

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: 6/16/2015

ORDER RE: PALMER MOTION TO COMPEL DISCOVERY

I. INTRODUCTION

In today's Order, the Vermont Public Service Board (the "Board") denies a motion filed by Nathan and Jane Palmer (the "Motion to Compel") requesting that the Board compel Vermont Gas Systems, Inc. ("VGS" or the "Company") to produce discovery.

II. PROCEDURAL BACKGROUND

On December 23, 2013, the Board issued a final Order (the "December 23rd Order") granting VGS 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").

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

On December 19, 2014, VGS notified the Board that, for the second time, it projected a significant increase in the Company's estimated cost for the Project,¹ which had then reached \$154 million (the "second VGS Cost Estimate Update").

On January 16, 2015, the Board provided notice to the parties that it would seek a second remand of the December 23rd Order from the Vermont Supreme Court in light of the second VGS Cost Estimate Update.

On February 9, 2015, the Vermont Supreme Court remanded this case to the Board.

On April 8, 2015, the Palmers filed their first set of information requests and requests for admission served upon VGS consistent with the schedule for the second remand proceedings ("Palmers' Discovery Request").

On April 23, 2015, VGS filed its responses to the Palmers' Discovery Request.

Between April 29, 2015, and May 19, 2015, the Palmers and VGS corresponded directly regarding the Palmers' Discovery Request. This correspondence included two supplemental discovery responses from VGS.

On May 26, 2015, the Palmers filed the Motion to Compel.

On May 29, 2015, the Board issued an Order directing VGS to file responsive comments to the Motion to Compel by June 2, 2015.

On June 2, 2015, the Board received comments from VGS requesting that the Board deny the Motion to Compel ("VGS Comments"). The VGS Comments included an additional supplemental discovery response by VGS.

III. POSITION OF THE PARTIES

The Motion to Compel requests that the Board compel VGS to produce answers to two questions previously submitted to VGS on April 8, 2015, Q.Palmer:VGS.1-1 and Q.Palmer:VGS.1-24, each addressed separately below.

Q.Palmer:VGS.1-1

Q.Palmer:VGS.1-1 states:

1. On July 2, 2014, VGS informed the Board that its projected costs had increased from the \$86.6 million set out in the December 23rd Order to approximately \$121 million.

Please produce all relied upon thermal energy market survey *Documents* and any other market research *Documents* developed by VGS using their in-house resources, or commissioned by VGS from an outside firm, or publicly available purchased energy consulting market research reports or data. In particular, produce those *Documents* that substantiate the VGS claim [sic] there is still the previously asserted thermal energy market demand within the Docket 7970 proposed Addison County VGS gas service distribution network area by producing a *Document(s)* for each candidate VGS customer in the G1, G2, G3, G4, and interruptible ratepayer classes stating:

- a. The type and amount (in MM-BTU per year units) of thermal energy fuel(s) each such candidate VGS customer already uses.
- b. For those candidate customers consuming their thermal energy fuel in a building space heating boiler system, please provide the boiler's efficiency and its age since installation.
- c. The estimated cost incurred by each candidate VGS customer if they were to convert their existing thermal energy consuming facility to the VGS gas product. When reporting this estimated cost, please produce the *Documents* identifying who made the conversion cost estimate, their cost estimation methodology, and their assumptions.
- d. The estimated subsidizing cost incurred by VGS for connecting each candidate VGS customer if the candidate VGS customer was to convert their existing thermal energy consuming facility to the VGS gas product. When reporting this cost, please produce *Documents* identifying and stating the value of all such cost components including but not limited to gas equipment rebates, free pipeline hook up for the first 100 feet of trenching, the free gas meter for residential customers, the marketing overhead cost allocated per customer for acquiring a new account, and the overhead cost allocated per customer for delivering energy efficiency services.
- e. After their conversion to VGS gas service, the candidate VGS customer's most likely VGS gas service rate class that they would use to purchase their gas energy.
- f. The annual amount of gas energy (in Mcf units) the candidate VGS customer would consume per year after conversion of their thermal energy consuming facility.
- g. Whether the candidate VGS customer would retain dual-fuel capability such that they can switch their consumption between the VGS gas product and their incumbent thermal energy fuel.

