STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7770

Amended Joint Petition of Central Vermont Public Service Corporation ("CVPS"), Danaus Vermont Corp., Gaz Métro Limited Partnership ("Gaz Métro"), Gaz Métro inc., Northern New England Energy Corporation ("NNEEC") for itself and as agent for Gaz Métro's parents, Green Mountain Power Corporation ("GMP") and Vermont Low Income Trust for Electricity, Inc. ("VLITE"), for approval of: (1) the merger of Danaus into and with CVPS; (2) the acquisition by NNEEC of the common stock of CVPS; (3) the amendment to CVPS's Articles of Association; (4) the merger of CVPS into and with GMP; and (5) the acquisition by VLITE of a controlling interest in Vermont Electric Power Company, Inc.	)

Order entered: 8/3/2012

ORDER RE AARP'S MOTION PURSUANT TO V.R.C.P. 52 AND 59

I. Introduction

On June 27, 2012, AARP filed a motion with the Vermont Public Service Board ("Board") pursuant to Rules 52(b), 59(a) and 59(e) of the Vermont Rules of Civil Procedure (the "AARP Motion"). AARP requests that the Order of the Board entered in this docket on June 15, 2012 ("June 15 Order"), be vacated and re-opened, that amended and new findings of fact be made, and that an amended Order be issued that directs the payment to ratepayers of Central Vermont Public Service Corporation ("CVPS") of $20.9 million in cash or bill credits at

closing.[1] In general, AARP contends that the June 15 Order is against the weight of evidence and is founded upon clear error of fact and law. In this Order, the Board denies the AARP Motion for the reasons discussed below.

II. Positions of the Parties

AARP raises several issues concerning the June 15 Order in support of its motion. AARP contends that the June 15 Order fails to address the plain wording and intent of the Board Order in 2001 in Dockets 6460/6120[2] that provides for ratepayers to share in any above-book-value proceeds shareholders may receive in a future sale of CVPS. In support of this contention, AARP challenges (a) the Board's conclusion in its June 15 Order that the Dockets 6460/6120 Order can be satisfied by the net benefits obtained through a charge on ratepayers, (b) the failure of the Board to require CVPS shareholders or Gaz Métro Limited Partnership ("Gaz Métro"), as assignee, to disgorge any unjust enrichment received from the sale of CVPS, (c) the Board's failure to address or adopt AARP's proposed findings that the Dockets 6460/6120 Order contemplated an immediate, one-time, full-value repayment to ratepayers, (d) the Board's reliance on, and failure to reconsider, its 2007 Order in Docket 7213[3] in determining that the benefits derived from the proposed CEED Fund represented an acceptable windfall-recovery mechanism under the Dockets 6460/6120 Order.

AARP also argues that the Board's conclusions as to the benefits of the proposed merger of CVPS and GMP and the risks of requiring an immediate and full payment to CVPS ratepayers were not adequately supported and were against the weight of evidence. In addition, AARP

---

1. The acquisition of CVPS shares was closed on June 27, 2012. For purposes of this Order, we will construe the AARP Motion as requesting that the Board order a cash payment or bill credit be made at or before the closing of the merger of CVPS with Green Mountain Power Corporation ("GMP").

2. Docket 6460/6120, *Tariff filing of Central Vermont Public Service Corporation requesting a 7.6% rate increase, to take effect December 24, 2000, and Tariff filing of Central Vermont Public Service Corporation requesting a 12.9% rate increase, to take effect July 27, 1998*, Order of 6/26/01 (the "Dockets 6460/6120 Order").

3. Docket 7213, *Joint Petition of Green Mountain Power Corporation, Northern New England Energy Corporation (NNEEC), as subsidiary of Gaz Metro, and Northstars Merger Subsidiary Corporation (Northstars) for approval of: (1) the merger of Northstars into and with Green Mountain Power; (2) the acquisition by NNEEC of the common stock of Green Mountain Power; and (3) the amendment to Green Mountain Power's Articles of Incorporation*, Order of 3/26/07 (the "Docket 7213 Order").

asserts that the Board erred in its findings of fact and law about certain elements of the CEED Fund. Furthermore, AARP requests that the Board clarify its June 15 Order to state that the order does not preclude future review of CEED Fund investments under the prudence and used-and-useful tests. Finally, AARP asks the Board to amend its findings and conclusions to clarify that AARP's position has been that ratepayers be made whole, whether by CVPS or its assignee.[4]

The Petitioners filed their opposition to the AARP Motion on July 12, 2012 (the "Petitioners' Opposition), arguing that the motion should be denied in its entirety because it does not raise any legitimate issue as to the findings or conclusions of the Board in the June 15 Order.[5] The Petitioners contend that the AARP Motion fails to meet the standards necessary for the Board to reconsider its findings or conclusions because the AARP Motion restates prior arguments without demonstrating Board error and raises new arguments that were not previously raised. The Petitioners also assert that the substance of the claims in the AARP Motion are without merit.

In a separate filing on July 12, 2012, the Vermont Department of Public Service ("Department") joined in the Petitioners' request that the AARP Motion be denied in its entirety, but did not offer any supporting arguments because it found the Petitioners' Opposition to be fully responsive to the ARRP Motion. None of the other parties to this proceeding filed responses to the AARP Motion.

