

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Amended Joint Petition of Central Vermont)
Public Service Corporation, Danaus Vermont)
Corp., Gaz Métro Limited Partnership, Gaz)
Métro inc., Northern New England Energy)
Corporation for itself and as agent for Gaz Métro)
Limited Partnership's parents, Green Mountain)
Power Corporation and Vermont Low Income)
Trust for Electricity, Inc. for approval of: (1) the) Docket No. 7770
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.)

REPLY BRIEF OF THE PETITIONERS

Petitioners¹ submit this Reply Brief in response to the briefs filed AARP, SED, WEC, and Omya. In their Proposed Decision and Initial Brief, the Petitioners demonstrated that the Merger promotes the general good, will not impair competition, and should be approved. The Petitioners cataloged the evidence adduced by thirty-four witnesses, over eight days of hearings, demonstrating the significant savings and improved service that the Merger will occasion. The Petitioners also provided uncontroverted evidence that these benefits would not be possible if CVPS were acquired by any other purchaser.

None of the other ten parties that filed briefs oppose the Merger. Only four raise ongoing issues for the Board's resolution: AARP (windfall sharing), SED (VELCO governance), WEC (sub-transmission tariffs), and Omya (assurance regarding CVPS Rate 5).² Petitioners respond as follows to these claims.

¹ Capitalized terms used in this Reply Brief have the meaning defined in the Initial Brief.

² The issues raised in the initial briefs filed by VEC, VPPSA, BED, and VELCO have been resolved by the Shareholder's Agreement and Letter Agreement filed with the Board on May 2, 2012. The initial briefs filed by the Department and IBM both support the Merger, subject to the conditions agreed upon in their respective MOUs with Petitioners.

I. PETITIONERS' PROPOSALS SATISFY THE WINDFALL SHARING OBLIGATION.

CVPS's windfall sharing obligation requirements are identical to those imposed on GMP in Docket 6107. Specifically, CVPS must provide \$21 million (adjusted for inflation) in value to customers in excess of what they would have been entitled to at law at the time of the triggering event: CVPS's acquisition at a price above book value.³ The evidence shows that customers would be entitled to approximately \$3 million as a result of CVPS's acquisition.⁴ Accordingly, Petitioners' proposal to merge CVPS with GMP several months after the acquisition of CVPS, and to guarantee \$144 million in customer savings as a result of the Merger, constitutes significant value to which ratepayers are not entitled as a result of the triggering event and that is far in excess of \$21 million. Additionally, Petitioners propose to deliver another \$25 million in value to CVPS customers through the CEED Fund. The CEED Fund is substantially similar to the GMP Efficiency Fund, which the Board ruled satisfied GMP's identical windfall sharing obligation in Docket 7213.

AARP's Brief does nothing to detract from these conclusions. Instead, AARP: (1) incorrectly characterizes Vermont precedent as precluding any sharing of merger savings; (2) argues without justification that the 7213 Order should be overturned; and (3) ineffectively attempts to distinguish the CEED Fund from the GMP Efficiency Fund.

For the reasons described below, AARP's arguments should be rejected.

A. AARP Incorrectly Claims that Vermont Precedent Precludes Savings Sharing.

AARP claims that Board precedent requires that all savings be flowed through to customers and therefore the Merger savings cannot be used to fulfill the windfall sharing obligation.⁵ AARP's claim that Vermont precedent precludes sharing of merger savings, however, is incorrect. As set forth in Petitioners' Initial Brief, the Board has permitted sharing of savings as a means for inducing electric utilities to undertake cost-saving mergers, despite the

³ Docket 6460/6120 at 58-59.

⁴ Tr. 3/21/12 at 167 (Reilly).

⁵ AARP Brief at 12-13, 23.

associated costs and risks, in at least three cases.⁶ AARP's Brief fails to acknowledge these decisions, much less explain why they are not applicable.⁷

The single case that AARP cites, *In re New England Telephone & Telegraph Co.*,⁸ is off-point for two reasons. First, the NYNEX Order did not require a contemporaneous rate adjustment or prospective rate plan to reflect merger savings. As a result, contrary to AARP's claims, all post-merger savings were retained by the merged company at least until the next rate case occurred, when an analysis of the post-merger cost of service could be established. Savings in that docket were thus given to the acquiring company until new rates were established, just like the Board cases cited in Petitioners' Initial Brief at footnote 59.

Second, the NYNEX Order is plainly distinguishable on its facts. Unlike this case, a large portion of post-merger savings in the NYNEX Order came from layoffs. Moreover, telecommunications mergers have less precedential value on the issue of savings sharing generally. Because the telecommunications industry is subject to far more competition than the retail electric industry in Vermont, telecommunications merger analyses focus primarily on the merger's impact on competition.⁹ The Board devotes far less analysis to the rate impacts of telecommunications mergers because rates are constrained by marketplace forces to a much greater degree.

