

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Vermont Gas Systems, Inc. for a)
certificate of public good, pursuant to 30 V.S.A. §)
248, authorizing the construction of the “Addison)
Natural Gas Project” consisting of approximately)
43 miles of new natural gas transmission pipeline)
in Chittenden and Addison Counties,)
approximately 5 miles of new distribution)
mainlines in Addison County, together with three)
new gate stations in Williston, New Haven, and)
Middlebury, Vermont)

Docket No. 7970

**VERMONT GAS SYSTEMS’ RESPONSE TO NATHAN AND JANE PALMER’S
MOTION TO ADMIT EVIDENCE FROM DOCKET NO. 8328**

NOW COMES Vermont Gas Systems, Inc. (“Vermont Gas” or “VGS”) and responds to the motion to admit evidence from Docket No. 8328 filed by Nathan and Jane Palmer (the “Palmer Motion”), dated March 9, 2015. In the Public Service Board’s (the “Board”) *Procedural Order Re: Second Remand*, issued March 25, 2015, the Board deferred ruling on the Palmer Motion until after the completion of the technical hearings in that proceeding. Further, the Board’s Order permitted parties to file responsive comments to the Palmer Motion by March 31, 2015. Accordingly, Vermont Gas offers the following comments.

Vermont Gas respectfully requests that the Board deny the Palmer Motion to admit evidence and discovery from Docket No. 8328 into this proceeding. First, Vermont Gas notes that the Board opened Docket No. 8328 as a separate proceeding to review the narrow question of whether Vermont Gas violated Board Rule 5.409. Specifically, as the Board acknowledged in its *Order Re Scope and Schedule and Motions to Intervene*, the purpose of Docket No. 8328 is to “address the discrete question of whether and when a violation of VGS’s obligations under PSB Rule 5.409 may have occurred, and if so, the appropriate amount for a civil penalty under 30

V.S.A. § 30.”¹ The testimony, discovery, transcripts, and final order from the proceeding address that narrow issue.

Additionally, the Palmer Motion does not identify any basis for admitting into evidence “all prefiled testimony, discovery questions, responses to discovery and any other records” from another proceeding. Nor is there any basis for doing so under the Board’s Rules or the Vermont Rules of Civil Procedure.² In determining whether evidence should be admitted over an objection in a contested case, moreover, the Board must follow the requirements of Section 810 of the Vermont Administrative Procedures Act (“APA”) and the Vermont Rules of Evidence (“VRE” or the “Rules”) as applied in civil cases in the superior courts.³ Pursuant to Section 810(1) of the APA, the Board *shall* exclude irrelevant, immaterial, or unduly repetitious evidence.⁴ Section 810(1) also provides that the Board *shall follow* the Vermont Rules of Evidence, although it may admit evidence that is inadmissible under the Rules if it is “of a type commonly relied upon by reasonably prudent men in the conduct of their affairs” and is not precluded by statute.⁵

Pursuant to Vermont Rule of Evidence (“VRE”) 401, relevant evidence is “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.” As noted above, the evidence offered in Docket No. 8328 was offered to help the

¹ Docket No. 8328, *Order Re Scope and Schedule and Motions to Intervene*, issued 11/6/2014 at 3.

² Consolidation authority under V.R.C.P. 42(a) and Board Rule 2.211, for instance, does not support the request because (1) consolidation requires the consent of the parties, and (2) a joint hearing is no longer timely (since the Docket 8328 hearing has already occurred) and in any event would not provide a basis for wholesale admission into evidence of all discovery.

³ See 3 V.S.A. § 810; Board Rule 2.216(A) (“Evidentiary matters are governed by 30 V.S.A. § 810.”); *In re Cent. Vt. Pub. Serv. Corp.*, 141 Vt. 284, 292 (1982).

⁴ 3 V.S.A. § 810.

⁵ *Id.*

Board determine whether Vermont Gas violated its cost reporting obligations under Rule 5.409 and if so, what the appropriate penalty would be.

Conversely, the purpose of this docket is to determine whether to reopen the December 23, 2013 order in this proceeding in light of the revised project cost estimated submitted by Vermont Gas.⁶ In its order establishing the scope for this proceeding, the Board specifically stated that parties would be permitted to seek to “present testimony on other [*Section 248*] *criteria* if they can show a reasonable relationship of the testimony to the updated cost estimates.”⁷

Accordingly, the evidence in Docket No. 8328 relates to the *first* revised cost update filed by Vermont Gas, whereas this proceeding relates to the *second* revised cost estimate submitted by VGS. Moreover, the Palmer Motion does not demonstrate how the evidence and record from Docket No. 8328 affect any of the Section 248 criteria as they relate to the revised cost estimated in this proceeding. Therefore, the evidence from Docket No. 8328 is not relevant to this proceeding.

Further, notwithstanding whether the evidence is relevant, under VRE 403, even if relevant, the Board may exclude evidence where its probative value is outweighed by other important considerations, such as its prejudicial effect.⁸ “Once the probative value of a piece of evidence is found to be substantially outweighed by the danger of unfair prejudice, there is no other evidentiary rule that can operate to make the same evidence admissible.”⁹ Therefore, as noted above, because the testimony, discovery, and cross-examination offered in Docket No.

⁶ See Docket No. 7970, *Procedural Order re: Second Remand*, Order of 3/25/2015 at 3.

⁷ *Id.* (emphasis added).

⁸ See VRE 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the *danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*”)(emphasis added).

⁹ *United States v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir. 2000), *cert. dem.*, 531 U.S. 903 (2000).

8328 were for the narrow purpose of determining whether VGS violated Rule 5.409 and if so, what penalty to assess, indiscriminately admitting the entire record into Docket No. 7970 could result in evidence being taken out of context or misinterpreted in this docket. This would result in confusion of the issues in this proceeding, ultimately resulting in unfair prejudice against VGS. Additionally, the schedule in this proceeding is expedited; incorporating an entire docket would be unduly burdensome and potentially result in undue delay.

WHEREFORE, for the foregoing reasons, Vermont Gas respectfully requests that the Board deny the Palmer Motion's request to admit the evidence, discovery, and record from Docket No. 8328. Vermont Gas submits that any evidence from that docket may be used as appropriate in this proceeding in accordance with Board Rules, the Vermont Rules of Evidence, and the Vermont Administrative Procedures Act.

Dated at Burlington, Vermont this 31st day of March, 2015.

VERMONT GAS SYSTEMS, INC.

By: _____

Kimberly K. Hayden, Esq.
Danielle Changala, Esq.
Downs Rachlin Martin PLLC
199 Main Street, P.O. Box 190
Burlington, VT 05402-0190
Tel: 802-863-2375