AARP filed a reply to the Petitioners' Opposition on July 23, 2012. In its reply, AARP challenged assertions in the Petitioners' Opposition that AARP had not preserved certain of its arguments and objections.

---

4. This request results from AARP's desire to clarify a statement (that was not a finding) regarding AARP's position in this proceeding made on page 18 of the June 15 Order under the heading "Positions of the Parties – AARP." That statement reads: "AARP insists that under the terms of that Order, CVPS's shareholders are required to provide an up-front payment to customers in the event CVPS is sold." The Board interpreted AARP's statements of its position in its briefs to include a payment made by an assignee, and understands AARP's position in this proceeding to be that CVPS ratepayers should receive a $20.9 million payment whether such payment comes from CVPS shareholders, CVPS, or Gaz Métro, as assignee. Accordingly, given the absence of any misunderstanding, it would not appear that the Board needs to amend any of its findings or conclusions in the June 15 Order.

5. The Petitioners consist of: CVPS; GMP; Gaz Métro; Gaz Métro inc.; Vermont Low Income Trust for Electricity, Inc.; Danaus Vermont Corp; and Northern New England Energy Corporation for itself and as agent for Valener Inc., Noverco, Inc., Caisse de dépôt et placement du Québec, Capital d'Amérique CDPQ Inc., Trencap L.P., Enbridge Inc., and IPL System Inc.

III. Standards of Review

Pursuant to V.R.C.P. 52(b), as applied to Board proceedings under Board Rule 2.103, the Board may amend its findings or make additional findings and amend an Order accordingly upon a party's motion made within 10 days after the entry of the Order. Similarly, V.R.C.P. 59(e) permits a party to move to alter or amend an Order within the same time period. Under V.R.C.P. 59(a), the Board, on a party's motion, may grant a new hearing "to all or any of the parties and on all or part of the issues for any of the reasons for which new trials or rehearings have heretofore been granted in actions at law or in suits at equity." The Board also may open the Order, "take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry" of a new Order.[6]

IV. Discussion

In this proceeding, the Board has a statutory duty to determine whether the transactions proposed by the Petitioners promote the public good and the general good of the State of Vermont.[7] As stated in our June 15 Order, "it is our judgment that the greater public good lies in securing the total benefits of the Proposed Transaction, even if it means accepting some terms that are not necessarily ideal."[8] Among other determinations, the Board concluded that the net benefits derived from rate-recoverable investments made by the CEED Fund represented an acceptable mechanism for providing the windfall-recovery amounts set forth in the Dockets 6460/6120 Order. The Board reached this conclusion after weighing the relevant evidence in the record, reviewing prior Board orders, and balancing various benefits and concerns in the context of the Proposed Transaction.

---

6. V.R.C.P. 59(a).

7. 30 V.S.A. §§ 107 (acquisitions of controlling interests) and 109 (mergers).

8. June 15 Order at 151. The "Proposed Transaction" encompasses the following elements: (1) the acquisition by Gaz Métro, through Northern New England Energy Corporation, of all the common stock of CVPS by the merger of Danaus Vermont Corp. into and with CVPS; (2) the acquisition by Vermont Low Income Trust for Electricity, Inc. ("VLITE") of controlling interests in Vermont Electric Power Company, Inc. ("VELCO"), Vermont Transco LLC, and Vermont Electric Transmission Company, Inc. through the transfer by CVPS of VELCO common stock to VLITE; (3) the subsequent merger of CVPS into and with GMP; and (5) certain related transactions, acquisitions of controlling interests, governance document amendments, and proposals as described in the findings of this Order. In this Order, the term "Proposed Transaction" should be understood to include the terms of the various settlements that some of the parties have entered into with the Petitioners. *See* June 15 Order at 4 (fn. 1).

As detailed in the June 15 Order, the Board reached its determination with respect to the CEED Fund for a variety of reasons, including: the large and likely enduring economic benefits for ratepayers from the proposed merger of CVPS and GMP that are unique to an acquisition of CVPS by Gaz Métro; the substantial similarities of the CEED Fund to the GMP Efficiency Fund which we determined in the Docket 7213 Order was an acceptable mechanism for providing the windfall-recovery amounts to GMP ratepayers even though investments by the fund would be recoverable in rates; the reasonable expectation created by the Docket 7213 Order that the Board would find the CEED Fund to be an acceptable means of providing windfall recovery in the context of the Proposed Transaction; and the potential risk of endangering the Proposed Transaction and jeopardizing the benefits of a combination of CVPS and GMP if the Board were to substantially change the economic terms of the Proposed Transaction.

