

2. <u>The Law to Apply</u>

Board Rules 2.103, 2.105, 2.106, 2.203, and 2.216 invoke the Vermont Rules of Civil Procedure and state that the rules shall be applied "to secure the just and timely determination of all issues presented to the Board." Rule 2.203 requires that every petition, motion or other pleading "be signed by at least one attorney or pro se representative." Rule 2.208 states that the Board may reject any defective filing and the filing is not effective until the defect is cured. Rule 2.216 states that evidentiary matters are governed by 30 V.S.A. § 810[1] and Vermont Rule of Civil Procedure 43.

Vermont Rules of Civil Procedure 11(a) states that every pleading, written motion or other document that requires a signature shall be signed by at least one attorney of record…" Rule 43 holds that in all trials "the testimony of witnesses shall be taken orally in open court unless otherwise provided by these rules, the Vermont Rules of Evidence or other rules adopted by the Supreme Court."

Vermont Administrative Procedure Act § 809(c) and (g) require that opportunity be given to all parties "to respond and present evidence and argument on all issues involved" and require that findings be based exclusively on the record. Vermont Administrative Procedure Act § 810(1) requires that irrelevant evidence be excluded, and that "the rules of evidence as applied in civil cases in the superior courts shall be followed." Subsections (3) and (4) guarantee the right of cross-examination and limit judicial notice to judicially cognizable facts and generally recognized

[1] It is clear from the context that the statutory citation in PSB Rule 2.216 to "30 V.S.A. §810" is intended to refer to 3 V.S.A. §810, the Administrative Procedures Act. 30 V.S.A. §810, which applied to railroad regulation, was repealed 20 years ago.

technical and scientific facts, and require notice and an opportunity to contest what is proposed to be noticed.

Vermont Rules of Evidence 402 and 403 bar introduction of irrelevant evidence, and require weighing of relevance against unfair prejudice. Rule 802 bars hearsay.

3. <u>The Filings are Inadmissible; If Admitted a Fair Process Is Needed</u>

AARP objects to the factual allegations and the arguments in the three filings (as well as to the legal commitments imposed on the Department in the MOU) for several reasons.

First, the filings on their face violate the clearly established rules that govern Public Service Board proceedings. The filings contain allegations that are hearsay. The filings are not under oath. The filings are not subject to cross-examination in open court. Judicial notice does not apply to the allegations in the letters or in the MOU, and requires an opportunity to contest. On their face, the filings violate Board Rule 2.216, V.R.C.P. 43, Administrative Procedure Act §§ 809 and 810 and Vermont Rule of Evidence 802.

Second, even if the modest reduction, from $154 million to $134 million, turns out to be reasonably likely, without evidence *relating this modest reduction to the evidence already in the record about the effect of the project on rates and the economics of the project*, the evidence is irrelevant. For example, the Project has been predicted by VGS to increase rates by 15% if the ratepayer dollars in the SERF fund are used to soften the rate impacts and by 19.8% if the SERF funds are returned to the existing ratepayers who involuntarily paid them. Simollardes 6/23/15 pp. 77-78; Rendall testimony 6/22/13 pp. 18-20. Is there a proportionate impact on rates from the Rate Cap -- so that rates would increase by 13 percent if ratepayers don't receive their funds back or by 17 percent if ratepayers do receive their funds back -- or will the effect on rates be less than that because ratepayer funds are being used for the carrying cost, regardless of what goes into rate

base? How does the Rate Cap affect VGS' testimony about rate impacts? The filings do not say. Neither the company nor the Department has provided any information or evidence that would allow the Board to make a finding that is relevant to the issues pending before the Board.

Similarly, nothing in the filing allows the Board to make any connection to the existing evidence that the Project has a substantial *negative* net present value to the state. In 2013 the Board found that a net present value of $87 million justified constructing a project costing about $87 million. Included in that calculus were the benefits of switching Middlebury businesses off of oil and propane and onto natural gas; in fact, this was one of the principal justifications for the Project.[2] In June, the Department calculated that the presence of CNG already in Middlebury removes $73 to $103 million in value from the Project.[3] Dismukes Rebuttal pft p.39. Dr. Hopkins had estimated in June that the net present value of the more costly Project *prior to taking into account the presence of CNG in Middlebury* was only $23 to $33 million (Hopkins Prefiled Rebuttal p. 15); therefore the net impact on the state economy of the $154 million Project as of June was *negative* $50 to $80 million. Does the Rate Cap change the negative economics of the Project to the degree its economics become positive – and positive enough to justify spending over a hundred million dollars to serve a few thousand new users? The filings do not address the impact, if any, on the net present value of the Project. The filings are irrelevant.

[2] For example, Finding 221 stated: "The need for the Project is based upon market demand to expand the system into a new geographic region. For example, Cabot Coop currently uses No. 6 fuel oil and propane for fuel at its Middlebury facility, and would intend to replace both with natural gas made available as a result of the Project. Teixeira pf. at 4; tr. 9/17/13 at 158-59 (Pcolar)."