h. If the candidate VGS customer was directly contacted by VGS or their market research agent, then when did the inquiry occur and please disclose any *Documents* reporting the candidate VGS customer's response to the offer to purchase VGS gas service.

i. The distance of the candidate VGS customer's thermal energy facility from the VGS gas service distribution network pipeline deployed at the nearest public street right of way.

j. Indicate if the candidate VGS customer is (1) already receiving CNG deliveries from NG/Advantage using direct CNG tanker truck deliveries, (2) or else is receiving VGS gas service from the Middlebury gas island distribution network (3) or has the future option of connecting to the Middlebury gas island distribution network, (4) or has the future option of connecting to a Vergennes gas island distribution network if one were to be built, (5) or consumes more than \$750,000 per year of thermal energy and therefore it may be cost effective for them to purchase direct CNG tanker deliveries (6) or the candidate VGS customer does not consume more than \$750,000 per year of thermal energy and so it will not be cost effective to receive direct CNG tanker deliveries.²

VGS's answer to this question states:

Objection, not reasonably calculated to lead to the discovery of relevant evidence. Further objection to the extent the question seeks to have new analysis created, and to do so would be unduly burdensome. Without waiving the objections, VGS has not performed the analysis requested. See also Attachment A:DPS:VGS.1-1 providing assumed customer counts by rate class and the load assumed for each.³

The Motion to Compel argues that the updated market research data sought in Q.Palmer:VGS.1-1 is relevant because it will show that "[t]he demand predicted by VGS is no longer representative of today's demand for the ANGP gas services" and that VGS's "materially incomplete response" hinders the Palmers' "ability to make an accurate assessment of the Project's asserted energy savings."⁴

In the VGS Comments, the Company reiterates its answer to Q.Palmer:VGS.1-1, above, by articulating that "VGS' initial and very clear response [was] that it did not perform market research analysis of the type requested, and that it did not rely upon such information for its

2. Palmers' Discovery Request at 11-13.

3. VGS First Response at 33.

4. Motion to Compel at 3.

testimony."⁵ The Company further states that "VGS did not develop or rely upon market research or survey documents to measure demand or conversion costs and prepared no such remand analysis."⁶

Q.Palmer:VGS.1-24

Q.Palmer:VGS.1-24 states:

Identify all public surveys, door-hanger campaigns, or other public opinion polls conducted by, or on behalf of, VGS in Addison County. Please include in your response all survey questions and all results and the date such survey was taken. For each survey:

- a. Identify all correspondence between any employee or agent of VGS and any employee or agent of Quantel Research, or any entity doing business under that name. Include in your response all contracts, instructions, directives, or requests by or on behalf of any VGS employee or any employee or agent of Quantel Research, or any entity doing business under that name.
- b. Identify the script or scripts of all telephone polling conducted in Addison County by or on behalf of VGS related to the pipeline that is the subject of this docket. Identify the name of the company, or companies, performing such polling, and the names of VGS contacts at those concerns, or the project managers who reported directly.
- c. Identify the budget, and all amounts spent, for all pipeline-related advertising in all print, radio, television, and Internet media during the pendency of this docket. Identify the person or persons with VGS whose responsibility it is to review or approve all such advertising.
- d. Identify all "push polling" conducted by VGS concerning provision of gas service in Addison County.⁷

VGS's answer to this question states: "[o]bjection, not reasonably calculated to lead to the discovery of relevant evidence."⁸

The Palmers responded to VGS's answer by asking the following supplemental question:

The VGS response to this discovery question asserts that the question was "not reasonably calculated to lead to the discovery of relevant evidence." That claim is not accurate, the request to produce Q.Palmer:VGS.1-24 is relevant because if responded to by VGS in alignment with the rules, their response would disclose VGS initiated market research to measure demand for their gas energy product and marketing

5. VGS Comments at 5.

6. *Id.* at 4.

