

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7970

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

Order entered: 10/10/2014

**ORDER RE: RULE 60(B) RECONSIDERATION**

**I. INTRODUCTION**

On December 23, 2013, the Vermont Public Service Board (the "Board") issued a final Order (the "December 23<sup>rd</sup> Order") granting Vermont Gas Systems, Inc. ("VGS" or the "Company") a Certificate of Public Good ("CPG") pursuant to 30 V.S.A. § 248 to construct a natural gas pipeline extension into Addison County, Vermont (the "Project"). For the reasons discussed in today's Order, we have decided not to reopen the record to reconsider the December 23<sup>rd</sup> Order in light of VGS's disclosure this past July that the estimated cost of the Project has increased by more than 40 percent since February of 2013. This is a significant cost increase. Having carefully considered the record developed at the hearing we convened on September 26, 2014, as well as the briefs subsequently filed by the parties, we have concluded that the new cost information is not of such a material and controlling nature so as to change our previous determination that approval of the Project pursuant to the criteria of 30 V.S.A. § 248 will promote the general good of Vermont.

## **II. PROCEDURAL BACKGROUND**

On April 9, 2014, Ms. Kristin Lyons filed a notice of appeal of the December 23<sup>rd</sup> Order to the Vermont Supreme Court.

On July 2, 2014, VGS filed an update of the estimated capital costs of the Project pursuant to Board Rule 5.409 (the "VGS Cost Update"). The Company's filing disclosed a net increase of \$35.0 million above the \$86.6 million cost previously estimated in February of 2013, resulting in a revised total cost estimate of \$121.6 million for the Project.

On July 8, 2014, the Board issued an Order seeking comments from the parties on the VGS Cost Update.

On July 14, 2014, the Conservation Law Foundation ("CLF") filed a petition for an injunction and a declaratory judgment that the Company is required to seek an amendment to its § 248 CPG for the Project in light of the VGS Cost Update (the "CLF DJ Petition").

On July 21, 2014, CLF, Ms. Lyons, Jane and Nathan Palmer (the "Palmers"), and the Department of Public Service ("DPS" or the "Department") respectively filed comments on the VGS Cost Update. Ms. Lyons and the Palmers also filed a motion requesting that the Board investigate the cost estimate increase.

On July 22, 2014, the Vermont Fuel Dealers Association ("VFDA") filed comments on the VGS Cost Update. Also on that date, VGS filed a response to the CLF DJ Petition.

On July 23, 2014, the Board issued an Order seeking comments from the parties on the CLF DJ Petition. Also on that date, Mr. Michael Hurlburt filed a motion on behalf of himself and others (the "Hurlburts") for injunctive relief and a declaratory judgment (the "Hurlburt DJ Motion").

On July 29, 2014, CLF filed a letter with the Board clarifying that the CLF DJ Petition was not intended to be addressed in Docket 7970.

On July 31, 2014, the Department filed comments on the CLF DJ Petition. The next day, VGS filed a response to the Department's comments.

On August 5, 2014, VGS responded to the Hurlburt DJ Motion as well as to the July 21<sup>st</sup> comments filed by Ms. Lyons and the Palmers on the VGS Cost Update.<sup>1</sup>

On August 26, 2014, the Board opened Docket 8328 to investigate whether and when VGS may have violated Board Rule 5.409 in filing the VGS Cost Update.

On September 4, 2014, the Board issued an Order announcing its decision to seek a remand of the December 23<sup>rd</sup> Order from the Vermont Supreme Court in light of the VGS Cost Update for the limited purposes of:

- (1) determining whether, in light of the disclosure of new information regarding an increase in the cost of the Project, the December 23<sup>rd</sup> Order should be reconsidered; and
- (2) determining the impact, if any, of the new information on the question of whether to authorize a CPG for the Project to promote the general good of the state.

On September 9, 2014, the Board filed a Motion for Expedited Remand with the Vermont Supreme Court.

On September 10, 2014, the Board opened Docket 8330 in response to the CLF DJ Petition.

On September 11, 2014, the Vermont Supreme Court granted the Board's remand request, specifying that:

We grant the Public Service Board's request to remand this case to the Board to allow the Board thirty days to determine whether to reopen the proceedings in light of the new cost information. If the Board determines that the proceedings will be reopened, it will have an additional thirty days to address the new cost information.<sup>2</sup>

On September 12, 2014, the Board issued an Order establishing a procedural schedule for reviewing the December 23<sup>rd</sup> Order on limited remand from the Vermont Supreme Court. The schedule provided an opportunity for the parties to prefile testimony, participate in a hearing, and file briefs. The Board further directed VGS to file an update to Exhibit Board-1 based upon the new cost information.

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1. We have deferred ruling on the Hurlburt DJ Motion until after both considering the CLF DJ Petition in Docket 8330 and investigating whether and when VGS may have violated Board Rule 5.406 in Docket 8328.

2. *In re: Amended Petition of Vermont Gas Systems, Inc.*, Supreme Court Docket No. 2014-135, Entry Order of 9/11/14; <http://mediad.publicbroadcasting.net/p/vpr/files/201409/supreme-court-remand-vpr.pdf>.

On September 22, 2014, AARP and the Vermont Public Interest Research Group ("VPIRG") respectively filed motions to intervene in this Docket. On that same date, the VFDA and the Palmers submitted prefiled testimony.

On September 23, 2014, CLF filed comments supporting the intervention of VPIRG, while the Department filed comments opposing both intervention motions.

On September 24, 2014, VGS filed responses opposing the AARP and VPIRG intervention motions. VPIRG filed a response to the comments opposing its intervention. VGS also filed a motion *in limine* to exclude the prefiled testimony of VFDA. Also on September 24, the Palmers sent an e-mail to the Board supporting the intervention requests of AARP and VPIRG.

On September 25, 2014, the Board granted permissive intervention to AARP but denied VPIRG's intervention request (the "September 25<sup>th</sup> Order").

On September 26, 2014, Ms. Lyons filed a Motion to Reconsider the Board's September 25, 2014 Ruling, or to Strike Parts of the Prefiled Testimony and Exhibits of Witnesses Simollardes and Gilbert (the "Lyons Reconsideration Motion"). In a footnote to that motion, Ms. Lyons' attorney also renewed VPIRG's intervention request.<sup>3</sup>

On September 26, 2014, the Board convened a hearing to receive testimony and argument from the parties on the question of whether to reopen the proceedings in light of the VGS Cost Update. At the outset of the hearing, the Board took up the Lyons Reconsideration Motion. After hearing oral argument, the Board denied Ms. Lyons' request to strike the Company's testimony and affirmed its denial of VPIRG's intervention request. The Board also stated that it would reduce this affirmation to writing. That written determination has been incorporated into this Order below. The Board further ruled that it would permit Ms. Lyons to present the testimony of Mr. Chris Neme comparing the costs and benefits of converting from residential oil or propane space heating to heating with either natural gas or cold climate heat pumps.<sup>4</sup> Furthermore, in the absence of any objection, the Board admitted the testimony of Ms. Diane Derrick, a witness for the Palmers, notwithstanding that Ms. Derrick was not present for cross-

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3. Ms. Lyons, AARP, and VPIRG have been represented by the same attorney during this remand.

4. Mr. Neme's testimony had also been offered by VPIRG prior to the Board's ruling denying VPIRG permission to intervene in the case.

examination. However, the Board declined to admit the prefiled testimony of VFDA because VGS objected to this testimony and the witness was not available for cross-examination.<sup>5</sup>

On September 29, 2014, the Company filed responses to two record requests made during the September 26<sup>th</sup> hearing.

On October 1, 2014, CLF filed a brief arguing that the Board should reopen the proceedings in light of the VGS Cost Update (the "CLF Brief").

