UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

LISA BARRETT, Plaintiff	*	Civil Action No. 2:16-CV-209
v.	*	
JAMES VOLT, MARGARET CHENEY, and SARAH HOFFMANN, Members of the Vermont Public Service Board in their official capacities, Defendants	*	

MOTION FOR DECLARATORY JUDGMENT,
TEMPORARY RESTRAINING ORDER,
AND PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff Lisa Barrett moves pursuant to the federal Civil Rights Act 42 U.S.C. § 1983 and F.R.Civ.P. 65 for a declaratory judgment, temporary restraining order, and preliminary and permanent injunction enjoining the defendants from enforcing the attached *Procedural Order re: Logistics of Technical Hearing* of July 15, 2016 in the matter Vermont Public Service Board Docket No. 8643 *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont at Shelburne Falls Road, Hinesburg, Vermont, for the purposes of constructing the pipeline authorized in Docket 7970* (hereinafter "*Petition of* VGS") excluding the public and the media from the premises and the technical hearing to be commenced on August 4, 2016. She also seeks preliminary and permanent mandatory injunction/TRO requiring the defendants to select a venue for the hearings that are large enough to accommodate the press and the public. She also seeks reasonable attorneys' fees and litigation costs under 42 U.S.C. § 1988.

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Plaintiff requests an evidentiary hearing on this motion.

MEMORANDUM IN SUPPORT OF MOTION

VERIFIED FACTS

Lisa Barrett is a retired attorney who lives in Huntington, Vermont. Her career included work as counsel for Vermont Legal Aid, as an Assistant Vermont Attorney General, and in the Offices of U.S. Senator Bernie Sanders including while he was a Member of Congress. She is an opponent of the project of Vermont Gas Systems, Inc. to extend its gas pipeline southward, including through the Town of Hinesburg, which is the subject of *Petition of VGS*. Although not a party to the proceedings in *Petition of VGS*, she opposes the proposal to take by eminent domain portions of a public park owned by the Town. She wants to attend the August 4th hearing but is prohibited from doing so by the *Order*. She has also been authorized to speak on behalf of and act as agent for an hoc group of others similarly situated who also want to attend.[1]

She has brought the instant action against the defendants in their official capacities as members of the Vermont Public Service Board to prevent them from enforcing their July 15, 2016 *Order* which ordered the public and the press be barred from the technical hearings which are scheduled to commence on August 4, 2016. She wants to and plans to attend that hearing.

ARGUMENT

I. VIOLATION OF THE PUBLIC'S FIRST AMENDMENT RIGHT TO ACCESS.

[1] Mari Cordes of Lincoln, Janice Nadworny of Hinesburg, Cynthia Hendel of Hinesburg, Geoffrey Gardner of Bradford, Beth Thompson of Danby, Susanna Lewis of Bradford, Suzy McCoy of Hinesburg, Ross Conrad of Middlebury. Barbara Forauer of Hinesburg, Rebecca Foster of Charlotte, Theora Ward of Hinesburg, and Mary Martin of Cornwall.

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proceeding and therefore violates 42 U.S.C. § 1983. This right is long recognized, and its application to civil proceedings has been recently analyzed and upheld in this Circuit in *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286, 298 (2nd Cir. 2011) and in this District in *Cyr v. Addison Rutland Supervisory Union*, 50 F. Supp. 3d 536, 544-45 (D. Vt. 2014), and earlier in a case also originating from this District *Huminski v. Corsones,* 396 F.3d 53 (2nd Cir. 2004).

A. The "Experience and Logic" Test.

Whether there is a First Amendment right of access to a governmental proceeding is determined by application of the "experience and Logic" test. *Cyr* and *N.Y.C.L.U., supra.* That test considers whether the place and process have been historically open to the press and the general public and whether public access plays a significant positive role in the functioning of the particular process in question. *Id., Press-Enterprise Co. v. Superior Court*, 478 U.S.1, 8 (1986). Developed in the context of criminal court proceedings, it has been extended to apply to civil trials and administrative hearings. *N.Y.C.L.U., supra.* "[T]he system of public justice depends on the willingness and ability of individual persons and entities to police the system by seeking access – through litigation if necessary – to courtrooms that have been closed." *Huminski, supra* at 84. The experience and logic test is not limited to the particular experience in any one jurisdiction but instead to the type and kind of hearing throughout the United States. *Cyr*, *supra*; *El Vocero de P.R. v. Puerto Rico*, 08 U.S. 147, 150 (1993); *N.Y.C.L.U., supra* at 301; *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3rd Cir. 19860 ("whether the particular type of government proceeding has historically been open in our free society"). That the right applies to non-criminal proceedings has been recognized by the Circuits

