STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Vermont Gas Systems, Inc., requesting 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

VERMONT GAS SYSTEMS INC. RESPONSE TO COMMENTS RE: MOTION TO ADMIT MOU

I. INTRODUCTION

Vermont Gas Systems, Inc. ("VGS") hereby responds to October 26 comments filed by AARP, and the October 27 comments filed by the Palmers, Conservation Law Foundation ("CLF") and the Vermont Fuel Dealers Association ("VFDA") regarding VGS's Motion to Admit Memorandum of Understanding ("MOU").[1]

The MOU represents a significant commitment by VGS to cap the amount of Project costs that may be included in rates, in response to rate impact concerns that have been a centerpiece of the opponents' arguments. The impact of the MOU was the subject of testimony and Public Service Board ("Board") findings relating to forecasted Project costs in the first remand.[2] The MOU is clearly relevant to the potential rate impact of the Project and should be admitted into evidence. The Board has ample discretion as to whether any further process is

[1] VGS also responds to AARP's and the Palmers' Initial Comments in response to the October 7 filing of the MOU.

[2] *Petition of Vermont Gas Systems, Inc., requesting a Certificate of Public Good pursuant to 30 V.S.A. § 248, etc.*, Docket No. 7970 (Vt. Pub. Serv. Bd. Oct. 10, 2014) ("First Remand Order") at 12.

required in connection with admission of the MOU. None of the above parties have established a persuasive basis for further process, especially in light of extended process that has already taken place after the Board issued its final order in 2013 and the potential adverse cost impacts of delays in Project construction.

For the reasons set forth herein, VGS submits that the Board should admit the MOU into evidence, that there is no need for additional discovery, testimony and hearings and that, once admitted, process should be limited to a round of written comments addressing the impact of the MOU on the Board's determination that the Addison Natural Gas Project ("Project") is consistent with the general good of the state under 30 V.S.A. § 248(a).

II. LEGAL MEMORANDUM

Consistent with Board-established process in this case regarding objections to the admission into evidence of two previous post-hearing MOUs, the parties have had an opportunity to (1) "clearly state the evidentiary basis for the objection" to admission of the MOU and (2) "articulate how the objecting party's interests are negatively impacted by its entry into the record."[3] Because admitting the MOU raises no evidentiary issues and has no negative impact on any party's interest, the Board should admit the MOU into evidence with an opportunity for parties to comment on its import under Section 248(a).

A. The MOU is Relevant and Should Be Admitted Into Evidence.

AARP and CLF claim that the MOU is irrelevant to the pending Rule 60(b) motions.[4] As indicated below, the rate cap included in the MOU is relevant to whether the Project results in an

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[3] *Petition of Vermont Gas Systems, Inc., requesting a Certificate of Public Good pursuant to 30 V.S.A. § 248, etc.*, Docket No. 7970 (Vt. Pub. Serv. Bd. Dec. 23, 2013) ("Final Order") at 14, n. 9.

[4] AARP Reply at 9; AARP Initial Comments at 5; CLF Comments at 2-3.

CLF also claims the motion to admit the MOU violates Board Rule 2.206, because it is not accompanied by a supporting memorandum. This is incorrect. VGS Motion to Admit MOU into Evidence (October 15, 2015) at 1-

impermissible cross-subsidy under Section 248(a) and is also admissible under the relaxed evidentiary standards of 3 V.S.A. §810(1).

The Board admits evidence into the record pursuant to the Rules of Evidence and the discretion accorded the Board in the Administrative Procedures Act.[5] The MOU is relevant, admissible evidence for two reasons. First, the MOU—at its core—limits recovery of Project costs in rates thereby affecting rate recovery of Project costs, which will be addressed by the Board in a subsequent rate proceeding. The Board has considered in this case the Project's future rate impact under the Section 248(a) general good criterion, and in particular whether it will result in an impermissible cross-subsidy under Section 248(a).[6] Therefore, the MOU is relevant to the Board's consideration of whether the Project promotes the general good under Section 248(a).

The MOU is relevant notwithstanding AARP's questions about the precise impact of the MOU on rates. The MOU's rate cap reduces the likelihood of an impermissible cross subsidy and, regardless of the precise impact, this fact is relevant to the Section 248(a) general good criterion.[7] In addition, the Board does not attempt in a Section 248 proceeding to definitively establish the precise rate impact of a proposed project[8] and there is no basis for doing so in this proceeding.