On October 2, 2014, AARP, Ms. Lyons, and the Palmers filed briefs arguing that the Board should reopen the proceedings in light of the VGS Cost Update (respectively, the "AARP Brief," the "Lyons Brief," and the "Palmer Brief"). Also, on October 2, 2014, VGS and the DPS each filed proposals for decision arguing that the Board should not reconsider the December 23<sup>rd</sup> Order (the "VGS PFD" and "DPS PFD," respectively).

No other objections or comments were filed.

*The denial of VPIRG's renewed intervention request*

At the September 26<sup>th</sup> hearing, the Board stated that a written order would follow its oral ruling in which the denial of VPIRG's intervention request was affirmed. Our decision to deny VPIRG permission to intervene rested principally on the fact that VPIRG had asserted a substantial interest — opposing hydraulic fracturing and the use of natural gas extracted by such means — that was shared by others who were already participating as parties in this proceeding, namely, the Palmers, the Hurlburts, and CLF, all of whom moved to intervene in a timely manner nineteen months ago in this Docket.

During the oral argument, the Company and the Department reiterated their opposition to granting VPIRG's request to intervene. We inferred from this continuing opposition that these parties would consider themselves unfairly prejudiced by VPIRG's late entry into the case. We found it difficult to justify overriding the objection of these parties when VPIRG had made no attempt to explain its long delay in moving to intervene. While we recognized that AARP was similarly dilatory and nonetheless was granted leave to intervene in this Docket over the objection of VGS and the DPS, the difference was that AARP's substantial interest in this

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5. Tr. 9/26/14 at 13, 203, 241-42 (Volz). The effect of this ruling was to moot out the Company's motion *in limine* to strike the VFDA's testimony.

proceeding arose directly from the revised cost estimate that only came to light this past July, namely, the rate impacts for the affected members of AARP and related rate design policy implications. VPIRG's interest in opposing hydraulic fracturing existed well before July of 2014, and otherwise lacked a comparable direct connection to the revised estimated cost increase for the Project. Furthermore, VPIRG made no effort to demonstrate that this proceeding afforded the exclusive means by which to protect its interest in opposing hydraulic fracturing — a policy matter that we have already held to be reserved to the Vermont Legislature for its consideration.<sup>6</sup> Accordingly, after balancing all of these considerations, VPIRG's renewed request for intervention was, and remains, denied.

Finally, to the extent that VPIRG desired to advocate in this particular proceeding for the comparative benefits of alternatives to the Project, the testimony from Mr. Neme that VPIRG would have relied upon was admitted into the record at the September 26<sup>th</sup> hearing by Ms. Lyons, and has been duly considered by the Board.<sup>7</sup> These events confirm our judgment in the September 25<sup>th</sup> Order that VPIRG's stated interests have been capably represented by others in this proceeding.

### **III. LEGAL STANDARD**

In Vermont, the process for reconsidering a final order is governed by Vermont Rule of Civil Procedure 60, which applies in Board proceedings pursuant to Board Rule 2.221.<sup>8</sup> In pertinent part, Rule 60(b) provides that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of judgment.

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6. December 23<sup>rd</sup> Order at 137-139.

7. The record of the September 26<sup>th</sup> hearing was created for the limited purpose of determining whether to reopen our December 23<sup>rd</sup> Order. Testimony in that record is not part of the evidentiary record on the merits of Docket 7970.

8. Board Rule 2.221 provides that the "[t]he provisions of the Vermont Rules of Civil Procedure, Rule 60 (Relief From Judgment Or Order) shall apply in proceedings before the Board."

Significantly, Rule 60(b) is not an "open invitation to reconsider matters concluded at trial, 'but should be applied only in extraordinary circumstances.'"<sup>9</sup> The threshold determination of whether to reopen a prior decision under Rule 60(b) is committed to the discretion of the Board.<sup>10</sup> In making this threshold determination, it is appropriate to consider the prejudice that would arise from setting aside the judgment.<sup>11</sup>

Of particular relevance to this remand proceeding is Rule 60(b)(2), which we have previously construed to permit relief from a final order when new evidence is discovered that is of "such a material and controlling nature as will probably change the outcome."<sup>12</sup> We find that subsection (b)(2) provides the appropriate standard for our review because the catalyst for any decision to reopen the December 23<sup>rd</sup> Order would be newly discovered evidence — the revised cost estimate reported by VGS on July 2, 2014. We observe that our decision to proceed under Rule 60(b)(2) is consistent with our precedent relating to the construction of the *Northwest Reliability Project*.<sup>13</sup>

Some parties have suggested that our review of whether to reopen the December 23<sup>rd</sup> Order should be conducted pursuant to other provisions of Rule 60(b), specifically, subsections (b)(3) and (b)(6). We find that Rule 60(b)(3) does not apply in this case, given the absence of any evidence of fraud, misrepresentation, or misconduct.<sup>14</sup> Nor does the "catchall" provision of

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9. *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24 (1999) (citing *Olde & Co. v. Boudreau*, 150 Vt. 321, 324 (1988)).

10. *See Lyddy v. Lyddy*, 173 Vt. 493,497 (2001).

11. *Teamsters, Chauffers, Warehousemen, and Helpers Union Local No. 59 v. Superline Transport. Co.*, 53 F.2d 17, 20 (1<sup>st</sup> Cir. 1992).

12. Docket 6860, Order of 9/23/05 at 21 (citing *In re Petition of Ryegate Wood Energy Co.*, Docket 5217, Order of 11/30/90 at 4 (quoting MOORE'S FEDERAL PRACTICE § 60.23[4] (2d ed. 1990)).

13. *See* Docket 6860, Order of 9/23/05 at 1-2. In Docket 6860, six months after issuing a § 248 CPG to a Vermont utility to construct a transmission line, the Board was asked to reconsider its decision because the utility had revised the project cost estimate to reflect a potential increase of up to 90 percent. After determining that its review would be governed by the requirements of Rule 60(b)(2), the Board held that reopening the proceeding was not warranted because "[w]hile the near doubling of projected costs for the [Project] may, at some visceral level, seem to call for reexamination of the Project, the cost increase in fact is not likely to change the outcome." *Id.* at 22.

14. Of all the parties, only the Palmers have asked that the December 23<sup>rd</sup> Order be reconsidered pursuant to Rule 60(b)(3), which provides for relief from a final judgment on grounds of fraud, misrepresentation, or misconduct. Palmer Brief at 1. The Palmers contend that the Company has presented testimony that "raises the specter of misconduct of VGS's contractor, CHA, in providing timely feedback about costs." Palmer Brief at 4. However, the Palmers have cited no testimony or argument to support or clarify this contention. *See Spencer v. Spencer*, 2014 VT 63, 63 (citing *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 2013 VT 115)("The burden is on the party

Rule 60(b)(6) apply in this case. As a matter of Vermont law, our decision to proceed under Rule 60(b)(2) forecloses any reliance upon Rule 60(b)(6).<sup>15</sup>

#### IV. POSITIONS OF THE PARTIES

##### CLF

CLF supports reopening the proceedings in this Docket in light of the increased cost estimates for completing the Project because "[t]he significantly increased costs alter the proposed project's balance of costs and benefits."<sup>16</sup> CLF recommends that the Board "reopen the proceedings to allow a fair evaluation of the actual impacts of the significantly increased cost estimate."<sup>17</sup>

CLF argues that VGS has failed to adequately analyze the impacts of the cost estimate increase and to balance those costs against the benefits of the Project. CLF maintains that "[t]o fairly evaluate whether the proposed project promotes the general good of the state, the comparison of the increased costs with the technologies that they will replace, such as heat pumps, should be evaluated."<sup>18</sup>

##### AARP

AARP advocates for reopening the proceedings in this Docket so that the Board may "order VGS to provide a cost estimate that has been prepared by experts . . . , schedule a hearing, and allow for expedited discovery, on whether the Certificate of Public Good in this matter should be withdrawn or maintained."<sup>19</sup> AARP argues that the remand hearing provided the Board with cause to reopen the proceedings pursuant to Rule 60(b)(2) because "[t]he Board has

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14. (...continued)  
seeking relief under Rule 60(b) to plead facts 'with sufficient particularity to warrant a hearing and potential relief.'). Moreover, the witness called by the Palmers to address the "completeness, reliability, and reasonableness" of the Company's cost estimates specifically admitted that she had no basis for alleging any bad faith on the part of VGS with respect to its construction cost estimates. Tr. 9/26/14 at 300 (Peyser).

