STATE OF VERMONT
PUBLIC SERVICE BOARD

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 Phase 2 (ARNGP Phase 2)" to extend natural gas transmission facilities in Franklin and Addison Counties, for service to the Ticonderoga mill in New York, and construction of 2 Community Gate Stations for distribution service in the towns of Cornwall and Shoreham, Vermont	)	Docket No. 8180

VPIRG RESPONSE TO VGS LETTER SEEKING INDEFINITE DELAY, INCLUDING VPIRG REQUEST FOR SANCTIONS AND DISMISSAL

The Vermont Public Interest Research Group (VPIRG) hereby responds to the December 19, 2014, letter filed by Vermont Gas Systems, Inc. (VGS), requesting an indefinite postponement of the technical hearings scheduled for January 12-16 in this matter. In light of the relevant prefiled testimony, discovery and judicially noticeable facts, VPIRG moves pursuant to Board Rules 2.103, 2.105, 2.206, 5.407 and 5.409, and Vermont Rules of Civil Procedure 16.2, 26(e)(2), 40, 41(b) and 78(b), for an order granting VGS' request only on the conditions specified below, or for dismissal of the Petition without prejudice on conditions.

1. FACTUAL BACKGROUND

The Petition in this matter was filed by VGS on November 19, 2013. The Petition sought a conclusion under § 248 that the project would promote the public good of Vermont by using Vermont land and lakebed to transport natural gas to an private user, International Paper Company, in New York. International Paper Company had committed itself by its Facilities Development Agreement (FDA) to pay $62 million of the $64.4 million cost of the project. A small number of

Vermont retail customers was proposed to be served by construction of limited distribution infrastructure in Cornwall and Shoreham; according to VGS President Gilbert, 160 Vermont customers would be served (Gilbert prefiled testimony p.12). VGS's prefiled testimony, later supported by that of International Paper Company, represented that a principal Vermont benefit of the project would be reduction of greenhouse gas emissions were International Paper Company to replace its usage of fuel oil by natural gas.

During the year following the filing of the Petition, numerous public interest and landowner interveners sought information about the costs and benefits of the project from VGS and International Paper Company. In discovery, interveners learned that the capacity of the pipeline substantially exceeds that needed to replace existing oil currently used by International Paper Company. See Solar Haven Farm Exhibits SHF-RTA-X11 and SHF-RTA-X12 and Solar Haven Farm amended rebuttal testimony of George Gross, December 12, 2014, p.12, explaining that VGS' discovery responses show that the pipeline has the capacity to deliver twice as much gas per year as the amount relied upon by VGS in calculating greenhouse gas emissions[1]. Interveners also learned that it is International Paper Company's position that this Board will lack authority to restrict or regulate the quantity of gas it consumes or the use to which it puts that gas once the pipeline has been constructed through Vermont to provide it with gas (IPC 9/24/14 Supplemental Response to VPIRG

1. The discovery that Solar Haven Farm obtained from VGS confirms the prefiled testimony of Agency of Natural Resources witness Jeff Merrell that the switch to natural gas may lead to increased emissions of greenhouse gasses:

> If the switch to natural gas enables IP (via financial savings, operational efficiencies, etc.) to not only replace their existing No.6 fuel oil consumption, but to expand or ramp-up, their operations, and thereby increase their overall energy consumption, then the project would result in additional GHG emissions that may not have occurred otherwise.

Discovery Request VPIRG-IPC 32).

On July 31, 2014, VGS admitted that sanctions should be imposed upon it for failure to timely notify the Board and parties of increased pipeline construction costs in Docket 7970. VGS committed to "quarterly" assessment of project costs in both Docket 7970 and Docket 8180, including "forward and backward looking assessment of the project, its costs, timelines and projections." These assessments were to be submitted to the Department. The explicit purpose of these requirements, which VGS agreed to, was "to prevent surprises…" See *July 31, 2014 Letter of Louise Porter to Susan Hudson*; and *July 31, 2014, Letter of John Marshall to Susan Hudson*.

VGS submitted rebuttal testimony on August 1, 2014, setting forth a new total project cost of $74.3 million (Simollardes Rebuttal p.8). Discovery was conducted on that increase. The rebuttal testimony included an Amended FDA; § 8.1.2 and Schedules A and B of the Amended FDA allow International Paper Company to cancel its obligations if the project cost exceeds $104 million or if all permits are not in hand by March 31, 2015.

