STATE OF VERMONT
PUBLIC SERVICE BOARD

Joint Petition of Central Vermont Public Service Corporation, Danaus Vermont Corporation, Northern New England Energy Corporation, for itself and as agent for Gaz Metro Limited Partnership and its parents Green Mountain Power and Vermont Low Income Trust for Electricity, Inc., for approval of: (1) the merger of Danaus into and with Central Vermont; (2) the acquisition by Northern New England of the common stock of Central Vermont; (3) the amendment to Central Vermont's Articles of Association; (4) the merger of Central Vermont into and with Green Mountain; and (5) the acquisition by VLITE of a controlling interest in the Vermont Electric Power Company, Inc.	Docket No. 7770

AARP'S (CORRECTED) PROPOSED FINDINGS AND CONCLUSIONS OF LAW

AARP thanks the Board and its staff for their detailed pre-trial memoranda raising questions to be addressed by the parties, and for their careful attention to the testimony. AARP hereby submits its post-hearing Proposed Findings and Conclusions of Law.

A. The 2001 Order

1. In 2000, Central Vermont Public Service Corporation proposed a 7.6% rate increase ($19 million annually). CVPS argued that it required this increase in order to cover the cost of the company's long term contract with Hydro-Quebec. Share values were low and the company's cost of capital was high. In earlier proceedings, the Board had already determined that the Hydro-Quebec contract had been imprudently "locked in" and that its above-market costs made it neither used nor useful. Docket Nos. 6460, 6120, In re Central Vermont Public Service Co., 211 PUR 4th 53, 2001 WL 1002730 (June 26, 2001).

2. AARP, IBM and others intervened in the rate case. AARP opposed the rate increase. AARP submitted expert testimony and briefing arguing that Vermont law prohibited rate increases to pay for imprudent decisions that resulted in costs that were not used and useful.

AARP also submitted expert testimony and briefing urging the Board, if it were to approve a rate increase, to also impose a windfall protection order so that, in the event the company regained profitability and were purchased or merged, ratepayers would be repaid the increased rates they had been ordered to pay to bail out the company. Id.

3. The Board approved a rate increase in the amount of 3.95%, or $9.852 million annually. However, over the objection both of CVPS and the Department of Public Service (see In re Central Vermont Public Service Co., 211 PUR 4th 53, 82-83), the Board also imposed part of the relief requested by AARP.

> However, one possible result of this decision (as pointed out by AARP in both Docket 6107 and the current Dockets) is that the Board's approval of rates which include all of the respective utility's HQ-VJO Contract costs could lead to a financial windfall for shareholders as the result of an acquisition offer or asset sale at substantially above book value. In Docket 6107, the Board concluded that:
>
> To avoid such unjust enrichment, and in consideration of ratepayers who will pay higher rates than are justified by routine rate-making procedures, we find it essential that the rates approved today be accompanied by a mechanism by which ratepayers will share in the above-book proceeds of any future sale or merger of the Company, or sale of its regulated assets.

In re Central Vermont Public Service Co., 211 PUR 4th 53, 84-85 (emphasis added).

4. The manifest intent of the June 26, 2001 Order was to prevent shareholders from enjoying an unjust financial windfall made possible by the sacrifices of ratepayers.

5. Paragraphs 25-29 of Part VIII of the Board's June 26, 2001 order state:

> 25. As is more fully described in Section VI of this Order, CVPS shall be subject to a protection against the unjust enrichment of its shareholders at the expense of its ratepayers. This mechanism shall be triggered by any one of the following: (1) any merger of CVPS with another company; (2) any acquisition of control of CVPS that requires Board approval under 30 V.S.A. § 107; and (3) the sale or lease of any of CVPS's assets so substantial as to require Board approval under 30 V.S.A. § 109.
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> 26. As is more fully described in Section VI of this Order, the protection against

> unjust enrichment shall not be triggered by the sale of CVPS's unregulated assets, nor by the establishment of a holding company that does not involve a change in ownership and does not involve the transfer of assets from regulated to unregulated subsidiaries. If a change in corporate structure involves the transfer of assets from regulated to unregulated subsidiaries, the Board will take whatever action is necessary to ensure that ratepayers are compensated appropriately. As long as the protection against unjust enrichment is in effect, CVPS shall present evidence in any docket in which it proposes a change in corporate structure regarding whether the change also involves the transfer of assets from regulated to unregulated subsidiaries.
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> 27. CVPS shall work with the DPS in Docket 6133 to develop a means of assuring that, if the Board were to approve the creation of a holding company, a transfer of assets from regulated to unregulated subsidiaries, and their subsequent sale for above book value could not occur without appropriate compensation to ratepayers. CVPS and the DPS shall be prepared to present evidence in Docket 6133 on any other possible ramifications of the creation of a holding company on the operation of the protection against unjust enrichment created by this Order.
>
> 28. As is more fully described in Section VI of this Order, when a triggering event occurs, CVPS's ratepayers shall receive fifty percent of the above-book proceeds of the event, subject to a cumulative limit of $16 million, such limit to be adjusted for inflation. CVPS shall notify this Board no later than July 20, 2001, as to whether CVPS requests a prompt Board investigation into the specific design of the procedure by which the protection against unjust enrichment is to be implemented.
>
> 29. Any benefits to ratepayers provided by the protection against unjust enrichment established in this Order shall be in addition to those ratepayers are entitled to under existing law.

In re Central Vermont Public Service Co., 211 PUR 4th 53, 92.

6. Section VI of the Order provided more details of how “CVPS's ratepayers shall receive fifty percent of the above-book proceeds.” The details included description of the mechanism of payment. The description of the mechanism of payment quoted and explicitly “adopted” the following language from the decision issued in Docket 6107, pertaining to Green Mountain Power:

> We explicitly recognize, and anticipate, that the repayment to ratepayers could either: (i) be provided to ratepayers immediately in the event of a triggering

> occurrence; or (ii) be extended over time, so that it does not then create an undue financial strain on the Company that might result from a <u>one-time full-value repayment</u>.

<u>In re Central Vermont Public Service Co.</u>, 211 PUR 4th 53, 88 (emphasis added).