A. Benefits of the Proposed Transaction and Possible Risks to the Proposed Transaction of Requiring a $20.9 Million Payment to Ratepayers at Closing

AARP argues that the evidence and the Board's findings do not support the Board's conclusions as to the magnitude of the benefits of the Proposed Transaction and the risks of endangering the Proposed Transaction if the Board were to require a $20.9 million payment to CVPS ratepayers at closing. With respect to the economic benefits of the transaction for ratepayers, ARRP contends that the $144 million of guaranteed rate benefits are not a sufficient benefit for ratepayers to justify the Board's concern about endangering the Proposed Transaction if it were to require a $20.9 million payment to CVPS ratepayers.[9]

We first note that the benefit alone that CVPS ratepayers will derive from their share of the $144 million of guaranteed rate benefits significantly exceeds the $20.9 million cash payment or rate credit that AARP advocates. More importantly, however, as we emphasized in the June 15 Order, the Proposed Transaction's principal economic value to retail electric customers in Vermont does not derive from the $144 million in guaranteed rate benefits but rather it comes from the opportunity to realize operational efficiencies that lead to permanent cost reductions and rate benefits.[10] As the Board found, the merger of GMP and CVPS is expected to generate as

---

9. AARP Motion at 8.
10. June 15 Order at 90.

much as $500 million of savings over a twenty-year period.[11] Furthermore, if the projected operational savings are realized and endure, ratepayers will long benefit from electric rates that will be at least 5.82 percent lower than those rates otherwise would have been.[12]

In support of our conclusions about the actual and anticipated benefits of the Proposed Transaction, we made specific findings in the June 15 Order about GMP's projections and expectations of future savings and of the permanence of such savings.[13] Neither AARP nor any other party challenged the evidence supporting these projections and expectations during this proceeding. Moreover, the June 15 Order highlighted a substantial reason for crediting GMP's projections and expectations, namely its commitment to provide $144 million of guaranteed rate benefits if its savings projections are not met.[14] To our knowledge, such a guarantee is unprecedented in Vermont utility regulation.[15]

AARP also disputes the Board's findings and conclusions with respect to the risks to the Proposed Transaction if the Board were to require a cash payment or rate credit to CVPS ratepayers of $20.9 million.[16] In AARP's view, the Board's concerns about the effect the imposition of this cost would have on the willingness of the Petitioners to effect the transactions are not supported by the evidence.

AARP argues that the Board did not give due consideration to testimony by CVPS's witness at the technical hearings. On cross-examination, CVPS's witness stated his belief that CVPS shareholders had already paid the windfall-recovery amount based on the presumption that the windfall-recovery amount was priced into bids for CVPS and that the resulting bids for CVPS shares were $21 million lower than they otherwise would have been.[17] However, this statement must be evaluated in light of the other evidence provided by CVPS and the other Petitioners that formed the basis for the Board's finding that:

---

11. June 15 Order at 47, finding 159.
12. June 15 Order at 4 and 91.
13. *See* findings 159 and 166 in June 15 Order at 47 and 48.
14. June 15 Order at 4 and 91; *also, see*, findings 190 to 193 at 51-52.
15. June 15 Order at 8.
16. AARP Motion at 11.
17. Tr. 3/21/12 at 159-60 (Reilly).

> Both Fortis and Gaz Métro were aware of the Board's Order in Docket 7213 that allowed GMP to satisfy the Docket 6107 windfall-recovery provisions through the benefits provided to customers from rate-recoverable investments in energy efficiency measures.[18]

Given the awareness of both these bidders of the Docket 7213 Order, the theory that the windfall-recovery amount of $20.9 million was priced into their bids is not credible to us. We find it much more likely that Gaz Métro and Fortis, Inc. had a reasonable expectation during the bidding process, based on the Docket 7213 Order, that the Dockets 6460/6120 Order could be satisfied without incurring significant additional direct or indirect cost.[19] Such an expectation also guided Gaz Métro's undertaking in the CVPS acquisition agreement to comply with, or to enter into an arrangement that is deemed by the Board to comply with or satisfy, the Dockets 6460/6120 Order.[20]

In further support of its argument that the Board incorrectly weighed the evidence related to the risks to the Proposed Transaction, AARP contends that Gaz Métro could not withdraw from its agreement with CVPS if the Board were to require a $20.9 million cash payment or rate credit to CVPS ratepayers. Though there may be merit to AARP's interpretation of the relevant provisions of the agreement governing Gaz Métro's acquisition of CVPS, these provisions are subject to other reasonable interpretations, as well. These differences in interpretation could potentially result in litigation – a risk both parties to the acquisition agreement acknowledged during the course of this proceeding.[21] In our judgment, this litigation risk could result in the loss of the larger benefits of the Proposed Transaction.

The Board's analysis in weighing the benefits and risks in this matter is guided by its statutory obligation to make determinations of public good. When balancing the significant actual and potential permanent savings benefits for ratepayers, which are unique to the Proposed

---

18. June 15 Order at 79, finding 346. Reference to "the Docket 6107 windfall-recovery provisions" is to applicable sections of the following Board order in 2001 that was applicable to the 2007 sale of GMP: Docket 6107, *Tariff filing of Green Mountain Power Corporation requesting a 12.9% rate increase*, to take effect on June 22, 1998, Order of 1/23/01 (the "Docket 6107 Order").

19. *See* June 15 Order at 7, 124-125 and 129.

20. *See* Exh. Pet.-Joint-2 at 41.

