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 – (On Second Remand)	))))))))))

Order entered: 1/8/2016

ORDER DENYING RULE 60(B) MOTIONS

I. INTRODUCTION

In today's Order, the Vermont Public Service Board (the "Board") decides not to reopen the December 23, 2013, final Order (the "2013 Final Order") in which we granted a Certificate of Public Good ("CPG") to Vermont Gas Systems, Inc. ("VGS" or the "Company") to construct a natural gas transmission line into Addison County, Vermont (the "Project"). Although a number of circumstances have changed since our original decision, the most significant of which is the much higher estimated cost of the Project, the new evidence does not alter our conclusion that construction of the pipeline promotes the general good and is in the best interest of the state. In reaching this decision, we place substantial reliance upon the Memorandum of Understanding ("MOU") between VGS and the Department of Public Service ("Department" or "DPS") and on VGS's testimony to the Board, under which the potential rate impacts of the Project have been limited through VGS's commitment to not seek rate recovery for costs in excess of $134 million (subject to limited exceptions) (the "Cost Recovery Cap"), even if actual Project costs exceed that figure.

Originally, the Project was estimated to cost approximately $86 million. At that cost level, we found that the Project was needed to meet demand for service and had significant economic benefits for the state. Moreover, it would not impose large costs upon existing VGS ratepayers in the form of higher rates. Now, the estimate has risen approximately 78% to $153.6 million.[1] Other changes in the energy marketplace have also occurred since our original Order: (1) declining oil prices that reduce the competitive price advantage of natural gas; (2) the availability of compressed natural gas ("CNG") as an alternative to pipeline-supplied gas; and (3) the availability of cold climate heat pumps ("CCHPs"), which may be more cost-effective for some customers than natural gas.

Collectively, these changes raise significant concerns. The need for the Project has been affected by higher estimated Project costs and changes in the market, the anticipated economic benefits have been reduced, and there is a potential that existing ratepayers will be called upon to absorb rate increases in the 15% range (as compared to the 5% rate increase we found acceptable in the 2013 Final Order or the 10.1% increase we considered in the First Remand Order).

We note that this proceeding is not an examination of VGS's rates; before any increase in rates occurs, the Board will carefully scrutinize VGS's request and evaluate the reasonableness of all Project costs, notwithstanding the Cost Recovery Cap. In addition, the Company has an incentive to control costs to keep the rate increase as low as possible, thereby optimizing the competitive price advantage of natural gas relative to other fossil fuels. The testimony nonetheless indicates that if the full $153.6 million cost of the Project were permitted to be recovered in rates, a 15% rate increase could occur, which would raise fairness questions.[2]

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1. On December 19, 2014, VGS disclosed that the estimated Project cost had risen to $153.6 million (the "Second Update"). Earlier, in July 2014, VGS had notified the Board that the estimated Project costs had increased to $121.6 million (the "First Update"). In response, the Board obtained a remand from the Vermont Supreme Court and held further proceedings pursuant to Rule 60(b), V.R.C.P. to determine whether to reopen the 2013 Final Order ("First Remand"). After hearings, the Board issued an Order on October 10, 2014, in which we declined to reopen the 2013 Final Order (the "First Remand Order"). In the instant proceeding, we are considering the Second Update. To do this, the Board requested and obtained from the Supreme Court a second remand of the pending appeal of the 2013 Final Order. In this Order, we refer to the current phase of the proceeding as the "Second Remand."

2. Throughout this Order, we discuss the potential rate impacts of the Project. These potential impacts do not necessarily reflect the actual rates that will occur. They are based upon the assumption that VGS's costs would be recoverable in rates, that VGS would seek to increase rates to recover these costs and earn its allowed rate of return, and that the existing rate designs are employed. At this time, we are not determining that any of these factors are actually true. For example, VGS has suggested that it might not seek to recover all costs or that it might vary the rate

(continued...)

The commitments contained in the MOU, however, materially alter the impact of the higher estimated cost of the Project. VGS has committed to a $134 million cap on the amount of the Project costs that it may seek to recover from ratepayers, reducing the potential rate impact from 15.1% to 12.2%. This figure is close to the 10.1% potential rate impact we found acceptable when we examined an earlier VGS estimate showing that the cost of the Project was expected to increase from $86.6 million to $121.6 million. By reducing the potential rate impacts of the Project, the Cost Recovery Cap also has the effect of improving the economic benefits of the Project relative to the benefits that were projected assuming that the full $153.6 million in estimated costs were flowed through to ratepayers. A lower rate impact also helps preserve the price advantage of natural gas relative to fuel oil and propane, which is part of the source of demand for the Project. Critically, in answers to our questions, VGS testified unambiguously that its commitment to cap its future recovery of Project costs was not only to the Department but was to the Board and other parties as well. The Board relies upon VGS's commitment to us in evaluating the impact of the MOU on future rate recovery.

After weighing the impact of the MOU and the evidence presented by the parties, we find that reopening our original approval is not warranted. The evidence shows that, with the Cost Recovery Cap, it is unlikely that, if we reopened, we would reach a different conclusion applying the standards of Section 248 of Title 30 than we did in either the 2013 Final Order or in the First Remand.

II. PROCEDURAL HISTORY

On December 23, 2013, the Board issued a final Order and CPG in this proceeding, authorizing VGS to construct the Project.

On March 10, 2014, the Board issued an Order (1) confirming the finality of the 2013 Final Order, (2) delineating the limited scope of post-certification review of that Order, and (3) ruling on several proposed amendments to the 2013 Final Order and CPG.

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2. (...continued)
designs. Nonetheless, in assessing the merits of the Project, it is necessary to evaluate the potential rate impacts in light of the information that is available. The findings reflect VGS's testimony concerning potential rate impacts, which was not contested by any party.

On April 9, 2014, Kristin Lyons filed a notice of appeal of the 2013 Final Order to the Vermont Supreme Court.

On July 2, 2014, VGS filed the First Update of the estimated capital costs of the Project pursuant to Board Rule 5.409. The First Update disclosed a 40% net increase in the projected costs, totaling $35.5 million for an overall updated estimate of $121.6 million.

On July 21, 2014, Nathan and Jane Palmer ("the Palmers") and Ms. Lyons jointly filed a motion requesting that the Board exercise its authority under 30 V.S.A. § 209(a)(3) and § 248 to investigate the First Update (the "Palmer-Lyons First Remand Motion").

On September 11, 2014, the Vermont Supreme Court remanded the case to the Board for 30 days to address the new cost information, as well as an additional 30 days to consider changes to the 2013 Final 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 in which it decided not to set aside the 2013 Final Order and not to reopen the proceeding pursuant to 60(b) (the "First Remand Order"). In the First Remand Order, the Board concluded that the new cost information in the First 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 would promote the general good of Vermont.

On December 19, 2014, pursuant to Board Rule 5.409, VGS filed the Second Update, which disclosed that the estimated capital costs of the Project had increased to $153.6 million.

On December 22, 2014, the DPS filed a motion seeking relief from the 2013 Final Order under Rule 60(b) (the "DPS December 22nd Motion"). After noting the magnitude of the cost increase in the Second Update and the approaching first anniversary of the 2013 Final Order, the Department stated that it was "not indicating its desire to proceed under Rule 60(b), but simply preserving the possibility to do so." The motion otherwise cited no specific grounds for reconsideration.

On December 24, 2014, the Palmers filed a motion seeking additional time to comment on the Second Update, as well as an order from the Board halting construction of the Project and appointing independent counsel to represent the interests of the public (the "Palmer December 24th Motion").

On December 30, 2014, the Palmers filed additional comments on the Second Update and a motion for "relief from judgment under rule 60(b)(2) in response to new evidence that has emerged since the Board's December 23, 2013, Order, the Board's March 10, 2014, Order, and the Board's October 10, 2014, Order"[3] (the "Palmer December 30th Motion").

On January 12, 2015, the following filings were made: (1) Ms. Lyons requested that the Board seek a remand to hear the DPS December 22nd Motion and otherwise independently sought relief from the Board's First Remand Order pursuant to Rule 60(b) (the "Lyons January 12th Motion"); (2) the Conservation Law Foundation ("CLF"), the Department, and the Vermont Fuel Dealers Association ("VFDA") filed comments on the Second Update; (3) AARP filed a motion for relief from the First Remand Order pursuant to Rule 60(b)(2)(the "AARP January 12th Motion"); (4) AARP filed a motion asking the Board to seek a remand to hear the DPS December 22nd Motion and to hear the AARP January 12th Motion; and (5) VGS responded to the DPS December 22nd Motion, the Palmer December 24th Motion, and the Palmer December 30th Motion.

On January 14, 2015, Michael Hurlburt, Herrick Hurlburt, Sr., David Hurlburt, Herrick Hurlburt, Jr., and Joshua Hurlburt ("the Hurlburts") filed comments and a motion requesting that an independent counsel investigate the Second Update (the "Hurlburt January 14th Motion").

On January 16, 2015, the Board took the following actions: (1) It provided notice to the parties that it would seek a second remand of the 2013 Final Order from the Vermont Supreme Court in light of the Second Update; (2) it sought comments from the parties as to the scope of the investigation if a second remand should be granted as well as the amount of time the Board should take to conduct any further investigations; and (3) it denied the Palmer December 24th Motion and the Hurlburt January 14th Motion.

On January 23, 2015, the Board filed a motion with the Vermont Supreme Court seeking a second remand of the case in light of the Second Update.

On February 9, 2015, the Vermont Supreme Court remanded this case to the Board (the "Second Remand"). The Court's Order in its entirety provides that:

> The Public Service Board seeks a second remand in the above appeal for the Board to determine whether to reopen its December 23, 2013, final

3. Palmer December 24th Motion at 1.

> order and, if it does so, to reconsider whether and on what terms to authorize the project that is the subject of the final order. Appellant supports the Board's second motion for remand, but requests that the matter be remanded without limitation to its scope or, in the alternative, with explicit authority to consider certain motions filed by her and others. The Board's motion is granted. Regarding appellant's motion, the Board on remand may entertain appellant's request that it consider certain specified motions in determining whether to reopen the final order.[4]

On March 2, 2015, the Board issued a procedural order in which the Board: (1) ordered a status conference to discuss the schedule for the Second Remand; (2) sought additional comments regarding the scope of the Second Remand; and (3) distributed a proposed schedule for the Second Remand.

On March 18, 2015, the Board held a status conference regarding the Second Remand proceeding.

On March 25, 2015, the Board issued a procedural order establishing a schedule for the Second Remand review of whether to reopen the 2013 Final Order. The schedule provided an opportunity for the parties to conduct discovery and to file direct and rebuttal testimony. The Board also outlined the scope of its review as follows:

> Parties have suggested that we should evaluate this question based upon V.R.C.P. 60(b)(1)(mistake, inadvertence, surprise), 60(b)(2)(newly discovered evidence), and 60(b)(3)(fraud, misrepresentation, or other misconduct). In deciding whether the proceedings in this case should be reopened, we will permit parties to present evidence related to each of these provisions. In doing so, we seek to address both the particulars and background of the new cost estimate information noticed in the second VGS Cost Update and the impact of that new information on any other factors relied upon in our December 23rd Order that similarly require factual updates. Parties may also present new information related to any criteria that may be affected by the updated cost estimate information.[5]

On June 22-23, 2015, the Board convened a technical hearing in the Second Remand proceeding.

On July 8, 2015, post-hearing briefs were filed by CLF (the "CLF Brief"), VGS (the "VGS Brief"), AARP joined by Ms. Lyons (the "AARP-Lyons Brief"), the Palmers (the "Palmer

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4. Vermont Supreme Court Docket No. 2014-135, *Entry Order,* dated February 9, 2015.
5. Docket 7970, Order of 3/25/15 at 3.

Brief"), Agri-Mark Inc./Cabot Creamery ("Agri-Mark" and the "Agri-Mark Brief"), VFDA (the "VFDA Brief"), and the Department (the "DPS Brief").

On July 10, 2015, 350 Vermont ("350VT") filed a motion for leave to file an *amicus curiae* (friend-of-the-court) brief, accompanied by a friend-of-the-court brief (the "350VT Brief").[6]

On August 6, 2015, AARP filed a motion to reopen the evidentiary record in the Second Remand to admit new evidence regarding a civil lawsuit between VGS and its main pipeline contractor (the "AARP Motion to Reopen Evidence").

On August 10, 2015, reply briefs were filed by AARP (the "AARP Reply"), Ms. Lyons (the "Lyons Reply"), the Department (the "DPS Reply"), the Palmers (the "Palmer Reply"), and VGS (the "VGS Reply").

On October 7, 2015, VGS and the Department filed the MOU setting a Cost Recovery Cap of $134 million on the Project, and the Board ordered a status conference to address the MOU.

On October 15, 2015, the Board held a status conference, and VGS filed a motion requesting that the evidentiary record be reopened to admit the MOU into evidence (the "VGS MOU Motion").