AARP also relies improperly on testimony from Mary Powell and Lawrence Reilly to support its proffered legal conclusions.¹⁰ The Board has previously observed that it will not give witness testimony "weight as legal conclusions."¹¹ This is especially appropriate here where both witnesses made clear they could not give legal opinions.¹² AARP's Brief also incorrectly

⁶ Petitioners' Brief at 11-12 (citing the mergers of: CVPS and Rochester Electric Light & Power, CVPS and Allied Power and Light Company, and Citizens Utilities and Franklin Electric Light Company).

⁷ AARP also suggests that by satisfying the windfall sharing obligation out of merger savings (which AARP incorrectly contends must flow 100% to customers), Petitioners will effectively be able to indirectly recover a portion of their acquisition premium. AARP Brief at 11, ¶ 43, 24. Yet AARP fails to rebut the testimony of Dr. Wilson and Mr. Hevert that such indirect recovery is appropriate in these circumstances under the so-called "benefits exception" or to provide any other authority demonstrating that Petitioners' savings sharing proposal is inappropriate on these specific facts. Wilson pf. at 30; tr. 3/27/12 at 71-72, 75-77 (Wilson); tr. 4/4/12 at 141-44 (Miller); tr. 3/26/12 at 90-93 (Hevert).

⁸ NYNEX Order (cited at AARP Brief at 23).

⁹ NYNEX Order at 19-34.

¹⁰ AARP Brief at 6-7.

¹¹ *Joint Petition of Vermont Electric Power Company, Inc.*, Docket No. 7373 (Vt. Pub. Serv. Bd. Aug. 21, 2008) at 2.

¹² Tr. 4/3/12 at 159-60 (Reilly) (testifying at the start of his cross examination that his participation in the Merger deal was as a business executive and that he is not licensed to practice law in Vermont); tr. 4/3/12 at 229 (Powell) (testifying that she is not an attorney). Following Ms. Powell's cross examination, counsel for GMP

claims Ms. Powell testified that “while there is precedent, the precedent is not useful.”¹³ This is a mischaracterization. Ms. Powell did not testify that the precedent was not “useful.” She testified that there is no precedent in Vermont for electric mergers of comparable size.¹⁴ Accordingly, AARP’s attempt to use Ms. Powell’s testimony to bind Petitioners to specific legal conclusions should be disregarded.¹⁵

Finally, AARP does not directly rebut Petitioners’ claim that the triggering event for the windfall sharing obligation is the acquisition of CVPS. Instead, AARP incorrectly asserts that none of the benefits of this unique merger proposal to combine CVPS and GMP should be taken into account in determining whether the windfall obligation has been satisfied. This assertion ignores the guarantee of savings, the commitment to no layoffs or forced relocations, the conveyance of VELCO shares to VLITE, or any of the other customer-value commitments made by GMP and Gaz Métro. The suggestion that these benefits are not “in addition to any benefits to which ratepayers would be entitled under existing law”¹⁶ simply ignores both the facts and the law.¹⁷ AARP’s objections to Petitioners’ first windfall sharing proposal should therefore be rejected.

B. There is No Basis to Overturn the 7213 Order.

AARP, which relies exclusively on this Board’s ruling in Docket 6460/6120 to support its windfall sharing arguments, makes the remarkable claim that the Board should ignore its later

advised the Board that in follow up to the legal questions posed to Ms. Powell, Petitioners would brief the Vermont precedent for savings sharing. Tr. 4/4/12 at 83-84 (Zamore).

¹³ AARP Brief at 7 ¶ 24.

¹⁴ Tr. 4/3/12 at 223-24 (Powell).

¹⁵ *Joint Petition of Vermont Electric Power Company, Inc.*, Docket No. 7373 (Vt. Pub. Serv. Bd. Aug. 21, 2008) at 2 (“However, this is not to suggest that we will construe the understandings or perceptions of a witness about the law as anything other than that witness’s understandings or perceptions (no matter how phrased) or that we will give them weight as legal conclusions or opinions.”).

AARP also mischaracterizes Mr. Reilly’s testimony, claiming he testified that both “CVPS and Gaz Métro knew that there was no precedent in Vermont for any merger savings with shareholders.” AARP Brief at 6. Mr. Reilly, however, made no representation as to Gaz Métro; instead, his statements were limited to CVPS, and therefore are not relevant to GMP’s proposal for satisfying the windfall sharing obligation. Tr. 4/3/12 at 196, 210 (Reilly).

¹⁶ Docket No. 6107 Order on Motion to Amend (Feb. 2, 2001) at 2.

