STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Petition of Vermont Gas Systems, Inc., for	)
a certificate of public good, pursuant to 30	)
V.S.A. § 248, authorizing the construction	)
of 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	)

COMMENTS OF NATHAN PALMER REGARDING REOPENING OF PROCEEDINGS AND PROPOSED FINDINGS OF FACT

I. INTRODUCTION

Nathan Palmer, *pro se*, supports the reopening of proceedings under Rules 60(b)(2) and 60(b)(3), or alternatively under Rule 60(b)(6) in light of the updated estimated capital costs, submitted by Vermont Gas Systems, Inc. (hereinafter "VGS") on July 2, 2014 (hereinafter "VGS Cost Update"). My explanation follows. In addition to the issues raised in our brief below, we concur with the arguments set forth in AARP's and Kristin Lyon's memoranda.

II. DUE PROCESS

I submit that the combination of only 13 calendar days allotted for preparation time before the technical hearing, the lack of proper notice of the rescheduling of the hearing from Monday, September 29, 2014

to Friday, September 26, 2014, and the narrow scope and time allotted for the hearing itself has impinged on my rights to due process. As a working person without the luxury of legal representation , the short period leading up to the technical hearings placed an almost unbearable burden on myself and my wife. We were essentially dependent on the kindness of our friends and neighbors to help us contact potential witnesses, prepare and format testimony, and pull together exhibits. As the Board knows, I was not altogether successful in our efforts. The elimination in the schedule of the final weekend before the technical hearing definitely had a negative effect on my preparation for oral testimony and cross-examination of other witnesses, and for my physical readiness to participate in the technical hearing itself. Having put in early starts and full days at our garage, farm, and other employment I was hard pressed to burn the midnight oil and felt simply frazzled by the morning of the technical hearing. I note that the Vermont Fuel Dealers Association (VFDA) appears to have faced a scheduling conflict in light of the silent rescheduling of the meeting. While I can obviously not take up VFDA's right to due process I do feel that their inability to testify and participate actively in the technical hearing prejudiced my ability to present fully our case. Given my own time pressures, I decided that we did not need to present evidence of the impact of the cost increase on the least-cost status of the project vis-à-vis low-sulfur home heating fuel because VFDA had expressed its intent to present evidence at the technical hearing.

It is evident that there was not adequate time at the hearing to present rebuttal testimony or to reflect on answers offered by any witnesses, including my own, effectively. Moreover, it quickly became clear to me that even the person who is supposed to be most knowledgeable about VGS exhibits, costs, and cost impacts, Ms. Simollardes, was unable to keep the various versions of the exhibits straight or to manipulate the numbers in places where the information provided was not readily comparable. It seems unreasonable to expect others to sort through the confusion and multiple spreadsheets with small fonts to formulate effective questions or identify inconsistencies. Like Ms. Simollardes, I was unable to

manipulate the figures or extrapolate on the spot, and I feel that I (and others with greater expertise) deserve a reasonable opportunity to respond to Ms. Simollardes' testimony.

Finally, I was shocked at the unwillingness and inability of Mr. Gilbert to provide reasonable answers to questions about the firmness of the cost estimates presented, the existence of cost controls in the contracts, or the timing and nature of the causes of the cost overruns to date. I was even more shocked that VGS informed the Board and other parties that they had virtually fired the team that was responsible for siting this pipeline, (including the re-route that put it through the heart of our farm instead of on the VELCO corridor) I believe that the only way that parties will be able to obtain reasonable and material information to assess the cost increase and its implications is through formal discovery, additional technical hearing(s) with adequate time for rebuttal and sur-rebuttal testimony, and oral arguments prior to the Board making a decision on whether to reopen proceedings.

III. NOT THE SAME AS THE NORTHWEST RELIABILITY PROJECT

I recognize that the Board has not been persuaded by such due process arguments under similar circumstances in re Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP) for a certificate of public good pursuant to V.S.A. Section 248 authorizing VELCO to construct the so-called Northwest Reliability Project (hereinafter "NRP") under Docket 6860. However, I believe that this project is entirely different in that it is not addressing serious reliability issues and the "need" for gas is not the same as the public need for electricity. The remand of Docket No. 7970 presents materially different facts and should therefore be distinguished from the NRP. The Board faces the same need to allocate precious time between development of evidence and submission of briefs by parties and the Board's consideration and preparation of its decision. However, in NRP, both the parties and the Board had much more lead time to prepare for the technical hearing before the Vermont Supreme Court's formal remand order was issued. In NRP, the Board had signaled its

willingness to consider reopening proceedings within a few days after the Supreme Court's order, and one of the parties seeking remedy on due process grounds had submitted a request to the Supreme Court to remand the case. In Docket No. 7970, none of the above is true. The Board only expressed its intention to seek remand on September 4, 2014, and made a motion to the Supreme Court on September 9, 2014 – just 2 days before the Supreme Court issued its partial remand order and 5 days after the Board issued the procedural order to consider reopening the case.

