

STATE OF VERMONT
PUBLIC SERVICE BOARD

Joint Petition of Central Vermont Public Service)
Corporation, Danaus Vermont Corp., Northern)
New England Energy Corporation for itself and)
as agent for Gaz Métro Limited Partnership and)
Its parents, Green Mountain Power Corporation)
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 Vermont Electric)
Power Company, Inc.)

DOCKET NO. 7770

**PREFILED SURREBUTTAL TESTIMONY OF
MICHAEL H. DWORKIN
ON BEHALF OF
THE DEPARTMENT OF PUBLIC SERVICE**

March 8, 2012

1

2 Q. Please state your name.

3 A. My name is Michael Dworkin

4

5 Q. Are you the same Michael Dworkin who provided direct testimony in this
6 docket on January 10, 2012?.

7 A. Yes.

8 Q. What is the purpose for which you are filing testimony today?

9 A. I wish to respond to certain points raised by the prefiled testimony
10 of Christopher Dutton and Nora Mead Brownell, as well as that of Avram
11 Patt. In that context, it will be helpful to clarify and reaffirm some of the
12 points in my original filing.

13

14 First, I wish to make clear that the intent of my testimony is to set out goals
15 and objectives that are important in the context of Petitioners' proposed
16 mergers and related activities.

17 Of these, three goals are most important:

18 - To allow for continued counterbalance to the influence of a large single-
19 owner block in the governance of Vermont's electricity transmission
20 system;

- 1 - To create a path for consideration of the general good of the state and in
2 particular, the concerns of those affected by transmission-related
3 decisions, even though they may not be parties to specific transactions
4 for the delivery or purchase of power over that system;
- 5 - To open the governance of Vermont's transmission system to a broader
6 range of experience and insights than would otherwise be ensured under
7 the terms of Petitioners' proposal, to give rigor and content to
8 Petitioners' original press releases announcing "public direction" over
9 the governance of Vermont's transmission infrastructure. *See Exhibits*
10 DPS-MHD-1, DPS-MHD-2 and DPS-MHD-3 to today's testimony.

11

12 Importantly, I want to emphasize that there many paths and mechanisms
13 that could be adopted in pursuit of these goals. I set out some of these in my
14 initial testimony and I discuss them further below; however, the important
15 points are the goals themselves, rather than specific choices amongst the
16 several procedures for enhancing those goals.

17 Q. You mentioned the testimony of witness Christopher Dutton. Are
18 there specific aspects of that testimony to which you wish to respond?

19 A. Yes; I would like respond to Mr. Dutton's assertions that my
20 recommendations are:

- 21 - Not needed (partly because of VELCO's practices and partly because it is
22 heavily regulated);

- 1 - Too complex;
- 2 - Too political, and
- 3 - Infeasible because they would require actions by others.

4 Q. Please address those issues:

5 A. First, I will comment upon the assertion that my proposed
6 remedies are unneeded. Mr. Dutton describes at some length the history of
7 the Vermont Electric Power Company (VELCO) noting the value it has
8 contributed to Vermont, mentioning briefly some past problems and
9 asserting that “VELCO performs very well right now. There is almost
10 universal agreement on that point.” Dutton pf. at 24. This assertion,
11 however arguable it may be as to past and present operations, is simply not
12 persuasive in the context of Petitioners’ proposed acquisition and merger.
13 The “if it ain’t broke don’t fix it” argument might have some power in the
14 context of a proposal to preserve the *status quo* absent the merger, but it
15 simply does not address the new world proposed by the merger of
16 Vermont’s two largest electric utilities. Furthermore, almost all of the
17 reforms and practices proposed by Mr. Dutton are voluntary, and could be
18 changed by future decisions of the governance of VELCO or Transco.
19 Neither the current bylaws, the current Articles of Agreement, the current
20 Certificates of Public Good nor the changes proposed by the Petitioners
21 would require maintenance of the favorable aspects of the practices
22 described by Mr. Dutton, and thus, as a matter of good governance, I

1 believe they should be codified. If the Board did not wish to do that in this
2 proceeding, at a minimum the matters necessary to ensure “public
3 direction” continues should be addressed, including evergreening VELCO’s
4 role as manager and prohibiting majority control of VELCO governance in
5 the Petitioners in the event of future acquisition.