On October 16, 2015, the Board directed the parties to respond to the VGS MOU Motion by October 22, 2015.

On October 19, 2015, the Palmers requested that the Board extend the deadline for responding to the VGS MOU Motion, and VGS requested that its deadline for comments be extended to November 2, 2015.

Also on October 19, 2015, the Board extended the deadline for parties' responses to the VGS MOU Motion to October 27, 2015, and on October 23, 2015, set November 2nd as the deadline for VGS's comments on the parties' responses.

On October 27, 2015, AARP, the Palmers, CLF, VFDA, and the DPS responded to the VGS MOU Motion.

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6. The motion filed by 350VT is hereby granted.

On October 28, 2015, VGS commented on the parties' responses to the VGS MOU Motion.

On November 2, 2015, the Board ordered a supplementary evidentiary hearing in response to the AARP Motion to Reopen Evidence and the VGS MOU Motion.

On November 5, 2015, in response to requests from the Palmers and AARP, the Board revised the schedule for the supplementary evidentiary hearing.

On December 1 and 9, 2015, the Board convened a supplementary evidentiary hearing and admitted new evidence from AARP and the VGS-DPS MOU into the evidentiary record of the Second Remand proceeding.

On December 17, 2015, post-hearing briefs were filed by AARP (the "AARP MOU Brief"), Ms. Lyons (the "Lyons MOU Brief"), VFDA (the "VFDA MOU Brief"), the Palmers (the "Palmer MOU Brief"), CLF (the "CLF MOU Brief"), the Department (the "DPS MOU Brief"), and VGS (the "VGS MOU Brief").

On December 23, 2015, post-hearing reply briefs were filed by AARP (the "AARP MOU Reply Brief"), the Palmers (the "Palmer MOU Reply Brief"), VGS (the "VGS MOU Reply Brief"), and the Department (the "DPS MOU Reply Brief"). Ms. Lyons filed a letter joining in the AARP MOU Reply Brief.

On December 24, 2015, VFDA filed a post-hearing reply brief (the "VFDA MOU Reply Brief").

III. POSITIONS OF THE PARTIES

VGS

The Company recommends that the Board decline to reopen the 2013 Final Order and instead find that "the weight of the evidence before the Board demonstrates that the Project continues to provide significant economic and environmental benefits to the State of Vermont and its residents."[7] VGS maintains that the parties seeking to reopen this proceeding have failed to present evidence under Rule 60(b) of such a material and controlling nature so as to change the outcome of our 2013 Final Order. VGS further argues that the Board should reject "claims that

7. VGS Proposal for Decision at 3.

the Company's hearing testimony was misleading, that reopening the CPG would not result in prejudice, and that there is a constitutional right to additional process."[8] The Company asserts that the VGS-DPS MOU "provides additional support for a determination that the record should not be reopened in response to the Rule 60(b) motions."[9] Finally, VGS argues that: (1) the MOU is a binding commitment; (2) the arguments about market changes and Project alternatives are repetitive of those made in prior hearings; (3) the Project has been and will be constructed safely; and (4) there is no basis in the record to reopen the Docket.[10]

The Department

The Department recommends that the Board "not take the extraordinary step of reopening the final order as the Project . . . continues to meet the requisite criteria and to promote the general good of the State."[11] Specifically, the DPS contends that "there are still significant net benefits associated with this Project. The record further demonstrates that a need — market demand — for the Project continues to exist."[12] DPS argues that while "the standard of Rule 60(b)(2) . . . is the legal standard to be applied here," the Board "should decline to exercise its discretion to reopen this proceeding under any of the relevant sections of Rule 60(b)."[13] The Department states that it recognizes the potential rate impact for residential customers and "continues to be concerned with the lack of alignment between those who pay for the costs of the Project and those who will receive the benefits."[14] The Department nonetheless argues that the cost of the Project to residential customers would be more appropriately addressed in other proceedings "in which issues of rate recovery and cost allocation will be addressed."[15] The Department further argues that the "impacts occasioned by the MOU will likely reduce the rate impacts and will likewise reduce the extent of any cross-subsidy."[16] The Department responds

8. VGS Reply at 1.
9. VGS MOU Brief, proposed decision at 3.
10. VGS MOU Reply Brief.
11. DPS Brief at 1-2.
12. DPS Brief at 2.
13. DPS Brief at 11.
14. DPS Brief at 16.
15. DPS Brief at 17.
16. DPS MOU Brief at 3.

to the arguments of the other parties regarding the MOU by stating that "absent from the record . . . is relevant, persuasive evidence of any negative impacts of the MOU."[17] The Department therefore "recommends that the Board deny the pending Rule 60(b) motions on or before January 8, 2016, and decline to reopen the CPG."[18]

Agri-Mark

Agri-Mark does not support reopening the proceedings because "the weight of the evidence presented demonstrates that neither the increased project costs, nor the changes in relative market prices for available fuels, fundamentally alter the Board's original conclusion that the Project will promote the general good of the state."[19] The Agri-Mark Brief also describes the investment Agri-Mark has made to convert to natural gas in anticipation of the pipeline. Agri-Mark argues that the benefits of its conversion will not be fully realized using CNG, as it currently does, because CNG is less reliable and more expensive than pipeline gas.

VFDA

VFDA recommends that the Board reopen the proceedings because "[m]ajor cost overruns, competitive oil prices, dubious environmental benefits and economic dislocations have combined to make this project against the interests of VGS ratepayers and the interests of Vermont."[20] VFDA also argues that the VGS-DPS MOU was "hastily conceived" in an "attempt to avoid full consideration of the causes and effects of cost increases in a vastly changed energy market."[21] Finally, VFDA urges the Board to reopen the Docket because "the new cost forecasts and the MOU present it with exactly the situation that Rule 60(b) was intended to remedy."[22]

17. DPS MOU Reply Brief at 1.
18. *Id.* at 5.
19. Agri-Mark Brief at 5.
20. VFDA Brief at 6.
21. VFDA MOU Brief at 2.
22. VFDA MOU Reply Brief at 2.

CLF

CLF supports reopening the proceedings in this Docket and requests that the Board "reconsider its approval of the proposed project" because "if the Board knew in 2013 all the information it knows now, it would not have approved the project."[23] CLF recommends that the Board "reopen the proceedings to allow a full and fair evaluation of the proposed project." [24]

CLF argues that since the Project was approved: (1) the cost of the Project has "nearly doubled," resulting in an expected cost increase that "could leave customers with rates 20% higher, and would not reach a break even point until more than 30 years from now;"[25] (2) VGS has exhibited poor project management by failing to provide reliable cost estimates "not once, but twice" and by failing "to keep the Board informed about very significant cost and budget changes;"[26] (3) the energy market has changed because CCHPs have become more available and affordable, the cost of oil has declined, and CNG is now available to large commercial customers; (4) the greenhouse gas ("GHG") evaluation relied upon in 2013 is inadequate because it only compared oil to natural gas, failing to address renewable energy and CCHPs; and (5) the Section 248 criteria have not been satisfied because insufficient information has been presented to determine the "actual cost or economic benefit over the life of the project."[27]

Finally, CLF argues that the VGS-DPS MOU "fails to provide any actual benefits on which the Board can rely" and recommends that the Board "re-open the proceeding to evaluate the Certificate of Public Good (CPG) in light of the ballooning project costs."[28]

AARP

AARP advocates for reopening the proceedings in this Docket "because newly discovered evidence reveals that the cost, need for and economic benefit of the Project would have led to different rulings on December 23, 2013, and October 10, 2014."[29] AARP argues for reopening pursuant to Rule 60(b), in particular, subsections (1) "mistake, inadvertence, surprise, or

23. CLF Brief at 1.
24. *Id.* at 6.
25. *Id.* at 2.
26. *Id.* at 3.
27. *Id.* at 6.
28. CLF MOU Brief at 1.
29. AARP-Lyons Brief at 9.

excusable neglect," (2) "newly discovered evidence," (3) "misconduct," (5) "it is no longer equitable that the judgment should have prospective application," and (6) "any other reason justifying relief from the operation of the judgment."[30]

AARP argues that: (1) the increased, uneconomic cost of the Project would create a burden for ratepayers; (2) the lower cost of fuel oil and the greater availability of CCHPs decrease the incentive for consumers to switch to natural gas; and (3) VGS failed to disclose either the first or the second cost increases before the 2013 Final Order and the First Remand Order were issued by the Board, which denied AARP a full and fair opportunity to respond to the cost increases.

AARP requests that:

> . . . the Board grant the pending motions that it has filed. The proceedings should be reopened. The existing Certificate of Public Good should be withdrawn. VGS should be ordered to apply for a modified Certificate of Public Good, authorizing only the first 11 miles of the project which have already been constructed. The Board should order cessation of all construction that serves any purpose other than providing reliability to existing customers.[31]

Finally, AARP concludes that:

> The Department and the company's submissions ignore the principal legal and factual issues before the Board and would impose a substantial cross-subsidy without legislative approval. The Board should reopen the CPG and order a halt to the construction of the Project.[32]

Ms. Lyons

Generally, Ms. Lyons supports AARP's position and also recommends that the Board reopen the proceedings in this case.[33] Specifically, Ms. Lyons argues that VGS's proposed findings of fact regarding CNG include a "fallacy"[34] because they address the existence of new CNG facilities in Middlebury but fail to assess the impact of those facilities on GHG savings or any other reduced benefits of the Project.

30. *Id.* at 11.
31. AARP MOU Brief at 1.
32. AARP MOU Reply Brief at 8.
33. Lyons MOU Brief at 1.
34. Lyons Reply at 1.

The Palmers

The Palmers request that the Board reopen the proceedings under Rule 60(b)(3) because VGS breached its duty to "disclose on or before October 24, 2014, that the Project cost would increase between $30-$35 million."[35] Specifically, the Palmers argue that the October 24, 2014, date is important because "VGS was obligated to disclose on October 24, 2014, the anticipated cost increase by means of a motion under Rule 59(e)."[36] More broadly, the Palmers argue that VGS knowingly withheld this information from the Board and has therefore denied them a full and fair opportunity to litigate the case.

Alternatively, the Palmers argue that the Board should reopen under Rule 60(b)(2) because the outcome in this proceeding would be different now that the Project's true and actual cost is known.

Finally, the Palmers argue that "[t]he submission of the MOU on October 7, 2015, followed by the VGS Motion, followed by a hearing schedule all designed to meet VGS's demand for a decision by January 8, 2016, has undermined the process before the Board, including the credibility and reliability of the MOU."[37] In response to the other parties' comments regarding the MOU, the Palmers request that the Board rule on the pending 60(b) motions and deny the VGS motion to admit the MOU because "the MOU is a bailout at the expense of the rate payers and the Vermont economy."[38]

Position of 350VT as a friend-of-the-court

As a friend-of-the-court, 350VT filed a brief advocating for reopening the proceeding because the Project "places permanent and unnecessary fossil fuel infrastructure into sensitive ecological areas, dismisses international consensus on the urgent need to reduce methane emissions, destabilizes consumers' home heating rates, distributes project costs disproportionately to Vermont families, and projects benefits to a small number of large

35. Palmer Reply at 1.
36. Palmer Reply at 2.
37. Palmer MOU Brief at 7.
38. Palmer MOU Reply Brief at 4. The Palmers' request that the Board deny the admission of the MOU into the record is untimely and is hereby denied. The MOU was previously entered into evidence at the December 1 hearing without the objection of any of the parties.

industrial customers."[39] 350VT argues that VGS has undermined the fairness, transparency, and efficacy of the regulatory process by holding back material evidence of escalating costs.

IV. PUBLIC COMMENTS

Since issuing the 2013 Final Order, we have received dozens of comments regarding the Project. These comments were delivered in the form of e-mails and postcards from individuals, as well as letters from various groups and businesses.

Under Vermont law, the Board is required to base its decision upon the formal evidentiary record compiled pursuant to the contested case process, the hallmarks of which are sworn testimony and cross-examination during the technical hearings. Public comments do not constitute formal evidence because they are not delivered under oath, and they are not subject to cross-examination pursuant to the Vermont Rules of Evidence or the Vermont Rules of Civil Procedure, both of which we are required by law to apply in this contested case proceeding. Nonetheless, we wish to assure the public that the comments they provided to us played an important role in drawing our attention to significant issues and perspectives that we have considered in reaching our conclusions regarding whether to reopen this Docket and reconsider the Project's CPG.

What follows is a summary of the remarks and impressions that were conveyed to us in this case through the public comment process:

1. *Economic Benefits.* Comments were received pointing out the need for the pipeline to deliver affordable natural gas in order to reduce household heating costs and bring Addison County businesses the same fuel cost advantages now achieved in Franklin and Chittenden Counties. At the same time, there were comments that the Board should reopen the Docket and reconsider the CPG because the escalating costs of the Project now outweigh the projected economic benefits, making the Project too costly to be continued. Related comments focused on the changes in the market since the 2013 Final Order that make alternatives to natural gas such as CCHPs and CNG more viable for homeowners and businesses.

