

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-1502-PET

Petition of the City of Burlington for a Declaratory Ruling	
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Order entered: 09/05/2018

ORDER RE PROPOSAL FOR DECISION

I. Introduction

On May 23, 2018, the City of Burlington, Vermont (the “City”), filed a petition with the Vermont Public Utility Commission (“Commission”) for a declaratory ruling that the Commission does not have jurisdiction over the City’s proposal to provide district heating service within its municipal boundaries (the “project”).

In today’s proposal for decision, I recommend that the Commission grant the City’s petition and conclude that it does not have jurisdiction over the City’s district heating proposal. I also recommend that the Commission take note of the fact that the project has already relied on, and may in the future again rely on, ratepayer funds from the City of Burlington Electric Department (“BED”) in the event such expenditures become relevant in a future BED rate proceeding.

II. Procedural History

On May 23, 2018, the City filed its petition.

On June 26, 2018, I conducted a prehearing conference. Appearances were entered by Elijah D. Emerson, Esq., Primmer Piper Eggleston & Cramer PC, on behalf of the City; and James Porter, Esq., on behalf of the Vermont Department of Public Service (“Department”).

On July 20, 2018, the Department filed its recommendation in this matter.

On August 2, 2018, the City prefiled supplemental testimony.

No other comments were filed and no party requested an evidentiary hearing or objected to the prefiled testimony. Accordingly, I am admitting the amended prefiled testimony¹ and

¹ The City included the prefiled testimony of Ms. Anderson with its petition on May 23, 2018. However, the City prefiled amended testimony by Ms. Anderson on June 12, 2018. The amended testimony superseded Ms. Anderson’s May 23rd testimony. The amended testimony is referred to herein as “Anderson pf.”.

supplemental prefiled testimony of Beth Anderson on behalf of the City into the evidentiary record as if presented at a hearing.

III. Findings

Based upon the petition and the accompanying record in this proceeding, I have determined that this matter is ready for decision. Based on the evidence of record, I hereby report the following proposed findings to the Commission in accordance with 30 V.S.A. § 8(c).

1. Over the past thirty years, the City has considered the creation and operation of an entity that would provide heating service in the form of steam and/or hot water to businesses, organizations, and residents within the municipal boundaries of Burlington (“District Heating Entity”). The City is now in the beginning stages of the implementation of a plan to provide this service. Beth Anderson, City of Burlington (“Anderson”) pf. at 3.

2. The District Heating Entity will be a distinct entity within the government of the City and will be created to own and operate the district heating assets. Anderson pf. at 3.

3. The District Heating Entity will function separately from all other City operations and will maintain separate financial records from the rest of the City, including BED. Anderson pf. at 3, 4.

4. The construction, operation, and maintenance of the District Heating Entity will be assigned to a third party for a specific period of time and then is expected to revert back to the City. Anderson pf. at 3.

5. The construction and operation of the District Heating Entity will be funded initially by the third-party operator and then from the project’s own revenue sources. Anderson pf. at 3-4.

6. In the future, BED may support the City in its oversight role of the third party’s operation of the District Heating Entity. In that event, BED’s services will be compensated by the third-party operator and no electric ratepayer funds will be used for this purpose. Anderson pf. at 3.

7. If BED personnel are utilized for the operation of the District Heating Entity, BED will be reimbursed at a fair market rate with funds from the District Heating Entity. Anderson pf. at 4.

8. BED has already expended ratepayer funds pre-construction in furtherance of the development of the District Heating Entity. Specifically, BED financed two studies to help address the concerns of the other owners of the jointly owned Joseph C. McNeil Generating Station (“McNeil”) regarding potential impacts to the McNeil facility if the District Heating Entity proceeded. The first study examined the impact of various steam extraction options on the turbine at McNeil at a cost of \$48,655. The second study addressed the impacts and risks to the balance of the equipment at the plant from operation of the proposed project at a cost of \$33,000. Anderson pf. supp. at 3.

9. BED did not seek a *pro rata* contribution from McNeil’s other owners (50%) because the primary beneficiary of the District Heating Entity will be the City of Burlington. Anderson pf. supp. at 3.

10. BED ratepayer funds will also be used to compensate Corix² for a portion of the time, travel, and expense that Corix incurs in the preliminary stages of the District Heating Entity’s development in the event the entity does not move forward. In the event the District Heating Entity does move forward, costs incurred by Corix to date would become capital costs of the District Heating Entity project and BED would not be obligated to reimburse any portion thereof. Anderson pf. supp. at 2-3.

11. BED has mitigated its risks under its agreement with Corix by securing commitments from a number of the larger potential heating customers to contribute to Corix’s expenses if BED does need to pay Corix. This structure represents a sharing of risk between Corix, BED, and key potential customers of the District Heating Entity in the event that, for one or more reasons, the project does not prove feasible. Anderson pf. supp. at 3.

