STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8330

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| Petition of Conservation Law Foundation for a declaratory ruling that an amendment to the Certificate of Public Good issued to Vermont Gas Systems, Inc., in Vermont Public Service Board Docket 7970 is required because of a substantial change in the approved project | ) ) ) ) ) |

Order entered: 3/30/2017

## ORDER DENYING REQUEST FOR DECLARATORY JUDGMENT

## I. INTRODUCTION

This proceeding concerns a petition filed by Conservation Law Foundation ("CLF") pursuant to 3 V.S.A. § 808 and Board Rules 2.202 and 2.403 requesting a declaratory ruling that Vermont Gas Systems, Inc. ("VGS" or the "Company") is required to seek an amendment to the Certificate of Public Good ("CPG") issued for Phase I of the Addison Natural Gas Project (the "Project") in Docket 7970 because of a substantial change in the approved Project. The issue presented in this case is whether either of the estimated Project cost increases that VGS disclosed in July of 2014 and December of 2014 and other changes in circumstances constitute a "substantial change" within the meaning of Board Rule 5.408, thus requiring VGS to seek an amendment of the Section 248 CPG that was issued in Docket 7970 in December of 2013. Rule 5.408 states that:

> An amendment to a certificate of public good for construction of generation or transmission facilities, issued under 30 V.S.A. § 248, shall be required for a substantial change in the approved proposal. For the purpose of this subsection, a substantial change is a change in the approved proposal that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a).

In today's Order, the Vermont Public Service Board (the "Board") rules that VGS is not required to obtain an amended CPG under Board Rule 5.408.

## II. PROCEDURAL HISTORY

On December 23, 2013, after a review under 30 V.S.A. § 248, the Board issued a final Order in Docket 7970 granting VGS a CPG to construct the Project. The estimated cost of the Project was $86.6 million.

On July 2, 2014, VGS, filed with the Board an update of the estimated capital costs of the Project in Docket 7970 pursuant to Board Rule 5.409. The updated estimate disclosed a 41% net increase of approximately $35 million for an overall updated budget of $121.6 million.

On July 14, 2014, CLF filed a petition seeking a declaratory ruling that an amendment to the CPG issued to VGS in Docket 7970 is required because of a substantial change in the approved Project (the "CLF Petition").

On September 19, 2014, the Board opened this Docket and solicited comments as to whether action in this Docket should be stayed pending resolution of the Board's request for a remand from the Vermont Supreme Court of the final decision in Docket 7970.

On September 26, 2014, the Company filed comments in response to the Board's Order of September 19, 2016.

By order dated October 10, 2014, the Board decided to not reopen Docket 7970 in response to the July 2, 2014, cost update (the "First Remand Order").

On October 17, 2014, the Company filed a letter requesting that the Board close this Docket in light of the First Remand Order.

On October 22, 2014, CLF filed a response opposing VGS's request to close this Docket.

On November 4, 2014, the Company filed a response to CLF's October 22nd filing.

On December 19, 2014, the Company filed with the Board a second update of the estimated capital costs of the Project in Docket 7970 pursuant to Board Rule 5.409. The cost estimate update disclosed an increase of $68 million, resulting in a cumulative 78% increase and an overall updated budget of $153.6 million.

On July 8, 2015, AARP filed a motion to intervene.

On August 20, 2015, AARP's intervention request was granted.

By Order dated January 8, 2016, the Board decided to not reopen Docket 7970 in response to the December 19, 2014, cost update (the "Second Remand Order").

On February 16, 2016, Terrence and Kari Cuneo and Claire Broughton filed motions to intervene.

By Order dated March 23, 2016, the Board granted the Cuneos' and Ms. Broughton's motions to intervene. The Board also denied AARP's request to admit the record from Docket 7970.

Also on March 23, 2016, the Board denied VGS's request to close this Docket. The Board requested comments on what process was necessary to inform the Board's decision on CLF's petition.

On April 18, 2016, the Department, CLF, and VGS filed their respective comments on the need for additional process.

On May 2, 2016, VGS filed a statement of stipulated facts for the purposes of resolving this case (the "Stipulated Facts").

On May 5, 2016, the Board issued an Order setting a schedule for the remainder of the proceeding.

On May 23, 2016, AARP and the Cuneos filed a request to withdraw as parties. This request was granted by order dated September 1, 2016.