2. *Environmental Impacts.* Many Vermonters expressed the view that the investment in the Project reflects a step backward in the state's long-term goal to shift from reliance upon fossil fuels to renewable sources of energy. Related to this view were comments that the use of natural gas from sources using hydraulic fracturing is contrary to Vermont

39. The 350VT Brief at 3.

law disallowing "fracking" within the state. Other comments expressed the view that increasing the availability of natural gas as a fuel source is an improvement for the environment because it will displace the use of other fossil fuels with more negative environmental impacts and will serve as a bridge to greater use of renewable energy as such resources and technologies become more viable and available in Vermont. Another view was that reopening the Docket would allow for a more thorough assessment of the life cycle costs of increasing the availability of natural gas in Vermont.

3. *Property Rights.* There were several comments questioning the validity of the Project given the impact on individual property rights caused by condemnations through eminent domain proceedings.

4. *Safety.* Some comments questioned the safety of the pipeline in light of accidents caused by flaws in the natural gas infrastructure outside Vermont.

5. *Project Cost.* There were many comments supporting the Board's efforts to examine the impact of both the first and second revised Project cost estimates. These comments requested that the Board exercise judgment in its review given the magnitude of the estimated cost increases. Some comments questioned whether the Board should continue to trust VGS in light of the amount and timing of these announced increases. Several comments requested that the Board halt the Project at 11 miles or disallow any costs over the $86 million cost estimate relied upon in the 2013 Final Order because current ratepayers should not be forced to bear the increased costs of the Project. Other comments continued to support the Project despite its higher cost because of the economic benefits it would provide to homes and businesses in Addison County.

These concerns were considered by the Board over the course of this proceeding. We have endeavored to state our findings and explain our conclusions clearly, recognizing that reasonable minds may differ with the judgments we have made and the outcome we have reached.

V. FINDINGS

1. In testimony that was presented prior to the 2013 Final Order, VGS had estimated that construction of the Project would cost $86.6 million. *See* remand exh. Pet. supp. EMS-1.

2. After reevaluating the January 2014 cost estimate developed for VGS by Clough Harbor and Associates ("CHA"), Price Waterhouse Cooper ("PwC") projected a $35 million cost increase. The total new projected cost was revised to $121.6 million, which was reported to the

Board on July 2, 2014 ("First Update").[40] Simollardes pf. 1/15/15 at 2; tr. 6/23/15 at 14-15 (Simollardes).

3. In September 2014, VGS began to observe cost-performance trends that raised concerns. Tr. 6/22/15 at 74 (Rendall); tr. 6/22/15 at 89-90, 105-06, 114 (Roam), tr. 6/23/15 at 16 (Simollardes).

4. VGS began working on its second cost estimate update ("Second Update") in October 2014 and completed the work in December 2014. Roam 3/27/15 supp. pf. at 2; tr. 6/22/15 at 105, 114 (Roam).

5. For the Second Update, VGS was assisted by PwC in conducting a comprehensive analysis and development of the estimated cost of the Project applying industry-recognized standards such as those established by the Association for the Advancement of Cost Engineering. This estimate was comprised of forecasted costs of $138.4 million and a contingency of $15.2 million for a total estimated cost of $153.6 million. Roam pf. at 2; exh. Pet. RR-2.

6. The majority of the adjustments associated with the Second Update related to the estimated costs of construction, project management, VGS overhead, and rights-of-way. Roam 1/15/15 pf. at 7.

7. The estimated construction costs were also modified to reflect the cost of construction completed to date and costs for winter construction anticipated under the then-planned Project schedule. Roam 1/15/15 pf. at 7.

8. VGS filed its Second Update on December 19, 2014, with an overall estimate of $153.6 million. Simollardes 1/15/15 supp. pf. at 3.

9. VGS believes that the Project is on time and on budget. The current $153.6 million forecasted Project cost has not changed since first disclosed in late 2014. Rendall MOU pf. at 2-3; exh. DR-1 at 2.

10. According to the VGS analysis of the Second Update, the net present value of the economic benefits, including greenhouse gas reduction benefits, ranges from $70.6 million (20-

40. Following an investigation on remand, the Board concluded that the new cost estimate information (First Update) was not of such a material and controlling nature so as to change its previous determination that approval of the Project pursuant to the criteria of 30 V.S.A. § 248 would promote the general good of Vermont. Docket 7970 on Remand, Order of 10/10/14 at 1.

year time frame) to $191 million (35-year time frame) at a 3% real discount rate. Simollardes 5/27/15 reb. pf. at 7-8.

11. On October 7, 2015, VGS and the Department entered into an MOU that precludes Vermont Gas from seeking rate recovery of Project costs in excess of $134 million ("Cost Recovery Cap"), subject to limited exceptions. Exh. DR-1 at 1 and 2.

12. The Department's analysis of the Second Update demonstrates that the Project's benefits range from a positive NPV impact of $43 million (20-year time frame) to $79 million (35-year time frame), using a 3% real discount rate. Assuming the Cost Recovery Cap as the total cost amount, the Department's analysis demonstrates that the Project's benefits range from a positive NPV impact of $53 million (20-year time frame) to $92 million (35-year time frame), using a 3% real discount rate. These analyses do not take into account benefits associated with reductions in greenhouse gases. Hopkins MOU pf. at 6-9.

13. VGS commits to the Board that it will not seek rate recovery of Project costs in excess of the Cost Recovery Cap, subject to limited exceptions. In a future proceeding on rate recovery, VGS expects that the Board and parties to the case will hold it accountable to the terms of the MOU. Tr. 12/1/15 at 61 and 67-68 (Rendall).

14. VGS may seek to recover costs in excess of the Cost Recovery Cap that result from "extraordinary events outside the control of Vermont Gas (e.g., vandalism, protests, other unreasonable interference with construction, or *force majeure*-type events)" or "material delays in rights-of-way construction access." Exh. DR-1 at 2.

15. Recovery of any costs above the Cost Recovery Cap will be limited in scope, and VGS bears the burden of demonstrating that contested costs would meet the exception criteria. Rendall MOU pf. at 2; tr. 12/1/15 at 60-61 (Rendall).

16. None of the Project costs incurred by VGS to date fall within the Cost Recovery Cap exception criteria. Tr. 12/9/15 at 128-129 (Recchia).

17. The Cost Recovery Cap does not change the amount that it will cost VGS to construct the Project. It is "a ceiling on total recoverable Project costs." Hopkins MOU pf. at 2; Rendall MOU pf. at 2.

18. The Cost Recovery Cap amount of $134 million represents a $20 million reduction from the most recent Project forecast of $153.6 million. Exh. DR-1 at 2.

19. Using the Cost Recovery Cap as the basis for recoverable costs, the time period during which incremental revenues from new customers do not cover the incremental carrying costs of the Project (cross-subsidization) is expected to be between 32 and 33 years. The period of cross-subsidization for the Project cost estimate of $121.6 million considered in the First Remand would have been between 31 and 32 years. The $134 million Cost Recovery Cap increases the cross-subsidization period by approximately 1.2 years as compared to the amount considered under the First Remand. Hopkins MOU pf. at 10-11; Simollardes MOU pf. at 3.

20. VGS will absorb any cost increase over the Cost Recovery Cap (unless the criteria for an exception are met) and will not seek recovery of these costs in rates. Tr. 12/1/15 at 157 (Recchia); exh. DR-1 at 2.

21. The MOU preserves the Department's ability to fully evaluate Project costs to determine which costs are appropriate to recover in rates. Recchia MOU pf. at 3.

22. VGS filed financial statements on November 30, 2015, that show it has "already taken a hit of... $10.3 million" on its books. VGS will continue to bear the risk going forward for costs incurred above the $134 million Cost Recovery Cap. Tr. 12/1/15 at 103 (Simollardes).[41]

23. After the Second Update, but before the MOU, VGS anticipated the need for a 15.1% rate increase. If ratepayer payments into the System Expansion and Reliability Fund ("SERF") are factored in, the total potential rate impact associated with the Project would be approximately 20%.[42] Exh. supp. 1/15/15 EMS-2; tr. 12/1/15 at 120 (Simollardes).

24. At the Cost Recovery Cap amount of $134 million, VGS estimates the rate impact to be an increase of 12.2%, or approximately 17% when the cost of the SERF is included. Tr. 12/1/15 at 119 (Simollardes); finding 23.

25. Relative to the estimated Project cost identified in the Second Update, the Cost Recovery Cap has the likely effects of increasing the savings realized by new VGS customers

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41. As a result of the MOU's Cost Recovery Cap, VGS recognized an impairment charge of approximately $10.3 million on its financial statements for the fiscal year period of October 1, 2014, to September 30, 2015 ("FY15"). While the MOU was executed after September 30, 2015, accounting standards require the adjustment to be booked in FY15. Letter from Timothy Keefe, Treasurer, VGS, to Susan Hudson, Clerk of the Board, dated November 30, 2015.

42. The Board approved the SERF in 2011. Docket 7712, Order of 9/28/11. Under the Board's ruling, in lieu of decreasing rates by approximately 5% to reflect lower natural gas costs, VGS was permitted to keep rates unchanged and place the difference into the SERF. Effectively, ratepayers have been paying higher rates in advance of the Project.

served by the pipeline and decreasing the expected bill increases experienced by existing VGS customers. Hopkins MOU pf. at 7.

26. For residential customers, the price advantage for natural gas over "other raw fuel prices" was roughly 45% at the time of the original proceeding. As of June 2015, the price advantage for natural gas as compared to fuel oil was approximately 25% and was just under 50% when compared to propane. Hopkins pf. at 2-3; tr. 6/22/15 at 55 (Rendall).

27. Large commercial customers in Middlebury can now take advantage of a CNG gas island that has been installed in the industrial park north of town. While CNG is more expensive than pipeline gas, several enterprises, including Agri-Mark, have converted to CNG from other fuel sources. Tr. 6/22/15 at 54 and 71 (Rendall); tr. 6/22/15 at 228 (Simollardes).

28. For industrial customers, natural gas continues to provide a significant cost savings relative to compressed natural gas. Tr. 6/22/15 at 57-58 (Rendall).

29. As compared to the Second Update, the Cost Recovery Cap increases the Project's economic benefit on a relative basis by limiting the costs that VGS will seek to recover from ratepayers. Simollardes MOU pf. at 1-2.

VI. DISCUSSION

A. Legal Standard

In Vermont, the determination of whether to set aside a final order and then reconsider it is governed by Vermont Rule of Civil Procedure 60, which applies in Board proceedings pursuant to Board Rule 2.221. The threshold determination of whether to reopen a prior decision under Rule 60(b) is committed to the discretion of the Board. In pertinent part, Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; [or]
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); [or]
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; [or]

…

> (5)… it is no longer equitable that the judgment should have prospective application;
>
> (6) any other reason justifying relief from the operation of the judgment.[43]

Rule 60(b) further provides that such a motion shall be filed "within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Finally, the Vermont Supreme Court has held that Rule 60(b) "does not operate to protect a party from freely made tactical decisions which in retrospect may seem ill advised."[44]

Rule 60(b)(1) standard

AARP asserts that the First Remand Order should be reopened due to the Board's alleged mistake in relying on representations made by VGS during the First Remand that have "turned out to be erroneous."[45] A court may properly exercise its discretion to reopen under Rule 60(b)(1) "by determining that the initial order was premised on a mistake."[46]

Rule 60(b)(2) standard

AARP, Ms. Lyons, the Palmers, the VFDA, and CLF assert that, based on newly discovered evidence, the 2013 Final Order and the First Remand Order should be reconsidered under Rule 60(b)(2). Under that rule, the Board may grant relief from a final order on the basis of newly discovered evidence, provided that the new evidence is "'of such a material and

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43. The Palmers cite to Rule 60(b)(6) as grounds for setting aside the judgment in this proceeding. However, as this Board has previously found, "Rule 60(b)(6) is also not intended to be used as a substitute for relief under one of the first five subsections of V.R.C.P. 60(b). To the contrary, relief is only available when a ground justifying relief is not encompassed within any of the first five classes of the rule." *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation*, Dockets 6545/7082/7440, Order of 11/29/12 at 12 (citing *Pierce v. Vaughan*, 44 A.3d 758, 761 (2012). As all of the Palmers' specific claims for relief under Rule 60(b) fall under other subsections, their request for relief under Rule 60(b)(6) is denied.

44. *Wild v. Brooks*, 2004VT74 ¶20 (citing *Okemo Mountain Inc., v. Okemo Trailside Condos. Inc.,* 139 Vt. 433, 436, 431 A.2d 457, 459(1981)).