21. Tr. 4/3/12 at 158, 162-63 (Reilly); Petitioners' Brief at 8. *See, also,* Petitioners' Opposition at 10; June 15 Order at 125.

Transaction, against the risks and benefits associated with requiring a one-time $20.9 million cash payment or rate credit to CVPS ratepayers, we find it prudent to be conservative and cautious before too readily dismissing the risks to the Proposed Transaction that might arise from imposing additional costs on Gaz Métro, the only potential acquirer of CVPS who can deliver the unique benefits of a CVPS/GMP merger to Vermont ratepayers.[22]

We recognize that AARP as well as many CVPS ratepayers may disagree with our assessments of the relative benefits and risks, or they may be less risk-averse and more willing to take a modest risk of jeopardizing the Proposed Transaction, but, in the end, it is our duty to make this judgment based on the evidence before us in this proceeding and the public good. Even if the Board were to consider only the interests of CVPS ratepayers in regard to the windfall-recovery issue, it is clear that the actual and potential rate benefits that are unique to the Proposed Transaction are far in excess of the benefits to such ratepayers if the Board were to interpret its Dockets 6460/6120 Order to require an immediate one-time cash payment or credit of $20.9 million to these ratepayers. If the parties had abandoned the Proposed Transaction as a result of the Board requiring that a $20.9 million payment be made to CVPS ratepayers, then CVPS ratepayers would get neither the larger benefits of the Proposed Transaction nor the $20.9 million payment.

B. The Docket 7213 Order and the Dockets 6460/6120 Order

AARP contends that the Board erred in concluding that the Dockets 6460/6120 Order can be satisfied by the net benefits obtained through rate-recoverable investments made by the CEED Fund and in relying on the Docket 7213 Order to reach that conclusion. AARP argues for a number of reasons that the Docket 7213 Order was wrong in determining that the net benefits of rate-recoverable efficiency investments constitute an acceptable return to ratepayers that satisfies the 2001 windfall-recovery orders. In AARP's view, the Board was obligated in this docket to reconsider the soundness of the Docket 7213 Order and failed to do so.

In opposition, the Petitioners argue, among other things, that the Board was not obligated to reconsider the soundness of the Docket 7213 Order in reviewing the Proposed Transaction. In

---

22. June 15 Order at 7 and 123-126.

the alternative, they observe that the Board, by performing similar analyses in the June 15 Order and the Docket 7213 Order, effectively re-examined the soundness of the Docket 7213 Order in reaching its conclusions about the CEED Fund. Accordingly, the Petitioners maintain that, through this analysis, the Board reaffirmed the Docket 7213 Order.[23]

We understand that AARP strongly disagrees with the Board's interpretation, analysis and applications of the Board's 2001 windfall-recovery orders. In essence, however, AARP is seeking to overturn and challenge the soundness of the Board's decision in Docket 7213 in this proceeding after having previously reached a settlement and electing not to litigate that decision as a party to the Docket 7213 proceeding in 2007.[24] Although AARP is fully within its rights to take a different position in this proceeding than it did in the Docket 7213 proceeding, we note that in choosing not to challenge the Docket 7213 Order in 2007, AARP made its task in this proceeding more difficult given the awareness of the Docket 7213 Order among bidders for CVPS and the expectation by such bidders that they could assume responsibility for the windfall-recovery mechanism without incurring significant direct or indirect costs.

Furthermore, while advocating for the Board to reconsider and reject its Docket 7213 Order as wrongly decided, AARP seems to mistake its interpretation of the Dockets 6460/6120 Order for a legally enforceable claim.[25] Based largely on a footnote in the Docket 6107 Order, AARP argues that Dockets 6460/6120 Order essentially created a trust for holding the windfall-recovery funds and that a trust standard is applicable in determining how that order may be satisfied. Based largely on the arguments that the Dockets 6460/6120 Order "was the result of a hotly contested trial" and contained "explicit requirements that were more detailed and more concrete than 'general parameters' or 'goals'," AARP asserts that the Dockets 6460/6120 Order "deserves and requires at least as much respect as a contract."[26] As Petitioners observed in their opposition, "this claim is little more a repetition of [AARP's] earlier claims that the Board was bound by the Docket 6460/6120 Order" that the Board addressed in the June 15 Order.[27] The

---

23. Petitioners' Opposition at 4-5.
24. *See* June 15 Order at 116 and 126-128.
25. AARP Motion at 6 and 18-20.
26. AARP Motion at 19.
27. Petitioners' Opposition at 15.

standards proposed by AARP to determine when a Board order "deserves and requires at least as much respect as a contract" have little merit, are applicable to a large number and wide range of Board orders, and would severely restrict the Board's ability to consider the public good in light of future developments and specific circumstances and contexts.