15. See *Pierce v. Vaughn*, 2012 VT ¶¶ 5, 10 ("Relief under V.R.C.P. 60(b)(6) is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule." (Citing *Alexander v. Dupuis*, 140 Vt. 122, 124 (1981)).

16. CLF Brief at 1.

17. *Id.*

18. CLF Brief at 3.

19. AARP Brief at 13.



received compelling evidence that some of the original cost estimates were inaccurate and/or incomplete"<sup>20</sup> and that the new cost information "will probably change the outcome."<sup>21</sup>

### Lyons

Ms. Lyons supports AARP's position and also recommends that the Board reopen the proceedings in this case. Ms. Lyons argues that the remand evidence was sufficient to "challenge the basis upon which the project was approved."<sup>22</sup> In particular, Ms. Lyons asks that the Board thoroughly assess evidence related to the cost estimate and heat pumps in order to revise the Board's findings and conclusion, respectively, about the general good of the state under § 248(a) and whether the Project is the least-cost alternative under § 248(b)(2). Ms. Lyons urges the Board to "order VGS to provide a cost estimate that has been prepared by experts . . . , schedule a hearing, and allow for expedited discovery, on whether the Certificate of Public Good in this matter should be withdrawn or maintained."<sup>23</sup>

### The Palmers

The Palmers request a reopening of the proceedings "under Rules 60(b)(2) and 60(b)(3), or alternatively under Rule 60(b)(6)" in light of the updated estimated capital costs reported in the VGS Cost Update. Further, the Palmers concur with the arguments set forth in the AARP Brief and Lyons Brief.<sup>24</sup> The Palmers also articulate a concern that the compressed schedule on remand violated their due process rights and argue that the only way "to obtain reasonable and material information to assess the cost increase and its implications is through formal discovery, additional technical hearing(s) with adequate time for rebuttal and sur-rebuttal testimony, and oral arguments prior to the Board making a decision on whether to reopen proceedings."<sup>25</sup>

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20. *Id.* at 12.

21. *Id.* at 13.

22. Lyons Brief at 5.

23. *Id.* at 7.

24. Palmers Brief at 1.

25. *Id.* at 3.

DPS

The Department recommends that the Board conclude that "the fundamental conclusion in the December 23<sup>rd</sup> Order is confirmed — the Project remains in the general good of the State as the significant benefits associated with the Project continue to outweigh the costs even in light of the revised cost estimates filed by VGS." <sup>26</sup> The DPS notes the related Board dockets where the cost increase will be addressed, first, by investigating whether VGS violated Board Rule 5.409 with respect to its reporting of the revised cost estimates and, second, by examining whether the estimated cost increase requires a CPG amendment. The Department further observes that reviewing the impact of the cost increase "does not constitute a Board review or approval of the costs associated with the Project" since "[t]hat issue is reserved for future rate proceedings, and the apportionment of the Project's costs is reserved to future rate design proceedings." <sup>27</sup> The Department urges the Board to decline to take the extraordinary step of reopening the proceeding because "the evidence adduced in this proceeding showed a relatively small reduction to the significant benefits associated with this Project, and in light of the overall regulatory context that allows for review of many of these issues in more appropriate settings." <sup>28</sup>

VGS

The Company recommends that the Board decline to reopen the December 23<sup>rd</sup> Order and instead find that "despite the increase in estimated costs, the Project will still provide substantial economic and environmental benefits to Vermont and its residents and promote the general good of the state." VGS maintains that the parties seeking to reopen this proceeding have failed to present evidence under Rule 60(b) of a material and controlling nature as would change the outcome of our December 23<sup>rd</sup> Order.<sup>29</sup>

**V. FINDINGS**

1. Prior to the December 23<sup>rd</sup> Order, VGS had estimated that construction of the Project would cost \$86.6 million. *See* remand exh. Pet. supp. EMS-1.

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26. DPS PFD at 2.

27. *Id.*

28. *Id.*

29. VGS PFD at 1-2.

2. In the VGS Cost Update, VGS filed a re-baselined cost estimate which determined that the budget estimate should be increased by \$35 million. Eileen Simollardes, VGS ("Simollardes") remand supp. pf. at 2; *see* remand exh. Pet. supp. EMS-1.

3. An increase of \$19.5 million in construction costs constitutes the majority of the estimated cost increase. Simollardes remand supp. pf. at 2.

4. Under VGS's original financial projections (as reflected in exhibit Board-1), the Project did not achieve VGS's return on equity within a 20-year period.<sup>30</sup> The updated version of exhibit Board-1 (marked for the record as "remand Exhibit Pet. supp. EMS-2") was extended an additional 15 years, and indicates that the Project will achieve VGS's return on equity between years 31 and 32. Simollardes remand pf. supp at 5; exh. Board-1; remand exh. Pet. supp. EMS-2.

5. In the original version of exhibit Board-1, VGS anticipated that it would need to increase rates by 4.5% at the outset of the Project. Under the revised estimates incorporating the increased capital costs, VGS anticipates the need for a 10.2% rate increase instead. To enable a full comparison among scenarios, VGS also expects that there would be a 2.3% rate reduction in 2025 and more reliance at that time upon the money in the System Expansion Reliability Fund ("SERF") established in Docket 7712. Exh. Board-1; remand exh. Pet. supp. EMS-2.

6. The increase in rates associated with the budget increase is expected to be approximately 5.7%. *Id.*

7. The projected benefits of the Project remain significant. Donald Gilbert, VGS ("Gilbert") remand pf. supp. at 7.

8. Due to the increase in costs, VGS anticipates that the Project will save Addison County homes and businesses that switch to natural gas \$195 million over the next 20 years. By comparison, VGS originally estimated these savings as approximately \$200 million. Gilbert remand pf. supp. at 7; tr. 9/26/14 at 106-107 (Gilbert).

9. VGS re-estimated the lifecycle avoided greenhouse-gas-CO<sub>2</sub> equivalent emissions from the conversion from fuel oil to natural gas. Using the \$100/short-ton value applied to carbon reductions used for energy efficiency screening and not counting any emission savings from

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30. By achieving the return on equity, we mean that the incremental revenues from new customers cover the incremental carrying costs of the Project, which include both depreciation expense to recover the cost of the investment and a return on equity on the unamortized balance of the investment.

customers converting from propane, the value of greenhouse-gas reductions over a 20-year period is \$27 million. In the December 23<sup>rd</sup> Order, the Board found that VGS had estimated the carbon reduction savings as \$17.1 million. Simollardes remand pf. supp. at 9; remand exh. Pet. supp. EMS-3; December 23<sup>rd</sup> Order at 80, Finding 244.

10. From a residential customer perspective and a societal perspective, the net benefits of switching from oil and propane to cold climate, ductless heat pumps are comparable to the net benefits of switching to natural gas. Christopher Neme, Lyons ("Neme") remand pf. at 2; tr. 9/26/14 at 216 and 226 (Neme).