On October 16, 2014, VGS submitted a one-page spreadsheet. The submission was accompanied by a cover letter stating that the spreadsheet was intended to satisfy VGS' commitments made in the July 31, 2014 filing. However, the cover letter also stated that the costs were identical to, and had not been updated from, the submission made on August 1. The spreadsheet did not contain any forward looking assessment of project timelines. No further quarterly assessments of costs, timelines or projections were provided to the parties from October 16 to the present. Because the October 16, 2014, filing was just a resubmission of the August 1 filings, and because no assessments have been submitted since then, in fact no quarterly assessments at all have been provided, despite the July 31,

---

Merrell PFT 6/13/14 pp.17-18.

2014 commitment.

During that year, VGS also repeatedly urged the Board to reject Interveners' requests for extra time in order to prepare for technical hearings because, according to VGS, existing consumers would be harmed by deferring the reliability component of the project, and because any delay would give International Paper Company grounds to terminate the Facilities Development Agreement and then the Amended Facilities Development Agreement. See, for example, *VGS Response to Town of Cornwall's Motion To Enlarge Time*, May 13, 2014 pp. 8-9 (any delay in the case "may jeopardize the Project" because International Paper Company may cancel the agreement) and letters from VGS to the Board dated September 26, 2014 and October 20, 2014.

The Board issued a final Scheduling Order on October 30, 2014, that set the trial date for January 12-16 and a final briefing date of February 13, 2015.

On December 14, 2014, the Select Board of the Town of Cornwall released to the public a two-page Terms Sheet, which the Select Board stated had been prepared by VGS. The Term Sheet summarized the general terms that the Town and VGS had agreed to. These include payment to the Town of $1.5 million, which the Select Board stated at its December 15, 2014 meeting would be used to reduce property taxes, in exchange for agreement by the Town that the project satisfies the criteria of § 248. The terms also included a commitment to construct up to $2 million in distribution lines. Because the Town of Shoreham had entered into an agreement with VGS granting Shoreham the benefit of any improved terms agreed upon by VGS and any other municipality, the Cornwall terms also will apply to Shoreham.

VGS has not provided any amended prefiled testimony or discovery supplement to place the parties on notice of its Cornwall Term Sheet, or to address how the terms satisfy § 248, or to explain

whether International Paper Company has waived its right to cancel the Amended FDA.

VGS filed a letter with the Board on December 19, 2014, asking that these proceedings be suspended indefinitely because as of that date – five and a half months after committing to quarterly reports in order to prevent surprises – "Vermont Gas is now in the process" of a cost-estimating "exercise" for the Phase 2 budget. Until now, budgeting "in accordance with best practice established by the Association for the Advancement of Cost Engineering International" has not been performed for Phase 2. When that exercise has been completed the Board and the parties will have "a clear view of the Project." The letter also stated, for the first time, that the needed reliability component of the project can be approved of and constructed separately, and will be the subject of a Petition to be filed in January.

VGS did not support its letter with any motion, affidavit, or statement pursuant to Rule 11 as to the need for the continuance and when that need first became known. VGS also did not provide amended prefiled testimony or supplementary discovery that informed the parties of the amount of the cost increase, or explained the reasons for the cost increase, or addressed how the new costs affect the existing prefiled testimony and existing discovery, or explained why the reliability component of the project can be approved and constructed on its own merits, or explained whether the Amended FDA remains in effect.

On December 21, 2014, VPIRG's counsel asked VGS to immediately provide to the parties supplementary discovery answers. VGS has never replied.

2. THE GOVERNING LAW

a. The Legal Context

VGS's December 19, 2014 letter must be considered in light of Board Rules 2.103 and 2.105

(Vermont Rules of Civil Procedure generally apply), Board Rule 2.206 (motions must be made in writing and if they raise a substantial issue of law be supported by a memorandum of law), Board Rule 5.407 (notice must be provided to all parties and to all newly affected property owners of substantial changes to a project), Board Rule 5.409 (petitioner has a duty to regularly monitor and update project costs and to notify the Board and the parties of the new capital cost estimates and of "the reasons for the increase"), Vermont Rule of Civil Procedure 16.2 (once a scheduling order has been issued, a trial date "may be continued only on motion and a showing of good cause"); Vermont Rule of Civil Procedure 26(e)(2) (responses to interrogatories and requests to produce must be supplemented "if the party learns that that response is in some material respect incomplete or incorrect") and Vermont Rule of Civil Procedure 40(d)(1) ("Motions for continuance shall be accompanied by an affidavit or a certificate of a party's attorney subject to the obligations of Rule 11, stating the reason therefor and when such reason was first known.")