45. AARP MOU Brief at 13.

46. *Murphy v. Dep't of Taxes,* 73 Vt. 571, 573, 7975 A.2d 1131, 1134 (2001).

controlling nature as will probably change the outcome.'" [47] Rule 60(b)(2) "generally applies when the parties are unaware of evidence existing at the time of the judgment and, through no fault of their own, discover that evidence only after the judgment." [48]

Rule 60(b)(3) standard

Both AARP and the Palmers have argued in favor of reopening pursuant to Rule 60(b)(3). They contend that the testimony of VGS witness Ralph Roam during the Second Remand demonstrates that VGS deprived them of a full and fair opportunity to litigate their cases in the First Remand. To prevail on a Rule 60(b)(3) motion, the moving party must show that the conduct complained of prevented a full and fair presentation of the movant's case.[49] In particular, the moving party must demonstrate the existence of fraud, misrepresentation, or other misconduct by clear and convincing evidence.[50] A Rule 60(b)(3) motion will be denied if it is simply an attempt to relitigate the case or if the court concludes that no fraud, misrepresentation, or other misconduct has been established.[51]

Rule 60(b)(5) standard

In addition to arguing for relief from judgment under the (b)(1), (b)(2), and (b)(3) criteria of Rule 60(b), AARP further maintains that the 2013 Final Order and the First Remand Order should be set aside pursuant to Rule 60(b)(5) because "a prevailing party may lose the benefit of his or her judgment" when "the inequity of the situation going forward may justify overturning the ruling . . . ."[52]

The equitable standard for relief under Rule 60(b)(5) recognizes a court's long-standing equitable power to modify an order or judgment of prospective application when circumstances

47. Docket 7970, Order of 10/10/14 at 7.
48. *Tobin v. Hershey*, 174 Vt. 634, 638, 2002 VT ¶ 11, 820 A.2d 982, 986-87 (2002).
49. *State Street Bank and Trust Company v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004).
50. *Clarkson Co., Ltd. v. Shaheen,* 544 F.2d 624, 631 (2d Cir. 1976); *Gonzalez v. Gannett Satellite Information Network, Inc.,* 903 F. Supp. 329, 332 (N.D.N.Y. 1995), aff'd 101 F.3d 109 (2d Cir. 1996).
51. 11 Fed. Prac. & Proc. Civ. § 2860 (3d ed.)(citing cases).
52. AARP-Lyons Brief at 11.

change such that continued application of the order is no longer equitable.[53] In determining whether an order or judgment has prospective application within the meaning of the Rule, a court must consider whether it is "executory, subject to change in response to changed conditions."[54] A party seeking modification under Rule 60(b)(5) bears the burden of showing either a "significant change in factual conditions or in law."[55] However, Rule 60(b)(5) relief is to be granted sparingly, so as not to open the door for relitigation of the merits of every final order, thereby undermining the finality of such orders.[56] Thus, Rule 60(b)(5) may provide relief when "continued enforcement of the [order] would be inequitable, not merely inconvenient."[57]

Vermont law and Board precedent make clear that Board orders under Section 248 are executory in nature. The Vermont Supreme Court has explicitly stated that the Board, in carrying out its duties under Section 248, is performing a legislative and policy function, rather than an adjudicative one.[58] Although issuance of a CPG confers a degree of certainty, a utility retains an obligation to continually monitor the project and adapt to changes over time. CPGs issued under Section 248 typically contain numerous conditions. A company granted a CPG that wants to alter the obligations set out therein may need to seek modification of the CPG. Board rules make clear that certain events can result in changes that may alter the certainty conveyed by the CPG.

Moreover, the Board has also ruled that utilities may not rely upon the issuance of a CPG to guarantee rate recovery. Instead, they have a duty to evaluate a project after approval and face a risk of disallowance based upon subsequent actions.[59] Thus, although the issuance of a CPG authorizes certain actions (*i.e.*, construct a generation facility or a transmission line, or enter into a contract), it does so with the recognition that changing circumstances may require amendment of an order or the terms of a CPG.

Nonetheless, this does not mean that Rule 60(b)(5) provides an open-ended opportunity to challenge any order or CPG issued under Section 248. Parties must be able to rely upon the

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53. 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.)(citing *United States v. Swift & Company*, 286 U.S. 106, 52 S. Ct. 260 (1932)).

54. *Boiselle v. Boiselle,* 162 Vt. 240, 245, 648 A.2d 388, 391 (1994).

55. *J.L. v. Miller*, 158 Vt. 601, 604, 614 A.2d 808, 810 (1992)(citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 760 (1992)).

56. *Miller*, 158 Vt. at 604, 614 A.2d 810-11 (citing *Rufo*).

57. *Id*.

58. *In re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 357, 618 A.2d 1295, 1306 (1992).

59. *Re: Green Mountain Power*, Docket 5983, Order of 2/27/98.

validity of a CPG. If it were easily challengeable due to any changes in the facts underlying the Board's approval, Section 248 CPG holders would be uncertain as to the authorization conferred. For this reason, as noted above, the Supreme Court has ruled that relief under Rule 60(b)(5) should be granted sparingly.[60]

B. Changes in Project Costs Since the First Remand Order

The Board originally issued a CPG for the Project in the 2013 Final Order, finding that the construction of the pipeline to Addison County promoted the general good of the state of Vermont. At that time, natural gas held a significant price advantage relative to other fuels (primarily fossil fuels). Testimony also suggested that natural gas had fewer greenhouse gas impacts than these fuels. As a result, the Project was expected to provide significant benefits to consumers in the newly served areas by introducing a new, cheaper, and cleaner source of energy. In the 2013 Final Order, we concluded that the economic benefits to the state of Vermont were expected to be substantial. At the time of the Board's determination, VGS estimated that the Project would cost approximately $86 million.

Since the 2013 Final Order, VGS's estimate of the Project's costs have changed significantly. On July 2, 2014, VGS informed the Board that it had revised the projected cost to $121.6 million. [61] The Board reviewed that updated cost estimate in the First Remand. After hearing evidence from VGS and other parties, the Board issued an Order on October 10, 2014, in which we concluded that the revised cost estimate did not support a decision to set aside the 2013 Final Order under V.R.C.P. Rule 60(b)(2). Specifically, we stated that "the new cost information is not of such a material and controlling nature so as to change our previous determination that approval of the Project pursuant to the criteria of 30 V.S.A. § 248 will promote the general good of Vermont."[62]

On December 19, 2014, VGS informed the Board that the estimated cost of the Project had increased to $153.6 million. VGS testified that it had performed a complete re-analysis of

60. *See Miller*, *supra*.

61. We examined the circumstances surrounding that change in cost and determined that VGS actually had reason to believe that the estimate of the cost of the Project had increased by approximately 40% as early as January 2014, but did not inform the Board or other parties until the July 2 date. Docket 8328, Order of 7/31/15.

62. Order of 10/10/14 at 1.

the Project cost estimates using an industry-standard methodology.[63] The result of the new assessment was a higher estimate of the Project costs, but also one that VGS asserted was reliable and less likely to change. The higher estimated Project cost had the potential to affect the Board's findings and conclusions on several of the statutory criteria, namely the need for the Project (Section 248(b)(2)), whether the Project would provide an economic benefit to the state (Section 248(b)(4)), and whether the Project would promote the general good (Section 248(a) and (b) generally) considering the rate impacts on existing customers and the cross-subsidy from those customers to support the Project. The Board conducted evidentiary hearings in June 2015 to consider the implications of the revised cost projections under Rule 60(b).

On October 7, the Department and VGS submitted an MOU between themselves, which VGS subsequently asked the Board to admit into the evidentiary record.[64] The MOU states that VGS still estimates that the total Project costs will be approximately $153.6 million.[65] Notwithstanding the higher estimate of Project costs, the Department and VGS agree in the MOU that, subject to certain exceptions specified in the MOU, VGS will not seek to recover more than $134 million in rates for the Project, even if the actual costs of the Project exceed this amount.[66] Recognizing that the Company may not recover all of its Project costs, VGS has recorded an impairment on its financial books of approximately $10 million. We note that the MOU does not affect the overall Project costs. Instead, it serves to cap cost recovery from ratepayers, thereby limiting the potential rate impacts associated with the Project at a $153.6 million cost. The rate impacts, in turn, affect the analyses of the economic benefits of the Project and the projected level of cross-subsidization from existing ratepayers.

CLF has characterized the MOU as an agreement between two parties that is not a binding commitment upon which the Board can rely. According to CLF, the MOU itself is not binding or enforceable except by the Department and VGS.[67] CLF further asserts that the MOU "simply expresses an intent to contain costs" and does not actually limit them.

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63. *See generally*, Roam 1/15/15 pf.; Roam 3/27/15 supp. pf.

64. Exh. DR-1.

65. Exh. DR-1 at 2, ¶6.

66. The MOU permits VGS to seek recovery for costs in excess of $134 million resulting from "extraordinary events outside the control of Vermont Gas" or "material delays in rights-of way construction access." VGS bears the burden of proof if it seeks to recover such costs. Exh. DR-1 at 2, ¶2.

67. CLF MOU Brief at 2.

We agree with CLF that, as originally filed, the MOU was a bilateral arrangement. However, VGS's president and chief executive officer, Donald Rendall, made clear in testimony that, even though the Cost Recovery Cap is set out in the MOU with the Department, VGS is making a regulatory commitment to the Board as well that it will not seek cost recovery for more than $134 million. Thus, in reaching our decision in today's Order, we have relied upon VGS's explicit commitment in testimony before us that the MOU commitments have been made to the Board and the other parties to this proceeding, and that VGS expects "to be held to the terms of the MOU."[68]

C. Analysis

1. Rule 60(b)(1) Analysis

AARP contends that the First Remand Order should be reopened because it contains a mistake by the Board. According to AARP, this alleged mistake occurred when, in discussing the $121.6 million estimate, the Board found that "there is a reasonable basis to conclude that the revised cost projections are reliable." AARP argues that in drawing this conclusion, the Board relied on representations made by VGS during the First Remand "that have turned out to be erroneous." Citing *Murphy v. Dep't. of Taxes*, AARP argues that for purposes of reopening under Rule 60(b)(1), "a mistake by the tribunal, based on erroneous information, suffices."

We find AARP's reliance on *Murphy* to be misplaced. In *Murphy*, the defendants essentially had lied to the trial court, representing that, in a separate lawsuit, they had not sued for damages from a developer when in fact they had. Relying on the defendants' false assertion, the trial court made a "mistake" within the meaning of Rule 60(b)(1) by finding an estoppel in favor of the defendants. At the time of the ruling, the trial court was unaware that because of the defendants' false assertions, no factual basis existed for the estoppel.

The court's mistake in *Murphy* is not analogous to the circumstances AARP has invoked to justify reopening the First Remand Order under Rule 60(b)(1). AARP insists it was a mistake not to reopen the Final Order in October 2014 because the Board's ruling relied on representations made by VGS that have since "turned out to be erroneous." AARP's argument

68. Tr. 12/1/15 at 61, 67-68 (Rendall); VGS MOU Brief at 2.

ignores that during the First Remand, the $121.6 million cost estimate was subject to VGS's qualification that "it is possible that additional cost increases may occur."[69] In October of 2014, we relied on that testimony in finding that there was "a reasonable basis to conclude that the revised cost projections are reliable." Unlike in *Murphy*, the testimony supporting our finding in the First Remand Order has not been shown to have been false or erroneous when given. Thus, although subsequent events have led to higher estimates of Project costs, a reasonable basis existed for our finding at the time it was made, and we fail to see any mistake in our decision within the meaning of Rule 60(b)(1). Accordingly, AARP's request for relief under Rule 60(b)(1) is denied.

We also point out that, assuming *arguendo* that AARP is correct, AARP has already had an opportunity during the Second Remand to examine the issues raised in the First Remand. AARP's motion seeks to reopen the First Remand Order, not the 2013 Final Order. If we found AARP's arguments concerning mistake to be valid, the remedy would be to reopen the First Remand proceeding to have further testimony related to whether to set aside the 2013 Final Order under Rule 60(b). AARP and other parties received such process during this Second Remand, after VGS filed the Second Update in December of 2014. Specifically, the Board again sought a remand from the Supreme Court in light of the higher estimated project costs. Upon remand, the Board allowed discovery and the filing of direct and rebuttal testimony and then held evidentiary hearings at which all parties could cross-examine witnesses. After the filing of the MOU in October of 2015, the Board allowed further discovery and convened additional evidentiary hearings. All of these proceedings occurred based upon the higher $153.6 million estimated Project costs that AARP cites as the basis for its claim that we mistakenly relied on the $121.6 million estimate in our First Remand Order. Thus, AARP effectively has been provided the same full opportunity to present testimony and arguments that it would receive if we were to reopen the First Remand Order in the First Remand proceeding. Further process would be duplicative and unnecessary.

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69. Order of 10/10/14 at finding 13. The specific testimony relied upon by the Board in making finding 13 was: "I don't want to say that this project is going to cost 121.6 million dollars. I just don't know that. It's not built yet. There could be more costs in there." Tr. 9/26/14 at 53:17-21 (Simollardes).