¹⁷ AARP’s claim that “the acquisition standing alone would not have had a likelihood of regulatory approval” is unsupported. AARP Brief at 29. The only evidentiary support cited by AARP, Dr. Wilson’s direct testimony, does not support AARP’s proposition. Wilson pf. at 36-37 (“it is not clear that acquisition approval would be as likely attainable if it were to be evaluated on a stand-alone basis without any merger benefits”) (underlining added). AARP’s claim is also belied by approval of GMP’s acquisition by Gaz Metro in 2007 and by the benefits to the state of Gaz Métro’s twenty-seven year track record in Vermont.

order in Docket 7213 because it was “wrongly decided.”¹⁸ The Board’s ruling in 7213 deserves greater deference than that accorded the 6460/6120 Order because it interpreted the earlier order and applied the interpretation to facts virtually indistinguishable to this case. The Board in 7213 expressly interpreted the windfall sharing obligation as *not* requiring a direct refund to customers.¹⁹ This ruling is fully consistent with the Board’s ruling in 6460/6120 Order, which expressly left open the specific mechanism for satisfying the windfall sharing obligation.²⁰ On these grounds alone, the claim that GMP must provide a direct refund to customers must be rejected.

The aspects of the 7213 Order that AARP disputes, moreover, are purely legal interpretations of the windfall sharing requirements, which are identical to those in the 6460/6120 Order. These conclusions do not involve any application of facts, as would, for example, issues related to the specific design of the CEED Fund. The doctrine of *stare decisis* therefore supports a determination that the conclusions of the 7213 Order not be disturbed.²¹ This doctrine is rooted in the principle that certainty, stability, and predictability in the law are of paramount importance.²² For this reason, the Vermont Supreme Court has observed that more than mere disagreement is required to overturn precedent, especially where, as here, the decision at issue is of relatively recent vintage.²³

AARP provides no cogent reason why the Board should overturn the legal conclusions in the 7213 Order. AARP simply contends that “[t]he ruling failed to respect both the explicit wording and the intent of the GMP windfall order.”²⁴ This is precisely the type of “mere disagreement” that the Vermont Supreme Court has identified as insufficient to overturn precedent.²⁵

Furthermore, in both the 6460/6120 and 6107 Orders, the Board expressly ruled that “clarity and predictability are desirable” with respect to the implementation of the windfall

¹⁸ Although the Petitioners have not done so, an equally compelling argument could be made that the Board’s clear precedent in Dockets 6170 and 6460/6120 were “wrongly decided” and that the windfall sharing obligation should itself be ignored.

¹⁹ 7213 Order at 41, 44.

²⁰ 6460/6120 Order at 59.

²¹ *State v. Carrolton*, 2011 VT 131 ¶ 15.

²² *State v. Carrolton*, 2011 VT 131 ¶ 15.

²³ *State v. Berini*, 167 Vt. 565, 566 (1997) (mem.).

²⁴ AARP Brief at 29.

²⁵ *State v. Berini*, 167 Vt. 565, 566 (1997) (mem.). AARP itself aggressively litigated and lost the same issue on summary judgment in Docket 7213. 7213 Summary Judgment Order at 8.

sharing obligations.²⁶ AARP's request that the Board overturn the 7213 Order would result in two identical windfall sharing obligations being implemented differently. This violates the Board's express directive that the windfall sharing obligations should be implemented clearly and predictably.

Finally, AARP is both disingenuous and incorrect in suggesting that the 7213 Order should have less precedential value because it was based on a settlement between AARP and GMP.²⁷ The Board denied AARP's motion for summary judgment on the issues of rate recovery and upfront payment prior to its settlement with GMP.²⁸ As the Board is well aware, IBM continued to litigate these issues all the way up until issuance of a final order, even after the AARP-GMP settlement.²⁹ Put simply, the 7213 Order established the GMP Efficiency Fund as a lawful and appropriate way to comply with the windfall sharing obligation after full litigation of the issues on the merits, including the same arguments advanced by AARP in this case. The 7213 Order is accordingly entitled to full precedential weight.

C. Contrary to AARP's Claims, the CEED Fund Satisfies All of the Requirements Articulated by the Board in the 7213 Order.

Petitioners proposed a CEED Fund in rebuttal testimony as an additional means for satisfying the windfall sharing obligation in response to the Department's testimony. The CEED Fund is very similar to the GMP Efficiency Fund approved by the Board in Docket 7213. The two plans, include (1) a "but for" test for selecting projects, (2) a minimum investment requirement, (3) rate recovery of investments, (4) measurement and reporting methodology, (5) a seven-year deadline for achieving the required level of benefits, (6) Board approval of the methodology for calculating net benefits, and (7) a plan to address the consequences for failure to achieve required investment or benefits.³⁰

The CEED Fund contains all the core requirements of the GMP Efficiency Fund and improves upon the benefits it provides to customers in two significant respects. First, the benefit required to be delivered to CVPS customers under the CEED Fund is 1.2 times in excess of the

²⁶ Docket 6460/6120 Order at 65; Docket 6107 Order at 119.

²⁷ See Petitioners' Initial Brief at 5, 7.

²⁸ Docket 7213 Summary Judgment Order at 8.

