

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Amended 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: 5/24/2013

PROCEDURAL ORDER REGARDING PROTECTIVE AGREEMENT

I. INTRODUCTION

Vermont Gas Systems, Inc. ("Petitioner" or "VGS") has information that it alleges is of a confidential and proprietary nature and that it has been, or may be, asked to provide to the Public Service Board ("Board"), the Vermont Department of Public Service ("Department" or "DPS") and certain other parties, the names of which are set forth on the signature pages and approved schedules to the Protective Agreement, as defined below. (Petitioner, the DPS and each other party will be sometimes referenced herein, where the context requires, as a "Party" and collectively as the "Parties".) To preserve the confidentiality of that information while facilitating disclosure of information in this proceeding, the Parties have entered into a Protective Agreement, dated as of April 18, 2013, attached hereto (the "Protective Agreement"). Schedule I of the Protective Agreement, as may be amended in accordance with the terms of the Protective Agreement, describes information that Petitioner alleges may result in financial or competitive harm to it or its parent company/affiliates, or might threaten the security of local, regional, or

national energy infrastructure if it is required to disclose such information to the public, and which information Petitioner believes to be proprietary, privileged, confidential or in the nature of a trade secret (which information is referenced herein as "Allegedly Confidential Information") or which Petitioner believes to be Critical Energy Infrastructure Information ("CEII") and is specifically described on Schedule I (for Allegedly Confidential Information) or Schedule Ia (for CEII) attached to the Protective Agreement.

Pursuant to that Protective Agreement and to preserve the confidentiality of Allegedly Confidential Information and CEII, Petitioner, the Department and such other parties that have executed the Protective Agreement request that the Board issue a Protective Order implementing the terms and procedures of the Protective Agreement.

II. DISCUSSION

Rule 26(c)(7) of the Vermont Rules of Civil Procedure, applicable to Board proceedings pursuant to PSB Rule 2.214(A), authorizes the issuance of protective orders, for good cause shown, so as to protect "confidential research, development, or commercial information" from disclosure by the party or parties receiving it for purposes of discovery and presenting testimony in a given case. Over time in Board proceedings, a standard form of protective agreement has evolved that parties have used in seeking Board approval of a process for addressing the confidentiality concerns of parties without impeding the discovery process.

The Protective Agreement into which VGS and the DPS have entered contains a new provision that we have not previously approved. This provision, Section 9(c)-(d) of the Protective Agreement,¹ concerns how the DPS, and any other state agency that obtains

1. Section 9(c) of the Protective Agreement reads:

In response to an access to public records request, the Department or any other state agency party to this agreement agrees to assert the "relevant to litigation" exemption contained within 1 V.S.A. § 317(b)(14) to prevent disclosure of the documents or information during the pendency of the litigation. Assertion of any other exemptions shall be at the discretion of the Department or other state agency receiving the request.

Section 9(d) reads:

At the final termination of the litigation, the Department or other state agency party to this

(continued...)

potentially confidential discovery materials in this docket by virtue of participating as a party, would treat a request for public disclosure of such materials under the Access to Public Records Act ("APRA"), 1 V.S.A. §§ 315 *et seq.* Section 9(c)-(d) would oblige the state agencies that are parties to this proceeding to invoke 1 V.S.A. § 317(c)(14), which authorizes agencies to deny requests for disclosure of "records which are relevant to litigation to which the public agency is a party of record."²

It is not apparent to us that Section 9(c)-(d) is appropriate for inclusion in a protective agreement that is directed at addressing confidentiality issues arising from discovery that is being conducted under the auspices of the Board's Section 248 jurisdiction and the Board's exercise of its powers as a court of record to craft such protective agreements as it deems necessary for the management of its proceedings. The Board is not the tribunal that would resolve any dispute between a state agency that is a party to this docket and any non-party seeking disclosure under the APRA of documents covered by the Protective Agreement at issue here. Under 1 V.S.A. § 319, such jurisdiction lies with the Superior Court. We therefore decline to approve Section 9(c)-(d) because the provision is not germane to the purpose of Rule 26 protective orders, which is to facilitate discovery in a manner that avoids "annoyance, embarrassment, oppression, or undue burden or expense."³

With the exception of Section 9 (c)-(d), the Board finds good cause to order implementation of the Protective Agreement for the reasons discussed above. The Board has determined that such Agreement is appropriate, useful and reasonable, but with the following clarification. Today's Protective Order shall govern only the protection of documents and information provided in disclosures and discovery. If a Party wishes to keep confidential any material that is proffered for inclusion in the evidentiary record, that Party must present a

1. (...continued)

agreement will produce on request the documents or information temporarily protected through the assertion of the "relevant to litigation" exemption within the timeframe prescribed by state law, unless within such timeframe Petitioner obtains a Protective Order from a court or administrative body of competent jurisdiction barring the production of the documents or information.