2. Rules 60(b)(2) and 60(b)(5) Analysis

In the motions for relief under Rule 60(b), parties cite to several of the Board's conclusions that they assert need to be revisited in light of the higher estimate of Project costs coupled with new information on alternative fuel options for customers. They suggest that these changes show that the Project is no longer needed, that it will not provide an economic benefit to the state, and that the rate impact for existing customers is not in the general good. We examine each of these issues.

We observe that much of the evidence we consider reflects changes that occurred subsequent to the initial evidentiary hearings and the 2013 Final Order. For example, fuel oil prices are lower than they were in 2013. Cold climate heat pumps have become a more viable alternative during the course of this proceeding; in 2013, it did not appear that they were a cost-effective alternative. Estimated Project costs have changed as well, leading to this inquiry.

a. Need for the Project (Section 248(b)(2))

In the First Remand Order, the Board examined the question of whether the changes in the estimated costs of the Project, coupled with other events, would make it probable that the Board would reach a different judgment. We summarized our original conclusions from the 2013 Final Order as follows:

> [T]he Board determined that VGS had met the requirements of Section 248(b)(2) in that the Project was (1) needed to meet present or future demand for service, and (2) this demand could not otherwise be met more cost-effectively through energy efficiency measures, taking into account least-cost principles in both analyses. We found that VGS had reasonably estimated the market, planned the Project to meet that market (including future markets), and did so in a reasonable manner showing that energy efficiency or demand-side management measures could not meet that need. In doing so, we characterized the "need" for the Project as the demand for natural gas in Addison County.
>
> The estimated cost of the Project was not a direct consideration in our discussion of need in the December 23rd Order. Rather, the estimated cost informed questions such as the demand for natural gas service. Put simply, if the Project costs drive the price of supplying natural gas too high, the demand for natural gas will fall. At the time of the evidentiary hearings in September 2013, VGS had a 40% price advantage relative to other fuels, primarily propane and fuel oil. Our December 23rd Order observed that this large price advantage

> was likely to produce over $200 million in savings for consumers in the areas where natural gas service was newly available.[70]

We then examined whether either the change in the cost of the Project or new information concerning the viability of electric heat pumps as an alternative to natural gas might alter our conclusion that the Project met the need criterion. Notwithstanding suggestions that the change in cost would reduce some of the demand for the Project, we found that demand for natural gas remained, particularly given natural gas's price advantage relative to alternatives.[71] As to heat pumps, we concluded that:

> . . . there is no indication that heat pumps would diminish industrial and large commercial demand for service. Based upon the new testimony on the cost-effectiveness of heat pumps, at best we can conclude that heat pumps might reduce the residential and small commercial demand for natural gas service, assuming they prove to be as cost-effective as natural gas. We cannot find, however, based upon the current record, that the change in residential demand will be substantial.[72]

We summed up our analysis by stating that "there was no foundation to conclude that reopening the record is likely to lead to a change in the Final Order's conclusion that the Project meets the standards of Section 248(b)(2)."[73]

Several parties contend that the evidence introduced subsequent to the First Remand Order now requires a different conclusion. The Palmers argue that the decrease in the current and projected market prices of oil and propane, coupled with the projected increase in rates as a result of the Project, has reduced the competitive advantage of natural gas. As a result, they assert that the price differential is no longer large enough to assume that demand exists. They point to alternatives, such as expanded use of CNG to serve customers in Middlebury and potentially other areas. The Palmers also argue that the demand for natural gas could be met at a lower cost through other means, including energy efficiency, CNG, advanced heat pumps, and weatherization. AARP and Ms. Lyons echo this concern, arguing that heat pumps now represent a cost-effective alternative to natural gas that makes gas unnecessary. In its friend-of-the-court brief, 350 Vermont raises similar concerns, stating that there are less costly, less environmentally

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70. Order of 10/10/14 at 15-16 (citations omitted).
71. Order of 10/10/14 at 16.
72. Order of 10/10/14 at 17-18.
73. Order of 10/10/14 at 18.

detrimental, and more temporary alternatives to meet demand. 350 Vermont also cites to energy efficiency, heat pumps, and CNG as viable alternatives.

In reply, the Department maintains that demand continues. The Department asserts that CNG is available only to limited sectors of the market and that these customers have made it clear that they would prefer natural gas. Agri-Mark echoed this point, citing to the fact that it would receive substantial savings if it converted to natural gas delivered by the Project. VGS contends that CNG could not meet the demand for the Project. VGS also argues that the evidence does not support the conclusion that heat pumps can provide a viable alternative.

The first question before us is whether the new cost information and market changes call into question our previous determination that demand exists for the natural gas to be supplied by the Project. We conclude that they do not. Natural gas is a fuel source that is not present in Addison County. At the time of our 2013 Final Order, we found that natural gas had an approximately 40% price advantage relative to other fuels (as measured on a BTU basis). The testimony now indicates that, even with falling oil prices, natural gas retains a 25% price advantage compared to fuel oil. As of the June 2015 hearings, the evidence indicates that natural gas has a 48% price advantage compared to propane.[74] This means that customers switching from other fuels are likely to experience savings in their energy bills, even after consideration of conversion costs.[75]

The increase in the estimated cost of the Project is likely to dampen some demand to the extent that these higher costs are passed on to consumers through rates. However, under the MOU, VGS may not seek cost recovery for more than $134 million. This is higher than the $121.6 million cost estimate that we considered in the First Remand Order, resulting in a potential rate increase of 12.2% rather than the 10.1% increase we examined in that decision.

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74. Tr. 6/22/15 at 65-66 (Rendall).

75. For many customers, conversion costs are relatively low by comparison to the savings. VGS estimates that 75% of customers who converted from fuel oil to natural gas in the past three years did so through the use of conversion burners. Tr. 6/23/15 at 20 (Simollardes). Such changes entail costs of less than $2,000. Simollardes 5/27/15 reb. pf. at 11. Other customers, however, would require more extensive equipment replacement. The evidence suggests that replacement of boilers could cost many thousands of dollars. For example, VFDA states that an average conversion cost for homeowners to switch from oil heat to gas would be about $12,000. Cota pf. at 6. Such large up-front capital costs would make conversion less cost effective for these customers.

Nonetheless, we are not persuaded that the added 2% rate increase will materially affect the demand for the Project.

This demand is demonstrated by the economic analyses presented by VGS, the Department, and AARP. Even after consideration of the change in oil prices and the estimated cost of the Project, all of these parties project that new customers will derive substantial savings through the conversion to natural gas. For example, VGS forecasts reduced customer costs arising from conversion to natural gas of $140.2 million (measured over 20 years) and $237.5 million (over 35 years).[76] AARP estimates this figure at $134.1 million over 20 years.[77] These savings demonstrate the likelihood of customer demand.[78]

We recognize that some industrial customers have already switched to natural gas, through the use of CNG trucked from VGS's system. Nonetheless, the evidence suggests that these customers would prefer natural gas that would be delivered through the Project. For example, Agri-mark has expressed a preference for natural gas through the pipeline and has made investment decisions based upon that preference.[79] Direct purchase from the pipeline is expected to deliver substantial savings even relative to CNG.[80] Thus, demand from these industrial customers remains.

The next question is whether the demand could be met more cost-effectively in other manners, such as through energy efficiency or other, lower-cost alternatives. Some parties suggest that the availability of air-source heat pumps could significantly reduce or eliminate the demand for natural gas. As noted above, we examined the availability of heat pumps as an alternative in the First Remand Order, finding that they had the potential to displace some customer demand. Since that time, multi-nodal heat pumps have also become available, so that customers do not need to purchase individual units for each room. This increases their desirability for some customers. It also appears that heat pumps are competitive in terms of price compared to natural gas for some residential customers. Yet there is still no evidence that

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76. Simollardes 5/27/15 reb. pf. at 3.

77. Exh. DED-3 at 1.

78. We note that a witness for the Palmers suggested that there would be no cost savings. However, this analysis was based upon a large number of assumptions and adjustments from actual costs. As we are not persuaded that all of these hypothetical adjustments are accurate, we do not rely upon this testimony.

79. Tr. 6/23/15 at 31 (Simollardes).

80. Tr. 6/23/15 at 34 (Simollardes).

heat pumps could serve industrial and commercial load, which represents a substantial portion of the demand. Moreover, although heat pumps might "reduce the residential and small commercial demand for natural gas service, assuming they prove to be as cost-effective as natural gas,"[81] there is no evidence that the change in residential demand will be substantial. Similarly, the record does not support the assertion by AARP and Ms. Lyons that heat pumps make the pipeline no longer necessary.[82]

We also find no evidence to support the assertion that the demand could be met more cost-effectively through demand-side management measures. The Board has long recognized that energy efficiency can be cost-effective and can be the least-cost means to meet some demand. However, no party has presented evidence showing that energy efficiency could displace the demand identified by VGS. Moreover, as we observed in the 2013 Final Order, there is no evidence of how cost-effective energy efficiency could otherwise be delivered to customers. Existing programs delivering thermal efficiency measures, such as home weatherization, are limited, and there is no indication that increased state or federal funding will be available to deploy such programs. By contrast, if the Project is constructed, consumers in Addison County that convert to natural gas will be eligible for energy efficiency programs offered by VGS that include thermal efficiency measures.

The Palmers posit that, in lieu of the Project, it would be possible to construct a natural gas "island" in certain load centers. Such an island would distribute natural gas to customers through a local distribution network. Natural gas would be provided to the island by trucks transporting CNG from VGS's existing system. The evidence suggests that this alternative is speculative. Many of the details of this alternative were incomplete, such as ownership of the system and the entity that would build the distribution network. Testimony concerning the likely savings that industrial customers would experience by switching from CNG to pipeline-supplied gas also indicates that CNG is not as cost-effective. More fundamentally, the proponents did not demonstrate that any market participants would be prepared to implement such a proposal.

In sum, the parties have not demonstrated that changes to estimated Project costs and other events are such that we would probably reach a different conclusion on the need criterion.

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81. Order of 10/10/14 at 18.

82. AARP MOU Reply Brief at 2.

The evidence supports our original conclusion that demand exists, albeit diminished as a result of the increase in Project costs and decline in oil prices. We also conclude that the evidence does not demonstrate that equity requires that we set aside our previous conclusion that the Project meets the need criterion.

b. Economic Benefit (Section 248(b)(4))

In our First Remand Order, we reviewed the Board's prior determination that the Project was expected to provide an economic benefit to the state of Vermont. We observed that in the 2013 Final Order, the Board had found economic benefits that included direct energy savings to customers, a quantified reduction of carbon emissions through displacement of the use of other fossil fuels, and increased property tax revenues.[83] Other benefits included an increase in economic activity, increased convenience for consumers, and increased access to energy efficiency programs. We stated that in the 2013 Final Order the Board weighed these direct benefits against the costs of the Project, then estimated at $86.6 million for the transmission mainline and distribution mainlines to Vergennes and Middlebury, and an additional $6.3 million for the distribution networks inside those communities. The net benefit, after including costs, was projected to be substantial over the next 20 years.[84]

The First Remand Order summarized the Board's original decision as follows:

> In reaching these conclusions in December of 2013, we considered, but ultimately did not find persuasive, the arguments that VGS's evidence was insufficient to find an economic benefit under Section 248(b)(4), and that the greenhouse gas benefits of the Project were uncertain. Rather, we determined that VGS had 'provided sufficient evidence for us to find that the Project will result in a net economic benefit.' Further, we concluded that 'the economic benefit of the Project remains significant, even when the projected greenhouse gas reductions are not included in the analysis.'[85]

We also considered whether the increase in estimated Project costs from $86.6 million to $121.6 million altered our prior conclusions. We stated that "an increase of $35 million in costs

83. Order of 10/10/14 at 18 (citing 2013 Final Order at Finding 244).
84. Order of 10/10/14 at 18.
85. Order of 10/10/14 at 18-19.

would directly reduce the economic benefit of the Project by that amount."[86] Nonetheless, we concluded that there would still remain a substantial benefit to the state economy, estimated by the Department to be in the range of $42 million to $72 million. These facts led us to find that, "notwithstanding the increase in estimated costs of approximately 40%, the new cost information probably would not alter our finding in the December 23rd Order that the Project satisfies the Section 248(b)(4) criterion, and will provide an economic benefit for Vermont."[87]

Since that time, several events have transpired that are expected to further reduce the estimated economic benefits of the Project. As described above, VGS now has increased its budget for the Project from $121.6 million to $153.6 million. VGS has also entered into the MOU, under which it has committed that it will not seek to recover more than $134 million of Project costs in rates (subject to some limited exceptions). The MOU does not alter estimated Project costs. Instead, by lowering the rate impact of the Project, the MOU increases the price differential between natural gas and alternative fuels, thereby resulting in higher cost savings for Vermont consumers that switch to natural gas from such fuels. At the same time, oil prices are now forecasted to be lower than previously anticipated. These lower oil prices translate to a reduced price advantage for natural gas relative to other fossil fuels, and therefore smaller savings. Nonetheless, natural gas still retains a 25% price advantage relative to fuel oil and 50% compared to propane.