In any case, as the Board discussed in the June 15 Order, the Dockets 6460/6120 Order left open for future determination the issue of how the windfall-recovery amounts would be provided to CVPS ratepayers.[28] Based on the evidence, Board precedent and all the relevant circumstances, we concluded in the June 15 Order that the CEED Fund represented "an acceptable mechanism for providing the windfall-recovery amounts set forth in Dockets 6460/6120, notwithstanding that the CEED Fund investments are recoverable in rates."[29]

The June 15 Order specifically acknowledges AARP's claim "that the Board's decision in Docket 7213 was wrongly decided because it failed to respect both the explicit wording and the intent of the Docket 6107 Order" as it related to windfall recovery.[30] We did not find AARP's claim persuasive. In the June 15 Order, we extensively discussed both the Dockets 6460/6120 and the Docket 7213 Order and the basis on which we concluded that, for purposes of the Dockets 6460/6120 Order, the CEED Fund was an adequate windfall- recovery mechanism, even if it was not a perfect or ideal one.[31]

Furthermore, in the June 15 Order, we stated that the Petitioners and the Department "had reasonable cause to believe that the Board would find the CEED Fund to be an acceptable means of providing windfall recovery in the context of the Proposed Transaction" because of the precedent established in the Docket 7213 Order.[32] More specifically, we concluded that Gaz Métro's conduct in the bidding process was probably affected by its knowledge of the Board's determination that the windfall-recovery mechanism in Docket 7213 was an acceptable means of

---

28. June 15 Order at 121. In interpreting its 2001 windfall-recovery orders, the Board put more weight on the express reservation of the windfall-recovery mechanism for future determination in such orders than on AARP's claim, based on wording in the 6107 Order, that an immediate full payment of the windfall-recovery amount is required unless such payment would create undue financial strain. *See* AARP Motion at 4-5.

29. June 15 Order at 122.

30. June 15 Order at 127.

31. *See* June 15 Order at 114-139 and 7-8.

32. June 15 Order at 7.

providing windfall-recovery amounts to ratepayers. Because of this awareness, Gaz Métro was "unlikely to have entered the bidding process for CVPS with the expectation that the costs of the acquisition would be increased by $20.9 million as a consequence of providing the windfall-recovery amount related to the acquisition in the place of CVPS's current shareholders."[33]

In the end, the Board's analysis and interpretation of its prior orders must be guided by its fundamental statutory obligation to determine the effect on the public good. As we pointed out in the June 15 Order, the Board's policy role to determine the public good requires a flexible appreciation of the particular context and all the circumstances that may be relevant to a specific matter put before the Board for its approval.[34] We expressly observed in the June 15 Order that:

> Any proposals in this proceeding to provide the windfall-recovery amount of $20.9 million . . . should be seen in the context of the larger guaranteed benefits to ratepayers of $144 million, the even greater anticipated benefits from the merger, and the relative costs of the acquisition for the acquirer.[35]

In rejecting AARP's view that the Docket 7213 Order was wrongly decided and that the Dockets 6460/6120 Order mandated a $20.9 million immediate payment to CVPS ratepayers, the Board specifically compared the anticipated benefits to ratepayers from the merger of CVPS and GMP with the benefits of such a one-time payment of $20.9 million. We concluded that "it is not in the public interest to risk long-term annual savings of 5.82 percent in the hope of attaining a one-time savings of less than 7 percent."[36]

We note that the Petitioners, in fact, have taken the position from the beginning of this proceeding that GMP's commitment to provide $144 million of guaranteed rate benefits in connection with the merger of CVPS and GMP satisfies the Dockets 6460/6120 Order because it

---

33. June 15 Order at 124-125. See, also, June 15 Order at 129:

> we now nonetheless conclude that the CEED mechanism, especially in light of the reasonable regulatory reliance interest created by the Board in Docket 7213, achieves the objectives the Board set out when it established the windfall-recovery concept eleven years ago.

AARP does not appear to address the reliance interest based on the expectation created by the Docket 7213 Order in its motion.

34. June 15 Order at 83-84 and 128.

35. June 15 Order at 123.

36. June 15 Order at 125-126.

will provide direct benefits to ratepayers far in excess of the applicable windfall-recovery amounts. As stated in the June 15 Order:

> The Petitioners contend that the acquisition of CVPS and the subsequent merger of the two companies three months later should be seen as two separate, independent transactions when interpreting the windfall-recovery provisions of Dockets 6460/6120 (and, in particular, the requirement that the benefits that provide the windfall recovery be in addition to the benefits ratepayers would otherwise receive from a future sale). In the Petitioners' view, the acquisition of CVPS is the triggering event for the windfall recovery, and the merger is the mechanism through which restitution by way of the guarantee of merger savings is provided to CVPS ratepayers.[37]

Although the Department, as well as AARP, disagreed with the Petitioners' analysis, we stated that:

> There may be merit to the Petitioners' first argument that the acquisition of CVPS (which could be accomplished by Gaz Métro, Fortis or any other successful bidder for CVPS) and the subsequent merger (which could only be accomplished through the acquisition of CVPS by Gaz Métro) should be seen as two independent transactions for purposes of interpreting the windfall-recovery provisions of Dockets 6460/6120.[38]

However, given the Board's determination that the CEED Fund provided an adequate windfall-recovery mechanism under the Dockets 6460/6120 Order, there was no need for the Board to examine this argument any further.

