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.'S COMMENTS ON THE PUBLIC SERVICE BOARD'S ORDER RE: SECOND REQUEST FOR REMAND

Vermont Gas Systems, Inc. ("VGS" or "Vermont Gas") hereby responds to the Public Service Board's (the "Board") *Order re: Second Request for Remand*, issued January 16, 2015, in which the Board notified parties that it intends to request a second remand of the December 23, 2013 final order in this docket from the Vermont Supreme Court in light of the second cost update (the "Second Cost Update") for Phase 1 of the Addison Rutland Natural Gas Project ("Phase 1" or the "Project"). In particular, the Board will review the Second Cost Update pursuant to Vermont Rule of Civil Procedure ("V.R.C.P.") 60(b) and will first consider whether the Second Cost Update is of such a material and controlling nature as to probably change the Board's previous determination that approval of the Project under the Section 248 criteria will promote the general good of Vermont. The Board's January 16, 2015 Order specifically requests that parties comment on the scope and schedule of its investigation under Rule 60(b).

I. VGS COMMENTS ON SCOPE

A. Standard of Review Pursuant to Rule 60(b)(2)

As explained in the Board's January 16, 2015 Order, the appropriate standard of review for the Board's investigation of the Second Cost Update is Rule 60(b). Rule 60(b) establishes the requirements for reopening a final decision of the Board, providing in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of judgment.[1]

Importantly, Rule 60(b) is not "an open invitation to reconsider matters concluded at trial, but should be applied only in extraordinary circumstances."[2] Furthermore, "Rule 60(b) is not designed to afford parties simply a second, better opportunity to litigate issues already contested and decided in a previous proceeding."[3]

Under Rule 60(b)(2), the Board may grant relief from a final order on the basis of newly discovered evidence, provided that the new evidence is "'of such a material and controlling nature as will probably change the outcome.'"[4] Rule 60(b)(2) "generally applies when the parties are unaware of evidence existing at the time of the judgment and, through no fault of their own, discover that evidence only after the judgment."[5] In summary, a party seeking relief under Rule 60(b)(2) must demonstrate that:

> (1) the newly discovered evidence was of facts that existed at the

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[1] V.R.C.P. 60(b).
[2] Docket No. 7970 (On remand), *Order Re: Rule 60(b) Reconsideration*, Order of 10/10/2014 at 7 (quoting *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24 (1999)) [hereinafter, "10/10/2014 Order"].
[3] *Pirdair v. Medical Ctr. Hosp. of Vt.*, 173 Vt. 411, 415, 800 A.2d 438, 442 (2002)(citing *Darken v. Mooney*, 144 Vt. 561, 566 , 481 A.2d 407, 411 (1984)("Rule 60(b) does not operate to afford parties a chance to relitigate matters in which there was ample time to prepare")).
[4] Docket No. 6860, *Petitions of Vt. Elec. Power Co.*, Order of 9/23/05 at 21 (citing *In re Petition of Ryegate Wood Energy Co.,* Docket 5217, Order of 11/30/90 at 4 (quoting MOORE'S FEDERAL PRACTICE § 60.23[4] (2d ed. 1990)).
[5] *Tobin v. Hershey*, 174 Vt. 634, 638 (2002).

time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.[6]

B. Scope of Board Review on Limited Remand from the Vermont Supreme Court

In motions and comments previously filed by parties in response to the Second Cost Update, several parties suggested that the Board conduct an expansive investigation into numerous facts and circumstances that have allegedly changed subsequent to the Board's December 23, 2013 and October 10, 2014 orders.[7] Vermont Gas respectfully disagrees.

The Board has explicitly held that revised cost estimates submitted by a petitioner after a final judgment would constitute newly discovered evidence for purposes of review under Rule 60(b)(2).[8] Beyond the Second Cost Update, under Rule 60(b), the Board should only consider evidence that existed at the time of the judgment that, through no fault of the parties, was not discovered until after the judgment. Therefore, Vermont Gas submits that the appropriate scope of review should be limited to evidence directly related to VGS' revised cost estimate, the Second Cost Update. Reviewing other facts and circumstances that have allegedly changed since the Board's prior orders would inappropriately expand the scope of review under Rule 60(b).[9]

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[6] *United States v. Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (internal quotation marks omitted).

[7] *See e.g., Comments and Motion of Nathan and Jane Palmer in Response to Cost Increase Filing*, dated December 23, 2014 (referencing the TransCanada Energy East Project and natural gas supplies, changes in oil prices, compressed natural gas ("CNG") "gas islands," and potency of methane); *Re: The Hurlburts Response to the Public Service Board's Order Entered 1/2/2015,* dated January 12, 2015 (mentioning the fracking ban in New York and Phase 2 construction); *AARP and Lyons Motions*, dated January 12, 2015 (referencing heat pumps and the "gas island" in Middlebury).

[8] *See* 10/10/2014 Order at 7 (holding that it "find[s] that subsection (b)(2) provides the appropriate standard for [its] review because the catalyst for any decision to reopen the December 23rd Order would be newly discovered evidence—the revised cost estimate reported by VGS on July 2, 2014").

[9] *See e.g., Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007) (holding that a declaration was not "'newly discovered evidence' under Rule 60(b)(2) because it discusse[d] evidence that was not in existence at the time of the judgment"); *United States v. 27.93 Acres of Land*, 924 F.2d 506, 516 (3d Cir. 1991) (concluding in condemnation proceeding that post-trial approval and enactment of an enterprise district did "not constitute grounds for relief under Rule 60(b)(2) because they were not 'facts in existence at the time of trial'")

Accordingly, the Board's threshold examination of whether the revised cost estimate would probably result in a different outcome than the one reached in its December 23, 2013 Order should be limited to evidence directly and materially related to the Second Cost Estimate.

With respect to Section 248(b)(2), Vermont Gas notes that in the December 23, 2013 Order, the Board explicitly found that:

> The Project need is driven by the desire to expand the availability of natural gas service to Addison County. Addison County does not have any natural gas infrastructure today; therefore, a complete network needs to be installed to serve the new emergent gas loads of these communities. . . . The need for the Project is based upon market demand to expand the system into a new geographic region.[10]

Thereafter, in the Board's October 10, 2014 Order in the first remand proceeding, it held that "the revisions to the Project's capital costs are [not] likely to reduce demand for natural gas service by so much that we would be likely to find the Project is not needed."[11] Correspondingly, to the extent the Board reviews the (b)(2) criterion, its review should be limited to the demand for the Project as it relates to the Second Cost Update.

Next, Vermont Gas agrees with parties that information regarding the changes in oil

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(citation omitted); *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988) (finding that evidence of investigation conducted subsequent to final order was outside the scope of Rule 60(b)(2) because the evidence "came into existence after the court's judgment"); *Southmark Props. v. The Charles House Corp.*, 742 F.2d 862, 873 (5th Cir. 1984) (explaining that "discovery of evidence not in existence at the time of an earlier judgment is not an available ground for attacking that judgment"); *Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1076 (D.C. Cir. 1983) (noting that evidence falls within Rule 60(b)(2) "as long as it pertains to facts in existence at the time of the trial, and not to facts that have occurred subsequently") (internal quotation marks and alterations omitted); *Ryan v. U.S. Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962) (ruling that results of a new physical examination were outside the scope of Rule 60(b)(2) as that rule "permits reopening a judgment only on the discovery of evidence in existence and hidden at the time of the judgment"); *Tobin*, 174 Vt. at 638 (noting that Rule 60(b)(2) "generally applies when the parties are unaware of evidence existing at the time of the judgment and, through no fault of their own, discover that evidence only after the judgment"); *see also* 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure § 2859, at 387-89 & n.5 (3d ed. 2012) (collecting cases and stating that "the evidence must have been in existence at the time of the trial" under Rule 60(b)(2)).

[10] Docket No. 7970, *Petition of Vermont Gas Systems, Inc.*, Order of 12/23/2013 at 70 [hereinafter, "12/23/2013 Order"].

[11] 10/10/2014 Order at 16.

prices are directly related to the Project's economic benefit analysis in light of the Second Cost Update and should be considered in the Board's review on limited remand. In fact, the prefiled testimony submitted by VGS on January 15, 2015 conservatively accounted for these changes in oil prices.[12] Conversely, the other issues raised by the parties are too attenuated to be directly related to the Second Cost Update and therefore are outside of the scope of the Board's limited remand.

Moreover, Vermont Gas submits that several of the issues and circumstances raised by parties in their previous comments and motions, including the purported TransCanada system constraints, air source heat pumps, and CNG "gas islands," have either previously been litigated in this docket, did not exist at the time of the initial proceedings, or should have been raised by parties at the time of prior proceedings. Therefore, such evidence does not constitute "newly discovered evidence" for purposes of review under Rule 60(b)(2).

Lastly, in the Board's January 16, 2015 Order, it notes that in the first remand proceeding it expanded the scope to examine information on other changes in the marketplace. Vermont Gas submits that this is not appropriate in the second remand proceeding for two reasons. First, as discussed above, the Board's review pursuant to Rule 60(b)(2) should be limited to issues that existed at the time of the judgment but through no fault of the parties, was not discovered until after the judgment.[13] Second, with respect to specific issues the Board reviewed in connection with the first remand proceeding, Vermont Gas submits that it would not be appropriate to reexamine them. As explained above, Rule 60(b)(2) does not afford parties an opportunity to re-litigate issues already contested and decided in a prior proceeding.[14] For example, in the first

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[12] *See* 1/15/2015 Prefiled Testimony of Richard Heaps; 1/15/2015 Supplemental Testimony of Eileen Simollardes.
[13] *See Tobin v. Hershey*, 174 Vt. at 638.
[14] *See Pirdair v. Medical Ctr. Hosp. of Vt.*, 173 Vt. 411, 415, 800 A.2d 438, 442 (2002)(citing *Darken v. Mooney*, 144 Vt. 561, 566 , 481 A.2d 407, 411 (1984)("Rule 60(b) does not operate to afford parties a chance to relitigate

remand proceeding, which was less than four months ago, after considering evidence regarding air source heat pumps, the Board concluded that: "Cold climate heat pump technology does not have an application that could work to meet the thermal needs of most commercial customers or of industrial customers and therefore is not an alternative to natural gas."[15] Further, after reviewing the evidence, the Board held that:

> We are not persuaded that either the new cost estimate information or the new testimony concerning the availability of electric heat pumps as an alternative to heating with natural gas is likely to alter our conclusion in the December 23rd Order that the Project meets the Section 248(b)(2) criterion.[16]

Moreover, given the fact that these issues have already been litigated, review of these issues and others previously discussed in the Board's limited remand on the Second Cost Update would be unduly cumulative.[17]

II. VGS COMMENTS ON SCHEDULE

The Board's January 16, 2015 Order also requests that parties address the amount of time the Board should take to conduct the limited remand. Taking the comments regarding schedule offered by the other parties into consideration, as well as the Board's decision to seek a second remand of the December 23, 2013 Order from the Vermont Supreme Court on January 23, 2015, Vermont Gas respectfully proposes the following schedule:

Vermont Gas files prefiled testimony	January 15, 2015
PSB Requests Second Remand from Vermont Supreme Court	January 23, 2015
Board Issues Scheduling Order re: Second Remand Proceedings	January 30, 2015

matters in which there was ample time to prepare")).

[15] 10/10/2014 Order at 12.

[16] *Id.* at 16.

[17] *See Pirdair v. Med. Ctr. Hosp. of Vt.*, 173 Vt. 411, 414-15 (2002) (affirming denial of Rule 60(b) motion where new evidence, "while potentially helpful," was merely cumulative and sought to rebut expert's opinion). *See e.g.*, 12/23/2013 Order at 71, Finding Nos. 224-226, 246 (addressing and considering the concept of using CNG or liquified natural gas ("LNG") to service customers as an alternative to the proposed Project).

VGS Files Supplemental Testimony (in the event the Board expands scope)	February 5, 2015
Discovery filed on VGS	February 11, 2015
VGS responds to discovery	February 20, 2015
Non-petitioners file prefiled testimony	March 4, 2015
Opportunity to conduct depositions	March 5-13, 2015
Technical Hearings	March 16, 2015
Parties file briefs	March 20, 2015
Last Date for PSB to Issue Order	March 30, 2015

Adopting a schedule consistent with VGS' proposed schedule would allow for a 59 day remand from the Vermont Supreme Court.

III. CONCLUSION

WHEREFORE, for the reasons stated in this memorandum, Vermont Gas respectfully requests that the Board grant the relief requested herein and limit the scope of its review in the second remand to evidence directly related to the Second Cost Update.

Dated at Burlington, Vermont this 21st day of January, 2015.

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