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 RESPONSE TO THE MOTIONS SUBMITTED BY THE DEPARTMENT OF PUBLIC SERVICE AND NATHAN AND JANE PALMER AND THE PUBLIC SERVICE BOARD'S ORDER RE: SCHEDULE FOR RESPONSES TO FILINGS

Vermont Gas Systems, Inc. ("VGS" or "Vermont Gas") hereby responds to three motions filed in response to its Notice of Revised Cost Estimates (the "Second Cost Update") for Phase 1 of the Addison Rutland Natural Gas Project ("Phase 1" or the "Project"), which was submitted to the Public Service Board (the "Board") on December 19, 2014, and addresses the Board's *Order Re: Schedule for Responses to Filings,* issued on January 2, 2015.

On December 22, 2014, the Department of Public Service ("DPS" or the "Department") filed a Motion for Relief Pursuant to Rule 60(b) (the "Department Motion"). On December 23, 2014, Intervenor Nathan Palmer ("Palmer") emailed a document entitled "Comments and Motion of Nathan and Jane Palmer (the "Palmers") in Response to Cost Increase Filing of Vermont Gas Systems, Inc."[1] (the "60(b) Motion"). In addition, on December 24, 2014, Palmer filed an Emergency Motion to Enlarge Time, Halt Construction and Appoint Independent Counsel (the

[1] The Board notes that at the time that it issued its December 24, 2014 memorandum regarding the deadline to respond to the DPS and Palmer motions, it had not yet received the paper copy of this motion.

"Motion for Injunctive Relief").[2]

Lastly, VGS addresses the Board's questions in its *Order re: Schedule for Responses to Filing*, issued January 2, 2015.

I. Overview of the Motions

The Department's Motion does not request Rule 60(b) relief, but rather, requests that the Board establish a process whereby the Board can evaluate and address the revised cost estimates reported by VGS. Additionally, by filing its Rule 60(b) motion within one year of the Board's December 23, 2013 Order initially granting VGS a Certificate of Public Good ("CPG") for the Project, the Department seeks to preserve its ability to seek relief pursuant to Rule 60(b) at a later date. VGS responds to the Department's Motion in Part III below.

The Palmers' 60(b) Motion relies on Rule 60(b)(2) to support their request for relief from the Board's judgment in the December 23, 2013,[3] March 10, 2014, and October 10, 2014 orders and argues that the Board should exercise its authority under 30 V.S.A. §§ 209(a)(3) and 248 to investigate the updated cost estimate. Relying on unsubstantiated facts, the Palmers seek to raise issues outside the limited scope of the Board's review in light of the updated cost estimate. VGS responds to these arguments in Part IV below.

Palmer's separate Motion for Injunctive Relief seeks several types of relief.[4] First, it seeks to "delay all deadlines related to the [Second Cost Update] on the above docket until some

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[2] For clarification, Vermont Gas notes that Palmer filed the 60(b) Motion on behalf of both himself and Jane Palmer (the "Palmers"), whereas the Motion for Injunctive Relief appears to be filed on behalf of only Nathan Palmer.

[3] The 60(b) Motion at page 1 states that "the Board's Order issuing the certificate of public good (CPG)" was issued "on December 23, 2014." The Board's Order, however, was issued on December 23, 2013.

[4] Although the Motion for Injunctive Relief has been brought solely by Palmer, in several of his arguments Palmer purports to be acting or speaking on behalf of others, including "property owners," "intervenors," "the public," "the parties," "all of the other parties," and "ratepayers." *See generally* Motion for Injunctive Relief. However, there is no indication in the Motion for Injunctive Relief, or otherwise, that Palmer is authorized to speak on behalf of anyone but himself. Nor does Palmer have standing to raise issues on behalf of others.

clarification can be made as to what is due when."[5] Palmer contends that at this time neither the Board nor the other parties have sufficient information to examine the Second Cost Update and that all parties need reasonable time in order to respond to the Second Cost Update.[6] For these reasons, Palmer suggests that the Board "may have erred" in setting a January 8, 2015 deadline for comments on the Second Cost Update.[7]

Second, Palmer seeks injunctive relief; namely, to "halt[] all construction and easement negotiations on the Project until such time when the Board can evaluate the new cost increase."[8] Finally, Palmer seeks appointment by the Board of "independent counsel for property owners and intervenors."[9] VGS responds to this Motion in Part V below.