In addition, MOUs have been admitted in many cases and therefore constitute the type of evidence commonly relied upon by the Board and parties. Accordingly, even if the MOU had

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2. In addition, the absence of a motion or supporting memorandum did not cause the Board to reject the two earlier post-hearing MOUs admitted into evidence in this case. Final Order at 14.

5 *Pet. of Vermont Solar Farmers, LLC, Requesting A Certificate of Pub. Good Pursuant to 30 V.S.A. S 248, etc.*, Docket No. 8443 (Vt. Pub. Serv. Bd. Jul. 27, 2015); 3 V.S.A. § 810(1)(providing the Board discretion to admit evidence "of the type commonly relied upon by reasonably prudent men in the conduct of their affairs").

6 Final Order at 142-43; First Remand Order at 23.

7 First Remand Order at 23-28. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. Here, the MOU makes it less probable that the Project will result in an impermissible cross-subsidy.

8 *See e.g. Petition of Green Mountain Power Corp., et al,* Docket No. 7628 (Vt. Pub. Serv. Bd. May 31, 2011 at 34 (identify potential rate impact of project under various alternative scenarios).

some evidentiary deficiency—which it does not—it is still admissible under the relaxed evidentiary standards applicable to the Board under 3 V.S.A. § 810(1).[9] Therefore, there is no basis for concluding that the MOU is inadmissible.[10]

B. Admission of the MOU into Evidence Without Discovery, Testimony and Evidentiary Hearings Will not Result In a Negative Impact on the Parties.

The only impact of the MOU is to cap VGS rate recovery for Project costs below the currently-forecasted cost. As a result the only substantive impact of the MOU is beneficial to other parties and VGS customers.[11]

The opposing parties have identified no negative impacts resulting from inclusion of the MOU in the record. Instead, AARP, CLF and VFDA claim that they have a right to further process, including discovery, testimony and hearings. For instance, AARP claims additional process is necessary to understand and respond to (1) details of the MOU's impact on the Vermont economy and rates, (2) allegedly ambiguous terms, and (3) certain statements contained in the MOU's whereas clauses.[12]

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[9] *See In re Central Vermont Public Service Corp.*, 141 Vt. 284, 292 (1982) (Section 810(1) codifies the Board's discretion to admit evidence normally excluded from court hearings).

[10] Contrary to AARP's claim, (Initial Comments at 4), the MOU also is not hearsay because it is not offered for the truth of the matter asserted, which is an essential component of the hearsay definition. V.R.E. 801(c). Instead the MOU is a contract offered to prove the substance of the obligations contained therein. It is not hearsay for the same reason supporting admissibility of a category of evidence known as "verbal acts," which are not offered to prove the truth of the matters asserted and therefore not within the scope of the hearsay definition. See V.R.E. 801 Reporter's Notes (testimony offered for a purpose other than the truth of the matter asserted includes testimony to prove verbal acts, "such as the terms of a contract"). The Reporters Notes cite *McCormick, Evidence* § 249, which indicates that a writing offered as evidence of a contract sued on is not hearsay. As with relevance issues, moreover, the Board has discretion to admit evidence under 3 V.S.A. § 810(1).

[11] As a result, this MOU is different than other MOUs that might provide benefits to some but undermine the interests of others. *See, e.g.*, Final Order at 54 (opposition of Palmers to re-route provision of Monkton MOU).

[12] AARP Initial Comments at 4-5; AARP Reply at 4-5, 8-10. CLF makes a similar claim. CLF Comments at 3. It should be noted that AARP did not propose a similar process when it sought to reopen the record to admit the Over and Under pleadings. AARP Motion to Reopen (August 3, 2015). VGS did not oppose admission of the pleadings into the record without further process.

Although AARP initially requested an opportunity to update evidence relating to fuel price forecasts and CNG consumption (AARP Initial Comments at 6-8), this request is not included in the AARP Reply. The MOU is not an update of existing facts; instead it consists of a contract that speaks for itself, rather than new facts proposed to be substituted for facts already in evidence. The Board has typically permitted admission of MOUs into evidence, at or after hearings, without providing for an opportunity for an additional hearing to update previous information, including that contained in prefiled testimony. *E.g. Petition of Green Mountain Power Corp., et al,* Docket No. 7628 (Vt. Pub. Serv. Bd. May 31, 2011) at 8. Since MOUs are often agreed upon late in a proceeding, after the

The Board generally has discretion in determining the scope and extent of process to be accorded in a proceeding,[13] absent a claim of violation of due process[14] or statutory violation.[15] This discretion applies to process relating to determinations concerning use of post-certification proceedings to evaluate compliance with Certificate of Public Good ("CPG") conditions.[16] It also applies to a proposed revision of a CPG condition, and updating previously-admitted evidence.[17] There is no reason why this discretion should not extend to consideration of MOUs.

Contrary to AARP's claims, discovery, testimony and hearings are not necessary to understand the rate impact of the MOU. The record already includes evidence and Board findings relating to a very similar issue, the rate impact of a $131.6 million Project cost forecast.[18] AARP has not demonstrated that the difference between the $131.6 million cost forecast and the $134 million rate cap is significant enough to warrant further process.[19] Although AARP claims it can only understand the impact if it is provided with information concerning annual rate levels and whether there will be write-offs, this information was

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parties have reviewed the prefiled testimony and discovery, a right to update information in response to MOUs would significantly undermine the incentive to enter into MOUs.

[13] *In re Green Mountain Power Corp.*, 2012 VT 89, ¶ 82, 192 Vt. 429.

[14] There is no basis for concluding that a failure to afford opportunity for discovery and hearing, once the MOU is admitted into evidence, would result in a deprivation of due process. *See In re Green Mountain Power Corp.*, 2012 VT 89, ¶¶ 76-77, 192 Vt. 429 (procedural due process claim requires showing of deprivation of property interest and due process violation based on a three-part test, involving balancing of (1) private interest affected by official action, (2) risk of erroneous deprivation of interest and probable value of additional procedures, and (3) government's interest, including function involved and burden of additional procedures). No party has demonstrated that a hearing is required based on a due process analysis. *Id.*, ¶ 78 (affirming rejection of hearing request where no attempt to address the due process analysis).

[15] There is also no statutory requirement of additional procedures involving discovery and hearing. Although an opportunity for hearing is required for a final decision in contested cases, 3 V.S.A. § 809(c), this Rule 60(b) proceeding is based on a post-decision motion after the required contested case hearings were held. In addition, a hearing has already been held in connection with the Rule 60(b) proceeding.

[16] *In re UPC Wind, LLC,* 2009 VT 19, ¶ 10, 185 Vt. 296; *In re Vermont Electric Power Co., Inc.,* 131 Vt. 427, 435 (1973).

[17] *In re Green Mountain Power Corp.*, 2012 VT 89, ¶¶ 82, 98; *In re New England Tel. & Tel. Co.,* 135 Vt. 537, 539 (1977).

[18] Simollardes' First Remand testimony included a sensitivity analysis addressing the impact on rates if the forecasted Project cost was $131.6 million. Simollardes 9-22-14 Pf. at 7, 9 (increase over ten years, assuming no change in SERF withdrawals and without contribution from International Paper ("IP")); *see also* Simollardes 1-15-15 Pf. at 7 (1% rate increase for each $10 million increase in Project costs). The Board addressed the impact of a $131.6 million cost forecast in its findings of fact. First Remand Order at 12.

[19] *In re Green Mountain Power Corp.*, 2012 VT 89, ¶¶ 82, 98 (Board discretion in determining whether hearing required in response to dispute between experts as to compliance with post-CPG condition).

apparently not important enough for AARP to raise a similar concern in analyzing the Project's impact in its post-hearing brief.[20] More importantly, information about annual rate impacts and write-offs requires far more detail than typically required in Section 248 proceedings and would be speculative since Mr. Rendall previously testified that VGS will propose in a rate case a plan to keep VGS's rates competitive and affordable.[21] AARP will have ample opportunity to address the MOU in any rate proceeding relating to the Project.

AARP's claim that discovery, testimony and hearings are needed concerning the MOU's impact on the Vermont economy[22] should also be rejected. The Board considered the impact of the $131.6 million cost forecast in the First Remand without addressing its impact on the Vermont economy. Instead it addressed the impact of the cost forecast on rates and potential cross-subsidies, which relate to the Section 248(a) general good standard.[23] AARP has not demonstrated why the rate impact of the MOU should be analyzed differently.

AARP also claims that further evidentiary process is required because certain MOU terms relating to the MOU's rate impact are allegedly ambiguous and therefore must be construed by reference to extrinsic evidence.[24] Ambiguity requires a determination that a contract term supports a different interpretation than appears when viewed in light of surrounding circumstances, and both interpretations are reasonable.[25] AARP merely identifies hypotheticals that do not establish that any ambiguity exists,[26] or seeks a level of precision far

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20 AARP Post-Hearing Brief (July 7, 2015) at 18-24.

21 Rendall 3-27-15 Pf. at 6.

22 Initial Comments at 4-5; AARP Reply at 8. VFDA's comments include a similar claim. VFDA Response at 4.

23 First Remand Order at 23-28 (rate impacts relate to cross subsidy rather than economic benefit). In contrast, the Project's impact on the Vermont economy, including Project costs and benefits, relates to the Section 248(b)(4) economic benefit criterion.

24 AARP Reply at 7. The question of whether a contract term is ambiguous is a matter of law for the Board to decide. *Isbrandtsen v. N. Branch Corp.*, 150 Vt. 575, 577, 556 A.2d 81, 83 (1988)(citing *Trustees of Net Realty Holding Trust v. AVCO Financial Services of Barre, Inc.*, 144 Vt. 243, 248, 476 A.2d 530, 533 (1984)).

25 *Isbrandtsen,* 150 Vt. at 556.

26 AARP's claimed ambiguity relates not to the definition of "material," but instead to how the term is applied. AARP Reply at 7 (whether the term includes events within VGS's control). *See Al Baraka Bancorp*

greater than necessary to determine the relevant issues.[27] As indicated previously, the precise rate impact has not been, and need not be established in this case,[28] and therefore AARP's claim of ambiguity should be rejected.

Finally, AARP claims that it has a right to discovery, testimony and hearings to address the content of various MOU "whereas" clauses.[29] These statements are part of a contract offered to identify a set of binding obligations, rather than for the truth of the matters asserted. As such, they do not constitute evidence of the matters asserted and cannot form the basis for findings of fact.[30]

There is also no need for significant additional process merely because the MOU was arrived at late in this proceeding. The Board has often admitted into evidence and considered MOUs submitted after the scheduled deadline for prefiled testimony and even after the evidentiary hearing, without providing for significant additional process.[31] It would be

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(Chicago), Inc. v. Hilweh, 163 Vt. 148, 155, 656 A.2d 197, 202 (1994)(rejecting claim that contract was ambiguous where party's ambiguity argument was essentially a request for a different interpretation of unambiguous transactional documents); *Isbrandtsen v. N. Branch Corp.*, 150 Vt. at 581 (holding that property use contract providing the premises may be rented or used for paying guests under express agreement between defendant and the owner was not ambiguous as to whether owner was authorized to rent the property without express agreement); *State v. Spitsyn*, 174 Vt. 545, 548, 811 A.2d 201, 205 (2002)(appearance bond was not ambiguous as it could not be construed to mean surety was not liable for defendant's failure to appear); *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 18, 739 A.2d 1212, 1218 (1999)(employment contract was not ambiguous because alternative interpretation would require Court to read additional terms into the contract).

[27] It claims that it is unclear whether the rate cap applies only for a single year, thereby permitting VGS to recover in excess of $134 million in subsequent years, and whether VGS will write off all costs above $134 million. AARP Reply at 5. AARP concedes that the scenario it raises "may appear to be speculative." *Id.*

[28] Rendall 3-27-15 Pf. at 6. The Board did not identify year-by-year rate impacts in its final or first remand orders.

[29] AARP takes issue with statements that the Project is on time and on budget, and that a material delay in resolution of the Rule 60(b) motions seriously risks the Project's completion. AARP Reply at 6.

[30] AARP also claims that a "whereas" statement that the Project is used and useful under certain conditions somehow eliminates the rate cap commitment. AARP Reply at 7. It offers no explanation, based on principles of contract interpretation or otherwise, as to how this claim should be given any credence.

[31] As the Board stated in admitting prior post-hearing MOU's in this case:

> Generally, material received after the closure of the evidentiary record is not considered by the Board, but in this instance the Board finds good cause to reopen the record and incorporate this MOU. In particular, it will serve to encourage the development of MOUs that address issues before the Board, thus justifying deviation from the general rule. Moreover, if we were not to incorporate the MOU into the record, we would be basing our decision on a route that we know is opposed by CSWD and that VGS has already agreed to modify.

Final Order at 14, nn. 9, 10. *See: Petition of Green Mountain Power Corp., et al,* Docket No. 7628, Memorandum of Susan M. Hudson (Vt. Pub. Serv. Bd. April 5, 2011) (admission of post-hearing MOU absent objections).

burdensome to require a hearing to consider the substantive impact of each post-hearing MOU.[32] Unlike other MOUs, moreover, there will be full opportunity to address the rate impact of the MOU in any proceeding relating to rate recovery of Project costs.

Furthermore, additional process in response to the MOU could result in higher costs to ratepayers. As the Board stated in responding to a request for more process in its First Remand Order:

> [T]his is a multimillion-dollar construction project that is now underway, having been found to promote the general good of the state nearly ten months ago. In this context, procedural delays can be costly and may further exacerbate the cost increases of the Project, to the detriment of Vermont ratepayers and others who continue to incur the economic costs of waiting to take natural gas service.[33]

These concerns continue to be present, but with increased urgency. The elapsed time since the Final Order (22 months) has more than doubled since the First Remand Order, and the margin in the schedule to accommodate delays of any kind decreases each day.

Whereas the first remand proceeding was concluded in 30 days, this second remand proceeding has now been pending for more than eight and a half months, and more than ten months since VGS disclosed the $154 million cost forecast.[34] The parties have been afforded substantial opportunity to fully explore all issues, including several rounds of discovery, several rounds of testimony, and extensive cross examination. Any benefit of further process is outweighed by the potential impact on Project costs.

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[32] *Cf. In re Green Mountain Power Corp.*, 2012 VT 89, ¶ 80, 192 Vt. 429 (burdensome to hold hearing in response to each post-certification claim of non-compliance with CPG condition).

[33] First Remand Order at 29. The Board also addressed the time constraints imposed by the Vermont Supreme Court's remand order. *Id.* Even though further delays may not result in increased rates, due to the MOU's rate cap, they may increase the financial impact on VGS. This should be of concern because customers have an interest in the financial health of the utility serving them. *In Re Green Mt. Power Corp.*, Docket No. 6107 (Vt. Pub. Serv. Bd. Jan. 23, 2001)(recognizing financial viability of utility is important "for the sake of ratepayers").

[34] First Remand Order at 1, 3. See Entry Order, Vt. Sup. Ct. Docket No. 2014-135 (Feb. 9, 2015) (order granting second remand).

Finally, the other claims of the opposing parties should be rejected. These include arguments by the Palmers[35] and VFDA.[36]

For these reasons, the Board should admit the MOU into evidence and any additional process relating to the impact of the MOU on the Rule 60(b) motion should be limited to a round of written comments.[37]

Dated at Burlington, Vermont this 28th day of October 2015.

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[35] In their October 27, 2015 Reply, the Palmers request that consideration of the MOU be delayed until after the Board rules on the Rule 60(b) motions, despite requesting the opposite approach of considering post-hearing evidence before the Board Rule 60(b) ruling, in connection with admission into evidence of the Over and Under pleadings. Contrary to the Palmers' claim, their proposal to address process at a later time is contrary to the requirement in the Board's October 23, 2015 Order that parties address now the issue of further process in the event the MOU is admitted. The Palmers' claim that admitting the MOU would violate various Board rules, statutes, rules of evidence and rules of procedure is unsupported, other than by a reference to a single case, without explanation of how it applies in this context. Palmer Reply at 6- 7. The Palmers' claim that a MOU "whereas" clause requires the parties litigate and the Board determine the Project's used and usefulness in this case is unsupported by the case they cite. *Id.* at 7, n. 2. *In re Tariff Filing of C. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20, 769 A.2d 668, 673 (2001)(issue and claim preclusion require, among other things, that the issue was resolved by a final judgment on the merits). Finally, the Palmers' claim that the filing of a contract by a lawyer not appearing as counsel constitutes a subject matter waiver of privileges, Palmer Reply at 7-8, is not relevant to whether the MOU should be admitted nor do they request any Board action. As a result, their claim should be ignored.

[36] VFDA incorrectly suggests that the MOU whereas clause relating to the Project's used and usefulness constitutes a request for advance approval of a rate change. VFDA Response at 3. The clause reflects a statement of position and does not request any action from the Board. This is made even clearer by the fact that Board is not requested to approve the MOU.

[37] It is noteworthy that in connection with the first remand, the Board requested a 30-day period to determine whether to reopen the record and, if reopened, another 30-day period to address new cost information. Procedural Order re: Limited Remand (Sept. 12, 2014). Each 30-day period encompassed a far broader scope of issues than is raised by the MOU's rate cap.