Rule 60(b)(2) states, "For newly discovered evidence to warrant relief, it must 1) affirmatively appear that the evidence is such as will probably change the result if a new hearing is granted, 2) that the evidence is material to the issue, and 3) it is not merely cumulative or impeaching. Bonfanti v. Ayers, 134 Vt. 421 (1976)."

This case is starkly different from Northwest Reliability Project, in which VELCO provided evidence of the process that the company had utilized to refine its project design, update costs, and validate the company's updated estimate of costs. The Board had a reasonable basis on which to assume that VELCO had acted in good faith and competently to produce the new cost estimates and to evaluate the risk of further escalation in costs. VGS has made no such presentation of evidence and has, in fact, presented testimony that corroborates concerns raised in parties' motions for relief from judgment under Rule 60(b)(2) and raises the specter of misconduct of VGS' contractor, CHA, in providing timely feedback about costs.

There is also no serious threat to the public good of reopening the proceedings. In contrast to NRP, the ANGP is not urgent. There is no significant reliability concern that could affect ratepayers in Chittenden and Frankin Counties this winter as there was facing electricity users in the northwest and throughout the state in 2004 and 2005. Residents of St. George and Addison County have heating solutions in place now. The Board does not need to re-litigate the question of a need for demand for natural gas in Addison County to recocognize that alternatives already exist.

IV. LACK OF EXPLANATION FOR COST ESTIMATE BOO BOO

It should be noted that as the applicant, VGS bore and bears full responsibility for any contractor the company engaged to develop cost estimates and present evidence to the Board.

At the technical hearing on September 26, 2014, Mr. Gilbert admits that project management lapses contributed to the estimated cost increase. (see page 110 of transcript, lines 8-21) Mr. Gilbert is still unable to explain whether the source of the massive 40% increase was an estimation error, an apparent failure to update costs regularly in response to market signals (whether based on bid submissions or publicly available market information), or poor cost controls. Unlike VELCO in the case of the Northwest Reliability Project cost increase and remand, VGS presented no evidence that the company initiated or completed a review and revision of cost estimates or that the company engaged any experts to develop and compare independent cost estimates.[1]

In this case, project cost is material to the Section 248(a) analysis of whether a project will contribute to the general good of the state and to the Section 248(b) analysis of whether the project represents the lowest cost means in comparison to alternatives to achieve the identified need. VGS knew or should have known that any substantial increase in the total project cost could affect the Board's determination of whether the project was capable of meeting the need for more affordable thermal heating than oil or propane, and also whether the project would provide the most economical option for achieving that need. Moreover, VGS knew or should have known that adverse parties would rely on

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1 In its findings, the Board noted, "Beginning in February, VELCO retained two engineering firms to prepare new cost estimates for the NRP, using a more detailed engineering design than was used for the original estimate. The two firms worked independently of each other. VELCO also employed other cost-estimation experts to review the two engineering firms' estimates; those other experts were independent of both engineering firms. Tr. 9/12/05 at 20-24 (Dunn). The two new, independent cost estimates were presented verbally to VELCO's Board of Directors in June, 2005, and were finalized a couple of weeks later. The two estimates were within three percent of each other. Tr. 9/12/05 at 24-25 (Dunn). Vermont Public Service Board, Docket 6860, In re Northwest Reliability Project, Order on remand re reopening of proceedings, September 23, 2005 at p.4.

VGS' cost estimate and responses to questions regarding project costs to determine whether any available alternatives could reasonably be expected to meet the identified need at a lower overall cost.