2. 1 V.S.A. § 317(c)(14). The Protective Agreement refers to this provision as 1 V.S.A. § 317(b)(14), reflecting an earlier version of the statute; a recent recodification has moved the disclosure exemptions in Section 317 from subsection (b) to subsection (c).

3. Vt. R. Civ. P. 26(c).

properly supported motion for protection of that material.

III. ORDER

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information or CEII provided by VGS pursuant to the Protective Agreement shall be treated in this proceeding as follows:

1. The Protective Agreement, filed with the Board on April 19, 2013, and attached hereto, is approved and adopted as part of this Order, subject to the modification discussed in this Decision rejecting Section 9 (c)-(d) of the Agreement.

2. For each document or information response that VGS wishes to treat as Allegedly Confidential Information or CEII, VGS must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment, which addresses the following, to the extent that VGS relies upon that factor as the basis for an assertion of confidentiality:

- a. Identification of the specific document or information for which confidential treatment is sought;
- b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information, or is privileged or CEII;
- c. For documents and information alleged to contain Allegedly Confidential Information or CEII,
 - i. the extent the information is known outside VGS and/or its parent or affiliates,
 - ii. the extent the information is known by employees and independent contractors,
 - iii. the measures taken to guard secrecy,
 - iv. the value of the information to VGS, its parent, its affiliates and competitors,
 - v. the amount of effort or money used to develop the information,

vi. the ease or difficulty of others in acquiring or duplicating the information, and

vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;

d. Justification of the period during which VGS asserts that material should not be available for public disclosure;

e. Explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the Allegedly Confidential Information or CEII; and

f. Any other information that the party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

3. If a party wishes to prefile any testimony or exhibits that include or otherwise disclose Allegedly Confidential Information or CEII, that party must give five-business days' advance notice to counsel for the party or other person that designated the information as Allegedly Confidential or CEII. Any party may move the Board for an order that the testimony or exhibits be filed under seal or under other conditions to prevent unnecessary disclosure.

a. If such motion is filed within the five-business days' advance notice period, the proponent of the testimony and exhibits shall place them in a sealed record by filing such documents in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (exhibit, report, etc.) and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board or Hearing Officer.

Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information or CEII, but shall not disclose the contents of any such sealed information to any person who has not

agreed to be bound by the Protective Agreement. The Board will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information.

b. If no such motion is filed by the end of the five-business days' advance notice period, the testimony and exhibits may be filed as documents available for public access.

4. At any hearing or conference in this proceeding, no witness may be questioned with respect to any Allegedly Confidential Information or CEII unless examining counsel has provided advance notice to counsel for any party or other person that designated the information as allegedly confidential. To the extent possible, such notice shall be given prior to the commencement of the hearing or conference. Any party may move the Board for an order that the testimony be received in camera or under other conditions to prevent unnecessary disclosure. If such motion is made, the Board will then determine whether the testimony should be received in camera or subject to other protection.

5. Upon receipt of an executed Protective Agreement signature form, that is, either Schedule IIa or IIb to the Protective Agreement, counsel for VGS shall forward one copy of the form to the Clerk of the Board.

6. All documents filed with the Board that are subject to the Protective Agreement as Allegedly Confidential Information or CEII and any documents that discuss or reveal documents that constitute Allegedly Confidential Information or CEII shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (discovery response, report, etc.) and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information or CEII, but shall not disclose the contents of any such sealed information to any person who has not agreed to be

bound by the Protective Agreement.

7. The Board will retain jurisdiction to make such amendments, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order.

8. The Board cautions the parties that there must be a good-faith basis for all claims of confidentiality. Claims without such a basis may result in sanctions against the party making the unfounded claim. A party's public disclosure of information that it has designated as Allegedly Confidential or CEII may indicate that the party lacked a good-faith basis for that designation.

Dated at Montpelier, Vermont, this 24th day of May, 2013.

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

OFFICE OF THE CLERK

FILED: May 24, 2013

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)