²⁹ Docket 7213 Final Order at 8.

³⁰ Griffin reb. pf. at 11-12.

windfall sharing obligation, i.e., \$25 million.³¹ Second, the CEED Fund provides for a meaningful investment in low income weatherization—the area the Department views as the greatest need for CVPS customers.³²

AARP claims that these improvements distinguish the CEED Fund from the GMP Efficiency Fund in nine respects.³³ As shown below, none of AARP's claims demonstrate that the CEED Fund lacks any of the necessary elements of the GMP Efficiency Fund or that the improvements should be rejected.

1. Thermal Efficiency Provides Electric System Benefits.

AARP incorrectly contends that “[t]he evidence is undisputed that there are no electric system benefits from investing in thermal efficiency.”³⁴ This is contradicted by Dr. Hopkins' testimony:

MR. DUMONT: Is it your position that there is evidence in this case that the 12 million dollars set aside for weatherization in the MOU, there's evidence that that will produce some electric savings?

A. I believe that it will. Yes.

Q. That wasn't my question.

A. Sorry. The -- well I guess there's an attachment at the end of my response to your discovery questions that I answered yesterday based on data from the weatherization program about electrical energy savings that they have achieved over the last four years, and I assume that, should that become evidence here, then there would be evidence in this proceeding that electrical savings would be achieved in those programs.³⁵

The attachment Dr. Hopkins referenced (AARP Cross Exhibit 32) indicates that participants in the weatherization programs under the CEED Fund could expect annual reductions in their electric bills of at least \$78 on average and would also yield system benefits for all customers/ratepayers.³⁶ Accordingly, AARP's claim should be disregarded.

³¹ Tr. 4/4/12 at 146 (Miller).

³² Tr. 4/4/12 at 146 (Miller).

³³ AARP Brief 18-22 (Proposed Findings ¶ 72(A)-(I)).

³⁴ AARP Brief at 18.

³⁵ Tr. 3/29/12 at 81 (Hopkins) (underline added).

³⁶ Exh. AARP-Cross-32, Attachment 1; tr. 3/39/12 at 92 (Hopkins).

2. The Board-Approved GMP Efficiency Fund Includes the Potential for Thermal Efficiency Projects.

AARP inaccurately claims that all but the low income pilot portion of the GMP Efficiency Fund was “intended to provide electric system benefits.”³⁷ To the contrary, the 7213 Order expressly acknowledged that the GMP Efficiency Fund could include “energy efficiency measures directed at non-electrical uses,” but that GMP would have to justify inclusion of these types of projects.³⁸ The Board has subsequently approved thermal investments in connection with its annual review of the GMP Efficiency Fund, finding that GMP has satisfied its burden to show that the thermal investments at issue benefit customers.³⁹ AARP’s attempt to distinguish the CEED Fund on this basis, therefore, also fails.

3. The Deemed 1.2 Benefit Is a Conservative Estimate of Thermal Investments.

AARP inaccurately asserts that the CEED Fund has a lower expected benefit as compared to the GMP Efficiency Fund because “the CEED Fund will produce a societal benefit only 1.2 times the investment.”⁴⁰ The lower expected benefit, however, is limited to the thermal efficiency programs to be implemented in 2012 and 2013 and, for those programs, is based on the conservative nature of the estimate, as explained by Dr. Hopkins.⁴¹ Commissioner Miller similarly explained that “the purpose of the 1.2 multiplier was . . . to find a conservative lower than expected amount in order to both streamline the process as well as to benefit from the work and calculations that had been done over the years understanding the value of thermal efficiency measures.”⁴²

AARP is also wrong in asserting that the 7213 Order requires the Board to use the “electric benefits” test (a subset of the “societal benefits” test, as opposed to the societal benefits test itself) to calculate the required benefit to CVPS customers under the CEED Fund. The GMP

³⁷ AARP Brief at 19.

³⁸ 7213 Final Order at 39.

³⁹ *E.g.*, Exh. AARP-Cross-30, exh. AARP-Cross-31; *Petition of Green Mountain Power Corp.*, Docket No. 7687 (Vt. Pub. Serv. Bd. Jan. 20, 2011); *Petition of Green Mountain Power Corp.*, Docket No. 7850 (Vt. Pub. Serv. Bd. Mar. 29, 2012); tr. 4/4/12 at 99-100 (Miller) (“What I can tell you is that thermal efficiency measures were contemplated to be included, and I’m sure you and others in the room know what the Board found on that. They found that it would be appropriate to include those so long as the utility could meet its, I think it said, heavy burden to ensure that those measures created value, and in the years since then the thermal efficiency measures have indeed been included, approved by the Board, and have been shown to meet a substantial -- have been shown to make a substantial value to the customers.”).

⁴⁰ AARP Brief at 19.

⁴¹ Tr. 3/29/12 at 130 (Hopkins); *see* tr. 4/3/12 at 66-67 (Griffin).