VGS was also aware or should have been aware of market data and analysis, available in early September 2013, suggesting that pipeline construction costs were on the rise. VGS likewise should have known that one of a handful of respected industry sources for pipeline construction market information was projecting an average 32% increase in per inch mile pipeline construction costs. Mr. Gilbert noted in his testimony that VGS has taken several steps to improve business practices, cost estimation methods, and oversight of contractor personnel and employees, who are charged with developing cost estimates and carrying out project management duties. This admission provides ample evidence that VGS did not have adequate resources or capacity in place at the time that prior cost estimates were developed. There would be nothing to improve or correct if VGS' team had exercised their judgment in a reasonable manner with the same result. In such a case, VGS could have claimed that the cost increase could not have been produced or was outside the scope of the company's control. VGS has made neither claim. A VGS spokesperson even stated immediately after the cost increase was announced that none of the additional costs were extraordinary or unexpected thereby confirming that VGS should have known that the company had omitted some required resources to carry out a project of this size and complexity and/or that there were prior indicators that VGS' cost estimate was inaccurate.

V. LACK OF EVIDENCE FROM VGS

VGS has not presented cost information to substantiate the proportion of the overall cost increase that is attributable to facts other than market forces. Since market information was publicly available, and the risk of cost inflation is a standard part of cost estimation for any construction project, that portion of the overall project cost increase, reported on July 2, 2014, should be considered to have been

known by VGS prior to finalization of the Board's decision. Whether willful or negligent, VGS's failure to present available market data in its submissions or to update its submission to the Board as part of a regular updating of project costs resulted in other parties' inability to prepare adequately because the lower cost submitted by VGS naturally narrowed the range of alternatives that could reasonably be substituted for the project to meet the demand for affordable and "cleaner" thermal energy at a lower cost. The Board's order states, "It is reasonable to assume that the additional demand to be met by the Project will displace the use of other fossil fuels with a greater carbon footprint. The Project is consistent with the Comprehensive Energy Plan adopted by the Department, which has determined that the Project merits approval under the (b)(6) criterion because it is consistent with the least-cost plan under review in Docket 7980 and endorsed by the Department in revised form. In these circumstances, the record supports a determination that the Project meets the (b)(6) criterion."

VI. IMPACT ON PARTIES' ABILITY TO PRESENT CASE FULLY AND EFFECTIVELY

I was prejudiced by VGS' omission of information because as a pro se litigant with extremely limited resources to present evidence, I relied on VGS' presented costs and chose not to introduce evidence or additional expert witnesses to demonstrate the cost-effectiveness or viability alternatives such as weatherization, or the separate or combined use of cold-climate heat pumps, wood pellets, solar arrays, and/or heating oil as lower-cost alternatives to natural gas for the purposes of meeting identified demand for affordable, clean thermal energy in Vermont. I could have presented information regarding both installation costs and annual expenditures on air source heat pump space heating and hot water had I realized the real cost estimate for the project. Now, with the revelation of a $35 million increase in total project costs to $121.6 million, those alternatives would clearly be a better choice for Vermont and Vermonters.

As it stands now, no evidence has been taken under docket #8330, and VGS has proposed a schedule that would leave a conclusion of the investigation and issuance of an order by the Board until at least March 2015, which would be well over a year after the issuance of the Board's order of December 23, 2014 thereby precluding a separate motion for relief from judgment under Rule 60(b)(3).

While recognizing that the Board could choose to decide that newly discovered evidence is the basis upon which the December 23, 2014 order would be reopened, this does not preclude the Board from considering Rule 60(b)(6) as an alternative basis should the Board determine that the new evidence is not adequate grounds to reopen the case. Rule 60(b)(6) was designed to address just this kind of situation – when no other remedy under Rule 60(b) or Rule 59 is available, but the result of allowing a judgment to stand would create unreasonable injustice or undue hardship.

VII. LIKELIHOOD OF SUCCESS ON MERITS

The cost of this project has gone beyond the point where the economic benefits will outweigh the price. The Board should re-open the decision in the order dated 12/23/13 and delve into the details of how and where the figures submitted will affect the original determination as to whether or not this project promotes the general good of the state.

a) VGS has complete disregard for the public good and the public's pocket book.

VGS made several attempts to justify the cost increase by adjusting the figures to minimize the impact to rates by including revenues from International Paper, which should not be considered in this docket, and using the money from the System Expansion and Reliability Fund (SERF).