11. Cold climate heat pump technology does not have an application that could work to meet the thermal needs of most commercial customers or of industrial customers and therefore is not an alternative to natural gas. Tr. 9/26/14 at 222-23 (Neme).

12. Even for residential customers, there is still a need for a back-up heating system. Tr. 9/26/14 at 213 (Neme); remand exh. Pet. Cross Neme-2.

13. The updated Project cost estimate of \$121.6 million includes many cost items that are no longer projections but reflect actual costs. VGS has negotiated costs for 70% of the right-of-way easements, has purchased the pipe needed for construction, has put the Project out to bid, and has entered into contracts for some aspects of the Project. It is possible that additional cost increases may occur, and VGS has committed to providing the Board and the Department with quarterly cost updates. Tr. 9/26/14 at 51-53 (Simollardes); Simollardes remand pf. supp. at 9.

14. The Project cost increase impact was therefore also evaluated assuming a Project cost of \$131.6 million, which adds an additional \$10 million to the Project cost. Each \$10 million in Project costs adds one to two years before the Project carries its own weight without additional rate changes or withdrawals from the SERF. Simollardes remand pf. supp. at 9.

15. From a rate perspective, a \$10 million increase in Project costs results in an incremental rate increase of approximately 1% over 17 years. Simollardes remand pf. supp. at 9.

16. The Department evaluated the impact of the increase in estimated construction costs on the Vermont economy using the PI+ model developed by Regional Economic Models Inc. ("REMI"). The REMI model captures economic changes among classes of ratepayers and among industries and sectors utilizing energy resources, along with the multiplier effects of consumer

expenditures (or reductions in expenditures) in various sectors of the economy. Poor remand pf. at 3.

17. In order to isolate impacts of the cost increase on the Vermont economy, the annual ratepayer impact of the revised Project costs was calculated by estimating the difference between the annual ratepayer costs associated with the infrastructure investments using both original and revised cost estimates. The same Weighted Average Cost of Capital of 7.69% as originally assumed in this case was used to calculate these annual costs. This analysis was prepared to shed light on the broader economic impact of the cost increase, as reflected by decreased consumer spending in the residential sector or the increase in natural gas costs to commercial and industrial retail customers. Poor remand pf. at 4; exh. DPS-WP-Remand 1.

18. The REMI analysis of the impact on the Vermont economy of the decreased residential consumer spending and increased natural gas costs for commercial and industrial consumers is shown in the table below.

DPS REMI Analysis of Economic Impacts of the Project Cost Increase			
Discount Rate	3.00%	7.69%	9.75%
Phase I Base Impact (\$M)	89.79	60.35	52.09
Impacts on VT Economy of Revised Cost Estimate (\$M)	(-17.9)	(-11.5)	(-9.6)
Phase I Updated Impact (\$M)	71.89	49.45	42.49

Poor remand pf. at 5; exh. DPS-WP-Remand 1.

19. These REMI results show the general impact on the Vermont economy from the revised cost estimate. Subtracting these cost impacts from the original base impacts continues to show positive economic impacts from the Project, under varying discount rates, even without the assumed aggressive energy efficiency programs or greenhouse gas benefits as estimated previously in the Project, and with none of the increased costs. Poor remand pf. at 5; exh. DPS-WP-Remand 1.

20. Industry market data published in 2012 and in 2013 indicated a 32% cost increase for actual pipeline construction costs nationally. Melanie Peyser ("Peyser") remand pf. at 7; remand exh. NP Peyser-3; remand exh. NP Peyser-4.

21. The estimated construction costs for natural gas pipeline construction projects and the corresponding actual costs typically do not match. Remand exh. NP Peyser-4 at 122; exh. NP Peyser-5; tr. 9/26/14 at 301-02, 306 (Peyser).

22. Estimating pipeline project costs is not an exact science. Tr. 9/26/14 at 302, 321 (Peyser).

## VI. DISCUSSION

The question before the Board under Rule 60(b)(2) is whether to reopen our December 23<sup>rd</sup> Order because of the new estimated cost information submitted by VGS in the VGS Cost Update. The change in estimated cost submitted by VGS is substantial, increasing from the original \$86 million to the present projection of \$121 million. This represents an increase of approximately 40% and has caused us to closely examine the potential impact of the changed forecast on our previous determination. Our analysis of whether to reexamine the December 23<sup>rd</sup> Order begins with considering whether this new information is of a nature that is so material and controlling as to probably change the outcome we reached in the December 23<sup>rd</sup> Order. If we conclude that such a probability exists, then we must proceed to take evidence (within the 30 days authorized by the Supreme Court) to support a determination of whether and how to modify our decision to approve a CPG for the Project. Conversely, if we conclude that no such probability exists, the December 23<sup>rd</sup> Order stands as is, and VGS retains all rights and obligations under the existing CPG for the Project.

VGS and the Department maintain that there is no cause to reconsider the December 23<sup>rd</sup> Order because the construction of the Project continues to promote the general good of the State, notwithstanding the new estimated cost information. In opposition to this view, the parties advocating for a reopening of the proceedings have raised four main concerns:

- (1) the Project is not needed to meet present or future demand for service due to the other changes in the marketplace, primarily the increased cost-effectiveness of electric heat pumps as an alternative to natural gas service;
- (2) the Board can no longer find that the Project will produce an economic benefit to the State due to the increases in costs and other changes in the marketplace;

(3) VGS's updated cost projections are not sufficiently reliable to support any conclusion as to the ultimate cost of the Project and therefore the size of any net benefit; and

(4) contrary to our previous conclusion that there was no unjust cross-subsidy, the Project results in an unjust cross-subsidy with the increase in costs.

Before we turn to examining these matters, we reiterate and emphasize that our analysis and conclusions are based solely on the Project before us in this Docket, which is commonly referred to as "Phase I." As we noted in the December 23<sup>rd</sup> Order, no other phase of the Project is before us in this Docket. Thus, as was the case when we reached our conclusions in the December 23<sup>rd</sup> Order, on remand we have not considered any revenues or costs associated with Phase II — a matter that is now pending in a separate proceeding, Docket 8180.<sup>31</sup>

#### Need for the Project (30 V.S.A. § 248(b)(2))

In the December 23<sup>rd</sup> Order, the Board determined that VGS had met the requirements of Section 248(b)(2) in that the Project was (1) needed to meet present or future demand for service, and (2) this demand could not otherwise be met more cost-effectively through energy efficiency measures, taking into account least-cost principles in both analyses.<sup>32</sup> We found that VGS had reasonably estimated the market, planned the Project to meet that market (including future markets), and did so in a reasonable manner showing that energy efficiency or demand-side management measures could not meet that need.<sup>33</sup> In doing so, we characterized the "need" for the Project as the demand for natural gas in Addison County.<sup>34</sup>

The estimated cost of the Project was not a direct consideration in our discussion of need in the December 23<sup>rd</sup> Order. Rather, the estimated cost informed questions such as the demand for natural gas service. Put simply, if the Project costs drive the price of supplying natural gas too high, the demand for natural gas will fall. At the time of the evidentiary hearings in

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31. In Phase II, VGS proposes a further extension of the natural gas transmission system through the towns of Cornwall and Shoreham and to Ticonderoga, New York, where it would serve International Paper. VGS submitted certain financial projections offered in this proceeding have included revenues associated with Phase II. These projections have not been considered by the Board.

32. December 23<sup>rd</sup> Order at 74-79.

33. *Id.*

34. *Id.* at 75.