AARP also argues that the Board incorrectly failed to address AARP's proposed findings 6 and 7 that the Dockets 6460/6120 Order contemplates an immediate payment of $20.9 million in cash or bill credits to CVPS ratepayers. Under Vermont law, the Board's decisions are required to include findings of fact and separately stated conclusions of law. The Board is further required to rule on proposed findings of fact submitted by a party in accordance with Board rules.[39] As the Petitioners point out, AARP's proposed findings 6 and 7 rely on quotations from and interpretations of prior Board decisions and are not based on testimony or other evidence. We agree with the Petitioners that these proposed findings of AARP do not amount to proposed findings of fact. In addition, if the Board's extensive discussion of the Dockets

---

37. June 15 Order at 118.
38. June 15 Order at 118 (fn. 93).
39. 3 V.S.A. § 812.

6460/6120 Order was not sufficient to indicate that the Board was rejecting AARP's findings interpreting the Dockets 6460/6120 Order, the Board expressly stated in its June 15 Order that: "[t]o the extent the findings in this Order are inconsistent with any findings proposed by any party, such proposed findings are hereby rejected."[40]

We recognize that our conclusions in this docket mean, as was the case in Docket 7213, that there will be no direct or indirect disgorgement of the unjust enrichment deemed under the Dockets 6460/6120 Order to have been received by shareholders from the sale of their shares. As we noted in the June 15 Order, there is no doubt that CVPS shareholders received a price for their shares that was substantially above book value because of the vigorous bidding competition to acquire CVPS.[41] And it is the Board's conclusion that this windfall was not reduced in the bidding process by the $20.9 million windfall-recovery amount because of the bidders' awareness of how the windfall-recovery issue was resolved in the Docket 7213 Order. Accordingly, we did consider in the June 15 Order the possibility of conditioning our approval of the Proposed Transaction on a restructuring of the transaction negotiated between CVPS and Gaz Métro to require that CVPS shareholders disgorge $20.9 million of the sale proceeds to CVPS ratepayers. We ultimately rejected this possibility as impractical, as detailed in the June 15 Order, because the condition would present such a significant risk to the Proposed Transaction and to the realization of all the Proposed Transaction's benefits to ratepayers.[42]

C. AARP Arguments Regarding the CEED Fund

AARP argues that the Board's findings and conclusions related to the CEED Fund should be amended. We decline to do so for the reasons set forth below.

First, AARP asserts that the Board was mistaken in basing its interpretation of the intent of the Docket 7213 Order upon subsequent Board decisions about thermal-barrier investments. AARP argues that in determining whether the reasoning of Docket 7213 should be followed in this case, the reasoning of the Docket 7213 Order is what the Board should be considering, not subsequent decisions in that docket. In the Docket 7213 Order, according to AARP, the Board

---

40. June 15 Order at 152; *see, also, In re Petition of Village of Hardwick Electric Department*, 143 Vt. 437,445 (1983); *see*, *also*, *In re UPC Vermont Wind LLC*, 2009 VT 19.

41. June 15 Order at 85.

42. June 15 Order at 7 and 123-124.

relied on the electric system benefits that would be provided to electric ratepayers when it rejected IBM's argument that electric system ratepayers should be paid with cash. Therefore, AARP asks that the Board amend its June 15 Order in this case to acknowledge that the electric system benefits explicitly relied on by the Board in 2007 do not support the 2012 CEED Fund proposal.

The Petitioners respond that AARP's claim that the Board could not rely on its decisions implementing the GMP Efficiency Fund is both procedurally and substantively flawed. According to the Petitioners, AARP should have raised this claim in its briefs, and because it did not, it is now barred from attempting to litigate this issue. The Petitioners also assert that AARP's argument is erroneous because the Docket 7213 Order explicitly left recovery of thermal investments as an issue to be resolved in the subsequent implementation of the GMP Efficiency Fund. The Petitioners contend that AARP cited no authority for the proposition that the Board may look to the Docket 7213 Order approving the GMP Efficiency Fund, but is barred from relying on the subsequent orders implementing it. The Petitioners also assert that it would be "illogical" if the Board could rely on the Docket 7213 Order but could not consider the implementation orders contemplated by the Docket 7213 Order.[43]

We are not persuaded by AARP's arguments on this issue. The Docket 7213 Order and the subsequent orders implementing the GMP Efficiency Fund all are part of Board precedent regarding an acceptable windfall-recovery mechanism. As we stated in our June 15 Order in this proceeding, "we apply our precedents unless a party demonstrates that a different course is appropriate in order to better promote the general good of the State."[44] Given that "the plain language of the Board's Order in Dockets 6460/6120 illustrates that the Board intended to treat [GMP and CVPS] in a similar manner,"[45] and AARP has not demonstrated that deviating from Board precedent would promote the general good of the State, it would be arbitrary for us to conclude that only the Docket 7213 Order is precedential and not the subsequent implementation orders. Furthermore, the Board did not rely solely on electric system benefits when it rejected

---

43. Petitioners' Response at 13.
44. June 15 Order at 128.
45. June 15 Order at 129.

IBM's arguments supporting customer refunds in Docket 7213. The Docket 6107 Order and the Dockets 6460/6120 Order required only that a benefit be provided to ratepayers, not an electric system benefit.[46] The Docket 7213 Order was consistent with this requirement when it referred to the GMP Efficiency Fund's provision of "benefits" or "net benefits."[47]

AARP's second argument is that the Board erred in approving thermal-barrier investment on the grounds that the funding does not derive from electric rates. AARP also contends that the principles upon which the GMP Efficiency Fund was approved depart substantially from the CEED Fund. Specifically, AARP asserts that the GMP Efficiency Fund was approved by the Board in an order which explicitly disclaimed reliance on thermal-barrier investments as justification for not requiring refunds to ratepayers while the CEED Fund explicitly relies on thermal barrier investments as justification for avoiding such refunds.