These changes are reflected in the various analyses of the economic benefits of the Project by VGS, the Department, and AARP. VGS continues to maintain that the Project has significant economic benefits for the state of Vermont. At a cost of $153.6 million, the Company projects the net present value ("NPV") of these benefits to be at least $70.6 million when measured over 20 years, and at least $191 million over 35 years.[88] VGS also testified that the MOU would have a positive effect on the net economic benefit, although it did not attempt to quantify the impact arising from the lower expected rate increase for existing VGS customers as a result of the MOU.[89]

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86. Order of 10/10/14 at 19.
87. Order of 10/10/14 at 19.
88. Simollardes 5/27/15 reb. pf. at 7-8.
89. Simollardes MOU pf. at 1-2.

The Department's analysis also identified a net economic benefit of the Project, albeit smaller than that identified by VGS. Based upon an estimated cost of $153.6 million, the Department estimates that, over 20 years, the Project will produce a net economic benefit of $43 million. Calculated over 35 years, the NPV of the estimated economic benefit to the state increases to $79 million.[90] The MOU increases these estimated benefits on an NPV basis by $10 million over 20 years, or $13 million over 35 years.[91] The Department adds to these benefits $18 million associated with reduced emissions of greenhouse gases ($28 million if calculated over 35 years).

AARP presents a different picture, estimating that the Project will produce net economic costs to the state. According to AARP, construction of the Project is likely to lead to a net contraction of Vermont economic output of approximately $78 million, a reduction of Vermont economic value added of $64 million, and a reduction in Vermont employment of 1,013 job-years.[92]

The three analyses employ different methodologies, which accounts for the disparate views of the economic benefits. One significant area of difference is the treatment of environmental benefits in the form of greenhouse gas reductions. In our 2013 Final Order, we recognized a degree of uncertainty about whether there would be a net greenhouse gas reduction, although we observed that the most likely scenario was that some reduction would occur.[93] At that time, we found that the Project still had a net economic benefit even without attributing any value to projected greenhouse gas reductions. After additional testimony during the Second Remand proceeding, we are not persuaded that our previous determination was incorrect. Moreover, eliminating the greenhouse gas benefits from the analyses presented by the Department and VGS does not alter their conclusion that the Project provides a net benefit.

The next area of disagreement is the assumptions concerning oil prices. In its most recent assessment, AARP updated its assumptions to reflect lower oil prices now and in the future. Lower prices for alternative fuels such as fuel oil tend to reduce the benefits by reducing the

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90. Hopkins MOU pf. at 6.

91. All of these estimates assume a 3% real (4.99% nominal) discount rate. Projected economic benefits diminish but remain positive at higher discount rates. Hopkins MOU pf. at 6-9; Hopkins 5/6/15 pf. at 12.

92. Dismukes MOU pf. at 16; exhs. DED-2 and DED-3.

93. Order of 12/23/13 at 86.

savings that customers are likely to experience by switching fuels (although these benefits actually depend upon the price relationship between natural gas and oil-based fuels such as oil and propane). However, the AARP analysis was not updated to also reflect lower natural gas prices that occurred during the same time frame.[94] Moreover, the overall magnitude of the recent change in the projections concerning future oil prices does not appear to significantly alter any party's overall analysis of whether the Project provides a net benefit.[95]

A third area of disagreement is the assumptions concerning the discount rate to be applied to future costs and benefits. The Department and VGS advocate use of a societal discount rate of 3% real (4.99% nominal). AARP and Ms. Lyons counter that the appropriate discount rate is VGS's weighted average cost of capital, 7.94% in real terms.[96] They point to testimony from a Department witness who advocated use of the higher discount rate.[97]

Use of a higher discount rate tends to reduce the net benefits of the Project, particularly when measured over long periods. From the testimony, it also appears that the selection of the discount rate has a greater effect upon the analysis presented by AARP.[98] However, the discount rate does not alter any party's assessment of whether the Project provides a net benefit, but only affects the magnitude of that benefit (or in AARP's case, the net loss). For example, changing the discount rate in the Department's analysis after consideration of the MOU changes the 20-year NPV from $53 million (using a 3% real discount rate) to $52 million (with a 7.94% rate). Similarly, over 35 years, the NPV would change from $92 million to $71 million. While there appears to be some merit to employing the societal discount rate in the context of measuring the benefits of the Project to the state of Vermont as a whole, in evaluating the testimony we consider both discount rates.

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94. Tr. 12/9/15 at 108 (Dismukes).

95. *Id*. at 112-113 (Dismukes). Mr. Dismukes stated that the adjustment in oil prices would have a much smaller effect on the overall analysis than did the $20 million reduction in costs assigned to ratepayers as a result of the MOU. From this testimony, it is reasonable to infer that oil price assumptions alone would not explain the difference among the economic analyses.

96. AARP MOU Reply Brief at 5.

97. *Id*. at 5-6.

98. Tr. 12/1/15 at 136 (Hopkins). As noted in the text, different discount rates do not appear to have a large impact on the Department's assessment, but parties clearly identified discount rate assumptions as one of the sources of disagreement.

Parties also presented their analyses over different time periods: 20 years, 35 years, and, in the case of VGS, 55 years. The longer time periods increase the net economic benefits (or, in the case of AARP, reduce the net economic cost), even after applying the discount rates. As with discount rates, however, the length of measurement does not alter any party's assessment of whether the Project produces net benefits or costs. We acknowledge that in our 2013 Final Order, we analyzed the Project over 20 years. However, we used this time period not because of a determination that this was the appropriate time horizon, but rather because the only evidence presented by parties was based upon this period. After evaluating the parties' most recent analyses, we conclude that both the 20-year and 35-year time horizons provide useful input in assessing the merits of the Project; we tend to discount the much longer 55-year period. As noted, both VGS and the Department find net economic benefits, whereas AARP reaches the opposite conclusion.

Another area of disagreement is what assumptions to make concerning industrial customers in Middlebury that are now using CNG. At the start of this proceeding, these customers were using other fuel sources. The economic analyses reflected the likely cost savings of switching from these sources to natural gas. Since that time, several large customers have switched to CNG delivered by truck from the VGS system. This produced some cost savings. At the same time, testimony indicates that these customers would still prefer natural gas from the pipeline, which will produce further savings. AARP criticizes the analyses performed by the Department and VGS for still assuming all of the cost savings associated with a switch from other fuel sources to natural gas when the customers have already switched to CNG.

There are several factors to consider. First, these industrial customers are still expecting to switch to natural gas service and will derive savings from doing so.[99] These benefits need to be reflected in the analyses of both the need for the Project and its economic benefit. Second, the customers that invested in CNG did so in anticipation of pipeline-supplied natural gas. If the Project does not proceed, it is not known whether they would continue on CNG for the period that the Project was expected to serve them, because truck delivery is not as reliable as pipeline-

99. Tr. 6/22/15 at 57-58 (Rendall); Agri-Mark Brief, generally.

delivered fuel.[100] Third, as a result of the first two factors, it would be reasonable to make some downward adjustment to the cost savings estimates, but it is not clear that this would be a large adjustment based upon the evidence presented.

VGS's analysis also does not account for the economic impacts associated with higher rates. The higher retail rates expected to result when VGS includes the Project costs in its next rate request are expected to affect existing customers, who will see more of their disposable income directed towards natural gas. VGS's cost/benefit analysis did not factor in these impacts, which would reduce the net benefits.

Finally, a significant component of AARP's determination that the Project will produce a net cost to Vermont is the assumption that it will result in sizable job losses. Parties generally agree that the addition of natural gas will displace other fuels, such as propane and fuel oil. The changing market shares are likely to result in job losses in these industries. AARP's methodology, however, counts these job losses as permanent, so a job lost in year one would count as 20 job-years lost over 20 years. This effect is assumed to occur even if the employees immediately find other jobs. At one level, there is some logic to the approach — a job removed from the economy is permanently lost as a job. However, AARP also counts as permanent job losses any loss associated with the normal "creative destruction" resulting from new technology and business opportunities. We find the approach used by the Department and VGS to be more reasonable.

As we weigh the different methodologies, we are also mindful that AARP's testimony actually shows a net economic benefit if the lower, societal discount rate is used, job losses are not compounded, and a different fuel price assumption is used.[101]

After careful consideration of the differences in the methodologies and areas of disagreement, we are persuaded by the evidence presented by the Department and VGS showing that the Project is still likely to produce an economic benefit. Even if we discount the magnitude of the benefits shown by the Department, there is expected to be a positive impact on the state's economy. More importantly, no party has demonstrated that we would probably find that the Project will produce a net cost to the state of Vermont. Thus, the standard for granting relief

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100. Tr. 6/22/15 at 58-59 (Rendall); Order of 12/23/13, Findings 224-226.

101. Heaps 5/27/15 reb. pf. at 3-4.

under Rule 60(b)(2) has not been met. Similarly, no party has shown that our previous determination that the Project would produce a benefit to the state was in error, thus warranting the grant of equitable relief under Rule 60(b)(5).

c. General Good of the State — Cross-Subsidization and Rate Impacts

In the 2013 Final Order, we considered the question of whether the Project would result in an impermissible cross-subsidy, ultimately concluding that it would not.[102] We described our analysis that led to this conclusion in the First Remand Order as follows:

> [W]e observed that, for a period of time, existing VGS ratepayers in Chittenden and Franklin counties would pay rates higher than those they would pay if the Project were not constructed. We acknowledged that while we generally disfavor cross-subsidization in rates, it nonetheless exists "to make rate making feasible" in some circumstances, such as when a utility expands its system. We explained that a cross-subsidy is not necessarily impermissible when time is needed until the number of new customers grows to a level where the incremental additional revenues cover the incremental carrying costs for the project. In the context of this Project — a major system expansion — we found the prospect of such a cross-subsidy to be acceptable, given the extended life of the Project, which ensures that over the long term, the new customers will provide a contribution to fixed costs that will benefit existing customers as well.[103]

In the 2013 Final Order, we found that it would be 20 years before the annual revenues from the Project exceed the annual carrying costs.[104] We noted that VGS's financial impact models were based upon assumptions of customer growth that were conservative, given VGS's more robust recent experience in expanding its system to Richmond. We also found that the Project was expected to be in service for many years beyond the 20-year period, so that after that point new customers would provide a contribution to the fixed costs of the existing system (and over time no cross-subsidy would occur). And we recognized that existing ratepayers receive some benefits from the Project that include enhanced reliability of the existing system, greenhouse gas reductions, and increasing economies of scale.

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102. Order of 12/23/13 at 142-144.

103. Order of 10/10/14 at 23 (footnote omitted).

104. This conclusion was based upon the carrying costs without a return. Including VGS's authorized return on equity, the period would have been longer than 20 years.

In the First Remand Order, we also considered how the updated cost estimates would affect our previous determination. At that time, instead of the 20-year time horizon before the annual incremental revenues would cover annual carrying costs, we found that VGS now projected that the increased costs had extended the period to year 32.[105] We also stated in the Order that "VGS also anticipates the need to increase its firm revenues by approximately 10.2% once the Project is placed into service."[106] This rate increase was in addition to the 5.4% rate reduction that had not been passed on to ratepayers, but had been used instead to establish the System Expansion and Reliability Fund ("SERF"). Examining these rate impacts, the Board concluded that:

> Yet, as discussed above, over the life of the Project, it is new customers who will provide a contribution to the fixed costs of VGS's system, not vice versa. Thus, although the time period has grown from 20 years to 32 years, the record from the September 26th hearing does not call into question our basic conclusion from before — that the Project costs do not result in an impermissible cross-subsidy when cost recovery is measured over the life of the Project.[107]

Moreover, the Board considered other benefits associated with the Project in weighing the general good:

> We also stress that our analysis of the cross-subsidy occurred in the context of our overall obligation under Section 248(a) to determine whether the Project promoted the general good. The December 23rd Order cites a number of specific considerations that weigh on this issue. For example, as we found in Finding 503 of the December 23rd Order, the Project is consistent with the 2011 Comprehensive Energy Plan adopted by the Department which reflects state policy goals. Any consideration of the general good must also contemplate the overall economic benefits of the Project. Further, this Project differs materially from typical line extensions and limited expansions of VGS service. Rather, as we found in the December 23rd Order, it would offer service to entirely new markets. We want to be clear that we are concerned by the increase in the cost projections as well as the amount that existing ratepayers will have to pay in rates over the next 32 years. Even though the Project may not reflect a cross-subsidy measured over its life, it is doubtful that current ratepayers will be made whole, raising intergenerational equity concerns. Nonetheless, when factoring in these considerations, we reach the same conclusion that we did previously, namely that to the extent that any rate impacts upon existing customers represent

105. Order of 10/10/14 at 24.
106. Order of 10/10/14 at 24 (footnote omitted).
107. Order of 10/10/14 at 26.

> a cross-subsidy, it is not an impermissible cross-subsidy in the context of the overall merits of this Project.[108]

Now, the estimated costs and the projected rate impacts (assuming VGS recovers all of these costs) have changed again in two ways. Estimated Project costs are now $153.6 million. If all of these costs were recovered in rates, existing ratepayers could see rates increase by as much as 15.1%.[109] The higher cost estimates are mitigated by the MOU, in which VGS agrees to a cap on the amount it may seek to recover in rates. Based upon the MOU, VGS forecasts an initial increase in its rates of 12.2%.[110] This amount is in addition to the amount that ratepayers are now paying into the SERF, which was intended to help mitigate the rate impacts of a system expansion. Together, this amounts to an increase of approximately 17%.