7. On its face, therefore, the June 26, 2001 CVPS order contemplated an "immediate… one-time full-value repayment."

8. The order also mandated that any repayment be in addition to value otherwise owed to ratepayers at time of merger:

> We emphasize, however, that 'Any such procedure [for windfall sharing] must ensure that the benefit provided to ratepayers <u>is in addition to (rather than a replacement for) other benefits appropriately assigned to ratepayers at the time of the future sale, merger or acquisition.'</u> In other words, when an event that triggers the windfall sharing mechanism occurs, <u>the first step is to determine what benefits ratepayers are otherwise entitled to as the result of the sale or merger. Once this determination has been made, the windfall sharing mechanism will apply to any remaining proceeds above book-value.</u>

<u>In re Central Vermont Public Service Co.</u>, 211 PUR 4th 53, 88 (emphasis added).

9. On its face, therefore, the June 26, 2001 CVPS Order also mandated that in the event of a sale or merger, "the first step" that CVPS must take is "to determine what benefits ratepayers are otherwise entitled to as a result of the merger," and then, after this has been done, "the windfall sharing mechanism will apply to any remaining proceeds above book value."

10. The June 26, 2001 Order stated that there were "significant similarities" between the prior windfall protection order issued in connection with a Green Mountain Power rate increase and the Order being issued in the CVPS case, but the Order contained no language committing the Board to implementing the CVPS order in the same manner as the GMP order might be implemented in the future. On the contrary, the Board invited CVPS to file a petition to obtain

more specificity from the Board as to how the CVPS Order would be implemented. In re Central Vermont Public Service Co., 211 PUR 4th 53, 84, 88.

11. CVPS never filed such a petition.

12. The June 26, 2001, order was not appealed by any party. It is a final judgment.

B. Petitioners' Proposal to Satisfy the 2001 Order Out of Merger Savings

13. A Petition has been filed in this matter by Gaz Metro, Northern New England Energy Corporation, Danaus, Gaz Metro, Central Vermont Public Service Corporation and Green Mountain Power, seeking Board approval of the acquisition of CVPS by NNEC and Gaz Metro and of merger of CVPS with GMP.

14. In their Petition and their initial prefiled testimony, Petitioners alleged generally that there would be $144 million in savings for ratepayers that would arise from the merger, and Petitioners alleged that these savings would satisfy the present value of the $16 million obligation set forth in ¶¶ 25-29 of the Board's June 26, 2001, order is $20.9 million. Petition ¶ 16, Powell PFT generally, Griffin PFT generally; Griffin Rebuttal PFT p.11 ($20.9 million).

15. The Petition and the prefiled testimony do not first "determine what benefits ratepayers are otherwise entitled to as a result of the merger," and then "apply" the windfall sharing order "to any remaining proceeds above book value." In fact, neither the Petition nor the initial prefiled testimony address or discuss in any way "what benefits ratepayers are otherwise entitled to as a result of the merger."

16. Petitioners' analysis predicts that the merger will result in a total of $226 million in savings from the merger of Operations and Management functions (O&M) over years. Bugbee PFT p.3. Petitioners propose to share $144 million of the $226 million with ratepayers, and to

retain $82 million of the savings by collecting that amount in rates. Petition ¶ 15; Griffin PFT p.4-5.

17. The present value of the $16 million windfall sharing obligation is $20.9 million. Griffin Rebuttal PFT pp.10-11.

18. Petitioners' expert witness on the issue of merger savings, Mr. Hevert, testified that the proposed sharing allocation of merger savings is appropriate. Mr. Hevert's opinion is that it is reasonable for ratepayers to receive $144 million of the savings and for the owner of the merged company to retain $82 million. Hevert PFT 3, 5, 14-16, 18-21; Hevert 3/26/12 pp.75-78.

19. Mr. Hevert admitted at the trial that his testimony was not based upon the Vermont Public Service Board precedents governing merger savings, and that he was not offering any expert opinion that the proposed terms would comply with the Vermont Public Service Board precedents. Hevert, 3/26/12 p.46, 62, 77-81.

20. Mr. Hevert's testimony is based on his general knowledge of, and survey of, how regulators in other jurisdictions have addressed the sharing of the savings from mergers. Hevert 3/26/12 pp.46-47.

21. The Petitioners' submitted a memorandum to the Board dated March 26, 2012, in which they stated that they rely on Mr. Hevert (and on their post-hearing briefing) to provide the justification for the allocation of merger savings between ratepayers and the owners of the merged business. Petitioners' Cross Ex. 13, Answer 27.

22. CVPS' President, Lawrence Reilly, testified that CVPS and Gaz Metro both knew at the time of their negotiations that there was no precedent in Vermont for sharing *any* merger savings with shareholders. All mergers savings, until now, have been allocated to ratepayers:

MR. BANG-JENSEN: …But the first thing that's mentioned there is significant

> regulatory challenges and the fact of Gaz Metro's proposal to keep a share of the savings created by the transaction.
> MR. REILLY: Right. To my knowledge, I believe the company's knowledge, there was no precedent for sharing of savings in Vermont at that time.

4/3/12 Tr. 196 (discussing merger negotiations with Gaz Metro, as summarized in Proxy Statement).

> MR. BANG-JENSEN: Right. And so just -- so in terms of the significant regulatory challenges, when the board met on May 21, May 25, what they were thinking of is just the precedent that the shared savings plan would create, that was one of the principal factors they were considering, the deviation from precedent in Vermont with respect to a shared savings plan.
> MR. REILLY: That was a big one. Not that the board didn't think it was reasonable to ask for. And that the board wouldn't necessarily -- would necessarily not go along it…

4/3/12 Tr. 210 (discussing merger negotiations with Gaz Metro, as summarized in Proxy Statement).

24. On the other hand, Green Mountain Power's position before this Board is that while there is precedent, the precedent is not useful. The precedent is not useful because it pertains to transactions smaller than this one:

> MR. DUMONT. Do you agree or do you not agree that in Vermont the precedent is that a hundred percent of merger savings -- regulated utility merger, flow through ratepayers?
> MS. POWELL. I do not agree that there is a precedent of a utility -- of a deal of this size in the State of Vermont. So there may have been in very small transactions that have -- I wouldn't disagree that in very small transactions that have happened throughout the state, with very different parameters, there have been -- it has been treated differently. I do not disagree with that.
> MR. DUMONT. So it's just very small transactions that have the precedent that the board staff and I have been asking about, that's your point?
> MS POWELL. Smaller than this. Yes.
> MR. DUMONT. Smaller than this or very small?
> MS POWELL. Both.