7. Palmers' Discovery Request at 18-19.

8. VGS First Response at 54.

campaigns to amplify the demand. VGS's response does not acknowledge that it has conducted one or more such market research surveys to measure the demand for VGS gas product in Addison County. Market demand is one component in the 10 VSA § 248(b)(2) criteria requiring a project to satisfy "the need for present and future demand for service". Please produce *Documents* as per this pending request to produce.⁹

In the VGS Comments, the Company responds to the request to compel Q.Palmer:VGS.1-24 by stating that "[t]here are no documents responsive to this question as clarified, which seeks market survey or research 'to measure demand.'"¹⁰ The Company concludes its comments on Q.Palmer:VGS.1-24 by arguing that, just as was the case with Q.Palmer:VGS.1-1, "Mr. Palmer seeks documents concerning market research that VGS has not performed."¹¹

IV. DISCUSSION AND CONCLUSION

Regarding Q.Palmer:VGS.1-1, the Palmers request that the Board compel VGS to provide market research information that the Company states¹² does not exist. The Company has stated that "it did not perform market research analysis of the type requested, and that it did not rely upon such information for its testimony."¹³ In light of VGS's statement that it has no responsive documents, we decline to compel VGS to produce documents that are not in the Company's "possession, custody or control."¹⁴

Similarly regarding Q.Palmer:VGS.1-24, the Palmers request that VGS be compelled to produce market survey data results. The Company states that it does not have any of the market survey information requested in Palmer:VGS.1-24. Because the materials do not exist, the

9. VGS Comments at 8.

10. *Id.*

11. *Id.*

12. Pursuant to Rule 26(g) of the Vermont Rules of Civil Procedure, when an attorney presents a document to a court such as VGS's answers to Q.Palmer:VGS.1-1 and Q.Palmer:VGS.1-24, the attorney has certified that, to the best of her "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" the document has not been presented for an improper purpose and that the factual contentions contained therein are supported by evidence. Further, Rule 26(g) also provides that sanctions may be imposed upon an attorney whose certification later proves to have violated the terms of the Rule.

13. VGS Comments at 5.

14. V.R.C.P. 34(a).

Company does not have "the practical ability to obtain"¹⁵ them and there are no materials that the Board can compel VGS to produce.

The Board notes that, in the Motion to Compel, the Palmers argue that these materials in fact do exist because the Board previously compelled their production in Docket 8180.¹⁶ Contrary to the Palmers' assertion, the Board has not previously determined that these materials exist. The Motion to Compel misconstrues the purpose and effect of the 11/18/14 Order in Docket 8180 which, like the 3/29/15 Order in this Docket, was a request for comments not a "litigated and concluded . . . judicial order"¹⁷ compelling VGS's production of market surveys or research.¹⁸

As no documents exist that are responsive to the Palmers' two information requests, there are no grounds to grant the Motion to Compel or information to require VGS to produce. Accordingly, the Motion to Compel is denied.¹⁹

SO ORDERED.

15. *Castle v. Sherburne Corp.*, 141 Vt. 157, 166, 446 A.2d 350 (1982) ("the critical inquiry in determining . . . 'control' is 'whether the party from whom the materials are sought has the practical ability to obtain those materials'"; quoting *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 170, 629 P.2d 231, 246 (1980)).

16. Motion to Compel at 6 citing *Petition of Vermont Gas Systems, Inc.*, Docket 8180, Order of 11/18/14.

17. Motion to Compel at 6. The Board notes that in the Palmer Motion some, but not all, of the language from the 11/18/14 Order in Docket 8180 is quoted. Specifically the Palmer Motion does not quote the title of the Order, i.e., "Order Re: Comments On Cornwall Motion to Compel VGS Discovery."

18. Docket 8180, Order of 11/18/14.

19. Having reached this determination, there is no need for us to address VGS's argument that we should disregard the Motion to Compel.

Dated at Montpelier, Vermont, this 16th day of June, 2015.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ Margaret Cheney</u>)	BOARD
)	
)	OF VERMONT
<u>s/ Sarah Hofmann</u>)	

OFFICE OF THE CLERK

FILED: June 16, 2015

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)