September 2013, VGS had a 40% price advantage relative to other fuels, primarily propane and fuel oil. Our December 23<sup>rd</sup> Order observed that this large price advantage was likely to produce over \$200 million in savings for consumers in the areas where natural gas service was newly available.<sup>35</sup>

Ms. Lyons suggests there is new information indicating that much of these savings can now be achieved without the construction of the Project. In her brief, she contends that "existing electric service can achieve the same or greater heating expense savings by installation of heat pumps, at the same cost to the consumer as converting to natural gas, *without any investment by existing ratepayers*."<sup>36</sup> Ms. Lyons asserts that these new facts challenge the basis upon which the Project was approved, including whether it continues to meet the Section (b)(2) "need" standard. According to Ms. Lyons, it is the deployment and use of heat pumps, and not the Project, that would be the least-cost alternative under Section 248(b)(2).<sup>37</sup>

We are not persuaded that either the new cost estimate information or the new testimony concerning the availability of electric heat pumps as an alternative to heating with natural gas is likely to alter our conclusion in the December 23<sup>rd</sup> Order that the Project meets the Section 248(b)(2) criterion. The information examined on remand does not demonstrate that the revisions to the Project's capital costs are likely to reduce demand for natural gas service by so much that we would be likely to find the Project is not needed. The record from the September 26<sup>th</sup> hearing indicates that, with the new, higher capital costs, the construction of the Project is expected to result in an increase in rates of approximately 10%. Admittedly, such a rate increase would reduce the price advantage that natural gas now holds relative to other fuels. However, given that the price advantage is now at least 40% (depending upon the alternative fuel considered), the remaining price advantage for natural gas would still be substantial. VGS estimates that the new cost estimates will have only a minor effect on demand, with projected savings of \$195 million compared to the original \$200 million estimate.<sup>38</sup> Moreover, we note that the projected rate impacts are based upon conservative assumptions regarding customer take

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35. December 23<sup>rd</sup> Order at 75.

36. Lyons Brief at 3 (emphasis in original).

37. Lyons Brief at 5 (the Brief points to Findings 229-230 and the discussion at pp. 72-79, which were part of the 248(b)(2) analysis in the December 23<sup>rd</sup> Order).

38. Tr. 9/26/14 at 106-107 (Gilbert).



rates; if a higher-than-projected take rate is realized, the effect would be to mitigate future rate increases.<sup>39</sup>

The new information on remand concerning the availability of heat pumps does have potential implications for whether the Project represents the least-cost option. At the outset, we note that, even if we accept the premise that electric heat pumps are more cost-effective than taking natural gas service, they are so only for certain uses. A substantial part of the need for the Project found by the Board in the December 23<sup>rd</sup> Order relates to fuel savings for industrial customers, for whom natural gas service would displace other fuels used for industrial processes. Ms. Lyons' witness readily concedes that heat pumps are not an alternative solution for many medium or larger commercial and industrial customers, particularly for industrial processes.<sup>40</sup> Thus, we conclude it remains the case that the demand for energy derived from natural gas cannot be met more cost-effectively through the use of electric heat pumps.

For most applications, a ductless heat pump system that is large enough to meet the load of a house all year round also is not economically optimal. Therefore, an alternative fuel, such as oil, wood, propane, or natural gas would still be needed to supply a secondary heat source.<sup>41</sup> Multi-nodal heat pumps capable of serving multiple rooms in the home are not yet commercially available, although that may change soon.<sup>42</sup> The need to deploy individual units rather than a multi-nodal system also alters the cost-effectiveness of heat pumps as an alternative. Collectively, these limitations on the impacts of heat pumps raise questions as to whether and to what degree heat pumps might displace natural gas in the future and can truly be a least-cost option for customers. Although potential benefits exist, the record from the September 26<sup>th</sup> hearing does not demonstrate that heat pumps are likely to displace large amounts of natural gas use in the residential market. It also does not show that heat pumps are likely to be a least-cost option to meeting the demand for natural gas.

In sum, there is no indication that heat pumps would diminish industrial and large commercial demand for service. Based upon the new testimony on the cost-effectiveness of heat

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39. Tr. 9/26/14 at 176, 178 (Poor). We observe the fact that VGS's estimates were conservative in the Final Order at 143.

40. Tr. 9/26/14 at 222-223 (Neme).

41. Tr. 9/26/14 at 212-213 (Neme).

42. Tr. 9/26/14 at 224, 231 (Neme).

pumps, at best we can conclude that heat pumps might reduce the residential and small commercial demand for natural gas service, assuming they prove to be as cost-effective as natural gas. We cannot find, however, based upon the current record, that the change in residential demand will be substantial. Accordingly, there is no foundation to conclude that reopening the record is likely to lead to a change in the Final Order's conclusion that the Project meets the standards of Section 248(b)(2).<sup>43</sup>

#### Economic Benefit (Section 248(b)(4))

In the December 23<sup>rd</sup> Order, the Board cited a number of economic benefits of the Project. These benefits include direct energy savings to customers, a quantified reduction of carbon emissions through displacement of the use of other fossil fuels, and increased property tax revenues.<sup>44</sup> Weighed against these direct benefits were the costs of the Project, then estimated at \$86.6 million for the transmission mainline and distribution mainlines to Vergennes and Middlebury, and an additional \$6.3 million for the distribution networks inside those communities.<sup>45</sup> The net benefit, after including costs, was projected to be substantial over the next 20 years.<sup>46</sup>

A separate economic-impact analysis showed net benefits to the Vermont economy ranging from \$52 million to \$90 million (depending upon the discount rate assumed). Increased energy efficiency, which the Project would enable, could swell these economic impacts from \$72 million to \$140 million.<sup>47</sup> The December 23<sup>rd</sup> Order also cites a range of other benefits Vermont stands to realize from the Project, including an increase in economic activity, increased convenience for consumers, and increased access to energy efficiency programs.<sup>48</sup>

In reaching these conclusions in December of 2013, we considered, but ultimately did not find persuasive, the arguments that VGS's evidence was insufficient to find an economic benefit

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43. For the same reasons, we reject Ms. Lyons' argument that we must reopen the December 23<sup>rd</sup> Order to modify Finding 502 from that Order, which concludes that the Project is consistent with least-cost planning principles. The record from the September 26<sup>th</sup> hearing does not support the conclusion that reopening the record will probably result in a different outcome.

44. December 23<sup>rd</sup> Order at Finding 244.

45. *Id.* at Finding 245.

46. *Id.* at Findings 244 and 245.

47. *Id.* at Finding 246.

48. *Id.* at Findings 249–251, 253.

under Section 248(b)(4), and that the greenhouse gas benefits of the Project were uncertain. Rather, we determined that VGS had "provided sufficient evidence for us to find that the Project will result in a net economic benefit."<sup>49</sup> Further, we concluded that "the economic benefit of the Project remains significant, even when the projected greenhouse gas reductions are not included in the analysis."<sup>50</sup>

The change in VGS's estimated construction costs has implications for the factual basis underpinning our prior analysis of the Project's benefits under the Section (b)(4) criterion. An increase of \$35 million in costs would directly reduce the economic benefit of the Project by that amount; nonetheless, there would still remain a substantial benefit.<sup>51</sup> An economic analysis that quantified the impact of the \$35 million increase in estimated costs projected a reduction in the benefits to the Vermont economy ranging from \$9.6 million to \$17.9 million (depending upon the discount rate employed). Even with this negative impact, the net benefits to the Vermont economy estimated by the Department would range from \$42 million to \$72 million. These facts lead us to conclude that, notwithstanding the increase in estimated costs of approximately 40%, the new cost information probably would not alter our finding in the December 23<sup>rd</sup> Order that the Project satisfies the Section 248(b)(4) criterion, and will provide an economic benefit for Vermont.