[3] Approximately half of the proposed replacement of oil by natural gas which formed the basis for all of VGS's and NPV and GHG calculations and therefore for the Board's December 23, 2013 ruling, is no longer going to occur. 6/22/15 Tr. p 227-237, esp. p. 237 lines 17-20.

The filings should be stricken for another compelling reason -- they ask that the Board rely on updated information that favors denying the Rule 60(b) motion while precluding intervenors from submitting updated information that strongly supports granting the motion. The filings urge the Board to quickly rule against granting the pending Rule 60(b) motion on the basis of new, current information – Mr. Rendall's, Vermont Gas System's and Commissioner Recchia's factual allegations that the project is, as of October 7, 2015, on time and on budget. As of October 7, the Project's economics also have changed – they have become worse than they were when the hearings closed on June 23. When the CPG was granted in 2013, oil traded at over $100 a barrel, and the price differential between heating with oil and heating with gas was one of the principal justifications of the project.[4] VGS' economist Mr. Heaps initially testified (Jan. 15 2015 pft, p. 6) that "oil is close to bottom, and will slowly climb back to $100 per barrel over the next three years." However, oil was trading at $60 a barrel in June (Heaps, 6/22/15 p.142) and by September the price had fallen below $40 a barrel. It is now between $40 and $50 a barrel (Counsel makes an offer of proof to this effect.) An updated net present value analysis of the Project, using current oil prices and current oil price predictions, undoubtedly would show the Project to have more deeply negative value than it did in June.

But the company and the Department do not propose to allow any other party to submit updated information. Only that which they have submitted should be considered, apparently – and quickly too, the letters and MOU say. The manner of proceeding would violate Administrative

[4] The project was approved when oil sold at over $100 a barrel, leading to a 40% price advantage for consumers who switched to gas – but by June the price differential had dropped to 25%. Rendall testimony 6/22/15 pp. 55, 65, 70; Hopkins testimony 6/23/15 pp. 112-113. It is below that now. Mr. Neme's testimony demonstrated that as of April (the latest data he used) heating with a cold climate heat pump was already more cost effective than switching to natural gas. Undoubtedly the advantage of cold climate heat pumps has improved since April and June. Neme Rebuttal pft pp.2-3.

Procedure Act §§ 809 and 810 by failing to provide an opportunity to cross-examine and to respond with argument and evidence. It also would violate Vermont Rule of Evidence 403, since admission of only VGS' and the DPS updated evidence would cause unfair prejudice.

The filings also should be stricken because they are not signed by counsel of record as required by the Board rule 2.203 and Civil Rule 11(a). This is not a technicality. The filings are not testimony because they are not under oath, subject to the penalties of perjury and also subject to cross-examination, but neither are they the submissions of an attorney subject to the good-faith and reasonable-investigation obligations of Rule 11. A submission signed by an attorney subject to Rule 11 either would set forth why the filing is proper under the Board's rules and the Administrative Procedure Act – or the filing would not be made. These filings cite no authority for submitting their non-rule, non-statutory requests for a quick ruling based on unsworn submissions. Yet, both DPS and the company ask that the Board make a decision on the basis of these filings.

If the filings are not stricken, AARP seeks to obtain the factual basis for their allegations and then be given the opportunity for cross-examination and response. On their face the filings call for discovery and cross-examination. For example, on June 22, 2015, the company's vice-president testified, in answer to AARP's questions, that the actual cost of the Project is $162.5 million, not $154 million. The company plans to have ratepayers pay for distribution system and maintenance costs as well as transmission pipeline construction. The company intends to place all $162.5 million into the rate base. 6/22/15 Tr. pp. 222-224. Yet, the two letters and the MOU explicitly treat the total Project cost as "$154 million" (MOU paragraph 7; Rendall letter second paragraph, Recchia letter second paragraph) and state that the company agrees that $20 million less than that $154 million should be in rate base. The MOU appears to treat the $8.5 million

difference as outside the agreement, thus allowing VGS to include $134 million in transmission construction costs plus $8.5 million in distribution and maintenance costs into rate base for a total of $142.5 million.

Discovery, cross-examination and the response should not be limited to the facts asserted in the filings, but also should address the context and significance of the facts asserted, such as the connection between the Rate Cap and rates, the effect of the Rate Cap, if any, on the net present value of the Project, and the current net present value of the Project using up-to-date data on fuel prices and the cost-effectiveness of heat pumps.

Conclusion

AARP respectfully asks that the Board uphold the integrity and fairness of its proceedings by striking the October 7, 2015 filings. If the filings are not stricken, AARP asks that the Board allow for brief discovery on the filing, followed by opportunity for cross-examination and submission of opposing evidence and argument.

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

AARP

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