

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)

Order entered: 9/4/2014

ORDER RE: DECISION TO SEEK REMAND

I. INTRODUCTION

On December 23, 2013, the Vermont Public Service Board (the "Board") issued a Final Order (the "December 23rd 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"). In today's Order, the Board provides notice to the parties of its decision to seek a remand of the December 23rd Order from the Vermont Supreme Court in light of the filing by VGS on July 2, 2014, made pursuant to Board Rule 5.409, which provided notice to the Board that the estimated cost of the Project had increased by 41 percent (the "VGS Cost Update").

The VGS Cost Update provided a revised and itemized cost estimate indicating a \$35 million net increase to the Project's overall budget of \$121.6 million. The Company summarized the basis for the itemized increase and characterized its impact on the Board's December 23rd Order. The cost increase was generally ascribed to the "significant demand for natural gas across the country," which has resulted in "numerous construction projects to expand natural gas infrastructure. This growth in demand has resulted in increases in construction

costs." ¹ Additionally, VGS stated that the June 28, 2013, realignment of the route of the Project did not include a budget revision and that a portion of the cost increases is attributable to route adjustments. As to the impact of the cost increase on the December 23rd Order, VGS represented that the increase was less than that in the Northwest Reliability Project² ("NRP"), which grew from \$120 million to \$228 million, and that just as this price growth did not result in a change to the final order in Docket 6860, the \$35 million increase here should not require any alteration to the Board's findings in the December 23rd Order.

The VGS Cost Update precipitated a variety of party responses from the parties to Docket 7970. Generally, these various responses sought a reassessment of the December 23rd Order, which has been appealed to the Vermont Supreme Court. In order to issue a timely response to the parties and otherwise address the impact of the VGS Cost Update, we are requesting a limited remand from the Court to allow for a review of the December 23rd Order in light of the VGS Cost Update.

II. PROCEDURAL BACKGROUND

On April 9, 2014, Kristin Lyons filed a notice of appeal of the December 23rd 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 highlighted a 41% net increase in the projected costs, totaling \$35.5 million for an overall updated budget of \$121.6 million.

On July 14, 2014, the Conservation Law Foundation ("CLF"), filed a petition for a declaratory judgment ruling and injunctive relief (the "CLF DJ Petition").

On July 21, 2014, CLF (the "CLF Comments"), Ms. Lyons and Jane and Nathan Palmer (the "Palmer's")(the "Lyons/Palmer Comments"), and the Department of Public Service ("DPS" or the "Department") (the "DPS July 21st Comments") respectively filed comments in response to VGS's update of the estimated capital costs of the Project. Ms. Lyons and the Palmers also filed a motion requesting that the Board investigate the cost increase (the "Lyons/Palmer Motion").

1. VGS Cost Update at 1.

2. *Petition of Vermont Electric Power Company, Inc.*, Docket 6860, Order on Remand of 9/23/05 at 1-3.

On July 22, 2014, the Vermont Fuel Dealers Association ("VFDA") filed comments in response to VGS's update of the estimated capital costs of the Project (the "VFDA Comments"). Also, VGS filed a response to CLF's petition for a declaratory ruling and injunctive relief (the "VGS July 22nd Comments").

On July 23, 2014, Michael Hurlburt (the "Hurlburts") filed a motion for a declaratory ruling and injunctive relief (the "Hurlburt Motion").

On July 29, 2014, CLF clarified that the CLF DJ Petition was not intended to be addressed in Docket 7970 ("CLF July 29th Clarification").

On July 31, 2014, the DPS filed a response to the CLF DJ Petition (the "DPS July 31st Comments").

On August 1, 2014, VGS filed comments on the DPS July 31st Comments (the "VGS August 1st Comments").

On August 5, 2014, VGS filed a response to the Lyons/Palmer Comments and the Hurlburt Motion (the "VGS August 5th Comments").

On August 26, 2014, in Docket 8328, the Board opened an investigation into whether and when VGS may have violated Board Rule 5.409.