4/3/12 Tr. 223-24

25. John W. Wilson, Ph.D. is a knowledgeable and experienced expert on the regulation

of utilities. He was retained by the Department of Public Service. See Wilson PFT 1-4.

26. A regulated utility has a monopoly service territory and is guaranteed the opportunity to earn a fair rate of return. The guaranteed opportunity to earn a fair rate of return, if correctly determined by regulators, suffices to reward the new owner of a newly merged entity. Wilson PFT pp. 13-14.

27. The savings that flow from a merger are not needed to entice purchasers. Id. These savings should be enjoyed by ratepayers. Id.

28. A windfall would arise if the new owner of CVPS were to enjoy not only a guarantee of a fair rate of return but also some of the savings that arise from the merger. Id.

29. Payment of merger savings to a regulated utility would violate the "*quid pro quo*" that justifies granting a corporation a monopoly franchise with the guaranteed opportunity to earn a fair rate of return. Id.

30. Payment of any merger savings to the new owner of a merged utility would be inconsistent with the obligation imposed by law on the corporation to operate in such a manner as to seek the optimal public interest and ratepayer benefit. Id.

31. The above-book value, or acquisition premium, paid by a purchasing utility should rarely be recovered in rates. Ratepayers should not pay acquisition premiums because this would result (and in the past, has resulted) in spiraling rate increases based upon incorporation of sales prices in rates without corresponding increases in the value of assets. Wilson PFT pp. 20-23.

32. It is necessary to examine the overall economics of a proposed purchase in order to determine whether the purchasing entity is, in effect, seeking to recover any part of the acquisition premium in rates. Wilson PFT 20-23; Wilson 3/27/12 pp.58, 65-71.

33. As initially proposed by Petitioners, the new owner would obtain from ratepayers

$175 million in benefits, from savings that otherwise would accrue to ratepayers, as compared to the roughly $222.5 to $225.5 million above book value that Gaz Metro proposes to pay to CVPS shareholders. Wilson PFT p.20; Wilson 3/27/12 pp.58, 65-71.

34. In effect, Petitioners Gaz Metro and GMP proposed to be repaid by ratepayers $175 million of the $222.5 to $225.5 acquisition premium that Gaz Metro will pay to CVPS's shareholders. Wilson PFT 20-25; Wilson 3/27/12 pp.58, 65-71.

35. Under the revised proposal set forth in the Petitioners' Memorandum of Understanding with the Department of Public Service, the amount of the acquisition premium that would be paid by ratepayers would be "a little bit less" during the first ten years but would increase in later years. The chief benefit of the MOU is timing; ratepayers would receive their savings sooner, and the shareholder would receive its savings later. Wilson, 3/27/12, pp.71-74.

36. The intent of the June 26, 2001 sharing order was to provide value to ratepayers *in addition* to value they might otherwise obtain from a merger. Since merger savings generally flow through to ratepayers, none of the potential sharings arising from the merger should be used to satisfy the obligation imposed by the 2001 Order. Wilson PFT p.34-37, 39.

37. Petitioners argued in pretrial discovery answers that the triggering event for the windfall is the purchase, and not the subsequent merger, and that the subsequent merger savings therefore provide "additional" value to satisfy the windfall sharing order. This argument lacks any serious foundation. Regardless of whether the acquisition and merger are separate, ratepayers are entitled to the benefits of the merger and those benefits are not "additional." Also, the purchase and merger were proposed to CVPS as a package, have been presented to the Board as a package, and the acquisition standing alone would not have had a likelihood of regulatory approval; there is no reason to regard them as separate transactions in order to deem

the 2001 Order satisfied. Wilson PFT 36-37.

38. A.J. Goulding is the Managing Member of Ampersand Gilman Energy and its affiliates, which generate and sell electricity in Vermont. He is also highly experienced in regulated utility acquisition and finance. He teaches in these areas at Columbia University. Goulding 1/20/12 PFT pp.1-2.

39. The 2001 windfall sharing order makes clear that its intent was to provide value to ratepayers in addition to value they might otherwise obtain from a merger. The proposed sale provides a substantial premium to the CVPS shareholders – more than twice the premium paid to shareholders in other recent purchases of regulated utilities. This substantial acquisition premium was made possible by the payment by ratepayers of imprudently incurred costs, pursuant to the 2001 Order. Since merger savings generally are passed through to ratepayers, the ratepayers who made possible these windfall gains by shareholders will receive nothing additional, under the Petitioners' proposal. Goulding PFT 13-14.

40. Peter Bradford and Dr. Richard Silkman, who testified on behalf of AARP, are the same experts who proposed to the Board it adopt a windfall sharing order in the original 2001 proceeding. Mr. Bradford has served as Chairman of the Maine Public Utilities Commission and of the New York Public Service Commission. He has been a member of the Nuclear Regulatory Commission. He has taught utility regulation at Yale Law School and Vermont Law School. Dr. Silkman obtained his Ph.D. in economics from Yale University and served as the Director of the Maine State Planning Office. He is a highly experienced utility consultant, energy economist and energy business investor. Dr. Silkman's testimony was upheld, and his expertise recognized, in the trial court and Vermont Supreme Court opinions in USGEN New England v. Town of Rockingham, 177 Vt. 193, 210, 862 A.2d 269, 282, 2004 VT 90, ¶ 39.

Silkman/Bradford PFT 1/13/12 pp.1-7.

41. As Mr. Bradford and Dr. Silkman explained, the merger/acquisition first must be evaluated on its own, by the standards used by the Vermont Public Service Board for the evaluation of all utility mergers. The Board spelled out the merger standards in its 2007 review of the acquisition of Green Mountain Power by Gaz Metro. They are:

> …whether the surviving company (1) is technically competent, (2) financially sound, (3) will act as a fair partner in business transactions with the citizens of Vermont, (4) creates efficiencies that will benefit customers, and (5) will not cause impairment of or obstruct competition in the energy markets as a result of the transaction. However, we have also made clear that our analysis of these five considerations, as well as specific factors that we may examine, is directed towards meeting the fundamental requirements under the statutes: that an acquisition must promote the public good.

42. Because these are the standards that any merger must meet to gain Board approval, the windfall protection measure sets a standard above and beyond these. Silkman/Bradford PFT p.9.

