

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: 1/16/2015

ORDER RE: SECOND REQUEST FOR 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"). On December 19, 2014, VGS informed the Board that, for the second time, it projected a significant increase in its estimated cost of the Project,¹ which has now reached \$154 million (the "second VGS Cost Estimate Update"). As we found with respect to VGS's first cost increase projection, the Board concludes that the estimated cost increase is sufficiently large, particularly in relation to the original \$86.6 million estimate, and that further investigation is warranted.

In today's Order, the Board provides notice to the parties of its decision to seek a second remand of the December 23rd Order from the Vermont Supreme Court in light of the new cost

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.

increase filing by VGS. The Board intends to file the request for second remand with the Vermont Supreme Court on January 23, 2015. To assist the Board in formulating its second remand request, we are seeking comments from the parties as to the scope of the investigation if a remand is granted as well as the amount of time the Board should take to conduct any further investigations that it may request. Comments are due by the close of business on January 21, 2015.

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 "first VGS Cost Estimate Update"). The first VGS Cost Estimate Update highlighted a 40 percent net increase in the projected costs, totaling \$35.5 million for an overall updated budget of \$121.6 million.

On September 11, 2014, the Vermont Supreme Court granted the Board's request for a 30-day remand to address this new cost information pursuant to Vermont Rule of Civil Procedure 60(b), as well as for an additional 30-day period to consider changes to the December 23rd Order if the Board determined that the new information would probably have resulted in a different outcome.

On October 10, 2014, the Board issued an Order reflecting its 60(b) review process (the "October 10th Order"). In the October 10th Order, the Board concluded that the new cost information made available by the first VGS Cost Update was not of such a material and controlling nature so as to change the Board's previous determination that approval of the Project pursuant to the criteria of 30 V.S.A. § 248 promoted the general good of the state of Vermont.

On December 19, 2014, pursuant to Board Rule 5.409, VGS filed the second VGS Cost Estimate Update, which highlighted an increase in the estimated capital costs of the Project to \$154 million.

On December 22, 2014, the Vermont Department of Public Service ("DPS" or the "Department") filed a motion seeking relief from the December 23rd Order under Rule 60(b).

On December 22, 2014, Jane and Nathan Palmer (the "Palmer") filed a motion to enlarge

time, halt construction, and appoint an independent counsel.

On December 23, 2014, the Palmers filed additional comments and a motion seeking relief from the December 23rd Order under Rule 60(b).

On December 31, 2014, VGS filed a proposed schedule for addressing the second VGS Cost Estimate Update using the same process the Board ordered in response to the September 11, 2014, remand.

On January 2, 2015, the Board issued an Order requesting comments from the parties on the second VGS Cost Estimate Update and the DPS and Palmers motions by January 12, 2015.

On January 12, 2015, the Board received responses from the Conservation Law Foundation ("CLF") (the "CLF Comments"), the Vermont Fuel Dealers Association ("VFDA") (the "VFDA Comments"), AARP (the "AARP Comments"), Kristin Lyons (the "Lyons Comments"), the DPS, the Palmers, Michael Hurlburt (for the "Hurlburts"), and VGS (the "VGS Comments").

III. POSITIONS OF THE PARTIES

CLF

In response to the second VGS Cost Estimate Update, CLF refiled the Petition and Memorandum it had previously filed and that the Board is considering in Docket 8330. The CLF Petition requested that the Board issue a declaratory ruling that an amendment to the CPG in Docket 7970 was required in response to the first VGS Cost Update. CLF also sought an injunction precluding VGS from proceeding with the Project in the absence of an amended CPG. The CLF Comments reiterate CLF's concern that the updated estimated capital cost increases reflected in both the first and second VGS Cost Estimate Updates amount 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. In the alternative, CLF supports a request for remand from the Vermont Supreme Court and encourages the Board to "fully evaluate the impact of the cost increase and its effect on all the criteria on which approval was previously granted."² CLF also opposes the hearing schedule proposed by VGS.

2. CLF Comments at 2.

VFDA

VFDA comments that in light of the second VGS Cost Estimate Update, the Board has an obligation to revisit the economic impacts of the Project and reconsider the December 23rd Order either pursuant to Rule 60(b) or by "an inquiry initiated by the Board."³

AARP and Ms. Lyons

AARP and Ms. Lyons are represented by the same counsel and filed parallel comments including motions for the Board to seek a remand and motions for the Board to provide relief from the October 10th Order pursuant to Rule 60(b). AARP and Ms. Lyons note that they would join with the Board in a motion for remand and if the Board decided not to seek a remand they would each do so on their own. AARP and Ms. Lyons argue that "there is no credible basis for concluding that the [P]roject is the least-cost alternative, or that it provides a net economic benefit under criterion (b)(4), or that its rate increases and 38-plus year dependence on cross subsidies is consistent with the public good."⁴

DPS

The Department argues that the second VGS Cost Estimate Update reflects a cumulative cost estimate 78 percent greater than the \$86 million estimated when the Board decided in the December 23rd Order to issue the CPG. Thus, the Department urges the Board to investigate whether the Project remains in the public good. The Department observes that due to the large increase in projected costs "the facts and assumptions underlying the CPG have potentially changed to such a degree that it is imperative that the Phase I Project be reconsidered in a manner that would allow the Board to evaluate whether it continues to meet the criteria set forth in 30 V.S.A. § 248."⁵ The Department requests that the Board review the cost estimate increase using the CPG amendment process proposed by CLF in Docket 8330 or that alternatively the Board seek a remand to allow consideration of the new projected costs under Rule 60(b).