Several parties take a different view. AARP asserts that VGS's original cost analyses were prepared by a firm, Clough Harbor and Associates ("CHA"), that lacked the skill and experience to adequately predict the costs of the Project. To support this assertion, AARP cites to the fact that VGS has recently replaced that firm in its role as the overall project manager. This decision, according to AARP, is "a frank acknowledgment that the prior project managers lacked the necessary skill and experience."<sup>52</sup> AARP observes that the new overall project manager has not developed its own estimate of project costs. Based on these events, and its assessment of the probative value of testimony presented by VGS's witnesses, AARP argues that the Board should not find the existing \$121 million cost estimate to be reliable and should

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49. December 23<sup>rd</sup> Order at 83.

50. *Id.* at 86.

51. Tr. 9/26/14 at 105-106 (Gilbert); December 23<sup>rd</sup> Order at Finding 144.

52. AARP Brief at 2.

therefore reopen the proceedings to develop a more reliable record regarding the projected costs of the Project.

Ms. Lyons contends that the \$35 million increase in projected costs may be the forerunner of a series of cost increases, echoing AARP's concerns about the adequacy of VGS's project management team. In addition, she reiterates many of the arguments raised by AARP.

The Palmers also question the validity of VGS's new cost estimates. The Palmers contend that VGS has made no presentation supporting the validity of the new cost estimates or the Company's assessment of the risk of further cost escalation. The Palmers also voice concern that the cost estimates may have been occasioned by misconduct on the part of CHA. The Palmers also contrast the cost information provided by VGS on remand with the information provided by the utility at issue in Docket 6860, arguing that VGS's new projections are comparatively inadequate.

CLF maintains that VGS's economic benefit analysis is flawed because it spans only 20 years. CLF argues that a fair evaluation would compare the costs and benefits over equivalent time periods, rather than spread the costs out over nearly 50 years (through depreciation). CLF suggests a fair evaluation of whether the Project promotes the general good of the state requires a comprehensive analysis of the increased costs in comparison with the technologies that CLF says they will replace.

Turning first to the AARP/Lyons/Palmer position concerning the reliability of VGS's cost estimate, we find these arguments to be unpersuasive. First, we find the record of the September 26<sup>th</sup> hearing does not compel the conclusion these parties urge us to adopt — that the current revised projections are inadequate because they were produced by a contractor whose role was altered by the Company due to mismanagement of the budgeting process for the Project. Rather, we find there is a reasonable basis to conclude that the revised cost projections are reliable. First, many of the cost elements in the revised budget are no longer projections, but reflect actual costs. For instance, VGS has put the Project out to bid and entered into contracts.<sup>53</sup> VGS has now purchased pipe for the Project. Furthermore, the revised projections include a

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53. Tr. 9/26/14 at 50-52 (Simollardes), 112 (Gilbert).

contingency.<sup>54</sup> Though VGS has indicated that the updated cost projections in July were prepared by the previous firm, CHA, whose performance in managing cost projections proved unsatisfactory to the Company over time,<sup>55</sup> VGS's president testified under oath at the September 26<sup>th</sup> hearing that the Project is now under new management that is capable and is producing reasonable cost projections.<sup>56</sup>

We note that a witness for the Palmers, Ms. Peyser, questioned some of VGS's new cost estimates, based upon trends in the industry. However, the studies Ms. Peyser cited as the basis for her concerns reflect that pipeline construction projects commonly experience significant variances between cost projections and actual costs.<sup>57</sup> Thus, the fact that VGS has had to update its cost projections is not surprising. Nor is the magnitude of the revision necessarily indicative of a need to reexamine the merits of the project and whether it should be constructed.<sup>58</sup>

In sum, based upon the record of the September 26<sup>th</sup> hearing, we cannot conclude that the new cost projections are so unreliable that the Board must reject them and reopen the evidentiary record supporting the December 23<sup>rd</sup> Order to develop a more reliable estimate for purposes of assessing the public good of authorizing the construction of the Project pursuant to Section 248.

Nor do we find CLF's arguments about asymmetrical time lines for VGS's cost/benefit projections to be persuasive. CLF is correct that the benefits cited by VGS are based upon a 20-year projection, and not over the longer life of the proposed pipeline. However, CLF has not shown how eliminating this asymmetry by extending these projections out for a longer time period is likely to cause us to reach a conclusion other than what is in the December 23<sup>rd</sup> Order — namely that the Project will produce an economic benefit for Vermont.

We cannot conclude that there is any likelihood that a longer-term projection of benefits would alter our conclusion that the Project provides economic benefits. The analysis performed by VGS included 20 years' worth of projected benefits. Our conclusion weighed these benefits against all of the Project's capital costs. Even if we assume that ongoing benefits after 20 years

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54. Tr. 9/26/14 at 52 (Simollardes).

55. Tr. 9/26/14 at 110-111 and 126-128 (Gilbert).

56. Tr. 9/26/14 at 52-53 (Simollardes), 111 (Gilbert).

57. Tr. 9/26/14 at 301-302, 306-307 (Peyser).

58. For example, by comparison, the variations in cost projections that prompted the Docket 6860 remand were significantly larger, but nonetheless did not compel a reconsideration of the decision to grant a CPG for the Project.

erode significantly, they would be weighed against only the operation and maintenance costs associated with the Project. Using VGS's projected operations and maintenance costs (from exh. Pet. Supp. EMS-2) over the remaining life of the Project, it appears unlikely that the benefits of the Project as a whole would be reduced to nothing, even if we assume no economic benefit and no gas sales after 20 years.<sup>59</sup>

Finally, we note that AARP and Ms. Lyons have cited to costs to existing ratepayers of \$270 million over the next 32 years as grounds for reopening the record.<sup>60</sup> The concerns expressed by these parties relate to the cross-subsidy that this implies, which they argue is unjust — a topic we will address in a later section of this Order. We emphasize, however, that the \$270 million figured asserted by these parties has no relevance to the assessment of whether the Project produces an economic benefit pursuant to the standards of Section 248(b)(4). The \$270 million figure — which relies upon VGS's assumed ratemaking and rate design treatment of the Project costs — reflects the increase in the amount that existing VGS ratepayers would be expected to pay in rates over the next 32 years.<sup>61</sup> It does not reflect the rate effect over the expected 70-year life of the Project which in our experience is likely to result in net downward pressure on rates. In addition, the \$270 million figure is derived from a model that includes the rate impacts of various cost items beyond the direct cost of the Project. Furthermore, this amount would have to be further adjusted to reflect the time value of money for ratepayers, because they would be paying the higher rates in future dollars. Thus, while the \$270 million figure may be relevant for the purpose of assessing cross-subsidies, it does not reflect the actual cost of the Project for ratepayers and is, therefore, irrelevant to assessing whether there is a benefit to the state and its residents under Section 248(b)(4). For purposes of evaluating the economic benefit of the Project, the estimated capital costs of the Project are approximately \$121 million, not \$270 million.

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59. Of course, in this scenario, it is not clear either that VGS would continue to incur operations and maintenance costs.

60. AARP Brief at 1 and Lyons Brief at 2.

61. At this time, the Board has not made any determination on issues related to VGS's future rates or the rate design options that might be used.

In conclusion, no party has demonstrated that reopening the December 23<sup>rd</sup> Order in light of the revised Project cost estimate would probably alter our previous determination that the Project will produce an economic benefit for Vermont as required under Section 248(b)(4).

#### General Good of the State – Cross-Subsidization

In the December 23<sup>rd</sup> Order, we considered the question of whether the Project would result in an impermissible cross-subsidy, ultimately concluding that it would not.<sup>62</sup> In reaching that conclusion, we observed that, for a period of time, existing VGS ratepayers in Chittenden and Franklin counties would pay rates higher than those they would pay if the Project were not constructed. We acknowledged that while we generally disfavor cross-subsidization in rates, it nonetheless exists "to make rate making feasible" in some circumstances, such as when a utility expands its system.<sup>63</sup> We explained that a cross-subsidy is not necessarily impermissible when time is needed until the number of new customers grows to a level where the incremental additional revenues cover the incremental carrying costs for the project. In the context of this Project — a major system expansion — we found the prospect of such a cross-subsidy to be acceptable, given the extended life of the Project, which ensures that over the long term, the new customers will provide a contribution to fixed costs that will benefit existing customers as well.