43. Mr. Bradford and Dr. Silkman, like Dr. Wilson and Mr. Goulding, conclude that the proposed terms of the merger agreement will result in payment of an acquisition premium. The Board agrees. Regardless of the label applied to the savings to be allocated to GMP's shareholder, the effect of the proposed terms of the acquisition and merger will be that the premium will be kept by the shareholder while ratepayers continue to await receipt of reimbursement pursuant to the 2001 Order.

> The balancing of the equities as between CVPS shareholders and its ratepayers requires that the dollars necessitated by the sharing mechanism be paid to ratepayers promptly and from the windfall that will soon benefit those shareholders. CVPS customers have already waited ten years for any return of the extraordinary advance that they made to assist the shareholders through difficult times. Now, these same shareholders are about to pocket the acquisition premium and go out of existence as a distinct corporate entity. Customers will have no

> further access to the sum that the PSB has already recognized to be "unjust enrichment". Their clear claim needs to be honored now.

Silkman/Bradford PFT p.14.

44. Mr. Bradford and Dr. Silkman explained the historical abuses that led to the prohibition against recovery of acquisition premiums:

> Were the acquisition premium to become a part of the new company's revenue requirements, the book value of the new company would be artificially inflated, causing rates to increase simply as a result of the merger/acquisition. In the 1920s, regulated utilities took advantage of such ratemaking naivete by selling the companies back and forth, and in the process, realizing unfair returns for their shareholders. As James Bonbright noted many years ago, "The unfairness, not to say the absurdity of a uniform rule permitting a transferee of a utility plant to claim his purchase price as a measure of ratemaking investment was noted by Judge Learned Hand……
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> > The builder who does not sell is confined for his base to his original cost; he who sells can assure the buyer that he may use as a base whatever he pays in good faith. If the builder can persuade the buyer to pay more than the original cost, the difference becomes part of the base and the public must pay rates computed upon the excess. Surely that is a most undesirable distinction. (*Niagara Falls Power Co. v. Federal Power Commission,* (137 F. 2d 787, 1943, p. 793).[1]

Silkman/Bradford PFT p.23-24.

45. It would be inconsistent with the intent of the 2001 order, the principle that merger savings benefit ratepayers, and the rule against imposing acquisition premiums on ratepayers, were the Petitioners allowed to use the benefits of the merger to pay the windfall sharing obligation. Instead of first determining merger benefits and then adding value to reimburse ratepayers, the proposed transaction relies on savings that should be allocated to ratepayers anyway under Vermont's merger savings sharing rules to "pay" for the windfall:

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[1] Bonbright et al, Principles of Public Utility Rates, (Public Utility Reports, Inc, 1988), pp. 240-41.

> The argument that the merger/acquisition provides ratepayer benefits and that these benefits offset CVPS obligations to its ratepayers is akin to Chrysler arguing that it has created jobs and therefore does not have to pay back the money it borrowed from the federal government to bail it out of its difficult financial situation. As was stated many times, the purpose of the loans to Chrysler and other corporations by the U.S. government was to ensure the financial viability of these companies so that they could continue to provide jobs and economic opportunities for our country. The fact that Chrysler has, to date, been successful in meeting this objective in no way relieves it of its obligation to pay back the borrowed money.
>
> Yet, this is what CVPS is arguing. The rate increase imposed on its ratepayers to preserve CVPS as a viable corporation in its time of greatest financial stress was made to ensure that CVPS would continue to provide reliable service at just and reasonable rates. The fact that it has done just that over the past decade in no way relieves it of its obligations to pay to its ratepayers the full amount required under the windfall sharing mechanism. The obligation of the merged entity to provide service at the lowest reasonable cost exists with or without the provision against unjust enrichment. The customers are entitled to expect no less and should not have to pay extra for it by using the savings to offset the provision against unjust enrichment.

Silkman/Bradford PFT 24-25.

C. Satisfaction of the 2001 Order by Investing in Efficiency, Weatherization, Renewable Energy and Economic Development

46. Petitioners filed rebuttal testimony which proposed creation of a fund named the Community Energy & Efficiency Development Fund ("CEED Fund"). The CEED Fund would be used to invest ratepayer money in efficiency, weatherization, renewable energy and economic development. The fund would be paid for by ratepayers: the funds would be placed in rate base, and Gaz Metro, sole shareholder of GMP, would receive return of and on the investment. Griffin 2/15/12 Rebuttal PFT pp.10-15 and Attachment II; Plunkett 3/22/12 p.53; Powell 4/4/12 pp.66-67, 77-78.

47. Vermont's efficiency utility is funded by ratepayers and has a positive track record for using ratepayer money in a cost-effective manner to produce net benefits to ratepayers. These benefits have included not only reduced energy usage but reduction of greenhouse gas

emissions. Plunkett 3/22/12 generally; Bradford 4/1/12 pp.10-11.

49. In Vermont, any management decision to invest ratepayer funds must meet the prudence standard and the used and useful standard. There must be a reasonable, documented, analysis demonstrating that the investment will result in net benefits to ratepayers, and the investment must in fact turn out to be used by and useful to ratepayers. Powell, 4/4/12 p.78.

50. Petitioners are proposing that their CEED Fund invest ratepayer dollars, as the efficiency utility does, and Petitioners predict that there will be a net benefit to ratepayers from the investment, as with any prudent investment. In addition, however, Petitioners propose that the benefits of *this* ratepayer-funded efficiency fund be deemed to satisfy the 2001 sharing order. Included in the package of investments, the value of which over time will be returned to ratepayers, Petitioners say, will be investments not only in electric efficiency but also in weatherization, renewable energy projects and economic development. Thus, some of the $20.9 million net return to ratepayers may consist of the "societal benefit" of green energy and new jobs. Griffin 3/22/12 pp.100-101.

51. Petitioners and the Department entered into a Memorandum of Understanding (MOU) on March 26, 2012. The MOU commits the Department to support Petitioners' position that investment in the CEED Fund satisfies the 2001 sharing order. MOU ¶18-¶ 20, and Attachment II.

52. The MOU commits Petitioners to spend $20.9 million of ratepayer funds on efficiency, weatherization, renewable energy and economic development. MOU ¶18-¶ 20, and Attachment II.

