



3. On or about July 2, 2014 VGS provided to the Board an update of the estimated capital costs of the Project. (Docket 7970, Update of Estimated Capital Costs, 7/2/14).
4. The updated cost estimate provided reflects an increase of \$35.0M or an increase of about 40%. *Id.* at 2-3.
5. No supporting information was provided by VGS substantiating the revised cost figures. *Id.*
6. VGS knew or should have known of the cost increases prior to the Board's December 2013 Order.
7. VGS failed to update cost estimates or correct testimony on which the Board relied prior to the Board's December 2013 Order.
8. The project cost is a factor in determining whether the proposed project meets the criteria of 30 V.S.A. § 248(b) and will "promote the general good of the state." 30 V.S.A. § 248(a)(2).
9. A 40% increase in the cost of the proposed project is a substantial change affecting at least one of the Section 248 criteria.
10. Failure to update or correct testimony is a substantial change affecting at least one of the Section 248 criteria as it bears on the trustworthiness of VGS and its ability to responsibly carry out its statutory obligations.
11. An amendment to the certificate of public good is required pursuant to Vt. PSB Rule 5.408 for "a substantial change in the approved proposal."
12. VGS is not authorized to proceed with the modified project without receiving an amended CPG.

13. Conservation Law Foundation submits the following Memorandum of Law in support of this petition.

WHEREFORE, Conservation Law Foundation requests the Public Service Board:

1. Issue a declaratory ruling that an amendment to the certificate of public good issued to Vermont Gas Systems, Inc. in Vt. P.S.B. Docket 7970 is required because of a substantial change in the approved project.
2. Issue an injunction precluding Vermont Gas Systems, Inc. from proceeding with the modified project unless and until it receives an amended certificate of public good.

Dated at Montpelier Vermont this 14<sup>th</sup> day of July 2014.

CONSERVATION LAW FOUNDATION

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1997); *In re Vicon Recovery Systems*, Procedural Order of 3/23/87 at 3-4, incorporated into Final Order of 12/16/87 at 2, 53, PSB Docket # 4813-A; Vt. P.S.B Rule 5.408.

Vermont P.S.B. Rule 5.408 states:

**Amendments to Projects Approved under Section 248**

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).

Vt. P.S.B Rule 5.408.

Project changes are substantial and need additional review and approval if they are “ ‘potentially significant’ under the Section 248 criteria.” *Citizens, supra* at 132 quoting *Vicon, supra* at 3-4; Vt. P.S.B. Rule 5.408. The Board has adopted the “substantial change” standard used in Act 250. In *Petition of Vermont Electric Cooperative, Inc.*, the Board stated:

We have previously outlined the circumstances where changes to transmission facilities that have been permitted by the Board under Section 248, and are subject to existing CPGs, will require Board review and approval prior to their construction or implementation. *See* Citizens Order of 6/16/97 at 133-139; *see also* Docket No. 4813-A, in re *Vicon Recovery Systems*, Order of 3/23/87 at 3-4. As noted by the DPS, Board approval is required when there is a “substantial change” to an existing project. In *Citizens* we adopted, in principle, the “substantial change” definition from Environmental Board Rule 2(G) which states that a “substantial change” is “any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (10).”<sup>1</sup> Thus, here we look at all of the Section 248 criteria to determine if the changes proposed have the potential for impact under any of these criteria.

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<sup>1</sup> In *Citizens* we did not limit our “substantial change” assessment to only those criteria of 30 V.S.A. Section 6086(a) that have been incorporated into Section 248(b)(5); rather, we applied this test to all of the criteria of Section 248(b).

*Petition of Vermont Electric Cooperative, Inc.*, Declaratory Ruling, PSB Docket #6544 at 6 (Feb. 20 2002) (footnote in original). In *In re Vt. Elec. Power Co., Inc, et al*, decided before the effect of Rule 5.408, the Board reaffirmed the amendment requirement stating: “If the project is amended after Board approval, the Board applies the "substantial change" test to determine whether an amended CPG is required.” *In re Vt. Elec. Power Co., Inc, et al*, Order on Remand at 18, PSB Docket #6860 (Sept. 23, 2005).

In all these cases, the Board determined that project changes that have the potential to have an impact under any of the 248 criteria are a “substantial change” that requires further review and approval by the Board. This is wholly consistent with the purpose of a CPG. Issuance of a CPG is necessarily based on a determination that the standards in Section 248 have been satisfied. If a project changes significantly, the approval may no longer be justified. The CPG allows the holder to build the project that was approved. If the project changes an amended CPG must be obtained before construction. *Citizens, supra* at 132.

## **II. The significant cost increase is a substantial change**

The significant cost increase for this Project is a substantial change that requires reevaluation by the Board. The cost increase has the potential for impact under the 248(a) criteria requiring that a proposed project “promote the general good of the State,” and under the 248(b) criteria addressing specific Project impacts and benefits. Specifically, the significant cost increase affects whether the Project “will result in an economic benefit to the State and its residents; 30 V.S.A. § 248(b)(4), and whether the Project will “have an undue adverse effect on ... the natural environment....” 30 V.S.A. § 248(b)(5). The significant cost increase also potentially affects whether the project is “required to

meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures ....” 30 V.S.A. § 248(b)(2). While some changes in cost or design are inconsequential and would not rise to the level of being a “substantial change.” *Vicon, supra* at 3-4 (“Changes which are inconsequential with respect to Section 248 criteria, therefore, should not result in the invalidity of the certificate”), a 40% cost increase cannot be inconsequential.