12. Corix will need to proceed with detailed engineering studies in the event that key customers elect to enter a letter of intent (“LOI”) with the District Heating Entity. The customers executing the LOIs would have a financial obligation toward these detailed engineering costs in the event that they did not ultimately take service from the system and the final heating entity prices were similar to the estimates to date. BED has agreed to underwrite a

² Corix is a company that assists in the construction and management of utility infrastructure for water, wastewater, and renewable energy. See <https://www.corix.com/>.

portion of the costs of the detailed engineering studies but is not yet committed to this because the LOIs are not yet at the signature stage. Anderson pf. supp. at 4.

13. BED has also used existing staff time in support of the District Heating Entity. The City asserts that BED would do so in the case of any project with the potential to meet Burlington's and Vermont's energy and climate goals, BED's Tier III obligations under the Renewable Energy Standard ("RES"), or to improve the economics of the operation of a BED-owned asset. Anderson pf. supp. at 4.

14. The steam and/or hot water used by the District Heating Entity will be created by the McNeil facility as well as two new natural gas boilers to be owned by the District Heating Entity. The steam and/or hot water will then be distributed by a network of pipes throughout the City. Anderson pf. at 3.

15. The two natural gas boilers will be used to produce steam and/or hot water and will have no role in the production of electricity. The natural gas used in the boilers will be supplied by Vermont Gas System Inc.'s ("VGS") local pipeline. Anderson pf. at 3.

16. There will be a clear demarcation between the McNeil facility and the facilities of the District Heating Entity, and a clear identification of the assets owned by McNeil and the facilities owned by the District Heating Entity. Anderson pf. at 4.

17. Heat from the McNeil facility will be sold to the District Heating Entity pursuant to a thermal energy agreement between the joint owners of McNeil and the District Heating Entity. Once the thermal energy is sold by McNeil to the District Heating Entity, it will travel onto the District Heating Entity's system and be distributed to its customers. Anderson pf. at 4.

18. The authority of the McNeil facility to participate in any thermal energy services arrangement will be addressed in a separate filing submitted by the joint owners of McNeil. Anderson pf. at 4-5.

IV. Discussion

For the reasons set forth below, I recommend that the Commission grant the City's petition and conclude that the Commission does not have jurisdiction over the City's proposal to provide district heating service within its municipal boundaries. However, as noted in the introduction to this proposal for decision, I also recommend that the Commission take note of the project's potential reliance on BED ratepayer funds.

The City contends that a plain reading of 30 V.S.A. § 203 demonstrates that the Commission's jurisdiction does not extend to the District Heating Entity because that entity is not engaged in the manufacture, transmission, distribution, or sale of gas or electric energy. Further, the City states that even if the District Heating Entity is considered to be engaged in the collection, sale, and distribution of water for domestic, industrial, business, or fire protection purposes, the entity is exempt from Commission jurisdiction because it is a municipal entity.³

The City also contends that the Commission does not have jurisdiction over the District Heating Entity under 30 V.S.A. § 248 because that section only applies to the investment in or construction of a facility associated with electricity or natural gas. According to the City, even though the District Heating Entity will receive heat from BED's McNeil facility, which is subject to Commission jurisdiction, that jurisdiction does not extend to the operations and plant of a different department within the City that is offering an unregulated service. The City emphasizes that the District Heating Entity will be an independent municipal entity, separate and apart from the jurisdictional operations of BED, and that no ratepayer funds will be used to operate the facility.⁴

The Department supports the City's request for a declaratory judgment. According to the Department, the Commission lacks jurisdiction under 30 V.S.A. § 203 because the District Heating Entity will not be engaged in manufacturing, transmitting, distributing, or selling gas or electricity. The Department also emphasizes the independence of the entity from BED, the fact that it will not be operating monopoly facilities using ratepayer funds, and that BED will be reimbursed for any services that it may provide. The Department states that because the Commission lacks jurisdiction under § 203, the District Heating Entity is not required to obtain a certificate of public good under 30 V.S.A. § 231.⁵

The Department also opines that Commission jurisdiction does not attach under 30 V.S.A. § 248 because the project is not an electric or gas facility and because the project cannot be said to be reasonably related to such a facility based on Commission precedent.⁶

³ City brief at 3-5.

⁴ City brief at 6-7, 8-9.

⁵ Department brief at 4-5. The Department also notes that the District Heating Entity would be exempt from Commission jurisdiction even if it was considered a water company because of its status as a municipal entity. *Id.*

⁶ Department brief at 5-9.

30 V.S.A. § 203

I agree with the City and the Department that the Commission lacks jurisdiction over the District Heating Entity under the plain language of § 203.