⁴² Tr. 4/4/12 at 102 (Miller).

Efficiency Fund and the CEED Fund both provide that “projected and achieved net benefits for efficiency investments . . . will be calculated using the measurement methodology that VEIC currently uses in administering EVT projects.”⁴³ This is the societal benefits test.⁴⁴ The 7213 Order, as well as the subsequent Board orders reviewing and approving the GMP Efficiency Fund, have all used the societal benefits test to calculate the benefit delivered to customers under the GMP Efficiency Fund.⁴⁵

4. AARP Incorrectly Claims That Weatherization Investments Will Occur Outside of CVPS Service Territory.

AARP is incorrect in asserting that the CEED Fund does not require that the \$12 million in Weatherization be spent in CVPS service territory.⁴⁶ Mr. Griffin expressly testified otherwise:

MR. DUMONT: Is it your testimony that the 12 million in weatherization set forth in the MOU will directly benefit CVPS customers?

A. Yes.

Q. Tell us why.

A. Because what I just stated, we will have the process in place to assure that the customers receiving those weatherization benefits are located in CVPS territory.

Q. Is that in the MOU or in your attachment that the weatherization will only be conducted in CVPS former service territory? Or are you just adding that today?

A. I don't recall if it's in the document or not. I'm indicating that we will do that.

Q. What are you basing your answer on?

A. Excuse me?

Q. What are you basing the answer you just gave me on?

⁴³ Exh. Petitioners-DPS-1, Attachment 1 at 4.

⁴⁴ EEU Policy 1029: Efficiency Cost-Effectiveness Analysis Policy and Practice. The societal benefits test includes avoided electricity costs, avoided marginal electricity supply costs (including energy generation and generating, distribution, and transmission capacity), energy efficiency savings, resource costs (avoided oil, propane, and natural gas costs), customer operations and maintenance and capital costs, and environmental externalities. Tr. 3/22/12 at 25-26 (Plunkett). The electric benefits test, on the other hand, is limited to avoided electricity costs, avoided marginal electricity supply costs (including energy generation and generating, distribution, and transmission capacity), and energy efficiency savings, including electric thermal savings. Tr. 3/22/12 at 25-26, 48 (Plunkett).

⁴⁵ 7213 Final Order at 19 ¶¶ 67-68, 35; exh. AARP-Cross-26 at 1-3, 9; exh. AARP-Cross-30 at 1-2, 9; exh. AARP-Cross-31 at 3, 4, 10.

AARP's suggestion that the Board should use the electric benefits subset appears to be based on a statement by the Board in the 7213 Order explaining that thermal investments would receive higher scrutiny because “the system benefits of reduced electrical usage that flow to all customers would not occur.” 7213 Final Order at 39. This statement cannot be fairly read to require a change in the standard for measuring benefits, and, indeed, the Board has continued to use the societal benefits test in connection with the GMP Efficiency Fund, including with respect to thermal efficiency investments, as well as in the Energy Efficiency Utility docket more generally. Exh. AARP-Cross-26 at 1-3, 9; exh. AARP-Cross-30 at 1-2, 9; exh. AARP-Cross-31 at 3, 4, 10.

⁴⁶ AARP Brief at 19.

A. It's my understanding of the deal that we will verify that this -- that these weatherization improvements take place in CVPS territory. I think that's an important consideration to both the department and the company.⁴⁷

5. The Board Can Address Concerns Regarding Sector Equity Through Rate Design.

AARP claims that the CEED Fund “cannot provide sector equity” because there will be “only \$9.9 million to spend on commercial and industrial customers and on the majority of non-low income residential customers.”⁴⁸ AARP’s claim does not demonstrate, however, that the CEED Fund spending cannot assure that the benefits “received by each customer class accrue in rough proportion to that class’s revenue.”⁴⁹ Instead, GMP will comply with its CEED Fund obligations and GMP’s compliance will be fully reviewed as a result of the monitoring and reporting obligations of the CEED Fund.

6. Contrary to AARP’s Claims, the Board Did Not Reject Rate Recovery of Thermal Investments in the 7213 Order.

AARP incorrectly claims that raising “electric rates in order to pay for thermal efficiency investments [] was not contemplated when the GMP Efficiency Fund was approved.”⁵⁰ In fact, the Board specifically ruled in the 7213 Order that GMP would “bear the burden of showing that [efficiency measures directed at non-electrical uses] benefit ratepayers if it should seek to recover those costs in electric rates.”⁵¹ In addition, GMP has since obtained rate recovery of the thermal investments included in the GMP Efficiency Fund.⁵²

The use of electric rates to pay for thermal efficiency is also consistent with state policy.⁵³ For example, 10 V.S.A. § 581 provides that “[i]t shall be the goals of the state to . . . increase weatherization services to low income Vermonters by expanding the number of units weatherized, or the scope of services provided, or both, as revenue becomes available in the home weatherization assistance trust fund.” Similarly, under 30 V.S.A. §§ 235, 255 programs

⁴⁷ Tr. 4/3/12 at 69-70 (Griffin) (underlining added). Mr. Griffin also testified that Petitioners would prospectively report to the Board regarding delivery of Weatherization benefits to CVPS customers, and Petitioners have proposed such a requirement as a condition of the Merger’s approval. Tr. 4/3/12 at 68-70 (Griffin); Petitioners’ Proposed Decision at 66, ¶ 12.