As Mr Young pointed out, (at page 30, line 22-25 of the technical hearing transcript), the SERF is made up exclusively of money taken from ratepayers. And Mr Burke again makes the point that the money "came out of [the ratepayers] pocket one way or the other." (see page 31, lines 10-11) Ms Simollardes seems to want to forget that fact. (See page 69, lines 11-15 in transcript of technical hearing), "..I fundamentally disagree with the assertion that existing ratepayers need to be fully paid back. We are making an investment in infrastructure that benefits existing ratepayers. And they will contribute to it accordingly." Most perplexingly, later (on page 70, lines 6-7) "I disagree with your assertion that ratepayers have funded this." If the case is reopened, VGS will have the burden of proof to demonstrate that the proposed project will "promote the general good of the state." 30V.S.A. § 248 (a)(3); *In re: Champlain Pipeline Co.,* Docket No. 5300, Order of 8/21/89 at 47 (petitioner bears burden of proof); see also *Petition of Central Vermont Public Service Corp.,* Docket No. 4782, Order of 4/10/86 at 7 (" The burden of proof is, of course, upon the petitioners with respect to each element of their case.") when considering the VGS Cost Update.

b) The demand was overstated by VGS

Ms Simollardes says, in response to Mr Young pointing out that the rate impact anaylysis is a projection and not an attempt to be comprehensive. (in tech hearing page 49 at lines 7-11) "As everyone knows, there is a lot of moving parts in here. The saturation rate can drive it, the actual customer usage rate can drive it." This is exactly the case. Ms Simollardes said, "I think in many ways this is very conservative." but one cannot verify that these customer saturation rates are either conservative or very optimistic. Without seeing the map, and counting existing structures that are within 100 feet of the distribution mainline, one cannot judge if these estimates are accurate or not. And alternatives that are available now and will be becoming more

accepted such as cold climate heat pumps could put the squeeze on new gas customers. Middlebury customers are very environmentally astute. (remember the PSB public hearings held there?) They care about their carbon footprints. If given the choice of going carbon neutral or hooking up to a fracked fossil fuel pipeline at a relatively comparable cost, no doubt the majority would choose the heat pump. So I think it is fruitless to compare Middlebury's potential gas customer base with other areas in Vermont at this time.

c) The benefits were overstated by VGS

In the transcript of the technical hearing page 59 lines 19 – 25, Ms Simollardes tells the Board that VGS has not done a re-evaluation of the benefits of the project using the inflated cost estimate because she didn't have the time and she didn't feel it was necessary. “I don't believe it's material....And as I understand it, that is the question before us, is there sufficient evidence to determine that the finding would be different. And I look at the economic benefits that were cited in that case, and it's like no, there are huge economic benefits here.”

d) Emerging technologies and new standards for low-sulfur fuel emissions decrease the emissions advantage claimed by VGS. There is a difference in emissions from the low sulfur fuel oil being sold starting this year and going forward than the fuel oil VGS based their greenhouse gas emissions analysis on. This is a new development since the CPG was granted. Also, air source heat pumps have become readily available to the Addison County area and costs to install and operated those devices are competitive if not cheaper than hooking up to a gas pipeline, not even counting the cost of the pipeline itself. (see testimony of Mr Neme. Page 219, lines 5-17).

VIII. NO PREJUDICE TO VGS IF PROCEEDINGS ARE REOPENED

VGS has not and will not suffer any hardship or prejudice associated with the reopening of the case that is not of the company's own making. VGS was fully aware that the value of the projected cost increase constituted a substantial change to the project and could trigger reopening of the case. Based on the record before the Board, VGS did not take timely or effective action to stem the cost increase, obtain an accurate update of estimated costs, or notify the Board once it became clear that the increase would exceed the threshold under Rule 5.409 of 20%. In fact, Mr. Gilbert's testimony suggests that VGS went ahead and concluded contracts with materials suppliers with full knowledge that costs associated with other project components exceeded the 20%.

Reopening of proceedings would also be unlikely to cause additional delay to a project that is already behind the original schedule at least, in part, because of VGS' poor performance in managing its contractors, negotiating with landowners to secure rights of way for the proposed project route, and securing necessary permits for construction. Mr. Gilbert admits that VGS has made yet another change in land agent personnel by ensuring that employees play a more direct role in the ROW procurement process. This represents the third major restructuring of the ROW team and does not account for periods of up to four months during which VGS did not communicate at all with some landowners.