53. The MOU commits Petitioners to spend $12 million of the $20.9 million on weatherization, $10 million of which will be spent by delivering those funds to community

action agencies outside the regulatory jurisdiction of the Board, all by the end of 2013. MOU ¶18-¶ 20, and Attachment II; Hopkins 3/28/12 pp.94-95.

54. Mr. Hopkins, the Department's witness on this issue, testified that he does not know how those agencies plan to use the funds. Hopkins 3/28/12 pp.94-95.

55. However, there will be no prior approval by the Board of how that $10 million will be spent; once the Board approves of the MOU by issuing a judgment in this case, no further authorization will be sought or needed from the Board. MOU ¶18-¶ 20, and Attachment II; AARP Cross Ex. 32, p.15; Hopkins 3/28/12 pp.94-95, 107; Miller 4/4/12 pp.92-93.

56. The Department and Petitioners rely on the Board's March 7, 2007 Order in Docket 7213 as justification for using investment of ratepayer funds to satisfy the 2001 Order that ratepayers share in the proceeds of a merger or acquisition. Hopkins 3/29/12 p.119; Miller, 4/4/12 p.91; Griffin Rebuttal PFT p. 10; Griffin 4/3/12 p.135; Powell 4/4/12 p.62.

57. In Docket 7213, GMP and Gaz Metro proposed to satisfy GMP's $9.3 million sharing obligation by investing ratepayer funds in efficiency and related uses. Docket 7213, Order of March 26, 2007, parts I and IV.G.

58. AARP opposed use of ratepayer funds to satisfy the GMP sharing order. AARP filed a motion for summary judgment, which was denied, and then filed testimony by Mr. Bradford and Dr. Silkman opposing the Efficiency Fund. Id; Bradford, 4/3/12 pp.14-17.

59. At the time the GMP "Efficiency Fund" was proposed, GMP expected that for every dollar invested in efficiency, the net benefit would be between *one and a half and two* dollars. AARP Cross Ex.17, Hopkins 3/29/12 p.15.

60. At the time the Efficiency Fund was proposed, the proposed use of GMP customers' funds was restricted to the service territory of GMP, and was not proposed to be used in other

service territories. Docket 7213, Order of March 26, 2007, parts G.2 and G.3; AARP Cross Exhs. 18, 19.

61. At the time the Efficiency Fund was proposed, the Department supported the use of ratepayer funds to provide the projected benefits on the grounds that investments in efficiency would generate *electric system* benefits for *all* GMP customers, because the investments would reduce *electric* usage and therefore *electric* rates. AARP Cross Exhs. 18, 19, 22.

62. At the time the Efficiency Fund was proposed, the use of these funds to support weatherization was considered as a possibility, not a likelihood, and the Board made clear that if and when such a use was actually proposed, it would look upon the proposal with deep skepticism. This was because the Board agreed with the Department that electric ratepayer funds should not be used unless the investment would produce benefits to *electric* system users, and the Board was concerned that investing in weatherization would not generate *electric* system benefits for all GMP customers. AARP Cross Exhs. 18, 19, 22; Docket 7213 Order of 3/26/07, part VI.G.3.

63. At the time the Efficiency Fund was proposed, it was understood that every dollar proposed to be invested over the coming year would be carefully examined, each year, in a stakeholder process and would not occur without prior approval, each year, by the Board. AARP Cross Exhibit 17, pp.11-12; AARP Cross-Exhibits 18, 19, 22; Order of 3/26/07, Part VI G.2, G.3. In fact, such annual reviews have occurred and have demonstrated detailed examination of each kind of proposed investment, by the Board. AARP Cross Exhibits 26, 30, 31.

64. At the time the Efficiency Fund was proposed, the funds were to be invested by and accountability was assigned to the same entity whose shareholders benefited from the 2001 order – GMP. Producing the required benefit remained GMP's obligation and that of its shareholder,

subject to Board oversight. AARP Cross Exhibit 17, pp.11-12; AARP Cross-Exhibits 18, 19, 22; Order of 3/26/07, Part VI G.2, G.3.

65. The Board approved the Efficiency Fund, but the Board's Order in Docket 7213 was based on a settlement between AARP and GMP. GMP agreed to provide $333,000 a year for three years to fund an experimental "Pilot Program" by which low-income customers (defined as up to 200% of the federal definition of the poverty level) would receive a 10% discount on their rates. Docket 7213, Order of 3/26/07, Findings 82-92.

66. Over a three-year period, a total of $1 million would be spent on the Pilot Program, out of a total of $9.3 million in the Efficiency Fund. Docket 7213, Order of 3/26/07, Findings 82-92.

67. The Board initially rejected the settlement because of one concern: low-income participants in the Pilot Program would be accepted on a first-come, first-served basis. It appeared likely that the annual limit would quickly be reached, and the Board ruled that this would lead to the situation in which two similarly situated persons would receive disparate treatment solely on the basis of who had applied first. The Board ruled that use of ratepayer funds in this manner would constitute undue discrimination. Docket 7213, Part VI.H.

68. AARP and GMP immediately re-negotiated the agreement so that there would be no annual cap on expenditures. The entire $1 million would be available in year 1 and the program would remain open until the $1 million was exhausted. The Board approved this version. Docket 7213, Order of March 29, 2012.

69. Under the settlement agreement, GMP, Gaz Metro and AARP agreed that AARP's testimony opposing use of ratepayer funds to satisfy GMP's 2001 sharing order was withdrawn, and Gaz Metro, GMP and AARP agreed that the settlement would not be cited by any party as a

precedent. Docket 7213, Order of 3/26/07, Part I.

70. IBM was the sole party that, after AARP settled, opposed GMP's proposal to satisfy the sharing order by means of the Efficiency Fund. The Board rejected IBM's criticisms. Docket 7213, Order of 3/26/07, Parts I and VI.

71. However, the Board expressed concern that these funds might be used for weatherization and other means of saving non-regulated fuels. The Board's March 26, 2007 order in Docket 7213 (Part VI.G.3) states (underlining added):

> We do want to express significant concerns about one potential energy efficiency investment suggested by GMP - GMP testified that thermal-barrier projects for GMP can generate particularly large returns. According to GMP, the beneficiaries of Efficiency Fund investments in thermal barriers would be GMP customers, even though the benefit to the customers would not come directly through electric savings. Unless the customers are using electric heating, however, these investments would save primarily other fuels, not electricity. <u>As a result, the system benefits of reduced electrical usage that flow to all customers would not occur.</u> It is also not clear whether from the electric ratepayers' perspectives, these measures are cost-effective. We do not need to resolve this issue now, but <u>if GMP seeks to implement energy efficiency measures directed at non-electrical uses, it will have a heavy burden of persuasion.</u>

72. There are substantial and important differences between the facts before the Board in Docket 7213 and the facts now before the Board.