The Civil Rules also provide that when a party has not obeyed a scheduling order, the claim may be dismissed by the tribunal or subject to other sanctions. V.R.C.P. 16.2 (final paragraph, applying V.R.C.P. 37(b)(2)(B) and (C)). Vermont Rules of Civil Procedure 41authorizes the tribunal to dismiss any action when the plaintiff has failed to comply with any of the Rules of Civil Procedure or any order of the tribunal.

b. VGS Has Violated Rule 5.409, V.R.C.P. 40(d) and Its Explicit Commitments to the Board

As of December 19, VGS has notified the Board and the parties that it possesses new information about cost increases -- but it has not notified the Board of what that new cost information is as required by Rule 5.409 or of the reasons for the cost increases as is also required by Rule 5.409 or of when it learned of that new information as is required by V.R.C.P. 40(d). As of August 1, the budget

was $74.3 million. What is it now? Why has the budget increased? When did VGS learn of these facts? The plain meanings of Board Rule 5.409 and V.R.C.P. 40(d) have been violated.

If the December 19 letter is interpreted as saying not that VGS knows of an increased cost, but that VGS no longer has confidence in the testimony and discovery already filed about project cost because it failed to engage in the cost-review process it committed to in July, the result is the same. Which components of project cost does it no longer have confidence in? For what reasons? Did VGS ignore Rule 5.409 and its July 31 commitments until the third week of December? When did VGS discover that it had failed to abide by the rule and its commitments? Rule 40(d) states that "Motions for continuance shall be accompanied by an affidavit or a certificate of a party's attorney subject to the obligations of Rule 11, stating the reason therefor and when such reason was first known."

VGS should not be heard to defend itself by stating it does not know yet what the cost increases will be, or it does not know yet what the "best practice" will reveal. VGS has known for many months – and has insisted for many months – that the technical hearings will start on January 12. The Board agreed, and issued an order to that effect. VGS should not have expected to proceed into the technical hearings a year after it submitted its prefiled testimony, and five months after its August 1 cost update, without again reviewing project costs to ensure they are up-to-date. On July 31, 2014, VGS had already admitted that sanctions should be imposed upon it for failure to timely notify the Board and parties of increased pipeline construction costs in Docket 7970, and had committed to "quarterly" assessment of project costs in both Docket 7970 and Docket 8180, including "forward and backward looking assessment of the project, its costs, timelines and projections." The explicit purpose of these requirements was "to prevent surprises…" After making these explicit

commitments in writing to the Board, VGS took no steps to comply with its commitments and the Rule. Almost two quarters after July 31, VGS was unable to submit to the Board a single page of "forward and backward looking assessment of the project, its costs, timelines and projections" in support of its December 19, 2014, request for continuance.

Either VGS did not engage in the process it committed to in order to ensure that its testimony up-to-date, accurate and in compliance with Rule 5.409 -- or VGS possesses this information and has chosen not to disclose it as required by Board Rule 5.409 and Vermont Rule of Civil Procedure 40. In either event, sanctions should be imposed, as set out below.

These are not hypertechnical complaints. The Agency of Natural Resources's staff, the Department of Public Service staff, and the Board's members and staff are all public servants with already-overburdened schedules. The public interest interveners participate in this matter using donated funds, and the private landowners participate using their own hard-earned funds, and miss work to do so. The Board and the parties reserved the week of January 12 for trial. Other commitments have been pushed to the side. Months of trial preparation have occurred, based on VGS' prefiled testimony and discovery. The Board and the parties now stand on the brink of trial without crucial information. Realistically, this leaves the Board and the parties without any fair option. Either they insist on a trial for which they cannot be prepared and as to which VGS has lost confidence in the accuracy of its prefiled testimony and discovery, or they accede to VGS' request even though they lack the basis for evaluating and agreeing to that request.

c. VGS Has Disobeyed the Board's Scheduling Order

The Board's Seventh Scheduling Order, issued October 30 2014, was a Scheduling Order within the meaning of V.R.C.P. 16.2. VGS was duty-bound to have this case ready for trial on January 12.