6
7 A second strand of Mr. Dutton’s argument is that my proposal is unneeded
8 because VELCO is already highly regulated. This argument is in some
9 ways similar to the position that AT &T took in anti-trust litigation prior to
10 its restructuring; it has sometimes been summed up as “being regulated
11 means never having to say you’re sorry.” My direct testimony outlines
12 several reasons why decisions about transmission infrastructure have effects
13 that go well beyond areas of direct regulation.

14
15 Next, I turn to the argument that my recommendations are too complex.
16 The answer to this is straightforward. My recommendations, if adopted
17 could be implemented in a manner which is either less complex or no more
18 complex than that proposed by Petitioners. For example, if the “general
19 good” directors were appointed through the “VLITE” seats and VLITE
20 itself were governed by a Board that included government or public
21 appointees, the result would be a corporate structure similar to that
22 proposed by Petitioners without any additional complexity. If Petitioners

1 had filed a plan with direct involvement for “general good directors,” it
2 could have been done with a structure simpler than their actual filing, thus
3 meeting Mr. Dutton's “simplicity” criterion
4

5 Third, I have considered Mr. Dutton’s assertion that the process I
6 recommend would be unduly political, even though it is broadly similar to
7 that used to appoint justices to the Vermont Supreme Court or members to
8 the Public Service Board. The proposal was meant to ensure that
9 competent individuals insulated from day-to-day and short-term political
10 considerations have a role on the public’s behalf in VELCO governance, to
11 allow the long-term concerns of the general public to have some influence
12 in a manner that is consistent with stability and predictability. In terms of
13 political sensitivity, the most significant difference between my proposal
14 and the judicial and quasi-judicial system in place in Vermont, would occur
15 only if multiple appointments were made over a short time period, which
16 could be addressed easily by phased appointments.
17

18 Fourth, Mr. Dutton suggests that my recommendations are infeasible
19 because they would require actions by more parties than Petitioners alone.
20 In response to Interrogatory 3 propounded by the Petitioners on January 24,
21 2012, I outlined one mechanism for addressing the timing of actions by
22 others:

1 I would anticipate that any required actions would take place following
2 Board approval of this transaction, if such approval is obtained, and would
3 be a condition or conditions of a Certificate of Public Good. Recognizing
4 that some aspects of the conditions would likely require action by other
5 bodies, the Board should require that the Petitioners accept such actions
6 when taken. The commitment to do so would be filed within 30 days of a
7 Board Order and should precede completion of proposed transaction; actual
8 actions should not be required prior to closing.
9

10 However, importantly, this is only one of many mechanisms that could be
11 used to pursue this goal. The VLITE private non-profit itself could be used
12 to effectuate this, through initial Board appointments made by Petitioners at
13 the direction of or approved by the Board, for example. Competency
14 review could be accomplished by the VSPC, an entity already established
15 by the Board.

16 Q. Which aspects of the testimony of the witness Nora Mead
17 Brownell do you wish to address?

18 A. Ms. Brownell mentions access to capital, she suggests that other
19 corporate governance measures would provide a less intrusive remedy to
20 protect against "the tyranny of the majority," she is concerned that 'general
21 good' directors would become a different class of directors with duties in
22 conflict with the company overall, and she suggests that "principles of
23 corporate governance" require that directors act "only in the interests of the
24 company and its shareholders." Brownell pf. at 18 line 19.

25
26 Q. What are your responses to these concerns?