The Petioner presents absolutely no evidence that reopening proceedings would cause hardship to the company or the project. In fact, there is evidence to suggest that VGS might actually benefit from time to complete the organizational changes outlined in Mr. Gilbert's testimony, gear up its new project management team, incorporate the lessons that team brings from individual team members' participation in the Northwest Reliability Project, and introduce the new standards and methods for cost estimation and control referenced by Mr. Gilbert. (See Page 3, lines 18-20) "We have made a number of changes to the processes and management of the ARNGP. As I previously stated, we have restructured the team that is working on the ARNGP and have brought in additional resources to manage several different

aspects of it." Moreover, while VGS refuses to commit to the updated costs submitted to the Board, VGS' prior submissions under the docket, including the companies' response to motions, prefiled testimony, and testimony at the technical hearing regarding the remand, claim that VGS now has finalized contracts and values for the majority of the work to be completed under the contract. It is disturbing that Mr. Gilbert was unable to assure the Board that cost containment measures such as fixed-priced contracts, escalation caps, or performance bonds have been incorporated into those contracts. But it is up to VGS to proceed with construction at its own risk. Until actual hardship is described and proved there is no basis for Petitioner's Motion.

IX. CONCLUSION

I, as a citizen and not an attorney, cannot make very good legal arguments before the Board. I cannot divest my emotions from the case. I, as well as the rest of us earthlings have much to lose if this pipeline gets built. I see the defects in this project...moral as well as economic and environmental. I did not create the cost increase, although VGS would like to blame landowners, and do when they talk to the media. VGS estimated insanely low in their original estimate on land easement acquisition, and yet easement costs are a disproportionately small portion of the cost increase. I worry that in reviewing the minutiae of this project, there is real danger of missing the forest for the trees. Even if it is true that the Board has the authority to determine that "any" economic benefit to the state is enough to confirm an economic good or to approve even a doubling of the cost of a utility project, the mere fact of authority does not mean that either course of action would make sense in this case. The question facing the Board is whether this project as a whole at the current cost meets a need that cannot be achieved at a lower cost.

While I understand that the scope of this proceeding is not to reassess the necessity for the project I agree with others that the cost of the project cannot be evaluated in a vacuum. To do so would

be to ignore the purpose for which public utilities have been established in Vermont. The need has never been choice. The need has never been specifically for natural gas. The need has always been for affordable thermal energy. More recently, the need to protect the environment from greenhouse gas emissions has also emerged from public policy, business, and individual consumers' perspectives. As the cost of Gaz Metro/VGS' pipeline construction increases the question is whether those two needs can be met to the same degree at a lesser cost through alternatives and whether the general public good or demand for affordable thermal energy will actually be achieved by building this expensive fossil fuel infrastructure.

Unfortunately, VGS has not demonstrated through pre-filed testimony or the technical hearing that the costs as presented are even remotely accurate. The question is whether a project, with seemingly runaway costs that VGS management cannot certify are even roughly accurate or under adequate control, is likely to bring to Vermonters and Vermont businesses thermal energy that is more affordable, energy efficient, and environmentally sound than energy efficiency measures or alternative energy sources can deliver alone or in combination.

The role of utility regulation is not economic development. The burden of cost to install fossil fuel infrastructure that would essentially subsidize large thermal energy using businesses in Addison County should not fall upon the shoulders of the current ratepayers. Sixty percent of the phase 1 economic savings go to just four users. This would be a case of taking from the many and the small to give to the few and the big.

We respectfully request that the Board reopen the proceedings and reevaluate the extent to which the Project meets the standards set forth in Section 248(a) and Section 248(b). Should the Board reopen the proceedings we further request that the Board direct VGS to submit for review and approval by the Board a cost estimation and management plan, including proposed steps, required expertise, qualifications of proposed experts, data, data sources, and collection protocols, analytical methods and

tools, report content, and presentation formats. This will help to ensure that the Board and all parties have reasonable assurance that the completeness, accuracy and refinement of estimates are consistent with each stage of project design and implementation; can reasonably rely on project budget estimates; and have a reasonable opportunity to evaluate presented exhibits for accuracy and compare presented scenarios without undue burden.

As a matter of fairness, due process cannot be served if VGS is allowed to hide behind vague and contradictory statements about the course of events, timing of cost estimates and sources of estimation errors and actual cost increases.

Signed at Monkton, Vermont this day of October 2, 2014

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