III. POSITIONS OF THE PARTIES

CLF

In response to the VGS Cost Update, CLF made three filings: the CLF Comments in this Docket, the CLF DJ Petition, and the CLF July 29th Clarification. The CLF DJ Petition requests that the Board issue a declaratory ruling that an amendment to the CPG in Docket 7970 was required and seeks an injunction precluding VGS from proceeding with the Project in the absence of an amended CPG. The CLF Comments on the VGS Cost Update filed in Docket 7970 included the CLF DJ Petition as a comment. The CLF DJ Petition requested Board action in a new docket. The CLF Comments also reiterated CLF's concern that the updated capital cost increase amounted to a substantial change to the Project requiring both an amendment to the CPG and a halt to construction of the Project until an amended CPG is issued.

The Lyons/Palmer Comments

Ms. Lyons and the Palmers support the CLF DJ Petition. Specifically, in light of the announced 41% cost increase, they ask that the Board open an investigation to determine: (1) the likely date at which the Project will generate incremental revenue that exceeds the Project's carrying costs; (2) the impact of the cost increase on rates, including the rates to be paid by Franklin and Chittenden County ratepayers; (3) the size of the cross-subsidy by Franklin and Chittenden County ratepayers over the life of the Project; and (4) the impact of the cost increase on the general good criterion of § 248(a)(3), the least cost standards of § 248(b)(2), and the economic benefit standard of § 248(b)(4). The Lyons/Palmer Motion further asks that if the Board's investigation finds reasonable grounds to conclude that the December 23rd Order should be factually reassessed, the Board or one or more of the parties seek a remand of the December 23rd Order from the Vermont Supreme Court so that the order may be reconsidered pursuant to V.R.C.P. 60(b).

DPS

The Department states that it was "dismayed and disappointed"³ by the cost increase and is working with VGS to ensure that there is no recurrence. Nonetheless, the Department maintains that there are substantial benefits to the Project and the Board should take no action in response to the report that would create construction delays which, in turn, would exacerbate the cost increase.

In the DPS July 31st Comments, the Department recommends that the Board reject the CLF DJ Petition because CLF did not demonstrate that the revised cost estimate would have the potential for significant impact on the Section 248 findings in the December 23rd Order. Further, the DPS argues that there are alternative regulatory mechanisms better suited to addressing VGS's report of a cost increase — specifically, more frequent reporting, review in a rate case, and a \$35,000 fine for violation of Board Rule 5.409.

3. DPS July 21 Comments at 1.

VFDA

VFDA asks that the Board: (1) formally investigate the VGS cost increase; (2) as appropriate, re-open the proceedings and/or require an amendment to the CPG; and (3) enjoin VGS from construction pending the outcome of the investigation. In particular, VFDA expressed its concern that the VGS cost increase will result in an unjust cross-subsidization contrary to Board precedent.

The Hurlburts

Along with supporting the CLF DJ Petition and the Lyons/Palmer Motion, the Hurlburt Motion also requests that the Board: (1) issue a ruling rejecting the VGS Cost Update for inadequacy on the basis of insufficient information; (2) enjoin VGS from submitting any Project costs from the date of the Board's ruling rejecting the VGS Cost Update; and (3) arrange for the appointment of an Independent Counsel to represent the interests of the public in an investigation of the VGS cost increase. The Hurlburts argue that VGS appears to "overstate the cost increase"⁴ and that the DPS can no longer adequately represent the public in a cost investigation because it has a conflict of interest created by its "two MOUs with VGS"⁵ and the Governor's public support of the Project.

VGS

The Company asks the Board to dismiss the CLF DJ Petition because: (1) there are procedural defects in the petition; (2) the CLF DJ Petition is not warranted under the circumstances, given that the Board may request a remand to re-open the decision; and (3) CLF's argument that an amendment to the December 23rd Order relies upon a conclusory determination that a 40% cost increase has a "potential for impact"⁶ on the § 248 criteria. VGS urged the Board to follow its precedent from the NRP in considering the significance of the cost increase and to

4. Hurlburt Motion at 2.

5. *Id* at 7.