On May 31, 2016, CLF, VGS, and the Department filed their respective initial briefs.

On June 14, 2016, CLF, VGS, and the Department filed their respective reply briefs.

On June 21, 2016, CLF requested that the Board conduct oral argument.

On September 7, 2016, David Stevens on behalf of the Claire R. Broughton Revocable Trust requested to withdraw as a party. The request was granted at the oral argument held that day.

Also on September 7, 2016, the Board heard oral argument from CLF, VGS, and the Department at the Pavilion Building in Montpelier.

No other filings were received.

## III. POSITIONS OF THE PARTIES

CLF

CLF argues that the Stipulated Facts confirm that "the significant cost increase and the changes to the energy market constitute a substantial change to the Project." As specific examples of substantial changes, CLF cites the 78% increase in the estimated cost of the Project (from the December 2013 estimate of $86.6 million to $153.6 million), decreased oil prices, availability of compressed natural gas ("CNG"), and the availability of cold-climate heat pumps "which may be more cost effective for some customers than natural gas" as examples of substantial changes.

CLF contends that the "substantial change test" in Rule 5.408 and the related rulemaking history support the application of the rule to the foregoing circumstances as changes to the Project, notwithstanding that these are not physical changes to the Project. CLF states that the Board's decision in *In re Vt. Elec. Power Co., Inc, et al.* ("Docket 6860") did not restrict the application of the substantial change test to only physical changes. CLF states that the Board's subsequent adoption of Rule 5.408 without language limiting its application to physical changes demonstrates that the significant increase in estimated cost of the Project and changes in energy markets can be considered to be substantial changes for purposes of applying Rule 5.408.

CLF asserts that the Company's reported cost estimate increases and changes in the energy market have the potential for significant impacts under the substantive criteria of Section 248(b), such as whether the Project is required to meet the need for present and future demand for service, whether the Project will result in an economic benefit to the State and its residents, and whether the Project will have an undue adverse effect on the natural environment.

CLF states that "Vermont law requires the CPG to reflect the project that is proposed to be constructed." Therefore, according to CLF, "VGS is not authorized to construct the revised project under the authority of the CPG issued in Docket 7970 in December 2013." CLF requests that the Board: (1) declare that VGS must seek an amendment to the Docket 7970 CPG, and (2) enjoin VGS from proceeding with the Project until it receives an amended CPG.

VGS

VGS argues that Rule 5.408 entails the application of a two-part test. First, VGS contends, there must be a "cognizable change" to an approved project, meaning there must be a either a physical change to the project or a change in use. Second, any such "cognizable change" must have the potential to have a significant impact under the statutory criteria of Section 248. VGS contends that the first step of this two-part test has not been met because the increased cost estimates do not constitute a "cognizable change" to the Project. Rather, the cost estimate increases "relate only to actual or potential changes in Project impacts."

The Department

The Department states that the question of whether or not the "substantial change" standard in Rule 5.408 should be applied to Project changes other than physical changes has never been decided. The Department maintains that as a matter of policy, there is no reason to limit the applicability of Rule 5.408 to only physical changes. However, the Department notes that the cost estimate increases have been reviewed in light of the "non-physical" criteria of need and economic benefit in both of the Docket 7970 Remand Proceedings. Furthermore, the Department observes that "CLF has not proposed any particular amendment to the CPG in its Petition for a Declaratory Ruling and none is necessary." Therefore, the Department recommends that CLF's requested declaratory ruling be denied.

## IV. STIPULATED FACTS

For the purposes of this case, the parties have stipulated to the following set of facts.

1. On December 23, 2013, the Board issued a CPG approving the Project based in part on a projected cost estimate of $86.6 million.

2. On July 2, 2014, the estimated cost of the proposed project increased from $86.6 million to $121,655,000.

3. On December 19, 2014, the estimated cost of the proposed project increased from $121,655,000 to $153,600,000.

4. The cost estimate has risen approximately 78% to $153.6 million.

5. Other changes in the energy marketplace have also occurred since the Board's original Order:

(a) declining oil prices that reduce the competitive price advantage of natural gas;

(b) the availability of compressed natural gas as an alternative to pipeline-supplied gas; and

(c) the availability of cold climate heat pumps, which may be more cost- effective for some customers than natural gas.

## V. DISCUSSION

Section 248 prohibits persons from engaging in site preparation and construction of energy infrastructure without first obtaining a CPG. A corollary to this statutory requirement is that " a certificate for a given facility confers no authority to construct a different one."[1] Since 1997, the Board has applied the Environmental Board's "substantial change test" when determining whether a CPG holder must obtain Board approval prior to implementing a change to a certificated project.[2] Under the Environmental Board's substantial change test, the first step is to determine "whether there has been a change, and second, whether any change may have a significant impact under the Act 250 criteria."[3] In the context of our review of utility projects under Section 248, the Board has modified the substantial change test so that changes that are "potentially significant" under any of the Section 248 criteria, as opposed to only the Act 250 criteria incorporated in Section 248, require an amended CPG.[4] As applied in Act 250 proceedings, a change must be a "cognizable physical change" or a "change in use" to satisfy the first step of the substantial change test.[5] To date, the Board has not had to address the question

1. *Petition of Vicon Recovery Sys., Inc.*, Docket 4813-A, Order of Mar. 23, 1987 at 3.

2. *In Re: Citizens Utilities Co.*, Docket 5841, Order of 6/16/1997 at 132. The Environmental Board was subsequently disbanded and replaced with the Natural Resources Board.

3. *Id*. at 133.

4. *Petition of Vermont Electric Cooperative, Inc.*, Docket 6544, Order of 2/20/2002 at 6.

5. *Sec'y, Vermont Agency of Nat. Res. v. Earth Const., Inc.*, 165 Vt. 160, 164 (1996) (citing *In re H.A. Manosh Corp.*, 147 Vt. 367, 369–70 (1986)); *In re Request for Jurisdictional Opinion re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A*, 2015 VT 41, ¶ 22.

of whether changes in the estimated cost of a project or changes in energy markets would constitute a "substantial change" for the purposes of applying Board Rule 5.408.

In this case, CLF contends that the Board should recognize the increases in the estimated cost of the Project and the changes in circumstances (such as changes in the oil market and heat-pump technology) as changes that trigger the requirement for an amended CPG. CLF contends that these changes should be found to be substantial notwithstanding the fact that they are not physical changes to the approved Project because "there is a substantial change in the approved proposal here."[6]

The Board has previously been confronted with cases involving increases to the estimated cost of a certificated facility. In Docket 6860, a utility informed the Board of substantial increases in the estimated cost of an approved electric transmission line.[7] The cost increase was the result of "increases in the market cost for materials, equipment and services necessary for . . . construction, and from the Order's conditions [of approval]."[8] The Department argued in Docket 6860 that the increased cost estimate was a substantial change that required an amended CPG.[9] However, the Board chose to review the significance of the new cost information within the framework of a reconsideration analysis pursuant to Vermont Rule of Civil Procedure 60(b).[10] Ultimately, the Board concluded that the change in the transmission line's estimated cost did not constitute grounds for reconsideration under Rule 60.

In 2006, following the conclusion of the reconsideration proceeding in Docket 6860, the Board initiated a rulemaking to establish regulations for the review of Section 248 petitions. The rulemaking was intended to "codify into a rule the Board's case law on when an amendment to an approved CPG is required."[11] Significantly, at the same time that Rule 5.408 was adopted, the Board also adopted Rule 5.409, which specifically addresses changes in project costs. Rule 5.409 provides:

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6. CLF Reply Brief at 3 (internal quotes ommitted).
7. *In Re Vt. Elec. Power Co.,* Docket 6860, Order of 9/23/2005 at 1.
8. *Id.* at 2.
9. *Id*. at 19.
10. *Id.* at 20.
11. Comments of the Vermont Department of Public Service on Proposed Rule 06-003, dated April 17, 2006, at 7–8.

> Where a Vermont utility is the petitioner, or the costs of a project or a portion thereof are eligible to be recovered from ratepayers, the petitioner shall regularly monitor and update the estimated capital costs of any project it has proposed for or received approval under Section 248. When the estimated capital costs of such a project increase by 20 percent, and the increase is at least $25,000, or such other amount as the Board may order in a given proceeding or prescribe in a Procedure, prior cost estimates submitted by the petitioner to the Board, the petitioner shall notify the Board and parties of the new capital cost estimates for the project and the reasons for the increase. This requirement to monitor, update, and report shall continue until construction of the project has been completed.

Board Rule 5.409 is directed at protecting ratepayers from escalations of project costs by expressly requiring utilities to monitor the estimated capital costs of projects and imposing a duty to report cost-estimate increases of more than 20%. When a utility reports a cost-estimate increase under the rule, the company must provide an explanation of the reasons for the increase. However, by its terms, Rule 5.409 does not require any additional review of reported cost increases. Rather, a reported cost-estimate increase under Rule 5.409 presents an opportunity for the Board and affected parties to consider whether any additional review is warranted and, if so, what type of review, whether pursuant to Rule 5.408, Rule 60, or any other type of review that appears appropriate under the circumstances.

Reading Rules 5.408 and 5.409 together, we conclude that an increased cost estimate by itself does not, as a matter of law, constitute a substantial change that requires a Rule 5.408 amendment review. Rule 5.408 refers to changes "to the approved proposal." A cost increase without attendant physical changes does not alter the proposal itself because the Board does not approve the estimated cost of a project in a Section 248 proceeding. A cost-estimate change reported under Rule 5.409 might be indicative of a "substantial change" that requires greater review under Rule 5.408. For example, if the accompanying explanation for the increase shows that the rise in costs is driven by a cognizable change to the project, such a change could trigger the need for an amended CPG pursuant to Rule 5.408.

Applying these principles to the stipulated facts of this case, we conclude that the facts cited by CLF do not constitute "cognizable changes." There are cost changes but not physical changes to the plans of the approved Project. Similarly, the facts concerning changes in oil markets and heat-pump technology cited by CLF are not changes to the approved proposal and,

therefore, are not valid grounds for requiring the Company to obtain an amended CPG. Therefore, the Board holds that the Company does not need to obtain an amendment to the Project's CPG under Board Rule 5.408.

In reaching this conclusion, we do not find that changes in costs are irrelevant for all purposes. Rather, our ruling is narrow: i.e., changes in costs or other circumstances without physical changes do not trigger Rule 5.408's obligation to seek an amended CPG. This holding does not mean that cost increases are automatically recoverable in rates.[12] Section 248 proceedings involve the review and approval of the construction of proposed facilities, not the approval of the recovery of construction costs from ratepayers. Unlike construction activities, which may proceed once a CPG issues, project costs may only be recovered after a regulated utility files for a rate adjustment demonstrating that its construction costs are known and measurable, and that the constructed facility is used and useful.

It is conceivable that a cost-estimate increase reported under Rule 5.409 or changes in technology and markets could call into question the continued validity of the findings in the approval order underlying a CPG, or, put more simply, whether it is still in the public good for an approved project to have a CPG. Under such a scenario, the Board may decide to review its decision to issue a CPG for a Project under Rule 60, which is what occurred in Docket 6860 and in Docket 7970.

In Docket 7970, the Board conducted reviews of the July 2014 and December 2014 cost increases, as well as the other changed circumstances cited by CLF, under Rule 60 and found that this information would not likely change the Board's conclusion that the Project is in the public good.[13] For this reason, the Board did not reopen Docket 7970 and allowed VGS to continue to construct the Project. The Board has not, however, approved any cost recovery for the Company or relieved the Company of its duty to prudently manage its construction of the Project. These issues are being examined in the rate case now pending Docket 8710, which concerns VGS's most recent base rate filing.

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12. For example, in a post-construction rate case, the Board disallowed unjustified costs related to a wind project that cost approximately $2 million more than had been estimated in the Section 248 proceeding for the facility. *In re Green Mountain Power Corp*,. Docket 5983, Order of 2/27/1998 at 64.

13. *Petition of Vermont Gas Systems, Inc.*, Docket 7970, Orders of 10/10/2014 and 1/8/2016.

## VI. CONCLUSION

For the reasons explained above, we rule that VGS is not required by Rule 5.408 to obtain an amended CPG for the Project. CLF's requests for a declaratory ruling and an injunction are denied.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 30th day of March, 2017.

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| s/Margaret Cheney | PUBLIC SERVICE BOARD OF VERMONT |
| s/Sarah Hofmann | |

OFFICE OF THE CLERK

FILED: March 30, 2017

ATTEST: s/Judith C. Whitney
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.*