The December 19, 2014 letter signifies that VGS's existing prefiled testimony and discovery answers are no longer sufficiently accurate as to be relied on by the parties and the Board. If the technical hearings were to commence on January 12, VGS would be in violation of its duties of full disclosure and candor to the Board and to Board participants, as discussed at length in In re Citizens Utilities, 179 P.U.R.4th 16, 1997 WL 582155 and In re Entergy Nuclear Vermont Yankee, LLC., Docket No. 6812, *Order re NEC Motions for Sanctions and Schedule,* Oct. 7, 2003 -- as well as its duties not to submit misleading or false testimony under Vermont's criminal code, and its duties under V.R.C.P. 11 and V.R.C.P. 26(e). Were this situation to have arisen due to an unexpected *force majeure*, the conduct could be excusable. It is not. VGS is in violation of the Scheduling Order. The sanctions set forth in final paragraph of V.R.C.P. 16.2 and in V.R.C.P. 41(b)(2) should be imposed.

d. Rule 5.407 and V.R.C.P. 26(e) Also Require Action by VGS

The description of the project for which Board approval is being sought has changed substantially since November 19, 2013. The Petition and supporting prefiled testimony portrayed a project that did not include cash contributions to subsidize local property taxpayers and did not include any significant Vermont distribution service – only 160 homes. Now VGS is committing to pay $3 million to the towns, and to construct $4 million worth of distribution lines in the towns.

This change may affect several statutory criteria. The general good of Vermont under § 248(a) would be violated by basing a regulatory decision on the advocacy of a statutory party, a town, whose position in favor of a project, contrary to its prefiled expert testimony, was obtained by payment of $1.5 million dollars in cash payments that will be used to reduce local property taxes[2]. A project that

2. Cornwall's Select Board has stated that it based its position on its duty to town residents to keep their taxes down. Were this conduct allowed, the positions before this Board of every town, planning commission or other statutory party will be susceptible to influence if not outright

requires existing ratepayers to subsidize millions of dollars of uneconomic construction of distribution lines, in order to win the favor of a statutory party, does not satisfy least-cost planning standards – particularly where alternative means of reducing consumers' heating bills and greenhouse gas emissions are available to the same consumers without any subsidization by existing ratepayers, as Mr. Neme's testimony demonstrates.

These changes are substantial. Board Rule 5.407 required that VGS notify all of the parties and the Board of these changes. Counsel has not had time to review the thousands of pages of discovery answers to determine which discovery responses also require supplementation under V.R.C.P. 26(e), although it is obvious that many do, since many addressed project cost and potential Vermont residential users.

3. RELIEF REQUESTED BY VPIRG

VGS' last-minute, cryptic and legally unsupported submission as to project costs leaves the Board little room to deny the request, despite VGS failure to comply with governing law. Neither the parties nor the Board should spend the time and money involved in the technical hearings in the absence of reliable up-to-date, complete, information as to cost. Neither the parties nor the Board should proceed with technical hearings on a project that International Paper may cancel 20 days after the new cost is revealed during the hearings.[3] VPIRG submits that the Board is left with only two

---

determination by an auction process. Those with the deepest pockets – such as utilities invested by law with monopoly service territories, captive ratepayers and the right of eminent domain -- will always prevail over citizens. Compelling public policy and Vermont Constitution Chapter I, Article IV, prohibit the Board from allowing Vermont Gas to engage in this conduct.

3. International Paper Company has the right to terminate the Amended FDA if all permits have not been issued by March 31, 2015, or if the cost exceeds $104 million. It is now certain that all permits will not be in hand by March 31. The Amended FDA grants International Paper Company 20 days after it learns of these facts to exercise its right of termination.

reasonable choices that will protect the integrity of the regulatory process. The Board may grant the request with stringent conditions, or it may dismiss the Petition without prejudice and on conditions that will apply to any re-filing.

a. Conditions That Should Be Imposed If the Continuance Request Is To Be Granted

VPIRG moves pursuant to the Board's Rules and the Vermont Rules of Civil Procedure for an order granting the requested postponement only upon the following terms:

1) By April 1, 2015, International Paper Company shall inform the Board that it has irrevocably waived its right under § 8.1.2 of the Amended Facilities Development Agreement ("Amended FDA") and Schedules A and B to terminate the agreement on grounds that project cost exceeds $104 million or that all Vermont permits have not been issued by March 31, 2015. Without such a commitment, the Board and the parties may be involved in months or years of litigation – for naught.