1 A. As to access to capital, I note that the Federal Regulatory Energy
2 Commission (FERC), in setting rates for use of transmission systems,
3 already sets a rate which both reflects the ordinarily-determined cost of
4 capital and also includes a specific incentive to attract investment in
5 transmission systems. There is no reason why investors will turn away from
6 these opportunities, which are currently--and expectedly--set at levels
7 attracting significant amounts of capital. Ms. Brownell, and to some extent,
8 Mr. Dutton, suggest that public involvement in governance of VELCO may
9 deter capital investment. Given the success of municipal, cooperative, and
10 public utility district bodies in attracting necessary investment, I do not find
11 their contentions persuasive. Indeed, the movement of stock prices
12 immediately after the merger was announced showed exactly the opposite
13 effect, at least as to equity investors, rising rapidly when Petitioners
14 announced their proposal, including multiple press releases explicitly
15 committing to divest themselves of about one-third of VELCO in favor of
16 an entity "under public direction." See,
17 [http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ti](http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=CV:US)
18 [cker=CV:US](http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=CV:US), last checked March 4, 2012 and Exhibits 1, 2 and 3 to today's
19 testimony.

20
21 Ms. Brownell also suggests that other governance mechanisms such as
22 "supermajority" or "majority of the minority" voting provisions would

1 mitigate the concerns raised by the proposed merger. *See* Brownell pf. 1-
2 20-12 at 46 lines 2-9. I agree that such mechanisms might provide some
3 protection to minority owners. However, they would not fulfill the offer of
4 “public direction” as a part of VELCO governance or address the goal of
5 opening VELCO’s board deliberations to a more wide-ranging set of
6 participants. Indeed, the very fact that neither of these widely-recognized
7 mechanisms was included in Petitioners’ original proposal illustrates
8 strongly the value of opening the governance of the transmission system to
9 new insights and experiences--going beyond those of the Transco owners
10 and their appointees.

11
12 I have also considered Ms. Brownell’s assertion that “principles of
13 corporate governance” require that directors act “only in the interests of the
14 company and its shareholders.” This is a concern that overlaps with her
15 feeling that ‘general good’ directors might respond to different “masters”
16 than other board members. Brownell pf. at 18 line 19 and at 40, lines 5-6.

17
18 In practice, any allocation of Board seats to specific parties could present
19 this tension; Petitioners seem to find this unacceptable when public
20 members are considered, while accepting it when separate business entities
21 are granted the right to appoint Directors. All Directors of course would
22 have fiduciary responsibility to VELCO; all Directors should have a more

1 sophisticated understanding of fiduciary responsibility than merely short-
2 term financial gain for shareholders. *See, e.g., "On the Proper Motives of*
3 *Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus*
4 *to Join Your Board)," Delaware Journal of Corporate Law, Vol. 28, pp. 1-*
5 *25, 2003.*

6 A corporation certified under a statute requiring that it promote the general
7 good (like VELCO) will, in the long run, lose much or all of its financial
8 value if it is found to no longer serve the general good. Thus a larger
9 reading of fiduciary duty can and should consider consistency with that
10 requirement. Indeed, the American Law Institute Principles of Corporate
11 Governance: Analysis and Recommendations explicitly state in Section
12 2.201 (b) :

13 Even if corporate profit and shareholder gain are not thereby enhanced, the
14 corporation, in the conduct of its business:

15
16 (1) Is obliged, to the same extent as a natural person, to act within the
17 boundaries set by law;

18
19 (2) May take into account ethical considerations that are reasonably
20 regarded as appropriate to the responsible conduct of business; and

21
22 (3) May devote a reasonable amount of resources to public welfare,
23 humanitarian, educational and philanthropic purposes.
24

25 The ALI comments note that that a long-term view of corporate benefit may
26 help recognize that most such measures also will, or may, benefit the
27 corporation in the long run; but they also list them as a general economic

1 enhancement in order to make explicit the authority of Directors to
2 consider, investigate, and occasionally act upon such concerns. These are
3 reasons similar to the reasons why I recommended explicitly including
4 “promotion of the general good” in the articles of the company, a purpose
5 that is also consistent with the reasons cited by the Public Service Board
6 when it issued VELCO’s Certificate of Public Good in 1956. *See Exhibit*
7 *VELCO-CLD-1 at 14.*¹

8 Q. Are you familiar with the recommendations of the Washington
9 Electric Cooperative?

10 A. Yes, in particular I have seen that Washington Electric Cooperative
11 recommends that the Board consider ownership of transmission assets
12 within the state of Vermont by a cooperative or state-owned entity.