Section 203 provides in relevant part:

The Public Utility Commission . . . shall have jurisdiction over . . . (1) A company engaged in the manufacture, transmission, distribution, or sale of gas or electricity directly to the public or to be used ultimately by the public for lighting, heating, or power . . . [and] (2) That part of the business of a company which consists of the manufacture, transmission, distribution, or sale of gas or electricity directly to the public or to be used ultimately by the public for lighting, heating, or power.⁷

Because the District Heating Entity will be engaged in the delivery and sale of steam and/or hot water and not the manufacture, transmission, distribution, or sale of gas or electricity, by their plain language §§ 203(1) and (2) do not extend Commission jurisdiction over the District Heating Entity. Additionally, even if the District Heating Entity could be considered a water company, it would be exempt from Commission jurisdiction by virtue of its status as a municipal entity.⁸

I agree with the parties that the entity's status as a municipal entity independent of BED is an important factor in this analysis given the Commission's jurisdiction over BED. According to the City, the entity will function independently from BED and will not rely on any BED ratepayer funds for its operation. To the extent BED contributes any resources to the operation of the entity, the City represents that the third-party operator of the system will reimburse BED at fair market rates.

Further, as the parties both noted, the Commission is a body of limited jurisdiction. The Vermont Supreme Court has described the Commission as:

a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction. It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.⁹

⁷ 30 V.S.A. §§ 203(1) and (2).

⁸ See 30 V.S.A. § 203(3) (exempting municipal water companies from Commission jurisdiction).

⁹ *Trybulski v. Bellows Falls Hydro-Corp.*, 112 Vt. 1, 7 (1941).

After considering the plain language of § 203, the Commission's statutory charge to regulate statutorily specified public utilities, and the limits on its powers as described by the Vermont Supreme Court, I recommend that the Commission conclude that it lacks jurisdiction, either expressly granted or necessarily implied, over the District Heating Entity as it is described in the petition and testimony filed by the City. Because I recommend that the Commission find it lacks jurisdiction under § 203, I also recommend that the Commission conclude that the District Heating Entity is not required to seek a certificate of public good under 30 V.S.A. § 231.

30 V.S.A. § 248

Section 248 of Title 30 requires in relevant part, with certain limited exceptions that are not applicable here, that a person or company seeking to construct an electric transmission or generation facility or a natural gas facility obtain a certificate of public good from the Commission prior to commencing site preparation for or construction of such a facility.

Provided that the District Heating Entity functions as an independent entity separate and apart from BED it is apparent that it does not fall squarely within the requirements of § 248 because it will not be generating or transmitting electricity or transmitting natural gas. However, the ultimate determination of whether the District Heating Entity requires a § 248 certificate of public good to construct its facilities requires a review of Commission precedent.

In past orders the Commission has determined that a § 248 certificate of public good is required where the construction of a facility is "reasonably related" to a generation or transmission project.¹⁰ Accordingly, the Commission must determine whether the District Heating Entity would be reasonably related to either or both the McNeil generating station and/or a VGS gas transmission line. I recommend that the Commission find that the entity's facilities are not so related.

First, with respect to the McNeil generating station, the Commission has already determined that § 248 jurisdiction did not extend to a district heating system that would

¹⁰ See, e.g. *Petition of UPC Wind Management, LLC*, Docket 6884, Order of 4/21/04 at 17-18.

utilize waste heat from a proposed wood-fired electric generation facility, even though the electric generation facility itself was subject to § 248 jurisdiction, because the heating system was not reasonably related to the electric generation facility.¹¹ The only difference between that case and the project described by the City is that the City's project would utilize heat from a plant owned by a rate-regulated distribution utility as opposed to using heat from a wholesale merchant generator. However, I do not believe this distinction is sufficient to warrant a different conclusion by the Commission in this matter. The District Heating Entity's function and relation to the generating facility remain the same whether that generation facility is owned by a merchant wholesale generator or a rate-regulated distribution utility.¹² I therefore recommend that the Commission determine that the District Heat Entity proposal is not reasonably related to the McNeil generating station and is therefore not required to obtain a § 248 certificate of public good.

Second, with respect to the delivery of gas by VGS for use in the two additional boilers that would be used to generate steam and/or hot water for use by the District Heating Entity, the testimony shows that those boilers would be owned by the District Heating Entity and would have no relation to the generation of electricity and are therefore not jurisdictional under § 248.

Additionally, Commission precedent indicates a lack of jurisdiction over any upgrades to VGS's distribution facilities¹³ that may be necessary to interconnect the two boilers. The Commission has found that it has a responsibility under Section 248(b) to ensure that a proposed project that is subject to Section 248 does not have any undue adverse impacts, including impacts from upgrades to distribution facilities that would not be needed but for the construction of the project. Therefore, the Commission reviews the impacts of such distribution upgrades even though the upgrades are outside the control of

¹¹ See *Petition of North Springfield Sustainable Energy Project LLC*, Docket 7833, Order of 2/11/14 at 15-16, 19-21.