6. VGS July 22nd Comments at 5 quoting the CLF DJ Petition at 3-4.

apply the standards of V.R.C.P. 60 rather than the "substantial change" standard in Board Rule 5.408.⁷

The Company acknowledges that it could have provided notice of the cost increase earlier, and states that it has "decided to pay the amount of the \$35,000 fine proposed by the Department"⁸ in place of litigating whether Board Rule 5.409 is "ambiguous." The Company is intent on proceeding to avoid further delay and attendant potential cost increases.⁹

In the VGS August 5th Response, the Company asks that the Board deny both the Lyons/Palmer Motion and the Hurlburt Motion for several reasons: (1) the Project will result in significant economic benefit to and will promote the general good of the state notwithstanding the cost increase; (2) the cost increase does not result in unjust cross subsidization; (3) there is no basis for injunctive relief; (4) no basis exists to revoke the Phase I CPG; (5) VGS's delay in reporting the cost increase was caused by an ambiguity in Rule 5.409 in that the rule does not specify when the Board should have been notified of the cost increase; and (6) there is no basis for the appointment of an independent counsel.

IV. DISCUSSION AND CONCLUSION

The VGS Cost Update provided the Board with notice of a 41% increase in the Project costs. The Board has several options for acting in response to this report, which was made pursuant to Board Rule 5.409. The Board appreciates the thoughtful input and comments of all the parties, summarized above, in recommending an appropriate course of action for the Board to follow. The Board's decision on how to proceed in response to the VGS Cost Update has been guided by the parties' comments, by Vermont Supreme Court precedent,¹⁰ and by Board rules

7. VGS July 22nd Response at 7.

8. VGS August 1st Comments at 2.

9. *Id.* In the CLF July 29th Clarification, CLF responded to VGS's concerns by providing a proposed order of notice as required by Board Rule 2.205 for declaratory judgment petitions. CLF otherwise asserted that the CLF DJ Petition conforms to Board Rules for both declaratory judgments and injunctive relief. CLF further maintains that "the fact that Docket 7970 is currently on appeal at the Vermont Supreme Court further confirms that a new proceeding should be initiated to address the need for a new CPG."

10. *See Kotz v. Kotz*, 134 Vt. 36, 38, 349 A.2d 882, 884 (1975) (trial court lacks authority to consider motions for relief from final judgment while an appeal of that same judgment is pending in the supreme court).

and precedent, in particular the order on remand in Docket 6860.¹¹ This Order addresses the first step the Board must take before considering how to address the VGS Cost Update, namely the step of seeking remand of the December 23rd Order from the Vermont Supreme Court 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 23rd 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.

VGS's filings and the other parties' comments highlight the potential impact on the December 23rd Order that the 41% increase of the estimated capital costs of the Project may have. These filings provide a *prima facie* basis for the Board to undertake further examination of those potential impacts. However, these filings do not amount to evidence upon which the Board can make a determination as to whether the case needs to be re-opened and re-assessed under either V.R.C.P. 60 or as a substantial change requiring amendment of the CPG.

The Board has determined that the issues raised by the VGS Cost Update and the responsive filings of the parties relate directly to our December 23rd Order and therefore may only be considered after a limited remand is granted. Depending upon the evidence developed after remand, if any, the Board may, among other things, need to directly re-address the bases for the December 23rd Order. The Board has therefore concluded that it has no jurisdiction to develop that evidence without a limited remand from the Vermont Supreme Court.

In contrast, on August 26, 2014, we exercised our residual supervisory jurisdiction to open a separate investigation into whether VGS may have committed a violation of Board Rule 5.409 in reporting the Project's cost increase to the Board. The limited scope of this investigation does not implicate the substance of the December 23rd Order and therefore does not require re-opening that decision. Rather, the Rule 5.409 investigation is focused on whether VGS appropriately complied with Board Rule 5.409. Thus, the investigation embodies precisely the kind of collateral decision-making contemplated by *Kotz v. Kotz*, and therefore does not require a limited remand.

11. See *Northwest Reliability Project*, Docket 6860, Order on Remand dated 9/23/05.

In the CLF DJ Petition, CLF asks that the Board open a new docket to render a declaratory judgment as to whether an amendment to the Project CPG is required and further seeks an injunction.¹² We have decided to address CLF's declaratory judgment request in a separate proceeding.

SO ORDERED.

Dated at Montpelier, Vermont, this 4th day of September, 2014.

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

OFFICE OF THE CLERK

FILED: September 4, 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.

12. CLF Petition at 7 citing Docket 6860, Order on Remand dated 9/23/05, footnote 28. Our Order on remand in Docket 6860 reads: "If a substantial change has occurred, without an amended CPG the permittee would not be authorized to proceed, regardless of whether the original CPG were on appeal."