The Petitioners respond that AARP misstates the Board's conclusion regarding the source of the funds for the thermal efficiency investments. The Petitioners assert that the Board expressly acknowledged that the CEED Fund's thermal investments would be recovered through electric rates, and that this was an exception to the general rule that funds collected through electricity rates should only be used for investments related to the electric system. The Petitioners further contend that AARP's argument that the CEED Fund is distinguishable from the GMP Efficiency Fund because the Docket 7213 Order expressly disclaimed reliance on thermal investments was rejected by the Board in its June 15 Order.

AARP has misunderstood the discussion on page 135 of our June 15 Order. That discussion described both the general principle that funds collected through electricity rates should only be used for investments related to the electric system, and the reasons why we considered the GMP Efficiency Fund's and the CEED Fund's thermal efficiency investments to

---

46. Dockets 6460/6120, Order of 6/26/01 at 65, quoting Docket 6107 Order at 116.

47. *See, e.g.,* "GMP's proposal will lead to incremental investment in energy efficiency and other projects. GMP has shown that the potential exists for greater investment in energy efficiency as well as other renewable and clean energy projects. These investments are likely to provide consumers as a whole benefits equal to or greater than they would receive through a refund . . ." Docket 7213, Order of 3/26/07 at 37 (footnote omitted).

"The effect of the inclusion of the investments in rate base is that the actual return of the financial windfall from the acquisition occurs not through the incremental investments themselves, but instead through the net benefits of each investment." Docket 7213 Order at 38.

be an exception to that general principle. In addition, as discussed in our June 15 Order, the Board did not explicitly reject using GMP Efficiency Fund monies for thermal efficiency investments in the Docket 7213 Order. Rather, the Board contemplated, but did not resolve this issue in that Order.[48] Since the Board did not reject using such monies for thermal efficiency investments, it could not have "explicitly disclaimed reliance" on such investments as justification for not requiring refunds to ratepayers.

AARP's third argument is that the Board erred in relying on "some research" to support the finding and conclusion that the actual benefit-cost ratio of the CEED Fund's investments in weatherization activities will exceed 1.2. AARP asserts that without a finding by the Board what that research is, and that it is reliable, the Board's conclusion is improper under the Administrative Procedure Act § 812 and should be stricken.

The Petitioners respond that the Board did support this determination by citing Dr. Hopkins' testimony which reaches the same conclusion, as well as making two findings (Findings 360 and 361) which adopt his testimony that the 1.2 benefit-to-cost ratio is a conservative estimate of weatherization benefits. In addition, the Petitioners assert that even if there were a basis for challenging the reliability of Dr. Hopkins' testimony on this issue, that time has passed because AARP did not challenge the testimony on cross-examination or in its briefs, even though the Petitioners proposed that the Board adopt this testimony as reliable in their Proposed Decision.

We find AARP's assertion to be without merit. Our discussion of this issue specifically cites to Dr. Hopkins' testimony, and Findings 360 and 361 rely on his testimony to reach the same conclusion.[49] AARP did not object to the admission of Dr. Hopkins' testimony into

---

48. June 15 Order at 134-135, quoting the Docket 7213 Order at 39.

49. Our June 15, 2012, Order cites to tr. 3/29/12 at 129-130 (Hopkins). Those pages include the following testimony: "I could say that the fuel only [benefit-cost] numbers that I was just describing come out around [1.2], recognizing that generally when we're thinking about counting benefits we're counting more than just fuel only savings . . ." Tr. 3/29/12 at 129 (Hopkins).

"MS. BISHOP: But it sounds like what you're telling me is that that would be a conservative number if you're looking at the total benefits. If the fuel benefits alone were 1.2, then a deemed benefit of 1.2 should be a conservative estimate of these — of the benefits from those investments? Am I understanding your testimony correctly? MR. HOPKINS: I — yes. I think that's — that's true." Tr. 3/29/12 at 129-130.

In addition, on page 128 of the same transcript, Mr. Hopkins explains the source for the fuel-only benefit-

(continued...)

evidence, nor did it challenge Dr. Hopkins' testimony during the hearings or when the Petitioners proposed in their Proposed Decision that the Board rely on his testimony on this issue.