⁴⁸ AARP Brief at 20.

⁴⁹ 7213 Order at 40.

⁵⁰ AARP Brief at 21.

⁵¹ 7213 Final Order at 39.

⁵² Tr. 3/29/12 at 122 (Hopkins).

⁵³ E.g., 10 V.S.A. § 581(5); 30 V.S.A. § 235.

that support whole building heating and process energy efficiency and facilitate appropriate fuel switching are funded from proceeds from Vermont's sale of RGGI allowances, which, in turn, are funded through a tax on electricity generators. The state policy evidenced by these statutes provides further justification for rate recovery of thermal investments where consistent with weatherization goals.

7. Petitioners Propose a Level of Review and Approval for CEED Fund Investments That Is Substantively Consistent With That Under the GMP Efficiency Fund.

It is true that the \$10 million invested in Vermont's Weatherization Program will not be subject to a stakeholder process under the CEED Fund Plan. The additional \$2 million in thermal efficiency allocated for customers who do not qualify for Vermont's Weatherization Program, however, will.⁵⁴

The exemption from the stakeholder process for the \$10 million ensures that the Weatherization Program investments are made earlier and in greater amounts. Commissioner Miller testified that "[e]arlier expenditures and greater amounts by the utility are more beneficial to Vermonters as a whole, including CVPS customers, than if those expenditures are made more slowly over time; and while the efficiency fund allows for, if approved as set forth in the MOU, expenditures over time, it, unlike the prior docket, requires a significant upfront, within the first 18 months or so, investment, and we believe that to be important and to create greater value to CVPS customers."⁵⁵ Commissioner Miller also testified that the \$10 million in Weatherization investments will have significant policy benefits, including: relieving pressure on low-income heating funding such as LIHEAP and the Crisis Fund, and on the low income program established under Docket No. 7535.⁵⁶

As to Board process, the Board has the opportunity review and approve the concept of Weatherization investments in ruling on the CEED Fund proposal in this Docket.⁵⁷ The structure of the Vermont Weatherization Program itself provides for another layer of review. Under this Program, the Office of Economic Opportunity oversees the various community action agencies,

⁵⁴ Tr. 4/4/12 at 94-95 (Miller).

⁵⁵ Tr. 4/4/12 at 100-01 (Miller).

⁵⁶ Tr. 4/4/12 at 146-47 (Miller).

⁵⁷ GMP has also proposed that it prospectively report on the Weatherization investments, and the Department agreements that a Board process of reporting and review in connection with the Weatherization investments is appropriate. Tr. 4/3/12 at 68-70 (Griffin); tr. 4/4/12 at 92 (Miller).

including those within CVPS's service territory.⁵⁸ The community action agencies within CVPS territory then disburse the Weatherization investments according to detailed rules regarding eligibility and acquisition of services.⁵⁹ Therefore, AARP's claim should be disregarded.

8. The Weatherization Investments Do Not Present Any Unjust Discrimination Concerns.

AARP wrongly claims that the \$10 million may be allocated on a first-come, first-serve basis, and thus could be viewed as unjustly discriminatory.⁶⁰ AARP's claim is undercut by the facts that: (1) the \$10 million in Weatherization investments will be disbursed by the community action agencies according to pre-set rules regarding eligibility and acquisition of services; and (2) the Vermont Weatherization Program is not a pilot (similar to the Efficiency Fund low income pilot) but rather a mature program run by of the Office of Economic Opportunity that has been in place for years.⁶¹ Accordingly, there are no unjust discrimination concerns in this case.

9. The Assignment of the Windfall Sharing Obligation Under the Merger Agreement Is Immaterial Under the 7213 Order.

AARP apparently argues that another difference between this case and the 7213 Order is that the CVPS-Gaz Métro Merger Agreement assigns the windfall sharing obligation to Gaz Métro, whereas the GMP-Gaz Métro merger agreement in Docket 7213 did not.⁶² AARP's argument is vitiated by the 7213 Order, which expressly recognized "the pivotal requirement [of the windfall sharing obligation] was the mandate that ratepayers receive the benefit, not that it come from a specific source."⁶³ The claimed distinction between the two merger agreements is therefore immaterial.⁶⁴

⁵⁸ Tr. 4/4/12 at 89 (Miller).

⁵⁹ Tr. 4/4/12 at 89-90 (Miller).

⁶⁰ AARP Brief at 22.

⁶¹ Tr. 4/4/12 at 97 (Volz, Miller).

⁶² AARP Brief at 22.

⁶³ 7213 Final Order at 40.

⁶⁴ AARP also inaccurately characterizes the 6460/6120 Order. This Board, in the 6460/6120 Order, expressly recognized that allowing rate recovery of the HQ-VJO contract was more favorable to ratepayers than rate disallowance, which would have placed CVPS in an unstable financial position and "likely increase[d] costs for CVPS and its ratepayers." 6460/6120 Order at 4. The purpose of the order was not, as AARP asserts, to prevent unjust enrichment made possible by "the sacrifices of ratepayers." Moreover, AARP's assertion that the HQ-VJO contract was economically beneficial for only a "brief" time is unsupported by the record. The sole evidence cited by AARP on this subject came from Mr. Bradford, who acknowledged that he did not perform any specific analysis of the HQ-VJO contract. His testimony cannot support any finding regarding the economics of this contract.

II. SED'S PROPOSALS TO ALTER VELCO'S GOVERNANCE AND STRUCTURE SHOULD BE REJECTED.

SED's Brief makes various proposals to alter VELCO's governance and structure, all transparently intended to secure SED a seat on the VELCO board of directors, even though SED owns only 1.35% of VELCO's voting shares.⁶⁵ Many of these proposals were addressed in Petitioners' Initial Brief, which sets forth the three Merger conditions Petitioners believe are necessary to address post-Merger GMP control of VELCO and Transco.⁶⁶ To the extent that SED's proposals go beyond these three proposed conditions, they are unnecessary and should be rejected.⁶⁷

SED identifies two additional arguments not addressed in Petitioners' Initial Brief. First, SED claims that Board approval under 30 V.S.A. § 104 is required to the extent that the Board imposes conditions that would require Transco to amend its organizational documents.⁶⁸ Although 30 V.S.A. § 104 applies to corporations' articles of incorporation whereas Transco is a limited liability company governed by an operating agreement, a stipulation submitted in Docket 7174 provided that "VELCO, on its behalf and on behalf of the LLC, ... has agreed that they will be forever estopped from claiming or asserting that the Board and the Department have less jurisdiction over the [Transco] than the Board and the Department have over a corporation that is subject to the provisions of Chapter 3 and Chapter 5 of Title 30."⁶⁹ For this reason and in implementation of Paragraph 13 of the DPS MOU, GMP will take actions necessary to facilitate Board approval of the necessary amendments to the Transco Operating Agreement.

Second, SED appears to argue that the Board's Order in Docket No. 7174 enabling the creation of Transco should be revisited.⁷⁰ In that Order, the Board found, based on evidence and with participation by the Department and various distribution utility owners (including SED

⁶⁵ Burt pf. at 8.

⁶⁶ Petitioners' Brief at 20-21 ([1] Petitioners shall transfer to VLITE of 38% of the total of VELCO Class B voting common stock and 31.7% of the total of VELCO Class C non-voting common stock; [2] Petitioners shall take all actions necessary to assure that they cannot unilaterally remove VELCO as the managing member of Transco or amend Section 9.3 of the Transco Operating Agreement; and [3] neither CVPS nor GMP will increase its ownership share of VELCO in any amount or take steps that would result in a dilution of the percentage ownership of VELCO by VLITE without Board approval).

⁶⁷ Petitioners' Initial Brief at 21.

⁶⁸ SED Brief at 3.

⁶⁹ *Re Vermont Electric Power Company, Inc.*, Docket No. 7174 (Vt. Pub. Serv. Bd. June 20, 2006) ("7174 Order"), Stipulated Proposal for Decision at ¶ 24.

⁷⁰ SED Brief at 8-9.

itself), that allowing Transco to organize itself as a Vermont limited liability company would occasion significant tax savings and resulting benefits for Vermont electric consumers.⁷¹ SED, however, did not provide any evidence in this case supporting such a fundamental change in the organizational structure of the Vermont transmission system. SED erroneously suggests that it is somehow necessary that VLITE become a member of Transco. Nothing in the Board's Order in Docket 7174 requires this result for VELCO governance or for any other reason.

III. THE BOARD SHOULD REJECT WEC'S PROPOSED REQUIREMENT THAT GMP HOLD IT HARMLESS FROM SUB-TRANSMISSION RATE INCREASES.

WEC requests that the Board effectively assume FERC's jurisdiction over wholesale rates, by conditioning Merger approval on GMP's agreement to hold it harmless from transmission rate increases.⁷² It is well-settled, however, that states do not have authority over rates for sub-transmission.⁷³ In its order approving the Merger, for instance, FERC stated that GMP must seek its approval of a consolidated transmission rate schedule in a follow-on FERC proceeding and that WEC "will have the opportunity to challenge any proposed rate increase at that time."⁷⁴ More generally, the filed-rate doctrine provides that only FERC may regulate rates for wholesale and transmission service.⁷⁵ For this reason, when setting retail electric service rates, states are required to accept as reasonable the FERC-established rates for transmission and wholesale electric service.⁷⁶

The cases cited by WEC do not support its position. For example, WEC cites FERC's order in the NStar/Northeast Utilities merger case for the principle that states may properly address the impact of a merger on customers or ratepayers.⁷⁷ The cited portion of the NStar/Northeast Utilities merger order, however, consists of FERC's conclusion that the merger would not affect state jurisdiction over retail electric service after the merger had been

⁷¹ 7174 Order.