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that have addressed the issue, *see* the cases cited in *N.Y.C.L.U* at 298, including administrative proceedings. *N.Y.C.L.U.*

Though modern administrative proceedings did not exist at the time the First Amendment was drafted, the experience and logic test considers whether the analogous proceedings that did exist at that time were presumptively open to the public. *CYR; N.Y.C.L.U., supra.* The focus is not on the formalistic description of the government proceedings but on the kind of work the proceeding actually does and on the First Amendment principle at stake. This is especially so when the administrative process at issue so clearly resembles a court. *N.Y.C.L.U* at 299-301.

B. The First Amendment Right of Access is Applicable to PSB Condemnation Proceedings.

The eminent domain proceedings before the Public Service Board are quasi-judicial and therefore quintessentially public. Condemnation is judicial in nature and consist of "two distinct judicial stages." *Chittenden Solid Waste District v. Hinesburg Sand & Gravel*, 169 Vt. 153 (1999). The first judicial stage is a determination of the necessity and the extent of the taking. The second judicial stage is the determination of just compensation due the owner of the property, as required by the 14th Amendment. *Id.* The power to condemn property is a legislative power which is often delegated to various entities such as municipalities, state agencies, and to public service companies such as Vermont Gas Systems, Inc. When such power is delegated, the necessity and the extent of the taking and the compensation due must be determined by an impartial tribunal. *George v. Consolidated Lighting Company*, 87 Vt. 11 (1914).

These judicial responsibilities may be are accorded and left to a court as was the

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case of the *Chittenden Solid Waste District, supra*, but may also be delegated to a body not strictly a court such as an administrative body exercising quasi-judicial functions such as the PSB. That it is so done is of no moment. "Impartial tribunal" and "judicial tribunal" are construed in the same sense. *Consolidated Lighting Co., supra* at 416; *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22, 25 (1974). This rule is widely recognized across the United States and has been so recognized now for over a century. *Consolidated Lighting*.

The PSB conducts its quasi-judicial proceedings in the manner of a court under the contested case provisions of the Administrative Procedures Act, 3 V.S.A. §§809-813. In most instances it must follow the Vermont Rules of Evidence. 3 V.S.A. § 810. The PSB's own Rules follow the Vermont Rules of Civil Procedure. The defendants' *Order* itself acknowledges that its proceedings including this condemnation proceeding are quasi-judicial and traditionally open to the public. The PSB's condemnation proceedings at issue here "clearly resemble a court" and are therefore subject under *N.Y.C.L.U., supra* to the same First Amendment right to attend as are courts.

C. The Defendants Have Not Demonstrated Circumstances Sufficient to Overcome the Presumption of Openness, and Have Not Engaged in Narrow Tailoring.

Civil and criminal trials have traditionally been open to the public for centuries. *Huminski, supra* at 81. The purpose of public judicial proceedings is public accountability and to maintain public confidence in the institutions. *Id.* "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enterprise v. Superior Court*, 478 U.S. 1, 13 (1986) c.f. *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980).

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Openness enhances basic fairness and the appearance of fairness so essential to the public's confidence in the system. Openness helps ensure that people not attending have confidence that the standards of fairness are being observed. *Id.* Courts and commentators have long recognized the utility of openness to the adjudicative process. *N.Y.C.L.U.,* supra at 296. "Without publicity, all other checks are insufficient." *Id.*

There is therefore a presumption of openness in judicial proceedings, and closed proceedings, although not absolutely prohibited, must be rare and only for cause shown that outweighs the value of openness. *Huminski, supra; Press-Enterprise v. Superior Court*, 464 U.S. 501, 509 (1984) (*Press Enterprise II).* Free speech carries with it some freedom to hear." *N.Y.C.L.U.,* supra at 296. The right to attend judicial and quasi-judicial proceedings is not absolute, and the due process rights of the parties to actually have and participate in the quasi-judicial condemnation hearing certainly must be protected. But that interest must be balanced against the First Amendment right to hear. *Huminski, supra* at 58.

Restrictions on attendance must be narrowly tailored, and hearings can be closed only after findings are made that clearly showing that reasonable alternatives to closure are inadequate to preserve the rights and interests of the litigants. *Id.; El Vocero, supra* at 151 (1993); *Press Enterprise I, supra* at 510. The basis of the defendants' July 15th *Order* does not overcome the presumption of openness and the *Order* is not narrowly tailored. Instead the *Order* assumes and imposes the worst. The defendants have first assumed that that there *will* be disruption of the August 4th technical hearings. Upon information and belief most if not all of the "disruptive" behavior has been at public or preliminary hearings, and not evidentiary quasi-judicial proceedings. Second, they have assumed that

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there will by annoyances that rise to the level of a "substantial impairment" of the proceedings. *See State v. Colby*, 2009 VT 28, ¶19, 185 Vt. 464 for a discussion of what constitutes "substantial impairment." Third they assume that there are no intermediate, progressive corrective measures to effectively deal with disruption. By their own admission in the *Order* they have not tried any. The *Order* also itself noted that the parties VGS and the State Department of Public Service earlier each opposed the type of blanket ban now imposed by the defendants. In addition James Dumont, the attorney for intervenors, decried the action as unconstitutional in a March 25, 2016 letter to the Board (attached).

In the face of this, the defendants nevertheless jumped to the First Amendment "death penalty": a blanket exclusion of the public from attending. While the defendants have made efforts to make audio of the proceedings available through an audio conference call system, this falls far short of actually attendance by the public and the press. Visual evidence, exhibits, and demonstrative evidence cannot be seen. The non-verbal demeanor and comportment of witnesses, parties, and of the Board itself cannot be seen. Use of a speakerphone may be inadequate to hear all which is being said. Comments from litigants cannot be obtained by the press or interested citizens during recesses because no one is allowed to be present on-site. This is anything but narrow tailoring.

D. The Defendants' Side Deals to Allow Admittance of Selected Individuals Aggravates, Rather Than Cures, the Constitutional Violation.

Ms. Barrett has been provided a July 21st email from PSB Deputy Clerk Holly R. Anderson (attached) that "Members of the press will be able to attend the August 4th

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hearing," despite the lack of any formal amendment of the *Order*. Moreover, an email from Vermont House member Mike Yantachka (attached) quotes a written email reply from defendant Cheney not only confirming that members of the press will now be allowed, but which also indicates that emerging are various side deals to allow attendance of selected individuals, such as a representative of the Conservation Commission, who are "invited" to "accompany the Town to the hearing as staff." *Huminski* decried the exclusion of selected individuals from Court proceedings as a First Amendment violation. This is even worse. It is the selective inclusion of certain members of the public with the exclusion of all others. This aggravates the unconstitutionality because this selectivity undermines the public's right to police and to have confidence in the proceedings.

E. THE DEFENDANTS MUST SELECT A VENUE REASONABLY LARGE ENOUGH TO ACCOMMODATE THE PUBLIC.

The email of Defendant Cheney incorporated in the Yantaschka email admits that "based on the small space available, we may need to limit the number of individuals in the room." The First Amendment right to attend is not satisfied by nominally lifting the ban on public attendance, but holding the proceeding at a location so small that the parties, press and public cannot all attend.

III. PLAINTIFF IS ENTITLED TO THE RELIEF REQUESTED.

The plaintiff is entitled under *Jackson Dairy, Inc. v. H.P. & Sons, Inc.,* 596 F.2d 70, 62 (2nd Cir., 1979)(per curiam); *Green Party of New York State v. N.Y. State Board of Elections*, 389 F.3d 411 (2nd Cir., 2004) to a TRO/preliminary injunction prohibiting defendants from enforcing their July 15th *Order*. This injury to the public's First Amendment rights constitutes immediate and irreparable harm. *Green Party, supra* citing

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Elrod v. Burns, 427 U.S. 347, 373 (1976). She has shown a substantial likelihood of success on the merits, *Green Party, supra.* Because this preliminary injunction stops a violation of First Amendment rights of political association, the Court should require no bond.

The Court should consolidate this with the request for declaratory judgment and permanent injunction as contemplated by F.R.Civ. P. 65(a)(2).

Dated this 22nd day of July, 2016 at Burlington, Vermont.

John L. Franco, Jr., Esq.
Attorney for Lisa Barrett

DECLARATION OF LISA BARRETT

I declare under penalty of perjury that the factual representations made in the foregoing *Memorandum* are true based upon my personal knowledge, except where indicate on the basis of information and belief.

Dated at Burlington, Vermont this 22nd day of July, 2016.

Lisa Barrett

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