Contrary to the claims of VGS in its letter regarding updated costs submitted in Docket 7970, the standard does not require that the change alter the Board findings. VGS Update of Estimated Capital Costs at 5 (7/2/14). The standard requires simply that the change have “the potential for significant impact with respect to any of the criteria....” Vt. P.S.B. Rule 5.408.

In *In re Vt. Elec. Power Co., Inc, et al*, Order on Remand PSB Docket #6860 (Sept. 23, 2005) on which VGS relies, the Board specifically determined that it was NOT considering whether the project needed an amended CPG under the “substantial change test” but instead concluded “that given the limited scope of the remand from the Court, the issue before us — whether to reopen our previous approval of the Project — properly falls under the provisions of Rule 60, and not the standards that govern amendments to projects.” *Id.* at 19. As explained in the *In re Vt. Elec. Power Co.*, remand decision, the Rule 60(b) standard is stricter and requires that the “the revised cost estimate is ‘of such a material and controlling nature as will probably change the outcome.’” *Id.* at 21-22.

Further, as the Board noted in the *In re Vt. Elec. Power Co.*, remand decision: “If a substantial change has occurred, without an amended CPG the permittee would not be

authorized to proceed with the modified project, regardless of whether the original CPG were on appeal.” *Id.* at 20 fn. 28. As recommended by the Public Service Department in the *In re Vt. Elec. Power Co.*, remand proceedings “the substantial change test will not be limited to physical changes, but could also apply to costs increases for permitted projects.” *Id.* at 20 fn. 29.

Here, the significant cost increases have the potential to have a significant impact with respect to some of the criteria. At a minimum the cost increase significantly undermines the claimed economic and environmental benefits of the proposed project. The statute, Board precedent and Board rules require an amended CPG before the project, with the substantial change of the increased costs may proceed.

### **III. The failure to update or seek an amendment is a substantial change**

VGS knew or should have known of the cost increases before its July 2, 2014 filing updating the Project’s capital costs. At least as early as March 2014, it should have been aware of the report it cited in its letter regarding significant increases in pipeline costs. Docket 7970 VGS Update of Estimated Capital Costs at 1 fn. 1 (7/2/14). The need for additional Horizontal Directional Drilling (HDD), additional property acquisition costs, engineering and project management costs were or should have been known long before the July 2, 2014 filing. As early as April 2012, CLF along with VPIRG and the Vermont Natural Resources Council identified a number of significant shortcomings of the proposed project that were raised during the VGS Addison Expansion Advisory Group Process including the lack of recommendations developed by the Group and the failure to undertake or address significant impacts on emissions, and impacts from the use of fracking, as well as impacts to natural resources as a result of developing in areas with

significant wetlands and natural resources. (Letter to VGS from CLF, VPIRG and VNRC of 4/24/12) (attached). VGS knew as of April 2012 that there were significant concerns about these impacts and that they would need to be addressed. VGS cannot now claim that increased costs from its failure to address these impacts are in any way unexpected.

The failure of VGS to affirmatively seek an amended CPG as required by Vermont Public Service Board rules or to previously update the cost estimates and present the Board and the parties with a fair estimate of the Project's costs calls into question VGS's trustworthiness and its willingness to comply with Board requirements. As the Board has acknowledged regarding the owners of Vermont Yankee, the trustworthiness, openness and willingness to be forthcoming and to correct and update testimony is expected. *In re Amended Petition of Entergy Nuclear Vt Yankee et al.*, Final Order at 41, PSB Docket #7862 (Mar. 28, 2014) ("Companies subject to the Board's jurisdiction are expected to comply with applicable law and regulatory commitments, particularly those commitments offered to other parties and the Board with the expectation that they would be relied upon in order to receive a benefit."). VGS's failure to seek an amended CPG or to present realistic cost estimates in a timely manner demonstrates a substantial change as to VGS's willingness to meet its obligations as a Vermont utility.

#### **IV. The CPG must be amended before construction**

Vermont law requires that the CPG reflect the project that is proposed to be constructed. 30 V.S.A. § 248. With the significant cost increase, the project changed and VGS no longer has authority to construct the project. An amended CPG that includes an evaluation of the impacts in light of the changed costs is required before construction can

commence. As recognized by the Board: “If a substantial change has occurred, without an amended CPG the permittee would not be authorized to proceed with the modified project, regardless of whether the original CPG were on appeal.” *In re Vt. Elec. Power Co., Inc, et al*, Order on Remand at 20 fn. 28 PSB Docket #6860 (Sept. 23, 2005). The significantly increased costs and the failure to seek an amendment has modified the Project and it cannot be constructed under the authority of the CPG issued in Docket 7970 in December 2013.

The significant cost increase for the Project is a change that has the potential for significant impact with respect to the Section 248 criteria. Since cost is a key element and a key factor in determining whether the proposed Project “promotes the general good of the state” the significant cost increase, and failure to seek an amendment for the Project is a “substantial change” and requires an amended CPG before construction can begin.

## **V. Conclusion**

For the foregoing reasons, Conservation Law Foundation requests the Vermont Public Service Board:

1. Issue a declaratory ruling that an amendment to the certificate of public good issued to Vermont Gas Systems, Inc. in Vt. P.S.B. Docket 7970 is required because of a substantial change in the approved project.
2. Issue an injunction precluding Vermont Gas Systems, Inc. from proceeding with the modified project unless and until it receives an amended certificate of public good.

Dated at Montpelier Vermont this 14<sup>th</sup> day of July 2014.

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