<u>A) The Evidence Is Undisputed That There Are No Electric System Benefits from Investing in Thermal Efficiency.</u> The evidence from Petitioners' own witness, Mr. Plunkett, leaves no doubt that investment in saving non-regulated fuels through weatherization reduces customers' fuel bills and reduces production of greenhouse gasses but provides no electric system benefits to other electric system users. As Mr. Plunkett testified (3/22/12 p.94), the system benefits from investing in thermal efficiency are only

"theoretical;" there are "no" tangible or quantifiable system benefits. Mr. Hopkins agreed there is "not much" benefit. Hopkins 3/29/12 pp.79-80. Yet, in 2007, this benefit had been seen by the Department and the Board as a prerequisite to any efficiency investment (see proposed Findings ## 58, 59 above).

<u>B) Over Half of the Proposed Efficiency Fund Will be Committed to Thermal Efficiency, With No Electric System Benefit.</u> Over half (12/21) of the fund will be devoted to saving non-regulated fuels through weatherization, which will have no electric system benefits. In contrast, in 2007, less than 1/9 of the Efficiency Fund being spent on the Pilot Program, for which there was some but limited evidence of benefit to *electric* system users at the time. MOU ¶¶ 18-20. The rest of the program was intended to provide electric system benefits. Docket 7213, Order of 3/26/07, part VI.

<u>C) More Than Half the Funds Will Be Invested in Measures that Not Only Provide No Electric System Benefits But Will Produce a Societal Benefit Only 1.2 Times the Investment</u>. The proposed use of $12 million on weatherization will be deemed to produce a benefit of 1.2 times the investment made. MOU ¶ 20. This will be less than 1.5 to 2 benefit ratio that was expected in 2007.

<u>D) The $12 million in Weatherization May Not Be Invested Within the Service Territory of the Ratepayers Who Deserve Repayment – Unlike the 2007 Proposal.</u> Twelve out of the 21 million dollars will be spent on weatherization. The MOU states that the $12 million will be spent on weatherization projects generally -- there is no territorial limit on

where these funds will be spent. The "community action agencies" (MOU ¶ 19) being given the money are not specified in the MOU. Some or all may have clients in GMP's existing service territory or in that of Vermont's other utilities. The MOU does not state that the agencies all do business exclusively or even primarily within CVPS' service territory. And all of the community action agencies operate outside the jurisdiction of the Board, and their expenditures will not be accountable to the Board. Yet, the MOU states unequivocally that the $12 million in weatherization investments "are qualifying energy efficiency projects" as defined in the CEED Fund, that the $12 million "shall be counted" toward the $20.9 million of required benefit, and that no further Board/stakeholder approval will be needed for the expenditure of this $12 million. MOU ¶ 18, 20; Attachment II, p.3 (first and second paragraphs). The requirement in <u>other</u> paragraphs of the CEED Fund that projects benefit CVPS ratepayers (Attachment II, fourth paragraph), therefore does not apply to the $12 million. In contrast, 100% of the 2007 Efficiency Fund had to be expended in the service territory of the ratepayers who had rescued the company. Docket 7213, Order of 3/26/07, part VI.

<u>E) The Remaining $9.9 million Cannot Provide Sector Equity, Unlike the 2007 Proposal.</u>

The expenditure of $12 million on low-income and nearly low-income weatherization will leave only $9.9 million to spend on commercial and industrial customers and on the large majority of non-low income residential customers, so that either middle-customers will receive little or no benefit, or commercial and industrial customers will receive little or no benefit, or both, unlike the Docket 7213 finding that the program would be structured so that "all" customers would benefit. Hopkins 3/29/12 pp. 120-121. See also

Bradford 4/3/12 pp.50-51, and Silkman 4/3/12, pp.54-55, both testifying that the MOU proposal is further removed from traditional cost-based ratemaking than the Docket 7213 proposal because of distribution of weatherization benefits.

F) The Effect of the MOU Is To Raise Electric Rates In Order to Pay For Thermal Efficiency Investments, Which Was Not Contemplated When the GMP Efficiency Fund Was Approved. In 2007, as set forth above, not only was investment in thermal efficiency not being relied upon but the Board cautioned that if and when GMP were going to rely upon thermal investment they would have a heavy burden of persuasion to meet. By March of 2012, the Department's principal witness on efficiency investments was compelled to agree that this was no longer true. The "effect" of the MOU "is to raise ratepayers' electric rates in order to pay for thermal efficiency improvements." Hopkins, 3/29/12 pp. 121-122. Mr. Hopkins justified this by noting that "in the last few years" the same thing has become true of the GMP efficiency fund. Hopkins, 3/29/12 p.122.

G) There Will Be No Stakeholder and Board Review of $10 to $12 million of the $21 Million Fund, Again Unlike the 2007 Proposal. The entire $12 million must be spent by December 31, 2013, according to MOU ¶ 19, and all investments made prior to that date "shall be counted toward" the required benefit, according to MOU ¶ 20. Therefore there will be no stakeholder review process, and no preapproval by the Board, of the entire $12 million to be invested in weatherization. Commissioner Miller thinks that only the $10 million to be given to the community action agencies should be exempt from Board pre-approval but she agrees that the MOU as written does not make this clear. 4/4/12 pp.94-

95 ("it may need bigger lights around it in the MOU"). As noted above, in 2007 it was contemplated that every dollar spent on the GMP Efficiency Fund would be subject to a stakeholder review process, and require Board pre-approval.

<u>H) The $10 Million May Be Allocated on a First-Come, First Served Basis.</u> The expenditure of the first $10 million may occur on a *first-come first-served* basis to community action agency clients, since there is great need for weatherization and the funds will meet only a small fraction of the need. Miller 3/28/12 pp.87-88. The Board approved the eventual settlement in Docket 7213 only after determining that it no longer involved first-come, first-served allocation of the benefits.

<u>I) CVPS's Shareholders Will Not Be Responsible for Reimbursing Its Ratepayers</u>. Under the Merger Agreement and the MOU, the windfall obligation is being assigned to Gaz Metro. In 2007, GMP remained liable for satisfying the Board's order.

73. Subsequent to the DPS/Petitioner MOU, IBM entered into a settlement with Petitioners. Pet. Cross Ex. 15.

74. The IBM settlement requires Petitioners to provide a bill credit if, at the end of ten years, the proposed $144 million in savings are not realized. This cost will be borne by GMP's shareholder, not ratepayers. Griffin 4/3/12 pp.143-144.

75. However, the IBM settlement treats failure to achieve the $20.9 million in net windfall benefits differently. There is no commitment for GMP's shareholder to provide bill credits, and the shortfall could be funded by investment of additional ratepayer funds. Grffin,

4/3/12 p.145.

D. CVPS Does Not Deny It Received a $100 Million Bail-Out from Ratepayers and Has Paid Over $100 Million in Dividends to Shareholders Since It Received the Ratepayer Bail-Out

76. The Board projected, in its 2001 Order, that ratepayers may end up paying as much as $100 million in excess rates because of CVPS' imprudent decisions. Docket Nos. 6460, 6120, In re Central Vermont Public Service Co., 211 PUR 4th 53, 69.

77. Since the Board issued its order in June of 2001, CVPS has paid its shareholders over $100 million in dividends. AARP Cross Ex. 12.

78. CVPS has not calculated and does not know if the Board's projection that ratepayers may pay $100 million in excess rates because of CVPS' imprudence, in retrospect, turned out to be accurate. AARP Cross Ex. 13.

79. At certain times, the CVPS-Hydro Quebec contract may have been economically beneficial, but that time period was brief. Bradford 4/3/12 pp. 41-42.

CONCLUSIONS OF LAW

The precedents of the Board hold that 100% of the savings from any merger be passed through to ratepayers. In re New England Telephone and Telegraph Company, dba NYNEX, 175 PUR 4th 504, Docket 5900, February 26, 1997.

> The evidence presented by the parties demonstrates that the proposed merger meets all of the standards of review under 30 V.S.A. § 107 that we have enunciated. The proposed merger achieves these standards in large part due to the benefits to both the merged company and to Vermont ratepayers that are expected to arise. These include greater access to capital that will facilitate investment; cost savings through consolidation of Bell Atlantic and NYNEX operations; improved ability to compete; and continued high quality service. We fully expect that the merger and Bell Atlantic/NYNEX's operation in Vermont will secure these benefits for Vermont ratepayers and thus we conclude that NYNEX has met each

> of the standards by which we typically assess mergers.
>
> Nonetheless, we are mindful that Section 107 requires us to find that the merger *will* promote the public good. Although we are convinced of Bell Atlantic/NYNEX's intentions to provide Vermont ratepayers with the anticipated benefits of the merger, we conclude that to find that the merger in fact promotes the public good, we must add conditions to our approval that secure these benefits. With these conditions, which are discussed below, we conclude that the merger promotes the public good.

175 PUR 4th 504 (printed page 15) (underlining added).

> The DPS has urged us to require NET to pass along projected cost savings from the merger during the next NET revenue requirement case or incentive regulation case. We agree with the DPS that any such savings should be directed for the benefit of ratepayers. However, we find it premature to specifically delineate how NET will ensure that these savings are passed to ratepayers.
>
> Nonetheless, we fully expect to review the savings achieved by this merger in future dockets involving NET. This might occur in the context of a cost of service regulation case, or it might occur in a docket examining an alternative form of regulation. In either event, we intend to review whether the one-time costs estimated here were borne out by experience and whether the expected long-term savings materialize. [FN47]We will also examine in such proceedings whether we should impute the anticipated savings into NET's revenue requirement or make other adjustments to reflect the benefits of the merger.

175 PUR 4th 504 (printed page 25) (underlining added). The NYNEX decision involved a merger in which the Vermont investment of the combined companies was approximately three-quarters of a billion dollars – not a "very small" merger, and not a "smaller" merger than this one. Finding 42 (compare Ms. Powell's testimony, supra). The decision reviewed the Board's precedents. Neither the precedents, nor any party, suggested that anything less than 100% of the savings would be allocated to ratepayers.

The Board's precedents also hold that ratepayers are not to be saddled with payment of acquisition premiums. Joint Petition of Vermont Marble Power Division of Omya, Inc., 2011 WL 2433071, Docket No. 7660 (June 10, 2011). Even when requested by the Department to do so, the Board has recently refused. Joint Petition of Central Vermont Public Service Company and Town of Readsboro, 2011 WL 2744871 Docket 7688 (July 8, 2011). The only exception the Board has recognized is that presented by the recent Omya merger, where an asset has value in the non-regulated market that is not recognized in the market for regulated utilities. Unlike the premium in this case, ratepayers in the OMYA case will enjoy the benefits of the actual market value of the generating asset. Real value is added to the service territory. That exception does not apply here. Joint Petition of Vermont Marble Power Division of Omya, Inc., 2011 WL 2433071, Docket No. 7660, supra, Part V.C.1. (pp.28-32).

In Docket 7213, a $62 million acquisition premium was paid. Order of 3/26/07, part G.2. There was no proposal by Gaz Metro to recover any of the acquisition premium from ratepayers, and no permission to do so was granted by the Board.

Acceptance of Petitioners' initial proposal, that the windfall order be satisfied by means of providing $144 million of the projected merger savings, would require the Board to depart from both precedents. Ratepayers would be "repaid" their $20.9 million by providing them with $144 million in savings to which they are already entitled. At the same time, ratepayers would forego receipt of $82 million in savings to which they are entitled under Board precedent. The net "repayment" to ratepayers would add up to a *loss* of $102.9 million in savings, in effect compelling ratepayers to pay an acquisition premium.