In the December 23<sup>rd</sup> Order, we found that it would be 20 years before the annual revenues from the Project exceed the annual carrying costs.<sup>64</sup> We noted that the Company's financial impact models were based upon assumptions of customer growth that were conservative, given VGS's more robust recent experience in expanding its system to Richmond. We also found that the Project was expected to be in service for many years beyond the 20-year period, so that after that point new customers would provide a contribution to the fixed costs of the existing system (and over time no cross-subsidy would occur). And we recognized that existing ratepayers receive some benefits from the Project that include enhanced reliability of the existing system, greenhouse gas reduction benefits, and increasing economies of scale.

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62. December 23<sup>rd</sup> Order at 142-144.

63. *Id.* at 143.

64. This conclusion was based upon the carrying costs without a return. Including VGS's authorized return on equity, the period would have been longer than 20 years.

The new cost-estimate information disclosed in the VGS Cost Update alters the rate impacts on existing customers as projected in the December 23<sup>rd</sup> Order. With the revised cost estimates, VGS forecasts that until year 32 of the Project, existing ratepayers will pay more in rates each year than they would if the Project were not constructed.<sup>65</sup> VGS still plans to request permission from the Board to use money in the SERF that the Board authorized in Docket 7712, which has been funded by all existing VGS ratepayers through a 5.4% foregone rate reduction. VGS also anticipates the need to increase its firm revenues by approximately 10.2% once the Project is placed into service.<sup>66</sup> By comparison, when we examined the question of whether an impermissible cross-subsidy would be authorized in the December 23<sup>rd</sup> Order, VGS projected the need for a 4.5% rate increase.<sup>67</sup> Thus, the anticipated 10.2% rate increase is not solely the product of the change in the estimated \$86.6 million Project costs described in the December 23<sup>rd</sup> Order. Rather, the effect of the new cost estimate of \$121.6 million is projected to be approximately a 5.7% rate increase, based upon a comparison of VGS's past and present cost projections.<sup>68</sup> VGS again used conservative assumptions in its analysis. Therefore, as in the December 23<sup>rd</sup> Order, we find VGS's past system expansion experience reasonably suggests it is likely that the actual rate impacts will be less.<sup>69</sup>

The rate impacts cited above are not expected to last for the life of the Project. After year 32, VGS projects that annual revenues from new customers will exceed the annual carrying costs of the Project, including a return on the investment. Thus, new customers will contribute to the fixed costs of the overall VGS system, with the annual contribution increasing rapidly.<sup>70</sup> This will have the effect of reducing the charges to customers in Chittenden and Franklin counties

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65. Exh. Petitioner Supp. EMS-2; tr. 9/26/14 at 32 (Simollardes).

66. Exh. Petitioner Supp. EMS-2; tr. 9/26/14 at 45-46 (Simollardes).

67. Exh. Board-1.

68. During the hearings, VGS witness Ms. Simollardes testified that the difference between the scenario presented last September and the current projections was a 3.4% rate increase. However, exh. Board-1 shows the projected need for a 4.5% rate increase whereas exh. Petitioner Supp. EMS-2 incorporates a projected 10.2% rate increase, producing a difference of 5.7%. The differences appear to arise from Ms. Simollardes' reliance upon the financial scenario in which costs and benefits associated with service to International Paper Company were included. As we have consistently stated in this proceeding, Phase II is not before us and we have disregarded the financial projections based upon service to International Paper. In any case, the difference between whether the incremental rate increase associated with the Project Cost Update is 3.4% or 5.7% is not material to our determination in this Order.

69. Tr. 9/26/14 at 49 (Simollardes).

70. Exh. Petitioner Supp. EMS-2.



relative to what those rates would have been in the absence of the pipeline. Over the 70-year life of the Project,<sup>71</sup> notwithstanding the expectation that existing ratepayers will be incurring higher rates than they otherwise would have for a period of time, it is likely that new ratepayers will provide a net contribution to the fixed costs of VGS's existing system.

AARP argues that existing ratepayers will unjustly be made to subsidize the carrying cost of the Project for at least 32 years. In addition, according to AARP, these ratepayers will pay more than \$270 million over that time period in excess of what they otherwise would have paid in rates due to the costs of the Project. AARP asserts that these ratepayers will experience a 15.2% rate increase as a result of the Project, with the revised estimated cost increase alone being responsible for about \$48 million of the \$270 million cross-subsidy. AARP further challenges the justness of the \$270 million cross-subsidy by existing ratepayers because it is designed to provide service to only 3,000 customers.

AARP also argues that during the proceedings leading up to the December 23<sup>rd</sup> Order, VGS failed to inform the Board of the extent and duration of cross-subsidies if Phase 2 is not approved. This, according to AARP, is a shortcoming that warrants reopening the December 23<sup>rd</sup> Order.

Ms. Lyons echoes the arguments raised by AARP, citing the large costs to ratepayers and the relatively small number of customers receiving service.

As is apparent from the discussion above, there is no dispute that the Project is likely to cause existing ratepayers to pay more for a period of time than they would if the Project were not constructed.<sup>72</sup> The question before the Board in the December 23<sup>rd</sup> Order was whether these payments constituted an impermissible cross-subsidy. In the context of this review on remand, we must now consider whether the change in the estimated cost of the Project and the attendant

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71. Transmission pipe is depreciated in rates over 70 years. Tr. 9/26/14 at 42 (Simollardes).

72. At this stage, we have no competent basis for concluding that existing ratepayers actually will pay more. The Board has not been asked to approve a change in rates due to the Project. Moreover, it is possible that the Board could adopt rate design options that would mitigate or eliminate any cross-subsidy, such as by setting different rates for new customers. However, based upon the record before the Board in this proceeding, there appears to be a reasonable possibility of existing ratepayers incurring higher charges for a period of time. For this reason, we have undertaken the analysis reflected in today's Order and in the December 23<sup>rd</sup> Order concerning whether the anticipated rate impacts of the Project would result in an unjust cross-subsidy. We emphasize that our analysis of this issue in this Section 248 proceeding has been limited and therefore does not constitute a conclusive or binding review by this Board of the actual rate impacts of the Project.

new information regarding the anticipated rate impacts on existing ratepayers make it probable that the Board would modify its conclusion in the December 23rd Order that the Project will not result in an unjust cross-subsidy. We conclude that the new information poses little probability of such a change in outcome.

This Board has long been vigilant about cross-subsidies and has generally adopted policies to minimize or avoid them. In the context of line extensions, the Board has implemented policies designed to ensure that growth pays for growth.<sup>73</sup> However, almost any system expansion requires a contribution from other customers for a period of time. As we discussed in the December 23<sup>rd</sup> Order:

In the case of service extensions by Vermont Gas, invariably, the revenues in the early years of a Project (such as the expansion to Jericho) will not cover the incremental carrying costs of the Project. Rather, VGS has typically examined such projects to determine whether the incremental revenues will exceed carrying costs after ten years. This reflects the fact that the natural gas pipeline is a long-lasting investment and, over time, the newly served customers will provide contributions to fixed costs of the overall system and thereby benefit all customers. Certainly, in these cases, in the short term, the existing customers effectively contribute to the new customers. Nonetheless, we have not considered this to be an impermissible cross-subsidy.<sup>74</sup>

At that time, we examined the Project based upon the assumption that the period of contribution by existing customers was 20 years. Following the VGS Cost Update, the calculations now show that period is likely to be about 32 years. Yet, as discussed above, over the life of the Project, it is new customers who will provide a contribution to the fixed costs of VGS's system, not vice versa. Thus, although the time period has grown from 20 years to 32 years, the record from the September 26<sup>th</sup> hearing does not call into question our basic conclusion from before — that the Project costs do not result in an impermissible cross-subsidy when cost recovery is measured over the life of the Project. Therefore, pursuant to Rule 60(b)(2), we find the new cost estimate information probably would not alter the outcome in the December 23<sup>rd</sup> Order.