⁷² WEC Brief at 8.

⁷³ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁷⁴ Exh. WEC-Cross-14 at 20.

⁷⁵ *See Montana-Dakota Utilities v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

⁷⁶ *Narragansett Electric Co. v. Burke*, 381 A. 2d 1358 (R.I.1977).

⁷⁷ WEC Brief at 9.

completed.⁷⁸ The decision provides no basis for a claim that states may require adjustment to rates for wholesale electric service and transmission.⁷⁹

WEC's request is also deficient in other respects. WEC would be subject to a rate transmission rate increase even if the Merger did not occur, and therefore it would be inappropriate to preclude GMP from seeking any rate increase.⁸⁰ Nor does WEC acknowledge that the FERC Order approving the Merger already requires GMP to hold it harmless from an increase in rates caused by Merger-related transaction costs (including the recovery of any portion of the acquisition premium in transmission rates) for a period of five years.⁸¹

Accordingly, WEC's request to condition the Merger's approval on sub-transmission rates should be denied.

IV. PETITIONERS' PROPOSALS SATISFY OMYA'S CONCERNS.

Omya's Brief seeks: (1) confirmation that Petitioners will serve Omya on CVPS's Rate 5 Tariff until September 1, 2017 (as agreed in the Docket No. 7660 MOU); and (2) assurance as to what rates will apply after its service under CVPS Rate 5 ends on September 1, 2017.⁸²

Petitioners' proposals in the case fully address these requests.

GMP has repeatedly affirmed that it does not intend to terminate or otherwise affect the Docket No. 7660 MOU agreement that Omya shall take service on the CVPS Rate 5 tariff for six years.⁸³ Moreover, the DPS MOU expressly provides that all non-residential tariffs shall be integrated after the Board approves a new fully allocated rate design, to be requested no later than October 15, 2014, and that any affected customer (including Omya) should have the opportunity to intervene and participate fully in the rate design proceeding.⁸⁴ Finally, the DPS MOU expressly states that its provisions (including allowance for the integration of non-residential tariffs after a rate design proceeding to begin no later than October 15, 2014) shall not affect the Docket No. 7660 MOU.⁸⁵

⁷⁸ *In re NStar Northeast Utils.*, 136 FERC 6106 ¶¶ 65-66 (2011).

⁷⁹ *In re National Grid*, 117 FERC ¶ 61,080, ¶ 54 (2006); *see also NStar*, 131 FERC ¶ 61,098, ¶ 18 (2010).

⁸⁰ Otley reb. pf. at 7.

⁸¹ Exh. WEC-Cross-14 at 19.

⁸² Omya Brief at 3.

⁸³ Griffin reb. pf. at 10; exh. Petitioners-DPS-1 ¶ 35.

⁸⁴ Griffin reb. pf. at 9; exh. Petitioners-DPS-1 ¶¶ 30, 35.

⁸⁵ Exh. Petitioners-DPS-1 ¶ 35.

Petitioners' assurances that Omya shall take service on CVPS's Rate 5 Tariff until September 1, 2017, and that Omya may participate in the rate design proceeding adequately satisfy the concerns set forth in Omya's Brief.


V. CONCLUSION

For the reasons stated in this Reply Brief, as well as in Petitioners' Proposed Decision and Initial Brief, the acquisition of CVPS by NNEEC, the merger of GMP and CVPS, the acquisition by VLITE of a controlling interest in VELCO, the savings sharing provisions of the DPS MOU, the CEED Fund, and the other transactions described in the Amended Petition promote the general good of the state, will not impair competition, and should be approved.

Dated this 4th day of May 2012.

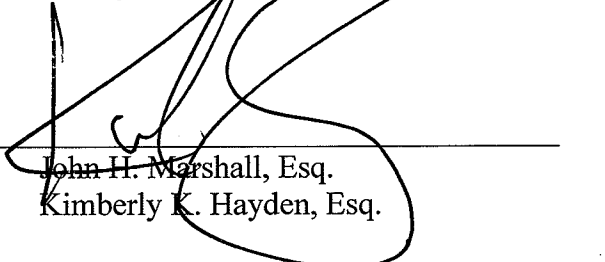
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DANAUS VERMONT CORP., GAZ MÉTRO LIMITED
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