Petitioners have urged the Board to depart from its precedents. Ms. Powell, in addition to dismissing the Board's precedents as pertaining only to very small or smaller mergers, has argued that without sharing of savings, business managers will have no incentive to merge companies and achieve economies of scale. Powell PFT p.10; Powell 4/3/12 pp.222-223. Mr. Wilson's prefiled testimony demonstrated the weakness of this argument when applied to a regulated utility with a legally protected monopoly service territory and a legally guaranteed opportunity to earn a fair rate of return. The protected monopoly status and the guarantee constitute one side of the regulatory *quid pro quo*; the preservation of all savings for ratepayers is a key component of the other side. Whether Green Mountain Coffee Roasters, an example cited by Ms. Powell, should be rewarded by allowing its shareholders to profit from merger savings has no bearing on whether Green Mountain Power should be allowed to do so. It is hard to believe that Gaz Metro really made its offer with the understanding that Green Mountain Power will be allowed to profit from merger savings the way that Green Mountain Coffee Roasters does.

The Board's 2001 order required that the windfall proceedings be shared with consumers in addition to benefits otherwise due. Reliance on merger savings fails this test.

As to the Petitioners' rebuttal position, that the investment of additional ratepayer funds in weatherization and efficiency satisfies the 2001 Order, one must cast the English language aside to reach that conclusion. To begin with, the Order on its face explicitly contemplated an "immediate… one-time full-value repayment." It was only if financial hardship would result that this requirement could be modified to extend over time. The concept of raising rates to extract additional funds from ratepayers, investing those ratepayer funds in projects that eventually will have a benefit for ratepayers, and awarding to the company a rate of return on those ratepayer funds, simply cannot be squared with an "immediate… one-time full-value repayment" by shareholders that might be extended in case of financial hardship. The two concepts are opposites.

The Order repeatedly describes its purpose as avoidance of "unjust enrichment of its shareholders." Petitioners attempt to shift the focus entirely to providing a benefit to ratepayers (a benefit to be provided by raising rates again). But the Order's reference to the "unjust enrichment of [CVPS'] shareholders" means that *shareholders* must be disgorged of an unjust benefit so that that benefit can be awarded to ratepayers.

"Unjust enrichment" by definition differs from the concept of compensating a person who has been wronged. The legal remedy called "unjust enrichment" focuses on the money or goods received by one party and on returning *that* money or *those* goods to the person from whom it was taken. Thus, even if the person seeking the remedy has already been compensated for the loss in some other way, that compensation cannot be set off against the benefit. The person who has been unjustly enriched still must hand over the benefit. Vastano v. Killington Valley Real Estate, 2010 VT 12 ¶ 8, 187 Vt. 628, 996 A.2d 170 (distinguishing unjust enrichment from compensation and refusing to apply the compensatory damages rule against double recovery that governs in common law damages claims, because the concept of unjust enrichment focuses on disgorging the unjustly held benefit).

Petitioners' version does nothing to require the shareholders to return anything that *they* possess to ratepayers. Instead, ratepayers are being asked to pay *more of their own money* in rates in order to obtain a future benefit.

Similarly, the Board labeled the fourth element of the mechanism "the specific manner in which ratepayers receive their restitution." Unjust enrichment is a form of restitution; both focus on the value obtained by the defendant rather than on the loss suffered by the plaintiff. In re Estate of Elliott, 149 Vt. 248 n.2, 542 A.2d 282 (1988).

The discussion in 2001 of the actual mechanics corroborates that the value is to be disgorged by shareholders, not involuntarily extracted from consumers and invested for them. Footnote 352 of the GMP Order states: "We expressly declare that the $ 8 million windfall sharing mechanism represents a predefined regulatory obligation accruing to ratepayers, like the customer refunds at issue in the Columbia Gas bankruptcy.*"* A predefined "regulatory obligation *accruing to ratepayers*" does not mean funds taken from ratepayers, added to the ratebase, and *accruing a return for the benefit of shareholders*.

In the final analysis, the statements in the 2001 Order that there would be an "immediate… one-time full-value repayment" by shareholders unless this would cause financial hardship to the company, and that "CVPS's ratepayers shall receive fifty percent of the above-book proceeds of the event," cannot be reconciled with a proposal to take *more* money from ratepayers and invest it in projects that may benefit some of them -- while allowing the company's shareholder to earn a return on that money. CVPS did not appeal the 2001 Order. Today it must comply with it.

Were there any doubt about the conflict between the wording of the 2001 order and use of the CEED Fund to satisfy the Order, Attachment II to Mr. Griffin's testimony (now revised as part of the MOU) resolves this doubt. It specifies that the $20.9 million "benefit" can be satisfied by investment in renewable energy sources and economic development. These measures, while important, are completely unrelated to the unjust enrichment that arose as a consequence of the 2001 Order. Investing in renewable energy and economic development provides little or no benefit to the customers who bailed out the company, and transfers no benefit *from shareholders* to ratepayers. Instead, ratepayer money is being used as if it were an appropriation granted to the Board to dispense in a socially beneficial manner.

Petitioners argue that the Board is bound, in this case, by its 2007 order in Docket 7213. This is a nearly frivolous argument, akin to arguing that because the Board granted a rate increase to GMP, as a result of its HQ imprudence, later in 2001 the Board was legally bound to award a similar increase to CVPS. *Stare decisis*, or respect for precedent, applies to legal principles and not to the application of those principles to specific facts. If the facts of two cases are distinguishable, *stare decisis* does not govern. Young v. Northern Terminals, 130 Vt. 258, 261, 290 A.2d 186, 188 (1972). The facts are not just distinguishable but are in opposition, as set forth above in proposed Findings 72(A)-(I).

Moreover, the concept of *stare decisis* does not compel a court or an agency to abide by a precedent it is convinced was wrongly decided. State v. Willard-Freckleton, 2007 VT 67A ¶ 10, 183 Vt. 26, 949 A.2d 416. The concept calls for respect for precedents; it does not require that precedents be followed. Although the Docket 7213 ruling can and should be distinguished from the facts of this case, AARP respectfully submits that the ruling was wrongly decided. The ruling failed to respect both the explicit wording and the intent of the GMP windfall order. In addition, the strength of the *stare decisis* doctrine is at its lowest ebb when applied to administrative agencies. Consumer Credit Ins. Assoc. v. State, 149 Vt. 305, 308, 544 A.2d 1159, 1161 (1988).

For each of these reasons, the ruling in Docket 7213 should not control the outcome of this case.

Conclusion

The Petition, as originally filed and also as modified by the MOUs executed by the Petitioners, should be rejected. Instead, the Board should add a condition requiring repayment of $20.9 million to ratepayers at closing.

Date: April 23, 2012
Corrected: April 24, 2012

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