Also changed is the time at which the annual incremental revenues that VGS expects to receive from new customers exceeds the annual carrying cost of the Project. It will not be until year 33 of the Project that this will occur, meaning that, until that time, existing ratepayers will be providing a cross-subsidy to the new customers.[111] Nonetheless, as we stated in both the 2013 Final Order and the First Remand Order, any significant expansion of infrastructure is likely to include a period of time in which the revenues from new customers do not fully cover the carrying costs of the system. Typically, as more customers use this new infrastructure, the revenues begin to fully cover the costs of the system expansion and then provide a contribution to the overall system costs.

VGS has pointed out that its ratepayers might not experience all of these potential rate increases. VGS witnesses stated that options for such mitigation could include a change in the capital structure, rate design, zoned rates, and the pace at which customers convert to natural gas on the VGS system.[112] Yet at the same time, VGS has acknowledged that for purposes of evaluating the need for the Project and its economic benefits, the Board must look at the potential rate impact because it is a reflection of the total cost of the Project.[113]

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108. Order of 10/10/14 at 27.
109. Tr. 6/23/15 at 67 (Simollardes).
110. Tr. 12/1/15 at 118-119 (Simollardes).
111. Tr. 12/9/15 at 96-97 (Simollardes).
112. Tr. 6/23/15 at 70-71 (Simollardes).
113. Tr. 6/22/15 at 69-70 (Rendall).

AARP and Ms. Lyons, however, assert that the "deliberate, significant cross-subsidization requires legislative authorization." As basis for the assertion, they cite to the Board's decision in *Investigation into petition of AARP, for the establishment of reduced rates for low-income consumers*, Docket 7535, Order of 7/22/11 at 13-15, 43-48.[114]

We are not persuaded by AARP's and Ms. Lyons' arguments. First, neither AARP nor Ms. Lyons has cited to any statute that contains a prohibition on cross-subsidization absent legislative approval. Second, we note that the Board did not conclude in Docket 7535 (or in the earlier Docket 5308) that it could not permit cross-subsidization of low-income customers through rates without legislative approval. Rather, the Board found in Docket 5308 that such income-sensitive cross-subsidies "should" require such authorization, not that they must.[115]

Third, we note that the rate design issues in Dockets 7535 and 5308 were quite different. In those cases, the Board was considering whether to intentionally lower the rates for some customers as a matter of policy, resulting in other customers paying more. By contrast, at issue in this proceeding is the fairness of a period of cross-subsidization associated with the expansion of the natural gas system. As we stated in the 2013 Final Order, many expansions of utility infrastructure entail some measure of cross-subsidy. Past VGS system expansions have had a period in which the incremental annual revenues have been below the annual carrying costs for a number of years. Over time, however, revenues from those expansions were expected to cover the costs. The same is true here. As we stated in the 2013 Final Order, over the life of the pipeline, it is expected that newly served areas will cover their costs and provide a contribution to other costs of VGS's system.

The big difference in this proceeding from other expansions is the length of time that the cross-subsidy occurs, not the fact that it occurs. We agree that this is a concern, which is why we examined the issue in the 2013 Final Order, the First Remand Order, and this Order. In the First Remand Order, we balanced our concerns over the rate impacts and cross-subsidy against other considerations — the economic benefits of the Project and the availability of a new, lower-cost alternative fuel for customers in Addison County through the expansion of natural gas service, which is also consistent with the state's energy goals set out in the Comprehensive Energy Plan.

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114. AARP MOU Reply Brief at 7-8.

115. Docket 7535, Order of 7/22/11 at 13 (citing Docket 5308).

In weighing the projected rate impacts, we concluded that in light of these other considerations, the cross-subsidization was not impermissible.

We reach the same conclusion in this Order. In this regard, the MOU is a significant factor in our decision, as it serves to limit the rate impacts and degree of cross-subsidization. The evidence indicates that, after consideration of the MOU, rate impacts would be higher than at a Project cost of $121.6 million (approximately 12% rather than 10%) and the period over which the cross-subsidization would occur is one year longer.[116] The economic benefits of the Project also are estimated to be somewhat lower than those forecasted in the First Remand. Nonetheless, substantial economic benefits are still expected, and the Project will serve a need in Addison County through the introduction of a new fuel source that costs less than alternative fossil fuels.

For this reason, we conclude that no party has demonstrated that setting aside the CPG and holding new hearings would probably alter our conclusion that the Project promotes the general good of the state and that cross-subsidy is not impermissible. We reiterate our finding from the First Remand Order that in the context of this Project — a major system expansion with an extended life span — where new customers are expected to provide a contribution to fixed costs over its life, the cross-subsidy that occurs is acceptable. For the same reasons, we also find that equity does not require that we grant the Rule 60(b)(5) motions.

3. Rule 60(b)(3) Analysis

In the Second Remand, AARP and the Palmers have moved under Rule 60(b)(3) to set aside the First Remand Order, which decided the First Remand in favor of VGS. Their argument essentially is this: During the First Remand, with knowledge of undisclosed facts to the contrary, Company witnesses nonetheless testified to the reliability of the revised $121.6 million cost estimate at issue on September 26, 2014 (the date of the First Remand technical hearing). Thus, VGS allegedly obtained a judgment in its favor based on misrepresentation because, through silence and inaction after the September 26th hearing, VGS let stand the Board's allegedly erroneous conclusion in the First Remand Order that the $121.6 million cost estimate was "reliable." AARP and the Palmers contend that VGS was duty-bound to move the Board to

116. By contrast, the rate impact based upon the estimated $153.6 Project cost was forecasted to be 15.1%.

correct this conclusion after the Company saw it in the First Remand Order because VGS already knew that the $121.6 million estimate was "off by $30-$35 million."

AARP and the Palmers maintain that it was through Mr. Roam's cross-examination on June 22, 2015, during the Second Remand that VGS's failure to move to correct the judgment in the First Remand became apparent. In that testimony, Mr. Roam disclosed that in September of 2014, he had informed VGS executive James Sinclair of emerging performance trends that were "of concern," which prompted Mr. Sinclair to commission a comprehensive re-estimate of the Project budget. According to AARP and the Palmers, these events demonstrate that the Company wrongfully withheld information in the First Remand, thus depriving AARP and the Palmers of a full and fair opportunity to present their cases in that proceeding.[117]

The first question these arguments raise is exactly what misrepresentation occurred, if any. In fact, the evidence does not support the conclusion that VGS made any specific misrepresentation in its testimony that the Board subsequently relied upon in the First Remand Order. As noted earlier, the suggestion of misrepresentation arises from the testimony of Mr. Roam. However, he was clear that his realization that Project costs were likely to be higher occurred after the evidentiary hearing.[118] AARP and the Palmers have not cited to other evidence indicating that VGS knew that its testimony on September 26th was in error at the time it was given. We thus find no misrepresentation by the Company witnesses during the First Remand hearing.

The next issue is whether misrepresentation occurred as a result of VGS learning from Mr. Roam that Project costs would be higher and not informing the Board in a timely manner post-hearing that its earlier testimony during the First Remand was erroneous. This requires consideration of Mr. Roam's testimony, which is the basis for AARP's and the Palmers' Rule 60(b)(3) arguments. In that testimony, Mr. Roam made several statements. He revealed that he realized in September 2014 that the costs were going to be "quite a bit" more.[119] He stated that

117. Palmer Brief at 18-19; AARP Brief at 24.
118. Tr. 6/22/15 at 112 (Roam).
119. *Id*. at 109-111 (Roam).

this occurred after the September 26 hearing.[120] He also stated that he did not know in September or early October that there would be a significant cost increase.[121]

Mr. Roam's testimony is seemingly inconsistent. Mr. Roam testified on cross that, between June and September of 2014, when actual construction on the mainline had begun, he observed "some performance trends that were of concern," and that he reported this information "in the roughly September time frame" to Mr. Sinclair, the Company's executive manager for the Project.[122] Mr. Sinclair's response was that a "bottoms-up" re-estimate of the Project "needed to start immediately," and thus it began in October 2014 and concluded in December 2014.[123] Hence Mr. Roam testified on re-direct that he knew in December, when the re-estimate had been completed, that there would be a significant increase in the Project's cost estimate, and that he did not know this in September or early October.[124]

AARP faults Mr. Roam for not withdrawing or correcting his testimony on cross once he had testified on re-redirect that he "knew" in December of 2014 that there would be a significant increase of the $121.6 million cost estimate. However, no party chose to question Mr. Roam further when he was on the witness stand. Nor did any party question Mr. Sinclair about what Mr. Roam had communicated to him about the new cost estimate.[125]

After reviewing the testimony, we draw the conclusion that VGS began to have concerns by late September and early October that the cost of the Project was going to be "quite a bit" higher. At the same time, the Company did not have precise information on how much higher and had not done the analysis necessary to develop a new cost estimate. What the testimony does not clearly and convincingly establish, however, is that VGS knew that the magnitude of the cost estimate increase was expected to be so much larger and that, therefore, the Company's testimony on September 26th was misleading. Nor does this testimony demonstrate that the Company breached a duty of disclosure before October 24, 2015.

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120. *Id*. at 112 (Roam).

121. *Id*. at 113-114 (Roam).

122. Tr. 6/22/15 at 89:25-90:1-4, 105:10-19; 111:4-5 (Roam).

123. Tr. 6/22/15 at 111:10-13, 114:10-16 (Roam).

124. With this in mind, we are not persuaded by the Palmers' argument that this testimony is not credible because the Company had cause to know as early as October of 2014 that the cost trend "of concern" was the performance of the mainline piping contractor then responsible for "37%" of the $121.6 million cost estimate for the Project. See Palmer Reply at 5.

125. Mr. Sinclair took the witness stand after Mr. Roam.

Citing the Board's penalty decision in Docket 8328, the Palmers further assert that VGS engaged in misrepresentation in the First Remand that is actionable under Rule 60(b)(3) when the Company failed to timely report the $121.6 million estimate pursuant to Board Rule 5.409.[126] We disagree. Our decision in Docket 8328 speaks for itself in establishing VGS's breach of its reporting duty under Rule 5.409, as well as the grounds that justified imposing a substantial penalty on the Company, which included consideration of the resulting procedural inconvenience and inefficiency for the Board and the other parties to Docket 7970. However, for purposes of review under Rule 60(b)(3), the fact remains that VGS ultimately did disclose the increased cost estimate of $121.6 million on July 2, 2014, and what followed was the First Remand, where the Palmers received a full and fair opportunity to present their case for reopening the Final Order.[127]

We also are not persuaded by AARP's argument that witnesses for VGS engaged in misrepresentation in the First Remand that is actionable under Rule 60(b)(3) because they had "a duty to disclose" the particulars of a contractual dispute with Over & Under (one of its construction contractors) while being cross-examined about the Company's management of Project costs through fixed-price construction contracts.[128] During the September 26th hearing, when asked whether the Company's contracts were based on fixed pricing, the VGS witnesses gave qualified answers about what they could recall about this matter at that time. AARP faults these witnesses for giving answers that did not refer to the $45 million fixed-price contract with Over & Under that remained unexecuted at the time of the hearing. During the Second Remand hearing on December 10th, over the Company's objection on grounds of relevance, we afforded AARP opportunity to explore this issue through cross-examination. Having now considered the

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126. Palmer Reply at 8-9. On July 31, 2015, we issued an Order in Docket 8328 imposing a $100,000 civil penalty on VGS for violating Board Rule 5.409 by waiting nearly six months (from January to July 2014) before filing notice with the Board of the First Update, which disclosed the $121.6 million cost estimate.

127. For this same reason, we reject the Palmers' similar Rule 60(b)(3) argument in regard to VGS's conduct in reporting the revised $153.6 million estimate in December of 2014. Palmer Brief at 21-22. However, in so ruling in today's Order, we do not foreclose the possibility of a future proceeding in which, for purposes of Rule 5.409 reporting, we may yet determine that the Company had cause to know before December of 2014 that there was a reportable cost estimate increase of 20% or more above the $121.6 million estimate. However, this compliance question is not within the scope of the Second Remand and thus is not the subject of today's Order.