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73. See e.g., *Investigation into Cooperative Electric Utilities' Accounting Treatment for Member Contributions-in-Aid-of-Construction for Line Extensions*, Docket No. 7554, Order of 2/3/11.

74. December 23<sup>rd</sup> Order at 143.

Other aspects of our previous analysis remain unaffected as well. Throughout its life, the Project will continue to provide non-quantified reliability benefits to many existing VGS ratepayers. Greenhouse-gas reduction benefits also affect these customers.

We also stress that our analysis of the cross-subsidy occurred in the context of our overall obligation under Section 248(a) to determine whether the Project promoted the general good. The December 23<sup>rd</sup> Order cites a number of specific considerations that weigh on this issue. For example, as we found in Finding 503 of the December 23<sup>rd</sup> Order, the Project is consistent with the 2011 Comprehensive Energy Plan adopted by the Department which reflects state policy goals. Any consideration of the general good must also contemplate the overall economic benefits of the Project. Further, this Project differs materially from typical line extensions and limited expansions of VGS service. Rather, as we found in the December 23<sup>rd</sup> Order, it would offer service to entirely new markets.<sup>75</sup> We want to be clear that we are concerned by the increase in the cost projections as well as the amount that existing ratepayers will have to pay in rates over the next 32 years. Even though the Project may not reflect a cross-subsidy measured over its life, it is doubtful that current ratepayers will be made whole, raising intergenerational equity concerns. Nonetheless, when factoring in these considerations, we reach the same conclusion that we did previously, namely that to the extent that any rate impacts upon existing customers represent a cross-subsidy, it is not an impermissible cross-subsidy in the context of the overall merits of this Project.

We note that AARP and Ms. Lyons focus on the comparison of the rate impacts upon existing customers relative to the number of anticipated new customers. This comparison, which is not fully accurate, is not the correct comparison. In weighing the benefits of the Project, the relevant consideration is not the number of new customers to be served; the relevant consideration is the overall economic benefits to the state. As discussed in the December 23<sup>rd</sup> Order, these benefits are substantial (and, as explained earlier in this Order, we have concluded that there is no reason to expect that this conclusion has changed). Thus, it is an error in reasoning to compare the Project costs to existing customers against the number of anticipated

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75. December 23<sup>rd</sup> Order at 75.

new customers.<sup>76</sup> We also point out that the AARP/Lyons comparison is incomplete in that it encompasses only the first 32 years of the Project. Carried out over a longer period, as this comparison should be to complete the exercise, the results would be very different for the reasons discussed above.

### Other Comments

Several parties submitted comments questioning the validity of other aspects of the Order. Ms. Lyons contends that "heat pumps would better promote the orderly development of the region under § 248(b)(1)" because fuel savings and greenhouse-gas reductions can be achieved without the impacts of constructing the transmission line and disruption of affected landowners. Ms. Lyons does not, however, demonstrate that any of our previous findings on Section 248(b)(1) were in error or which of our findings and conclusions on that criterion would be affected by the new cost-estimate information. We thus find no basis to determine that our conclusion on this criterion is likely to be changed if we were to reopen the record.

CLF argues that the global warming potential of methane is significantly higher than reflected in VGS's prior evaluation of greenhouse-gas emissions. Similarly, the Palmers contend that emerging technologies and the availability of low-sulfur fuel oil would probably lead to lower emissions than VGS assumed in its greenhouse-gas analyses. Neither of these arguments arises from the revised cost estimates for the Project. Moreover, neither CLF nor the Palmers have presented any evidence establishing the magnitude of the alleged change or otherwise demonstrating that revising our previous analysis of greenhouse-gas impacts is likely to alter our conclusions in the December 23<sup>rd</sup> Order. In the absence of any showing that there might be a material impact that would be likely to lead to a different outcome, we find no basis in CLF's assertions that would warrant reopening the December 23<sup>rd</sup> Order.

### Due Process Concerns

The Palmers urge the Board to delay its decision here because, as *pro se* litigants, they did not have sufficient time to respond effectively to this Rule 60(b) determination. The Palmers argue that the procedural posture in this case differs in two ways from the *Northwest Reliability*

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76. It is also not clear that the Project will serve only 3,000 customers.

*Project* proceedings in Docket 6860. First, the Palmers contend that in Docket 6860 "[t]he Board had a reasonable basis on which to assume that VELCO had acted in good faith and competently to produce the new cost estimates and to evaluate the risk of further escalation in costs. VGS has made no such presentation of evidence."<sup>77</sup> And second, the Palmers argue that, unlike in Docket 6860, there is no urgency to ensure the reliability of any power being transmitted by VGS's pipeline system.

In establishing the schedule for the remand proceeding, we were guided by the proceedings in Docket 6860 in establishing time and scope limitations. No other parties have articulated due process concerns. The Palmers, like the other parties, have been on notice of the VGS Cost Update since it was filed on July 2, 2014, and therefore have had ample time to consider the implications of the revised cost estimate. The Palmers, like the other parties, have provided comment about the estimated cost increase, have provided evidence to inform our limited review on remand, and have participated in these proceedings to the same extent as the other parties. Significantly, the Palmers' own witness has expressly disavowed any claim that VGS has acted in bad faith in providing construction cost information to this Board.<sup>78</sup>

This is a construction project to expand natural gas infrastructure. While there may be no comparable urgency as in Docket 6860 to ensure electric transmission reliability, the Board is nonetheless compelled to act promptly for several reasons. For one, our remand jurisdiction is limited to thirty days to determine whether to reopen the proceedings in light of the new cost information. Second, this is a multimillion-dollar construction project that is now under way, having been found to promote the general good of the state nearly ten months ago. In this context, procedural delays can be costly and may further exacerbate the cost increases of the Project, to the detriment of Vermont ratepayers and others who continue to incur the economic costs of waiting to take natural gas service.

In the end, we are not persuaded by the Palmers' due process arguments. We are mindful that the Palmers have carried a heavy burden in representing themselves in this Docket, and that the compressed nature of this remand proceeding may only have added to the difficulty of this undertaking. Nonetheless, it is not clear to us that there is a proceeding we could have conducted

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77. Palmer Brief at 4.

78. Tr. 9/26/14 at 300 (Peysner).

or that there was evidence that VGS could have presented that would have satisfied the Palmers' due process objections, as these objections appear to be a reflection of their ultimate position that the Project "just doesn't make sense."<sup>79</sup>

**VII. CONCLUSION**

In sum, we have discerned no grounds for reopening the December 23<sup>rd</sup> Order pursuant to Rule 60(b)(2) due to the new cost-estimate information disclosed in the VGS Cost Update.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 10th day of October, 2014.

<u>s/ James Volz</u>	)	
	)	
	)	
<u>s/ John D. Burke</u>	)	PUBLIC SERVICE
	)	
	)	
	)	BOARD
	)	
	)	OF VERMONT
<u>s/ Margaret Cheney</u>	)	

OFFICE OF THE CLERK

FILED: October 10, 2014

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. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.*

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79. Tr. 9/26/14 at 251 (Palmer).