II. Standard of Review Regarding Rule 60(b) Motions

When determining whether to reopen a prior, final order, the Board's review is governed by Vermont Rules of Civil Procedure ("V.R.C.P.") 60. Rule 60(b), which applies to Board proceedings pursuant to Board Rule 2.221, establishes the requirements for reopening a final decision of the Board. In pertinent part, Rule 60(b) provides 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.[10]

Rule 60(b)(2) allows the Board to 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

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5 Motion for Injunctive Relief at 1.
6 *Id.* at 1-2.
7 *Id.* at 2.
8 *Id.* at 1.
9 *Id.*
10 V.R.C.P. 60(b).

probably change the outcome.'"[11] 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."[12]

The Board recently addressed the Rule 60(b) standard in response to Vermont Gas' first cost update in this docket, which was filed with the Board on July 2, 2014 (the "First Cost Update"). In that Order, the "question before the Board under Rule 60(b)(2) [was] whether to reopen [the] December 23rd Order because of the new estimated cost information submitted by VGS."[13] Finding that the new cost information was not of such a material and controlling nature so as to 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 decided not to reopen the Phase 1 Order.[14] In that Order, the Board articulated the Rule 60(b) standard:

> Rule 60(b) is not "an open invitation to reconsider matters concluded at trial, but should be applied only in extraordinary circumstances." *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24 (1999). The threshold determination of whether to reopen a prior decision under Rule 60(b) is committed to the discretion of the Board. *See Lyddy v. Lyddy*, 173 Vt. 493,497 (2001). In making this threshold determination, it is appropriate to consider the prejudice that would arise from setting aside the judgment.[15]
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> Of particular relevance to this remand proceeding is Rule 60(b)(2), which we have previously construed to permit relief from a final order when new evidence is discovered that is "of such a material and controlling nature as will probably change the outcome."[16]

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[11] Docket No. 6860, *Order on Remand Re Reopening Proceedings,* 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)).

[12] *Tobin v. Hershey*, 174 Vt. 634, 638 (2002).

[13] Docket No. 7970 (On Remand), *Order Re: Rule 60(b) Reconsideration, Order of* 10/10/2014 at 14 [hereinafter, "10/10/2014 Order"].

[14] *Id.* at 1.

[15] *Id.* at 7 (citing *Teamsters, Chauffers, Warehousemen, and Helpers Union Local No. 59 v. Superline Transport. Co.*, 53 F.2d 17, 20 (1st Cir. 1992)).

[16] *Id.* at 7 (citing *Teamsters, Chauffers, Warehousemen, and Helpers Union Local No. 59 v. Superline Transport. Co.*, 53 F.2d 17, 20 (1st Cir. 1992)); Docket No. 6860, Order of 9/23/2005 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))).

Specifically, the Board found that Rule 60(b)(2) provided the appropriate standard for its review as "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."[17] Importantly, the Board explained that:

> Our analysis of whether to reexamine the December 23rd Order begins with considering whether this new information is of a nature that is so material and controlling as to probably change the outcome we reached in the December 23rd Order. If we conclude that such a probability exists, then we must proceed to take evidence . . . to support a determination of whether and how to modify our decision to approve a CPG for the Project. Conversely, if we conclude that no such probability exists, the December 23rd Order stands as is, and VGS retains all rights and obligations under the existing CPG for the Project.[18]

Further, the Board observed that its decision to proceed under Rule 60(b)(2) was "consistent with [its] precedent relating to the construction of the *Northwest Reliability Project*."[19]

In the *Northwest Reliability Project*, Docket No. 6860, the Board had granted the petitioner a CPG in January 2005, and in July 2005 the petitioner submitted an updated cost estimate reflecting a potential increase in costs of up to 90 percent.[20] Following a remand of the case from the Vermont Supreme Court, in which the Court limited the scope of analysis to the new cost information submitted by the petitioner, the Board provided the parties with an opportunity to move to reopen the proceedings to evaluate the effect of the updated cost estimate.[21] After determining the appropriate standard for review under Rule 60, the Board reasoned that the updated cost estimate constituted newly discovered evidence that was encompassed within Rule 60(b)(2), which permitted relief from a final order only if the new

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17 *Id.* at 7.
18 *Id.* at 14.
19 *Id.* (citing See Docket No. 6860, *In re: Vt. Elec. Power Co.*, Order of 9/23/05 at 1-2).
20 Docket No. 6860, Order of 9/23/05 at 2.
21 *Id.* at 4-5.

evidence was "of such a material and controlling nature as will probably change the outcome."[22] Based upon this standard, the Board held that reopening the proceeding was not warranted because "***[w]hile the near doubling of projected costs for the [Project] may, at some visceral level, seem to call for reexamination of the Project, the cost increase in fact is not likely to change the outcome of our January 28, 2005 Order.***"[23]

Similarly, the threshold question before the Board in light of the Second Cost Update is whether the docket should be reopened because the updated cost information filed on December 19, 2014 is of such a material and controlling nature that it will likely change the Board's previous determinations that the Project will promote the general good of Vermont pursuant to 30 V.S.A. § 248.[24] After that determination, if the Board concludes that such a likelihood exists, then it will at that time hear evidence to determine whether and how to modify its decision to approve a CPG for the Project.[25]

III. Response to DPS Motion for Relief Pursuant to Rule 60(b)

The Department requests that the Board establish a proposed process by which to evaluate and address the revised cost estimates for the Phase 1 Project. VGS welcomes the opportunity to present the Board with the updated Phase 1 budget and requests that the process be similar to the process followed by the Board in the First Cost Update. Accordingly, like the process employed in the First Cost Update and the *Northwest Reliability Project*, Vermont Gas requests that the Board, if it deems necessary, first determine whether the new cost information will change the Board's determination that the Project promotes the public good of Vermont to

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[22] *Id.* 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)).

[23] Docket No. 6860, *In re: Vt. Elec. Power Co.*, Order of 9/23/05 at 1-2 (emphasis added); *see also* 10/10/2014 Order at 7, n. 13.

[24] *Id.* at 1; *see also* 10/10/2014 Order at 14.

[25] 10/10/2014 Order at 14.

determine whether the case should be reopened under Rule 60(b)(2).

As established in the proposed schedule submitted on December 30, 2014, VGS proposes to submit testimony regarding the Second Cost Update by January 15, 2015, and allow for responses from other parties before the Board holds another technical hearing on the issue of whether to reopen the December 23, 2013 decision, in the event that the Board determines that such a hearing is necessary. Vermont Gas anticipates that the testimony filed on January 15, 2015 will demonstrate that, notwithstanding the increased cost estimate, the Project will result in substantial economic and environmental benefits to the state of Vermont and Vermont Gas ratepayers.

IV. Response to Comments and Motion of Nathan and Jane Palmer in Response to Cost Increase Filing of Vermont Gas Systems, Inc.

The Palmers' 60(b) Motion seeks Rule 60(b)(2) relief from the Board's Order issuing the Certificate of Public Good. The Palmers' motion includes a list of unsubstantiated factual allegations (unsupported by the record) that the Palmers argue should allow the Board to reopen the inquiry into the Certificate of Public Good.[26]

Notwithstanding the unsupported factual allegations, Vermont Gas requests that—consistent with prior Board precedent—the Board first hold a hearing to determine whether the December 23, 2013 Order granting the CPG should be reopened. If it determines that such relief is appropriate, then it can determine the scope of that inquiry, and set a schedule to take

[26] Vermont Gas further notes that reopening the docket at this time would result in significant negative impacts for the Project. See Section V.C below, and Docket No. 6860, Order of 9/23/2005 at 14 (finding that reopening the *Northwest Reliability Project* "would likely result in delays in construction of the NRP. The NRP is a complex construction project with a tight, coordinated schedule. Interruptions and delays in the schedule from reopening would likely result in disproportionate delays in construction for a number of reasons, including the need to remobilize resources, delays in fabrication of equipment, . . . and the potential loss of seasonal construction windows." Additionally, "[r]eopening the proceeding would likely result in further substantial cost increases for the NRP, due to market forces that have driven much of the recent cost increase. Other factors may also increase costs including cancellation costs for equipment and personnel, and the possible need to remobilize resources if coordinate activities in the construction schedule fall out of synchronization.")

testimony as to those portions of the Order that should be re-examined.

V. Response to Palmer's Emergency Motion to Enlarge Time, Halt Construction, and Appoint Independent Counsel

Palmer argues in his Motion for Injunctive Relief that the Board should delay all deadlines[27] concerning the Second Cost Update because, as he asserts, all of the parties need more information on the cost increase and need more time to address it.[28] In support of his Motion for Injunctive Relief, Palmer identifies his personal difficulties with participating as a *pro se* intervenor. While Vermont Gas agrees that the proceeding is complex, Palmer's Motion for Injunctive Relief does not amount to a showing of good cause as required under V.R.C.P. 6(b) and Board Rule 2.207.

Without meeting the procedural requirements for injunctive relief or providing any substantive support that addresses the criteria for such relief, the Motion for Injunctive Relief asks the Board to enjoin Vermont Gas from proceeding with any construction of the Project and from negotiating with any landowners regarding easements.[29]

A. Standard of Review for Injunctive Relief

"Injunctive relief is an extraordinary remedy and is not granted routinely."[30] Although not expressly stated in the Motion for Injunctive Relief, the injunctive relief that Palmer appears to be seeking is either a temporary restraining order or a preliminary injunction,[31] while the Board considers and evaluates the Second Cost Update. Under Board Rule 2.406(B):

> A temporary restraining order may be issued only where it clearly appears from specific facts shown by the affidavits or the verified petition, and by testimony if required by the Board, that substantial

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[27] The only deadline that has been established is January 8, 2015, the date by when parties must file any "response" to the Second Cost Update. Memo. from Susan M. Hudson to Parties in PSB Docket No. 7970, 12/19/14.

[28] *See generally* Motion for Injunctive Relief.

[29] Motion for Injunctive Relief at 1-2.

[30] *Application of Green Mountain Power Corp.*, CPG #NM-1646, Order of 7/11/13 at 11.

[31] *See generally* Motion for Injunctive Relief.

> immediate and irreparable injury, loss or damage, or danger to health or safety, will result to the petitioner before a hearing can be held upon proper notice.[32]

To the extent the Motion constitutes a request for a preliminary injunction, it is governed by Board Rule 2.406(D), which provides in pertinent part:

> No preliminary injunction may issue unless the petitioner establishes that the irreparable injury which will be caused to it if a preliminary injunction is denied, discounted by the probability that the respondent will prevail in the proceedings on the permanent injunction, will be greater than any injury which the granting of the preliminary injunction will cause to the respondent.[33]

The Board has established the following criteria to be considered in evaluating whether to grant a request for injunctive relief:

> (1) the likelihood of success on the merits;
>
> (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted;
>
> (3) whether the issuance of an injunction will substantially harm other parties; and
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> (4) the location of the best interests of the public.[34]

To the extent the Motion seeks a temporary restraining order under Board Rule 2.406(B), Palmer's request fails because it is not accompanied by an affidavit as explicitly required under Rule 2.406(B), and does not demonstrate that a substantial immediate and irreparable injury, loss or damage, or danger to health or safety, will result before a hearing can be held upon proper notice.[35]

Further, there is not a basis for granting preliminary injunctive relief under Board Rule 2.406(D) because the Motion does not address the Board's criteria for injunctive relief under

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[32] Board Rule 2.406(B).
[33] Board Rule 2.406(D).
[34] *Amended Joint Petition of Ludlow Tel. Co*, Docket No. 7493, Order of 12/7/09 at 6.
[35] Board Rule 2.406(B).

Rule 2.406(D).[36] A request for injunctive relief that does not address all of the necessary criteria "lacks a proper basis for review and adjudication" and therefore must be denied.[37]

B. The Motion Fails to Satisfy the Elements for Granting Injunctive Relief

The Motion for Injunctive Relief also fails to present sufficient evidentiary grounds to satisfy the elements for granting injunctive relief.[38] As to the first element of the Board's criterion for injunctive relief, the Motion for Injunctive Relief fails to present any legal argument as to the likelihood of success on the merits. As to easement negotiations, Palmer's Motion for Injunctive Relief fails to identify any legal authority or support for the contention that the Board has the authority to suspend private negotiations amongst individual parties. The Board "is a quasi-judicial agency with powers of record 'in the determination of all matters over which it is given jurisdiction.'" While Section 9 of Title 30 vests the Board with broad equitable powers, those powers are limited to "matters over which it is given jurisdiction." The decision to engage in easement negotiations is voluntary and individual landowners and VGS retain the right to engage in mutual, good faith negotiations.

The Motion for Injunctive Relief is also devoid of any consideration of the second, and "'single most important'" factor the Board considers—irreparable harm to the party seeking relief.[39] "Irreparable harm must be shown to be imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages."[40] The Motion for Injunctive Relief does not demonstrate imminent, irreparable harm to Palmer himself but, rather, alludes only to speculative harm to "landowners" and to ratepayers in Franklin and Chittenden

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36 *See generally* Motion for Injunctive Relief.
37 *Application of Green Mountain Power Corp.*, CPG #NM-1646, Order of 7/11/13 at 12.
38 *See generally* Motion for Injunctive Relief.
39 *Amended Joint Petition of Ludlow Telephone Company*, Docket No. 7493, Order of 12/7/09 at 9 (quoting *Bell & Howell v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)).
40 *Id.*

Counties.[41]

Third, the Motion for Injunctive Relief does not consider the harm to VGS, its ratepayers and potential customers, or VGS contractors.[42] While many construction activities on the transmission mainline have halted during the winter, Vermont Gas is currently engaged in numerous on-going activities that necessitate completion for regulatory compliance, scheduling purposes, and to avoid the substantial economic consequences described above. These activities include:

- Horizontal directional drills ("HDD") that are currently in progress and located on Redmond Road and I-89, and remaining drills that need to be performed to complete the Project;
- Winter shut-down work, expected to be completed after the completion of the two HDD drills referenced above;
- Compliance with VT ANR stormwater and U.S. Army Corps of Engineers permit obligations, which include continued maintenance of erosion prevention and sediment control ("EPSC") measures through the winter and spring;
- Materials delivery to Williston laydown yard – while there will only be a limited number of deliveries during the winter season, pipe deliveries are expected to resume in spring 2015;
- Continuation of the Williston laydown yard security coverage and field security inspections;
- Completion of the Green Mountain Power service line extension for the New Haven and Middlebury Gate Stations to provide electrical power to the sites;
- Planned shop fabrication work in Victor, NY, by Frank Lill and Son, Inc. beginning the week of January 5, 2015 required to install materials in the field for the Gate Stations later in January, 2015, contingent on weather conditions;
- Continuation of easement negotiations with landowners to minimize any impacts to the construction schedule;
- Completion of construction of the Phase 1 Williston, New Haven, and Middlebury M&R stations; and
- Completion of any work required to maintain the integrity and safety of the facilities installed to date.[43]

Additionally, although the distribution system network is not included in the Section 248 proceeding before the Board, Vermont Gas is also currently engaged in distribution system

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41 *See generally* Motion for Injunctive Relief.

42 *Id.*

43 Affidavit of James Sinclair at 1-2.

network construction work. This work requires completion of the HDD drill under Otter Creek in Middlebury, the completion of pipe tie-ins, and the gas up of the distribution pipe with compressed natural gas this winter.[44] Suspension of the Phase 1 work will prevent Vermont Gas from completing this important distribution system work.

- Halting HDDs now would risk the integrity of the drills in progress and cause VGS to incur potentially significant costs. As noted above, two drills are in progress. It is extremely difficult to preserve the integrity of a partially completed HDD for an extended period, and it is not good construction practice to attempt to do so.[45] Suspending this work would also place the Project at risk of incurring contractual damages and costs. The greatest immediate monetary risk associated with suspending construction now would result from the fixed price, design-build contract with the contractor currently performing drills on Phase 1. Specifically, Vermont Gas would be obligated to reimburse the HDD contractor for the following types of costs: (i) equipment standby and/or demobilization costs; (ii) the cost to preserve the integrity of field work performed; (iii) the cost to terminate the HDD contractor's subcontracts; (iv) the cost to remobilize equipment upon the resumption of work; and (v) the cost to re-perform work that deteriorates over an extended suspension.[46]

In addition to the foregoing cost impacts related to the HDD work, and given the complexity and unpredictability of HDD construction, suspension of the ongoing HDDs will have the most direct impact on VGS' ability to complete Phase 1 of the Project in a timely manner.[47] Completing sections of HDD work during the winter months, rather than attempting to perform all of the HDD work in one summer season, can dramatically reduce the schedule risk

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44 *Id.* at 2.
45 *Id.*
46 *Id.*at 2-3.
47 *Id.* at 3.

related to completing the Phase 1 transmission mainline during the 2015 construction season and providing an economical source of natural gas to Vergennes and Middlebury residents and small businesses.[48]

VGS would face similar cost and schedule risks in connection with other contracts, including the contract for the construction of the Meter and Regulation ("M&R") stations.[49]

VGS also would continue to accrue substantial fixed costs associated with the Project during the period in which the injunction is in effect. Fixed costs that would continue until the Project is completed, regardless of an interim suspension of work, include those related to winding down of contracts, resolution of suspension/termination claims, site security, storage and protection of construction materials, planning for the resumption of work, material and services procurement, and environmental oversight and compliance.[50] Moreover, the injunction could result in substantial additional costs from inflation when construction on the Project is resumed,[51] increasing the costs of the Project that ultimately could be borne by VGS customers.

Potential customers would also be harmed by such delay. These customers now pay higher prices for other fuels such as heating oil or propane. This affects households, institutions, and small businesses who cannot be served by new unconnected gas island loops such as the one VGS is working with NG Advantage to install in Middlebury to serve large institutional and industrial customers.

The Board has previously recognized the substantial harms associated with delay of complex infrastructure construction projects. In the *Northwest Reliability Project*, the Board found that reopening the proceeding "would likely result in delays in construction of the NRP.

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48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*

The NRP is a complex construction project with a tight, coordinated schedule. Interruptions and delays in the schedule from reopening would likely result in disproportionate delays in construction for a number of reasons, including the need to remobilize resources, delays in fabrication of equipment, . . . and the potential loss of seasonal construction windows."[52] Additionally, "[r]eopening the proceeding would likely result in further substantial cost increases for the NRP, due to market forces that have driven much of the recent cost increase. Other factors may also increase costs including cancellation costs for equipment and personnel, and the possible need to remobilize resources if coordinated activities in the construction schedule fall out of synchronization."[53]

Lastly, as previously demonstrated in VGS' prior filings in this docket and the Board's October 10, 2014 Order, the Project remains in the best interest of the public and promotes the public good despite the estimated increase in costs.[54] Not only will the Project continue to provide substantial economic benefits,[55] the Project will also result in significant environmental benefits. The Project offers residential and business customers in newly-served areas the choice to use a lower-cost and less carbon-intensive fuel. Additionally, as noted by the Board in its order approving the Project, VGS expansion will also provide robust new opportunities for energy efficiency investment in the proposed service area, helping more Vermont homes and

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[52] Docket No. 6860, Order of 9/23/2005 at 14.

[53] *Id.*

[54] 10/10/2014 Order at 1.

[55] Under 30 V.S.A. 248(b)(4), the Board has explicitly found that "Section 248 does not require [the Board] to quantify exactly how much economic benefit the State would receive from the Project but only determine that there will be *some* economic benefit." *See* Docket No. 7250, *Amended Petition of Deerfield Wind, LLC*, Order of 4/16/2009 at 33 (citing Docket 6812, Order of 3/5/04 at 45) (emphasis added). Further, the Vermont Supreme Court has also held that the economic benefit criterion requires only "*some, albeit possibly limited,* positive impact amounting to 'an economic benefit' required by § 248(b)(4)." *In re Amended Petition of UPC Vermont Wind, LLC,* 2009 VT 19, ¶ 7 (emphasis added).

businesses reduce their energy costs and usage.[56] Specifically, in its December 23, 2013 Order, the Board found that:

> This Project thus provides a double greenhouse gas benefit by (1) switching to the lower emitting natural gas from propane and fuel oil, and (2) increasing the availability of energy efficiency programs to a new customer base.[57]

The important economic, energy conservation, and environmental benefits of the Project are not altered by the increase in the Project cost estimate, and the overall benefits of the Project for the general good of the state and its residents remain substantial.

In summary, the Motion for Injunctive Relief's request for an injunction is procedurally deficient and fails to advance substantive grounds meeting the Board's criteria for injunctive relief.

C. There Is No Basis for Appointment of Independent Counsel

Palmer's final argument is that the Board must appoint independent counsel to represent the public or, more specifically, property owners and intervenors.[58] Pursuant to 30 V.S.A. § 2(b), the Board may appoint independent counsel in any hearing "if [the Board] determines that the public interest would be served." In previous dockets, the Board has limited the appointment of independent counsel to situations "when (1) a conflict appears to exist between the Department's role as a public advocate and its role pursuant to a separate statutory requirement, or (2) when the Department is not able to commit the resources to adequately review and present a case."[59] The Board has used this appointment power "sparingly, focusing on instances in which 'specific institutional or structural reasons . . . seemed likely to conflict

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56 Docket No. 7970, Order of 12/23/13 at 71.
57 *Id.* at 4.
58 Motion for Injunctive Relief at 1.
59 *Petitions of Vt. Electric Power Co., Inc.*, Docket No. 6860, Order of 4/8/04 at 2.

with the Department's ability to carry out the role that the laws of the State have assigned to it.'"[60]

Palmer has not alleged the appearance of any conflict between the Department's role in this docket as a public advocate and any role performed by the Department under a separate statutory requirement, nor has he alleged a lack of Department resources to adequately represent the public.[61]

VI. Response to the Board's *Order re: Schedule for Responses to Filings*

On December 30, 2014, Vermont Gas submitted a letter in Docket Nos. 7970 and 8180 providing the Board and parties with relevant information as to the schedules for both dockets. Concerning Phase 1, VGS noted the pending motions by the Department and the Palmers and submitted a proposed schedule to address the Second Cost Update. On January 2, 2015, the Board issued an *Order re: Schedule for Responses to Filings* directing Vermont Gas to explain the purpose of the proposed hearing and the Board's jurisdiction to conduct such a hearing given that the December 23, 2013 Order in this Docket is on appeal before the Vermont Supreme Court and no party has requested a remand.

As a preliminary matter, Vermont Gas will be filing testimony concerning the Second Cost Update in accordance with Board Rule 5.409.[62] VGS submits that the Board has jurisdiction to review cost updates and supporting materials pursuant to its supervisory jurisdiction under 30 V.S.A. §§ 203 and 209, even while the underlying order is on appeal. This is analogous to other circumstances in which the Board has noted that it has jurisdiction despite

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[60] *In re New England Telephone and Telegraph Co. dba Bell Atlantic-Vermont.*, Docket No. 6000, Order of 3/20/98 at 2 (citation omitted).

[61] *See generally* Motion for Injunctive Relief.

[62] *See* Board Rule 5.409 (requiring that utilities notify the Board and parties of when estimated capital costs increase by 20 percent and provide "the reasons for the increase").

the fact that an order is on appeal.[63] Therefore, the Board has jurisdiction to investigate the cost estimate under Board Rule 5.409 notwithstanding the appeal of the underlying December 23, 2013 Order.

Vermont Gas recognizes, however, that the Board is without jurisdiction to entertain a Rule 60(b) motion while the Order is on appeal.[64] Thus, if the Board wants to investigate the issues raised in the 60(b) Motion, either it or a party would need to petition the Supreme Court for a remand for that purpose. Vermont Gas filed the proposed schedule in an effort to be efficient in framing out the issues in anticipation of the Board requesting a remand. We respectfully defer to the Board's decision in how to proceed at the current stage, and whether an investigation is appropriate.

VII. Conclusion

WHEREFORE, for the reasons stated in this memorandum, the Department's Motion should be granted and both Motions submitted by Palmer should be denied.

Dated at Burlington, Vermont this 12th day of January, 2015.

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[63] *See Joint Petition of Green Mountain Power Corp.*, Docket No. 7628, Order of 10/3/11 at 6 n.23 (observing that while an appeal divests the Board of jurisdiction as to all matters within the "scope of the appeal," the Board has jurisdiction to address "issues of compliance with the terms and conditions of Board orders").

[64] *See Kotz v. Kotz*, 134 Vt. 36, 38-39 (1975) (holding that trial courts have no authority to entertain motions for relief from final judgment while an appeal of that judgment is pending before the Vermont Supreme Court absent a remand); *Joint Petition of Green Mountain Power Corp.*, Docket No. 7628, Order of 10/3/11 at 3. *See also* 10/10/2014 Order; Docket No. 6860, Order of 9/23/05.