3. VFDA Comments at 1.

4. AARP Comments at 10 and Lyons Comments at 10.

5. DPS Comments at 3.

Further, the DPS notes that the Department will seek a full rate case prior to VGS recovering any actual costs associated with the Project.

The DPS states that the Palmers' motion to enlarge time is unnecessary, that the DPS opposes the Palmers' request to halt construction, and that there is no basis to appoint an independent counsel.

The Hurlburts

The Hurlburts request that the Board halt construction until an investigation has been completed by an independent counsel. The Hurlburts further move for the Board to re-open the December 23rd Order, rescind the CPG, and not allow VGS to recover its losses through cost increases to customers.

VGS

VGS advocates for a Rule 60(b) process similar to that followed by the Board after the first VGS Cost Estimate Update and states:

[T]he threshold question before the Board in light of the Second Cost Update is whether the docket should be re-opened because the updated cost information filed on December 16, 2014, is of such a material and controlling nature that it will likely change the Board's previous determinations that the Project will promote the general good of Vermont pursuant to 30 V.S.A. § 248. After that determination, if the Board concludes that such a likelihood exists, then it will at that time hear evidence to determine whether and how to modify its decision to approve a CPG for the Project.⁶

The Company asks the Board to (1) deny the Palmers' motion to enlarge time for lack of good cause; (2) deny the Palmers' motion to halt construction for not making a showing of a need for extraordinary relief; and (3) deny the Palmers' motion for appointment of an independent counsel because there has been no allegation that the Department has conflicts requiring such an appointment.

Further, the Company maintains that "the Board has jurisdiction to investigate the cost estimate under Board Rule 5.409 notwithstanding the appeal of the underlying December 23, 2013 Order" but that "the Board is without jurisdiction to entertain a Rule 60(b) motion with the

6. VGS Comments at 6, citing Docket No. 6860, *In re Vt. Elec. Power Co.*, Order of 9/23/05 at 1-2.

Order on appeal.⁷ VGS also asserts that the Board's oversight authority under Sections 203 and 209 of Title 30 provide the Board with jurisdiction to investigate the cost increase without a remand, although VGS does not indicate what action the Board could take as a result.

IV. DISCUSSION AND CONCLUSION

VGS now forecasts that the Project will cost approximately 78 percent more than the estimate that the Board considered when it issued the December 23rd Order and concluded that the Project met the applicable criteria under Section 248 and would promote the general good. Several parties, including the Department, have now suggested that the magnitude of the change is sufficiently large so as to call into question the Board's conclusions under certain of the Section 248 criteria. Even VGS acknowledges that it is appropriate for the Board to conduct some further examination of the cost estimate increases.

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. These comments suggest that the Board has several options for acting in response to the second VGS Cost Estimate Update. These include acting pursuant to our continuing oversight jurisdiction under Sections 203 and 209, examining whether the updated estimate represents a substantial change to the Project such that VGS should be required to seek an amendment to its CPG under Board Rule 5.408, or considering the updated estimate under Rule 60(b), as we did with the first cost increase. An additional question raised by the parties is whether the Board must seek a remand from the Supreme Court to conduct such investigation.

After consideration of the parties' recommendations and the applicable law, we have decided to follow the same course as we did in responding to the first VGS Cost Estimate Update, namely to seek a remand of the December 23rd Order from the Vermont Supreme Court to consider under Rule 60(b) whether the new cost estimate information would probably result in a different outcome in the final decision of whether to issue a Section 248 CPG for the Project. We agree with the parties that the Board has residual supervisory jurisdiction to investigate the cost estimate increases without seeking a remand. However, it is not clear that the Board could

7. VGS Comments at 17.

modify the CPG or the December 23rd Order absent a remand. In the interest of procedural economy and efficiency, we find it is appropriate to seek a remand to ensure that we have the requisite jurisdiction to amend either the CPG or the December 23rd Order if need be.

We also conclude that the appropriate review process is the consideration under Rule 60(b). The new cost information relates to many of the findings and conclusions set out in the December 23rd Order and our overall decision to issue the CPG, not specific CPG terms and conditions. Thus, we will first consider, under Rule 60(b), whether the revised cost estimate would probably result in a different outcome than we reached in the December 23rd Order. If we answer that question in the affirmative, we then will hold further proceedings to reexamine the findings and conclusions in the Final Order.

The Board intends to file a request for a remand on January 23, 2015. To inform that request and the further proceedings that would ensue if the Supreme Court grants the Board's motion, this Order seeks additional comments from the parties as to the schedule and scope of the proceedings on remand. As to the scope of the Rule 60(b) proceeding on remand, the parties should address whether it would consider only evidence related to the second Cost Estimate Update or whether the Board should examine more broadly the criteria that may be affected by the second Cost Estimate Update to account for other changes that have occurred since the evidentiary hearings in September 2013. We note that in the hearing on the first VGS cost estimate increase, the Board ultimately expanded the scope to examine information on other changes to the marketplace.

As to the schedule for the remand proceeding, the parties should address how much time the Board should allocate to the Rule 60(b) examination. In our review of the first cost estimate update, the Board sought a remand for 30 days. However, we note that some parties have asked for an opportunity to conduct discovery on the Second Cost Estimate update. Any party comments on the schedule and scope of our request for remand to the Vermont Supreme Court made pursuant to Rule 60(b) shall be filed by the close of business on January 21, 2015.

As to the other motions, the Board sees no need to enlarge time as requested by the Palmers, nor is there any good cause to halt construction or appoint an independent counsel. The Palmers' motion to that effect is hereby denied. Similarly, we are not persuaded by the Hurlburts'

motion to halt construction or their motion for an independent counsel investigation, and they are also denied.

SO ORDERED.

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

<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: January 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)

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.