¹² This analysis again relies upon the City's representations that the District Heating Entity would be an independent municipal entity separate and apart from BED and that no ratepayer funds would be used to support the entity.

¹³ In the event VGS is required to upgrade its transmission facilities to serve the project, it is possible VGS would be required to seek a § 248 certificate of public good for those upgrades. See 30 V.S.A. § 248(a)(3).

the project applicant and standing on their own would not trigger direct Section 248 jurisdiction.¹⁴

In Docket 7201, the distribution upgrade was required to serve a generation facility that was jurisdictional under Section 248. In the case of the District Heating Entity, any necessary upgrades to VGS's distribution lines would be for the purpose of serving non-jurisdictional facilities (i.e. the two boilers to be owned by the District Heating Entity). Therefore, the Commission's authority to review any impacts from those upgrades, as articulated in Docket 7201, is not present in the instant case and I recommend the Commission so find.

While I do not believe it is controlling on the question of whether the Commission has jurisdiction over the construction and operation of the District Heating Entity, I recommend that the Commission take note of the previous expenditures of BED ratepayer funds, as well as the potential for future additional expenditures of BED ratepayer funds, in support of the project. I make this recommendation because such expenditures may be relevant to a future BED rate proceeding.

In its supplemental testimony, which was only filed in response to inquiries I made at the prehearing conference, the City disclosed that BED ratepayer funds had already been expended on the project for two studies regarding potential impacts from the project on the McNeil generating facility. According to the City, BED did not seek *pro rata* contributions from McNeil's other owners because the City is the primary beneficiary of the project. The City did not explain why it, as the primary beneficiary of the project, did not fund the studies itself instead of BED.

The City further disclosed in its supplemental testimony that additional BED ratepayer funds may be expended in support of the project for preliminary expenses in assessing the project's feasibility in the event the project does not go forward, and potentially for some costs related to detailed engineering studies if the project does move forward.

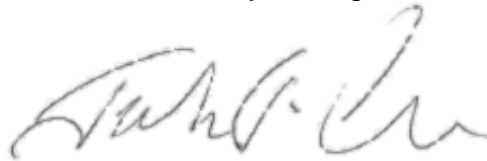
¹⁴ *Petition of Vermont Electric Cooperative, Inc., for a Declaratory Ruling*, Docket 7201, Order of 9/15/06 at 1-2.

Lastly, the City disclosed in its supplemental testimony that BED staff time has already been expended on the project for what the City (and presumably BED) believes are appropriate purposes.

I do not express any opinion or recommendation to the Commission on whether these existing and potential expenditures of BED ratepayer funds are an appropriate use of BED resources, as I do not believe that bears directly on the City's request for a declaratory ruling regarding the Commission's jurisdiction over the project. Rather, I am simply bringing the issue to the Commission's attention in the event it becomes relevant in a future BED rate proceeding.

For the reasons explained above, I recommend that the Commission grant the City's petition for a declaratory judgment that the Commission does not have jurisdiction over the City's proposal to provide district heating service within its municipal boundaries.

Dated at Montpelier, Vermont, this 14th day of August, 2018.



John J. Cotter, Esq.
Hearing Officer

V. Commission Discussion

On August 22, 2018, the Department of Public Service filed comments on the proposal for decision. The Department supports adoption of the proposal for decision, “including the hearing officer’s recommendation that the Commission take note of the fact that, in the event they become pertinent to a future City of Burlington Electric Department (“BED”) rate case, BED has already and may again in the future rely upon ratepayer funds in support of the project.”¹⁵

The City of Burlington did not file any comments on the proposal for decision.

We agree with the findings and conclusions recommended by the hearing officer and accordingly adopt them.

¹⁵ Letter from Sarah L.J. Aceves, Esq. to Judith Whitney, Clerk of the Commission, dated August 22, 2018.

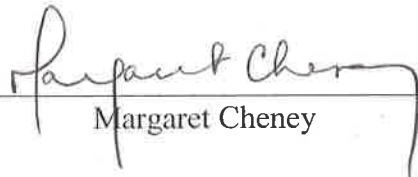

V. Order

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission (“Commission”) of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted.
2. The petition of the City of Burlington for a declaratory judgment that the Commission does not have jurisdiction over the City’s proposal to provide district heating service within its municipal boundaries is granted.

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of September, 2018.

)	
Margaret Cheney)	PUBLIC UTILITY
)	
)	COMMISSION
)	
)	
Sarah Hofmann)	OF VERMONT

OFFICE OF THE CLERK

Filed: September 5, 2018

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 18-1502-PET - SERVICE LIST

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