2) VGS shall serve on all existing parties, and on all parties entitled to notice under the Board's rules, an Amended Petition, no less than 60 days prior to filing the Amended Petition with the Board. The Amended Petition must include or be accompanied by:

   a. An accurate, complete and up-to-date projection of project cost.

   b. A complete description of the revised and expanded project, including:

      i. The Terms of any Memorandum of Understanding with the Town of Cornwall, or the Terms of any proposed Memorandum of Understanding submitted to the Town.

      ii. Prefiled testimony addressing why payments proposed to be made

to Cornwall and Shoreham town satisfy least-cost standards, would promote the public good, and may be placed into the cost of service.

iii. Prefiled testimony addressing whether the $4 million in distribution line improvements satisfies least-cost standards and may be placed into the cost of service.

iv. Prefiled testimony addressing the greenhouse gas emissions of IPC's use of the full capacity of the pipeline on an annual basis rather than the greenhouse gas emissions only of the gas needed to replace existing levels of fuel oil consumption.

3) VGS shall review all of its discovery responses and shall provide supplemental discovery answers to the parties within 30 days of filing the Amended Petition.

4) As a sanction under Board Rule 5.407, Board Rule 5.409, Vermont Rule of Civil Procedure 16.2, Vermont Rule of Civil Procedure 40(d)(1) and Vermont Rule of Civil Procedure 41(b), VGS shall promptly reimburse each public interest organization/ intervener and each landowner/intervener all legal fees, expert witness fees, and costs incurred prior to December 19, 2014. Without this remedy, the budgets of most if not all interveners will be depleted and VGS will be able to proceed forward with little public participation, other than by the Department of Public Service.

b. <u>The Petition Should Be Dismissed Without Prejudice On Conditions</u>

Dismissal without prejudice would be more appropriate than granting VGS' extraordinary request for postponement for an indefinite period of time. An indefinite postponement would raise substantial problems for the parties, the Board and the record. Much of the prefiled testimony is

already dated. The Board may take judicial notice that since November 19, 2013, there have been dramatic changes in the cost of oil, the legislature has decreed that financial assistance to homeowners who wish to install heat pumps should be provided by Efficiency Vermont, and there are now serious questions as to the potential constriction of natural gas transmission through Canada. Returning to the fold in three months or six months is likely to result in additional substantial changes. The record of prefiled testimony will consist of 2013 testimony, 2014 testimony, 2015 testimony, 2015 revisions of 2013 testimony and 2015 revisions of 2014 testimony. Cross-examination will be based on discovery that, by then, may be 18 to 24 months old and out-of-date and will have gone through its own revisions.

A better alternative would be a clean record, with fresh, accurate and up-to-date testimony and discovery, all dated 2015.

Therefore VPIRG asks that the Petition be dismissed pursuant to V.R.C.P. 16.2 and 41. The dismissal should be without prejudice but with the condition that upon refiling, VGS shall promptly reimburse each public interest organization/intervener and each landowner/intervener all legal fees, expert witness fees, and costs incurred prior to December 19, 2014.

c. Request for Evidentiary Hearing Pursuant to V.R.C.P. 78(b)

VPIRG requests an evidentiary hearing pursuant to V.R.C.P. 78(b) to address the terms on which VGS' request should be granted. However, if the Petition is to be dismissed with the condition that VGS reimburse interveners upon refiling, and or if the continuance request is granted with the conditions set forth above, VPIRG does not request a hearing.

At the hearing, by means of pre-hearing discovery or subpoena duces tecum, VPIRG intends to obtain from VGS and present to the Board, and then question a VGS representative

about, each "forward and backward looking assessment of the project, its costs, timelines and projections" that VGS has prepared since July 31, 2014, as well as VGS' communications with International Paper Company about whether International Paper Company has waived or will waive its rights to cancel the Amended FDA.

CONCLUSION

VPIRG asks that the Petition be dismissed without prejudice but on conditions. If the Petition is not dismissed, VGS' request for indefinite postponement should be granted only on the conditions set forth above. If the conditions set forth above are not imposed, VPIRG asks for an evidentiary hearing to address the terms on which the continuance should be granted.

The Vermont Public Interest Research Group
By:

Date: 12/29/14

James A. Dumont

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq. PC
15 Main St., PO Box 229
Bristol VT 05443

Attachment: Cornwall Term Sheet