128. AARP MOU Brief at 11 and 14. The Palmers make a similar argument, Palmer Reply at 6-7, which we found to be no more persuasive and therefore do not address further in this Order.

arguments briefed by AARP on this point, we fail to see the relevance of this issue to this Section 248 proceeding. Rather, in due course, VGS must answer for how well it has managed its construction contracts when the Company seeks rate recovery for these costs in a rate case.

The Palmers maintain that through misconduct, VGS denied them a full and fair opportunity to litigate the issues of cost and necessity under the Section 248 criteria. The Palmers state that they would have more vigorously pursued these issues had VGS been "truthful" and "opted for transparency by admitting by October 24, 2014, that the Company knew the cost of the Project would range from between $151-$156 million."[129]

The nature of a Section 248 proceeding is such that a petition will necessarily rest on estimated project construction costs, as opposed to fixed data about known costs. This is because the regulatory review of a project occurs before its actual construction costs become known. Thus, from the outset, all parties to a Section 248 case face the challenge of making litigation choices and preparing their cases based on project cost estimates that are subject to change. While Section 248 cases are quasi-legislative policy inquiries, by law the Board is required to conduct such proceedings using contested case procedures, which means all parties must rely on their own judgment in making strategic and tactical decisions about how to develop and present their interests in the course of the proceeding.

In this proceeding, Mr. Palmer testified that "if VGS had told the truth, we would have more vigorously pursued the cost and necessity issues." When questioned about this testimony during the Second Remand hearing on June 23rd, Mr. Palmer was unable to point to any evidence that VGS had lied or engaged in a falsehood about its cost estimate in the First Remand.[130] In the absence of such proof, the Palmers cite the *Sugarline* case for the position that VGS deprived them of a full and fair opportunity to litigate their case through "constructive fraud."[131] As explained by the Vermont Supreme Court in *Sugarline*, "[w]here there is no intent to mislead or defraud, but the other elements of fraud are met, a [party] may be liable for constructive

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129. Palmer Brief at 25.

130. Tr. 6/23/15 at 319 (Palmer). We note that no attempt was made by counsel to redirect Mr. Palmer on this point. The record now suggests that Mr. Palmer's testimony was moved into evidence without benefit of a due diligence inquiry into the evidentiary support for his testimony.

131. Palmer Brief at 26. To our knowledge, the phrase "fraud, misrepresentation or other misconduct" in Rule 60(b)(3) to date has not been construed by the Vermont Supreme Court to extend to constructive fraud, though we recognize that it would appear to reasonably fit within the meaning of "other misconduct."

fraud."[132] In turn, the elements of fraud are "some affirmative act, or of concealment of facts by one with knowledge and a duty to disclose."[133] At issue in *Sugarline* was a property buyer who unsuccessfully sued the seller for constructive fraud, claiming the seller had failed to disclose information about a septic system. The buyer's claim failed because there was no proof of justifiable reliance, an essential element of constructive fraud.

As in the case of the buyer in *Sugarline*, we are unable to conclude that constructive fraud occurred because the Palmers justifiably relied to their detriment on inferences they drew from VGS's cost information for the Project. No showing has been made that VGS provided "false" information about any of its cost estimates in this case.[134] The Palmers explain that though they had "deep suspicions about VGS' cost predictions," they decided not to challenge the Company's cost estimates because "they had concluded that they had no choice but to believe that VGS was being truthful with respect to the Project's cost."[135] To be sure, the Palmers were entitled to rely on VGS to fully and forthrightly comply with its obligations as a litigant and as a regulated utility, which would include matters such as responding to discovery in good faith, and testifying truthfully under oath. However, as litigants in this contested case, all parties were afforded the opportunity to investigate and assess for themselves the reliability of the evidence offered by VGS in support of its Section 248 petition. The responsibility for choosing how to exercise that opportunity belonged solely to each litigant.

While the technical hearings originally scheduled for the Second Remand concluded more than six months ago in June, the procedural record shows that post-hearing litigation has continued. For instance, during this time, two motions were filed to reopen the evidentiary record, and two days of additional evidentiary hearings were convened during two weeks in December. However, at no time during this six-month period did the Palmers or AARP ask to serve interrogatories on VGS or to depose Mr. Roam or Mr. Sinclair in order to clearly and convincingly establish that the Company wrongfully withheld relevant and material information

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132. *Sugarline Assocs. v. Alpen Assocs.,* 155 Vt. 437, 444, 586 A.2d 1115, 1120 (1990).

133. *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.*, 136 Vt. 376, 381, 392 A.2d 402, 405 (1978).

134. Compare *Bardill Land & Lumber, Inc. v. Davis*, 135 Vt. 81, 82, 370 A.2d 212, 214 (1977)(new trial required under Rule 60(b)(3) because of knowingly false answer to pretrial interrogatory on a material subject).

135. Palmer Brief at 24-25.

in the First Remand about its cost estimates from the Board or the parties, thereby depriving them of a full and fair opportunity to litigate and present their cases.

In this Docket, there have been three opportunities to litigate the issues of cost and necessity: first in the initial case addressing the $86.6 million estimate, then during the First Remand addressing the $121.6 million estimate, and now during the Second Remand addressing the $153.6 million estimate. These opportunities may not have been perfect, but after careful examination of the record, we have concluded that these opportunities have been full and fair for all parties concerned. We also reiterate the conclusion we reached in our discussion of the claims under Rule 60(b)(1), above. The arguments concerning Rule 60(b)(3) also relate to setting aside our judgment in the First Remand, not the original 2013 Final Order and CPG. Even if the arguments were correct, the extensive opportunities for testimony, discovery, hearings, and briefings provided over the last year enabled the Palmers and AARP to litigate the precise issues that they could litigate if the Rule 60(b)(3) motion were granted.

In light of the foregoing discussion, we cannot conclude that the Palmers and AARP have met the burden of establishing by clear and convincing evidence that reopening our original approval is justified under Rule 60(b)(3) due to "knowing nondisclosure" or misrepresentation by VGS. Therefore, the requests made by AARP and the Palmers for relief under Rule 60(b)(3) are denied.

VII. Other Outstanding Matters

A. AARP's Request for Declaratory Judgment in this Proceeding

AARP has asked us to issue a declaratory judgment in this Docket to the effect that, based on the testimony of VGS witnesses during the Second Remand, there has been a "substantial change" to the Project within the meaning of Board Rule 5.408. Furthermore, arguing that the Board has "no discretion but to issue the requested Declaratory Judgment," AARP maintains that any further work on the Project should be enjoined, after notice and opportunity for VGS to be heard on whether such an injunction should be issued.

We are not persuaded by AARP's position. Following the Company's filing of the First Update in July of 2014, and at the specific request of CLF, we opened a separate docket in

September of 2014 to review a similar request for declaratory relief (the "CLF DJ Petition").[136] On August 20, 2015, AARP became a permissive intervenor in that proceeding and has since filed a brief making the same argument for which it has now requested a ruling in this proceeding. We agree with the Department that it would not be appropriate for us to allow AARP to introduce into this Docket the issues that the parties in Docket 8330 will be required to address in due course. At issue in this Docket is whether the 2013 Final Order should be set aside. This proceeding is not an appropriate venue for determining whether changes in the cost estimate of the Project require VGS to seek an amendment to the CPG for the Project pursuant to Board Rule 5.408, whether through addition to or alteration of the existing terms of the CPG. That is precisely the matter at issue in Docket 8330. Accordingly, AARP's request for a declaratory judgment in this case is denied.

B. Status of Other Pending Requests

AARP asserts that "[e]ight requests for relief are pending before the Board."[137] As discussed below, the First Remand Order and this Order respond to all but one of these pending requests for relief noted by AARP.

The first pending request for relief identified by AARP is the CLF DJ Petition, which is a request for a declaratory judgment in Docket 8330. As discussed above, we do not address this request in this Order. It remains a pending request for relief before the Board in a separate Docket.

The second pending request for relief identified by AARP is the Palmer-Lyons First Remand Motion, which requested that the Board investigate the First Update.[138] The Board responded to the First Update "guided by the parties' comments,"[139] including those comments articulated in the Palmer-Lyons First Remand Motion. In its response, the Board sought a remand of the 7970 Docket from the Vermont Supreme Court in order to determine "(1) . . . 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) . . . the impact, if any, of the

136. Docket 8330, Order of 9/10/14. AARP has since joined in CLF's request in that proceeding.
137. AARP MOU Brief at 6.
138. Order or 10/10/14 at 2.
139. Order of 9/4/14 at 6.

new information on the question of whether to authorize a CPG for the Project to promote the general good of the state."[140] The First Remand Order reflects the investigation of the First Update that was conducted in the First Remand. We consider the First Remand Order to be dispositive of the Palmer-Lyons First Remand Motion. Accordingly, the second request for relief is no longer pending.

The third pending request for relief identified by AARP is the DPS December 22nd Motion. That motion requested that the Board seek a second remand of the 2013 Final Order in order to determine whether to reopen that decision in light of the Second Update. The Board obtained a second remand. Today's Order is dispositive of this request for relief under Rule 60(b). Accordingly, the third request for relief is no longer pending.

The fourth pending request for relief identified by AARP is embodied by the Lyons January 12th Motion and the AARP January 12th Motion, both of which sought relief under Rule 60(b)(2) from the 2013 Final Order in light of the Second Update. We consider today's Order to be dispositive of this request for relief. Accordingly, the fourth request for relief is no longer pending.

The fifth, sixth, and seventh requests for relief identified by AARP are found in the AARP-Lyons Brief, which requests relief from the 2013 Final Order under Rules 60(b)(1), 60(b)(2), and 60(b)(3) in light of "evidence which arose during the June 22 and June 23 hearings."[141] As requested by the parties, the scope of the Second Remand proceeding permitted the parties to present evidence related to these provisions of Rule 60(b) as well as any new information on any other factors relied upon in our 2013 Final Order or any new information related to any criteria that may be affected by the Second Update.[142] Today's Order is dispositive of these requests for relief. Accordingly, the fifth, sixth, and seventh requests for relief are no longer pending.

The eighth request for relief identified by AARP combines the requests of the Palmers in their October 2, 2014, brief in the First Remand, which requested that the Board reopen the 2013 Final Order under Rule 60(b)(2), (3), and (6), in light of the First Update, and in the Palmer

140. Order of 10/10/14 at 14.
141. AARP MOU Brief at 8.
142. Order of 3/25/15 at 3.

December 30th Motion, which requested that the Board reopen the 2013 Final Order, the March 2014 Order, and the First Remand Order[143] under Rule 60(b)(2) in light of the Second Update. The First Remand Order was dispositive of the Palmers' requests for relief in the First Remand, and today's Order is dispositive of the Palmers' December 23rd Motion. Accordingly, the eighth request for relief is no longer pending.

VIII. CONCLUSION

For the reasons discussed in this Order, we conclude that sufficient grounds do not exist to reopen the 2013 Final Order that granted a CPG to VGS to construct the Project. In light of the MOU and the Company's commitment to the Board to not seek to recover Project costs above the Cost Recovery Cap from ratepayers, we have determined that we probably would not reach a different decision from the decision we reached in the 2013 Final Order. As in the case of the First Remand, we conclude in this Second Remand that the general good of the people of Vermont would best be served if the proceeding is not reopened.

We have carefully considered the parties' many motions and held hearings in both June and December of 2015 to allow all parties a full and fair opportunity to demonstrate why the Board should or should not take the significant step of setting aside our 2013 Final Order. We conclude that, particularly because of the commitments that VGS made in the MOU and its testimony before the Board that limits the potential rate impact of the Project on existing and future VGS customers, the motions should be denied.

Specifically, no party has demonstrated that the original decision was based upon mistake (Rule 60(b)(1)). As we did in the First Remand, we find that the new cost information is not "of such a material and controlling nature so as to change our previous determination that approval of the Project pursuant to the criteria of 30 V.S.A. § 248 will promote the general good of Vermont"[144] (Rule 60(b)(2)). We also conclude that the process the Board employed provided a fair opportunity for parties to litigate and present their cases (Rule 60(b)(3)). Specifically, since VGS informed the Board in December 2014 that it estimated the Project costs to be $153.6 million, the Board has held two sets of evidentiary hearings and allowed extensive discovery.

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143. Palmer December 30th Motion at 1.

144. Order of 10/10/14 at 1.

This provided a fair opportunity for all parties to examine the facts surrounding the cost estimates, identify other changes in the marketplace that might affect our determinations, and present testimony and argument. Finally, no party has shown that the Project no longer meets the criteria of Section 248 so that we should exercise our equitable powers under Rule 60(b)(5) to set aside the CPG and reexamine the merits of the Project.

SO ORDERED.

Dated at Montpelier, Vermont, this 8th day of January, 2016.

s/James Volz	
	PUBLIC SERVICE
s/Margaret Cheney	BOARD
	OF VERMONT
s/Sarah Hofmann	

OFFICE OF THE CLERK

FILED: January 8, 2016

ATTEST: s/Judith C. Whitney
Acting 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@vermont.gov)

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.