13 Q. Do you have any response to its proposal??

14 A. I have addressed most of WEC’s testimony in my direct testimony.
15 Acquisition of Transco’s assets would not address the governance issues
16 raised by the merger and upon which I have focused, unless the acquisition
17 were at such a level to allow state control, which would require
18 investments now and in the future at a high level. I have reviewed the
19 state’s financial advisor testimony in the legislature on this topic (*See*

¹ Ms. Brownell also raises a number of legal issues concerning the discretion of directors under Vermont’s law of corporations. These matters are most appropriately dealt with in legal briefs and I expect they will be address by the Department of Public Service in that context.

1 Exhibit DPS-MHD-4). Moreover, I have noted GMP's testimony in
2 rebuttal through Mary Powell that the Transco assets are not for sale and
3 formed an important portion of the value to the acquiring company in this
4 proposed merger, meaning that forcing sale of Transco assets through this
5 docket or by way of eminent domain may simply have the effect of
6 stopping the merger which otherwise allows for value to be achieved for
7 Vermont ratepayers.

8 Q. Are there any final points that you would like to make?

9 A. Yes. Petitioners' rebuttal testimony, as well as the direct testimony
10 of some of the other parties in this docket, raised concern that any
11 implementation of the goals I have put forth would not be achievable, or are
12 not appropriate, for this merger proceeding. I would like to emphasize that
13 the goals that I suggest could be achieved in any of several ways, including
14 the manner I outlined in direct testimony. Perhaps the easiest way to
15 achieve the objectives I outlined would be to require the divestiture to the
16 private, nonprofit corporation, VLITE, in the approximately 38% amount I
17 had suggested for "general good" directors, and to require that the initial
18 board members of that entity appointed by the incorporator include public
19 servants or their designees. That nonprofit entity would then exercise
20 shareholder rights on the VELCO board and would, if Petitioners are
21 committed as a condition of the merger approval to support it, be permitted

1 representational membership on the VELCO Board in proportion with the
2 ownership percentage.²

3 Meanwhile, this Board, which created the Vermont System Planning
4 Committee, could add the VLITE entity to the sectors represented on the
5 VSPC and amend the VSPC's responsibility to include consultation with
6 the VLITE board in the selection of the VLITE representational Board
7 members on VELCO. In that manner, even if this Board took up a separate
8 docket to address other VELCO governance issues raised by the
9 Department and other parties in this proceeding, the merger if approved
10 would effectuate the necessary divestiture and governance changes.

11
12 I note that any future structure or purpose of the VLITE entity itself would thereafter be
13 under the hands of the initial board, not Petitioners, and could serve in the furtherance of
14 state objectives related to transmission, energy security, environmental, sustainable
15 energy choices, etc. in a role similar to that the Vermont Sustainable Jobs Fund serves
16 with respect to its mission. That, coupled with the conditions preventing VELCO
17 removal as manager of Transco and preventing as a condition of continuing a CPG
18 related to the merger any majority ownership of VELCO by the Petitioner in the future,
19 would ameliorate the concerns raised by the merger without any other required process.

² If so, it might be appropriate for VLITE to adopt a practice of doing business as ("dba") a title such as "Vermont Transmission and Sustainability Trust" in order to emphasize that its concerns would go beyond low-income issues alone.

1 These or other mechanisms could be used to achieve the overall goals of:

2 - creating a meaningful “swing-vote” between the influence of the various
3 owners of the transmission assets in Vermont, through input of those
4 vested with a public purpose;

5 - creating a path to ensure consideration of the general good of the state and
6 in particular the concerns of those affected by transmission-related
7 decisions, even though they may not be parties to specific transactions for
8 the delivery or purchase of power over that system, and

9 - to open the governance of Vermont’s transmission system to a broader
10 range of experience and insights than would otherwise be ensured under
11 the terms of Petitioners’ proposal.

12 Q. Does that conclude your testimony?

13 A. Yes, at this time.