AARP's fourth argument is that the Board erred in relying on the intent of the DPS MOU to provide benefits to all CVPS ratepayers — as the GMP Efficiency Fund did for all GMP ratepayers — when the actual terms of the MOU preclude providing benefits to all CVPS ratepayers. AARP adds that the Docket 7213 Order stated that there would be benefits for all GMP ratepayers and that GMP was required under the terms of that Order to ensure that the benefits received by each customer class accrue in rough proportion to that class's revenue. AARP asserts that this is different from the CEED Fund, under which such a large portion of monies will be spent on low-income weatherization, that either commercial, industrial, or non-low-income residential customers (or some combination thereof) will receive little or no benefit from the CEED Fund investments. AARP contends that the Board's response to this argument in the June 15 Order was inadequate because GMP striving for a fair distribution of benefits is materially different from being required to achieve a fair distribution of benefits. Therefore, according to AARP, there is a significant difference between the GMP Efficiency Fund and the CEED Fund such that the Board is not bound to approve the CEED Fund.

The Petitioners respond that AARP has confused the Docket 7213 Order's requirement that all customer classes receive proportional benefits with the concept that all individual customers receive a benefit. The Petitioners contend that AARP has not supported its assertion that allocating $9.9 million to non-low-income customers will result in some customer classes receiving little or no benefit from CEED Fund investments. In addition, the Petitioners assert that the Board found that the electric system benefits arising from CEED Fund investments will flow to all customers.

AARP's initial premise is incorrect — the terms of the MOU do not preclude providing benefits to all CVPS ratepayers. In fact, we found that the evidence in this proceeding

---

49. (...continued)
cost numbers that he described in the first quote above: "The numbers that I have seen are based on the projections done for the affordable heat report that I referenced in my testimony, you know, looking at for typical Vermont houses how many MMBTUs would be saved at what level of typical investment, et cetera." Tr. 3/29/12 at 128 (Hopkins).

demonstrates that investing in thermal efficiency can produce electric system benefits, and that Vermont's Weatherization Program does, in fact, produce electric savings.[50] In addition, there are significant opportunities for electric efficiency projects for commercial and industrial customers;[51] such investments would also produce electric system benefits. Thus, the Board's conclusion in Docket 7213 that electric system benefits "flow to all customers, so that even if a customer is not a direct beneficiary, he/she would still receive a benefit"[52] applies to the CEED Fund as well. Furthermore, we are not persuaded that requiring GMP to ensure a fair distribution of benefits by customer class is sufficiently different from requiring GMP to strive to provide a fair distribution of benefits as to justify overturning the Board's precedent in Docket 7213. As we explained in our June 15 Order, the evidence in this proceeding demonstrates that one dollar of energy efficiency spending produces varying amounts of benefits, depending upon the customer class.[53] As a result, the expenditure of a significant portion of CEED Funds on low-income customers does not necessarily mean that net benefits will not be fairly allocated among customer classes.

D. Future Application of the Prudence and Used and Useful Standards

AARP asserts that the June 15 Order provides that CEED Fund costs will be included in rate base, apparently without review under the prudence and used-and-useful tests.[54] AARP contends that this request would be contrary to the Board's precedent because there would be no opportunity later in a rate proceeding for a party to object, submit testimony, submit argument or to request an investigation as to whether the amounts spent on the CEED Fund were prudently spent and were used and useful and therefore just and reasonable to recover in rates. AARP

---

50. June 15 Order at 131.

51. June 15 Order at 80 (finding 352).

52. Docket 7213, Order of 3/26/07 at 38.

53. June 15 Order at 134.

54. The prudence and used-and-useful standards are applied to utility costs when considering whether they are appropriate to recover from ratepayers. The prudence standard requires that the decision to incur the expenditure was reasonable, given what a reasonable person would have known at the time the decision was made. The used-and-useful principle is a two-part standard. A utility's expenditures for a particular resource (or other item) can be included in rates if the resource is both used — that is, necessary to provide service to ratepayers — and useful — which is to say, economic for the purposes it is serving.

requests that the Board amend the June 15 Order to make explicit whether the ruling that CEED Fund costs will be included in rate base does or does not preclude review under the prudence and used-and-useful tests.

No party responded to this request.

The prudence and used-and-useful standards are long-standing principles of utility ratemaking in Vermont and other states. All expenditures that a utility seeks to recover in rates are subject to the prudence and used-and-useful tests, unless the Board expressly determines otherwise.[55] GMP's CEED Fund investments are no different from other utility expenditures. Therefore, since the Board has not ruled otherwise, CEED Fund investments will be subject to the prudence and used-and-useful tests at the time GMP seeks to recover those investments in rates.

V. CONCLUSION

For the reasons set forth above, the Board denies AARP's motion for the Board to vacate and reopen the June 15 Order, to make amended and new findings of fact, and to issue an amended order as requested by AARP.

SO ORDERED.

---

55. "Although the statute would permit the Board to abstain from applying [the prudence and used-and-useful] principles, as long as the resulting rates were just and reasonable, we conclude that we should only do so in rare circumstances and only when the requesting party makes a greater showing than a mere demonstration that the proposed transaction promoted the general good." Docket 6545, Order of 6/13/02 at 97.

Dated at Montpelier, Vermont, this 3rd day of August 2012.

s/James Volz	)	PUBLIC SERVICE
s/David C. Coen	)	BOARD
s/John D. Burke	)	OF VERMONT

OFFICE OF THE CLERK

FILED: August 3, 2012

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont.