STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8328

Investigation into alleged violation by	)	Hearing at
Vermont Gas Systems, Inc., of Public	)	Montpelier, Vermont
Service Board Rule 5.409	)	March 25, 2015

Order entered: 7/31/2015

ORDER RE VIOLATION OF BOARD RULE 5.409

PRESENT: James Volz, Chairman
Margaret Cheney, Board Member
Sarah Hofmann, Board Member

APPEARANCES: Louise C. Porter, Esq.
Timothy M. Duggan, Esq.
For Vermont Department of Public Service

Kimberly K. Hayden, Esq.
Joshua D. Leckey, Esq.
Downs Rachlin Martin PLLC
For Vermont Gas Systems, Inc.

Sandra E. Levine, Esq.[1]
Conservation Law Foundation

Louise Selina Peyser, *Pro Se*[2]

1. Not a party, but granted Friend of the Court status.
2. *Id.*

I. Introduction

On March 25, 2015, the Public Service Board ("Board") convened a technical hearing in this matter to take evidence concerning alleged violations by Vermont Gas Systems, Inc. ("VGS" or the "Company") of Board Rule 5.409. In today's Order we determine that VGS violated PSB Rule 5.409 by failing to timely report a cost estimate increase in excess of 20% for the natural gas pipeline extension project approved by the Board in Docket 7970. Trust and transparency are essential for effective regulation.[3] By waiting nearly six months before disclosing to the Board a cost estimate increase in excess of the 20 percent reporting threshold established by Rule 5.409, VGS failed in its obligation of transparency, thereby undermining the effectiveness of the regulatory process and creating mistrust in that process among members of the public. For this reason, and for the reasons discussed below, we impose a civil penalty upon the Company in the amount of $100,000.

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 Certificate of Public Good ("CPG") to construct a natural gas pipeline extension into Addison County, Vermont (the "Project"). The estimated cost of the Project as approved was $86.6 million.

On July 2, 2014, VGS filed with the Board an update of the estimated capital costs of the Project (the "July 2 letter").[4] The update highlighted a 41% net increase of $35.5 million for an overall updated Project budget of $121.6 million.

On July 31, 2014, the Department of Public Service ("Department" or "DPS") filed a recommendation in Docket 7970 that the Board impose a civil penalty of $35,000 on VGS for violation of Board Rule 5.409.

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3. *See* Docket No. 7044, *Petition of City of Burlington, d/b/a Burlington Telecom*, Order of 5/14/14 at 3. ("The City's misconduct has severely damaged the essential trust that is a prerequisite for effective regulation and regulatory relationships that serve the interests of the public efficiently while accommodating the legitimate needs of regulated entities.")

4. The July 2 letter was not introduced into evidence by either VGS or the Department. Accordingly, we are admitting the July 2 letter into the evidentiary record as exhibit Board-1. Any party that objects to the admission of this document must file its objection and the reasons therefor within 10 days of the date of this Order.

On August 5, 2014, VGS made a filing in Docket 7970 in which it asserted that Board Rule 5.409 is "ambiguous" but indicated that the Company nonetheless had decided to pay the DPS-proposed penalty rather than litigate this issue.

On August 26, 2014, the Board opened this investigation to determine "whether, and when, any violation of Board Rule 5.409 occurred and, if so, whether the proposed $35,000 civil penalty is appropriate under these circumstances."[5]

On September 17, 2014, the Board held a prehearing conference. Appearances at the prehearing conference were entered by: Kimberly Hayden, Esq., Downs Rachlin Martin PLLC, on behalf of VGS; Timothy Duggan, Esq., and Louise Porter, Esq., on behalf of the Vermont Department of Public Service (the "Department"); Diane Zamos, Esq., on behalf of the Agency of Agriculture, Food, and Markets and the Agricultural Interest Group; Judith Dillon, Esq., on behalf of the Agency of Natural Resources; Sandra Levine, Esq., on behalf of the Conservation Law Foundation; James Dumont, Esq., on behalf of AARP; and Richard Saudek, Esq., on behalf of the Vermont Fuel Dealers Association.

On September 19, 2014, the Board issued a Prehearing Conference Memorandum and Procedural Order, establishing September 24, 2014, as the date by which the parties must file scheduling proposals, and setting forth several questions each for VGS and the Department to address in their respective prefiled testimony.[6]

On September 24, 2014, VGS filed a proposed schedule that included deadlines for filing intervention motions and briefs related to the scope of the proceeding, as well as deadlines for filing testimony and serving discovery by VGS and other parties, and a date for technical hearings in June, 2015.

Also on September 24, 2014, the Department filed a letter generally supporting the schedule proposed by VGS, but recommending that the Board retain flexibility in the overall schedule until the scope and appropriate parties for the proceeding were determined.

On October 3, 2014, the Board issued a scheduling order setting deadlines for briefs regarding the scope of this proceeding, as well as for filing motions to intervene and responses to

5. Docket 8328, Order of 8/26/14 at 2.
6. Docket 8328, Order of 9/19/14 at 1-3.

any such motions. In that Order we noted the limited nature of this proceeding and expressed our view that this proceeding could be concluded in a more expeditious manner than that envisioned by VGS in its proposed schedule.[7]

On October 14, 2014, VGS and the Department each filed comments detailing their individual recommendations on the appropriate scope and format for this investigation.

Also on October 14, 2014, Conservation Law Foundation ("CLF") filed a motion to intervene in this proceeding.

On October 16, 2014, Louise Selina Peyser filed a motion to intervene in this proceeding.

On October 21, 2014, VGS and the Department each filed responses opposing the motions to intervene filed by CLF and Ms. Peyser.

Also on October 21, 2014, CLF filed its comments on the scope of the proceeding, along with a request for enlargement of time to make that filing.

On October 28, 2014, CLF filed a reply to the VGS and Department responses.

On November 6, 2014, the Board issued an order denying the motions to intervene filed by CLF and Ms. Peyser, but allowing CLF and Ms. Peyser to each file a friend-of-the-court brief during the briefing stage of this investigation. That Order also established a framework for this proceeding and directed the parties to submit a scheduling proposal consistent with that framework.[8]

On November 14, 2014, VGS filed a proposed schedule that it represented was developed jointly with the Department.

On December 1, 2014, we issued an order adopting the proposed schedule.[9]

On December 19, 2014, VGS prefiled the testimony of Eileen Simollardes.

On January 6, 2015, the Department served information requests on VGS.

On January 30, 2015, VGS responded to the Department's information requests.

On February 17, 2015, the Department prefiled the testimony of Department Commissioner Christopher Recchia.

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7. Docket 8328, Order of 10/3/14 at 1-2.
8. Docket 8328, Order of 11/6/14 at 4, 6, 8-9.
9. Docket 8328, Order of 12/1/14.

On March 25, 2015, a technical hearing was held in the Board's hearing room in Montpelier, Vermont.

On April 2, 2015, a post-hearing scheduling order was issued establishing deadlines for VGS to respond to a record request made from the bench during the March 25 technical hearing, for the Department to file responsive testimony if necessary, and for the filing of briefs and reply briefs.[10]

On April 10, 2015, VGS filed its response to the Board's record request.

On April 17, 2015, VGS and the Department each filed an initial brief.

On April 17 and April 21, 2015, respectively, CLF and Ms. Peyser each filed a friend-of-the-court brief.

On May 1, 2015, VGS filed its reply brief.

III. Findings

1. On December 23, 2013, the Board granted a CPG to VGS for the Project based on the Company's then-estimated capital cost of $86.6 million. The budget was entered into evidence in Docket 7970 as exhibit Pet. Supp. JH-11 on February 28, 2013 (the "2/28/13 Budget"). *Petition of Vermont Gas Systems*, Docket 7970, Order of 12/23/13 at 80; Eileen Simollardes, VGS ("Simollardes") pf. at 3.

2. In January 2014, VGS had reason to believe that a cost increase for the Project in excess of 20 percent was likely to occur, after receiving revised budget estimates of $112.2 million and $121.2 million from its contractor, Clough, Harbor and Associates ("CHA") on January 13 and 17, 2014, respectively. Simollardes pf. at 4.

3. These two cost estimate increases represented increases over the 2/28/13 Budget of 30 percent and 40 percent, respectively. Simollardes pf. at 4.

4. In February 2014, VGS alerted the Department that it was seeing cost estimate increases relative to the Project and was reviewing the overall cost estimate. Christopher Recchia, Department ("Recchia") pf. at 3.

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10. Docket 8328, Order of 4/2/15.

5. In February 2014, VGS retained Pricewaterhouse Coopers ("PwC") to re-baseline the budget and schedule for the Project. Simollardes pf. at 5.

6. In March 2014, PwC provided VGS with a re-baselined budget of $121.6 million. Simollardes pf. at 5-6.

7. Setting aside potential cost estimate changes due to pending collateral permits, VGS considered the vetting of the revised budget complete in March of 2014. Tr. 3/25/15 at 28 (Simollardes).

8. In late March 2014, VGS informed the Department that it had completed its review of the Project's revised cost estimate, which then stood at approximately $121 million. Simollardes pf. at 6; Recchia pf. at 3.

9. VGS had reason to believe that the Project could not be constructed at a cost less than 120 percent of the 2/28/13 Budget as early as the time the Company received the January 2014 CHA preliminary budget estimates, and in any case, no later than its receipt of the March 18, 2014, PwC re-baselined budget. Simollardes pf. at 7.

10. As of March 2014, VGS had no reasonable expectation that further review of the re-baselined budget would reduce the estimated cost increase below the 20 percent reporting threshold contained in Rule 5.409. Tr. 3/25/15 at 28-29 (Simollardes).

11. From March through June of 2014, Department staff repeatedly urged VGS to notify the Board and the Docket 7970 parties of the revised cost estimate. Recchia pf. at 3; tr. 3/25/15 at 45 (Simollardes).

12. On July 2, 2014, VGS provided notice to the Board and the Docket 7970 parties that a number of factors had contributed to an estimated $35 million increase in the Project's estimated costs for an overall estimated budget of $121.6 million. Exh. Board-1.

13. The primary reason that VGS waited until July 2, 2014, to notify the Board and the Docket 7970 parties of the cost estimate increase was VGS's desire to obtain all outstanding collateral permits prior to reporting the increase, because VGS was concerned that those collateral permits might contain requirements that could impact the budget estimate. Simollardes pf. at 6-8.

14. On July 31, 2014, in a letter to the Board, VGS stated that rather than litigate the question of when VGS was required to file its updated budget estimate under Rule 5.409, it would pay the $35,000 fine proposed by the Department. Exh. DPS-Cross-3.

15. On December 19, 2014, VGS notified the Board of another estimated budget increase for the Project, increasing the estimated budget from $121.6 million to $154 million, including a contingency in the amount of $16 million. Simollardes pf. at 7.

IV. Positions of the Parties[11]

Vermont Gas

VGS asserts that the Board should accept the recommendation of the Department and impose a civil penalty in the amount of $35,000.[12] However, VGS contends that it reported the cost estimate increase in a timely fashion, given the ambiguity the Company perceives in Rule 5.409 as to when a utility must notify the Board and parties to a § 248 proceeding of a 20 percent budget increase. VGS does concede that a better course of action would have been for the Company to report the cost estimate increase at an earlier time and to provide any related supplemental information when it became available.[13]

VGS asserts that the $35,000 penalty is appropriate whether or not the Board deems the failure to report to be a single-instance violation or a continuing violation. According to VGS, the following factors militate against the imposition of a higher penalty amount: (1) the delay in reporting did not harm or have the potential to harm the public health, safety, or welfare; the environment; the reliability of utility service; or other interests of utility customers; (2) VGS did not know or have reason to know that it was violating Rule 5.409; (3) VGS did not stand to realize an economic benefit from the delay in reporting; (4) VGS notified the Board of the cost increase in a timely manner given the ambiguity perceived by the Company in what is required by Rule 5.409; (5) $35,000 is a reasonable deterrent against future violations because it

11. While the Department and VGS are the only parties to this proceeding, we will also review here the positions advocated by CLF and Ms. Peyser in their respective friend-of-the-court briefs.

12. VGS Brief at 9.

13. VGS Brief at 5, 7, 9.

represents almost 90 percent of the maximum allowable penalty for a single-instance violation;[14] (6) VGS has the financial resources to pay the proposed penalty amount; (7) during its tenure in Vermont, VGS has had a record of only one other regulatory violation; and (8) the Company has agreed to provide voluntary quarterly cost updates for the Project.[15]

Lastly, VGS asserts that under Board precedent, a failure to timely file a report with the Board constitutes a single-instance violation.[16]

Department

The Department contends that VGS violated Rule 5.409 by waiting until July 2, 2014, to report cost estimate increases in excess of 20 percent that the Company was aware of at least as early as March of 2014, if not as early as January of 2014. The Department does not believe that VGS incurred an immediate reporting obligation under Rule 5.409 upon learning in January of 2014 that the estimated costs of the Project had increased. Rather, the Department believes that Rule 5.409 is designed to allow for a reasonable amount of time for a utility to investigate increased cost estimates and the reasons therefor prior to reporting the new estimate so that the Rule 5.409 notification will be well-founded. Determining what length of time is "reasonable" would be based on "the details of the utility, the project, and other case-specific information."[17]

In this case, the Department believes that VGS's responsibility to report the cost estimate increase pursuant to the requirements of PSB Rule 5.409 arose in the second half of March of 2014. The Department states that while two months may seem to be a long period of time for VGS to have investigated the increased costs, it is not unreasonable in this case given the magnitude of the Project and the fact that VGS has not in recent memory undertaken a project of such large scale. The Department disagrees with VGS that the outstanding collateral permits provided justification for the delay in reporting. According to the Department, VGS should have reported the cost estimate increase by mid-March 2014, because by that time VGS had vetted the new estimate and it continued to exceed the original estimate by well over 20 percent. The

14. VGS also believes that the potential damage to the Company's credibility provides an additional, larger deterrent. VGS Brief at 8.

15. VGS Brief at 7-8.

16. VGS Brief at 11-15.

17. Department Brief at 8-9.

Department does not believe it is important to identify a specific date on which VGS should have reported the cost increase. Rather, the question under Rule 5.409 is whether the time taken to report an increase is reasonable under the circumstances. According to the Department, VGS's decision to wait until July 2, 2014, was unreasonable by any measure.[18]

The Department also asserts that the Board has sufficient discretion to determine whether VGS's violation of Rule 5.409 was either a single-instance or a continuing violation. The Department maintains that, with one exception, Board precedent under 30 V.S.A. § 30 has not reached the question of whether a violation is of a single or continuing nature. According to the Department, the Board has only reached this issue once after determining that the appropriate penalty exceeded the $40,000 maximum for a single-instance violation.[19] Thus in this case, in the event the Board seeks to impose a penalty above the $40,000 amount for a single-instance violation, the Department states that the Board could do so up to the maximum amount of approximately $109,000[20] by determining that the violation lasted at least seven days, and that it would be well within the Board's authority and discretion to do so. If, on the other hand, the Board were to determine that VGS's failure to timely report the cost estimate increase was a single-instance violation, the Department cites to 30 V.S.A. § 30(c)(4) for the proposition that the Board can consider the length of time that the violation existed in determining the appropriate penalty amount, subject to the $40,000 cap for a single-instance violation.[21]

The Department agrees with VGS on many, but not all, of the factors the Board should consider in determining an appropriate penalty amount under 30 V.S.A. § 30. Notably, the Department asserts that VGS: (1) had reason to know that it had violated Rule 5.409 because Department staff repeatedly urged VGS to report the cost estimate increase to the Board and the Docket 7970 parties beginning in March of 2014 and continuing through June of 2014; and (2) failed to report the cost estimate increase in a timely fashion, and therefore a violation of Rule

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18. Department Brief at 8-10.

19. *Petition of Entergy Nuclear Vermont Yankee*, Docket 6812, Order of 2/18/05 at 9.

20. A continuing violation is subject up to the maximum $40,000 figure plus up to an additional $10,000 per day, but not to exceed the larger of $100,000 or one-tenth of one percent of VGS's gross Vermont revenues from its regulated activities in the preceding year. 30 V.S.A. § 30(b). VGS's gross revenues for 2014 were $109,283,509. Exh. DPS-Cross-7.

21. Department Brief at 10-13.

5.409 existed for a period of at least three months.[22] Ultimately, the Department recommends that the Board impose a civil penalty in the amount of $35,000, and notes that if the Board agrees with this recommendation, the Board need not reach the issue of whether the violation was of a single or continuing nature.[23]

Louise Selena Peyser

Ms. Peyser believes that VGS has repeatedly and continuously violated the reporting requirements of Rule 5.409 for a period of at least 170 days. She also contends that VGS continued to violate Rule 5.409 when VGS filed its notice of cost estimate increases on July 2, 2014, because VGS did not accurately disclose the true Project costs at that time by understating construction costs, contingency needs, and right-of-way costs. According to Ms. Peyser, VGS's conduct warrants imposition of the maximum penalty available under 30 V.S.A. § 30. Ms. Peyser states that: (1) VGS's failure to report in a timely fashion harmed consumers economically who made decisions about heating and weatherization based on inaccurate rate assumptions; (2) VGS violated Rule 5.409 each time it came into possession of new estimated cost information and decided not to report the increase, and each time it decided not to report the increase after being urged to do so by the Department; (3) VGS's conversations with the Department constitute an aggravating factor; (4) VGS could anticipate significant economic benefit only if the Project's CPG was not revoked; (5) the maximum fine is needed to deter VGS from similar actions in the future; and (6) VGS has substantial resources to pay the maximum fine amount.[24]

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22. Department Brief at 15-16.

23. Department Brief at 13.

24. Peyser Brief at 13-15, 18-22. In addition to imposition of a civil penalty, Ms. Peyser also asks for other forms of relief that fall outside of her role as a friend-of-the-court. Ms. Peyser was not granted party status in this proceeding, and the traditional role of a friend-of the-court is limited. A friend-of-the-court's role is generally limited to providing assistance in a case of general interest, supplementing the efforts of counsel in such a case, and drawing the court's attention to legal arguments that have escaped consideration. A friend-of-the-court typically cannot expand the scope of a proceeding, cannot file pleadings, motions, or oppositions to motions, or otherwise participate in a manner reserved for the parties in the case, or introduce extra-record materials outside of the evidentiary record developed by the parties. *Center for Biological Diversity v. United States Bureau of Land Management*, 2010 WL 1452863 (D.Ariz.) (Citations omitted). We have made clear that this proceeding is limited to determining whether a violation of Rule 5.409 took place, and if so, what the appropriate penalty should be for that violation. See e.g., Docket 8328, Order of 8/26/14 at 2. See also USSCT Rule 37(1). Where Ms. Peyser's brief

(continued...)

Conservation Law Foundation

CLF recommends that the Board impose a civil penalty in the amount of $100,000. CLF asserts that VGS's violation was knowing, intentional, and continuing under 30 V.S.A. § 30. CLF states that VGS was aware of a reportable cost estimate increase at least as early as March of 2014, but believes that VGS was actually aware of such an increase by the end of 2013 as demonstrated by VGS's FERC Form No. 2 for 2013, entered into evidence as exhibit DPS-5. CLF argues that the Board should ignore the affidavit submitted by Mr. Keefe on behalf of VGS, which explains why the costs set forth in that exhibit are not correct.[25] CLF recommends a civil penalty of $100,000 based on what it alleges was the Company's intentional and continuing violation of Rule 5.409.[26]

V. Discussion

1. The legal standard

Public Service Board Rule 5.409 imposes two specific responsibilities upon a utility such as VGS with respect to the estimated costs of the Project. First, VGS must "regularly monitor and update the estimated capital costs" of the Project. Second, VGS must report to the Board and the other parties to Docket 7970 "[w]hen the estimated capital costs" of the Project increase by 20 percent, along with the reasons for the increase.[27]

Section 30 authorizes the Board to impose a civil penalty upon any company that fails, other than through negligence, to furnish any report or information that it is lawfully required to provide, or which violates a rule of the Board.[28] Accordingly, if VGS failed to comply with either the monitoring or reporting obligations established by Rule 5.409, the Board is authorized to impose a penalty on VGS pursuant to the terms of Section 30.

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24. (...continued)
assists us in making those determinations, we have considered it in our decision. To the extent that the positions advanced by Ms. Peyser fall outside her role as a friend-of-the-court in this proceeding, we have not considered them.

25. CLF Brief at 3-5.

26. CLF Brief at 5-6.

27. PSB Rule 5.409.

28. 30 V.S.A. § 30(a)(1).

Subsection (b) of Section 30 provides as follows with respect to civil penalty amounts for such violations:

> (b) The board may impose a civil penalty under subsection (a) of this section of not more than $40,000.00. In the case of a continuing violation, an additional fine of not more than $10,000.00 per day may be imposed. In no event shall the total fine exceed the larger of:
> (1) $100,000.00; or
> (2) one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company or corporation in the preceding year.

Subsection 30(c) identifies eight factors that the Board may consider in determining the amount of a civil penalty:

> (1) the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers;
> (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
> (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
> (4) the length of time that the violation existed;
> (5) the deterrent effect of the penalty;
> (6) the economic resources of the respondent;
> (7) the respondent's record of compliance; and
> (8) any other aggravating or mitigating circumstance.

2. VGS violated the reporting requirement of Rule 5.409

PSB Rule 5.409 states as follows:

> 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.

The Department maintains that VGS violated the reporting requirement of Rule 5.409, and recommends a penalty of $35,000. By comparison, VGS contends that its reporting was timely given VGS's claimed ambiguity in Rule 5.409.[29]

Based on the plain meaning of the language used in Rule 5.409 and the evidence of record in this proceeding, we conclude that VGS violated the reporting requirements of that Rule by waiting until July 2, 2014, to report the increase in the cost estimate for the Project.

We reject VGS's suggestion that there is ambiguity in the Rule's language regarding when an increase of 20 percent in a project's estimated capital costs must be reported. The Rule obligated VGS to report the cost estimate increase "when" the increase occurred. At the technical hearing, VGS acknowledged that the Company "had reason to know" of a cost estimate increase in excess of 20 percent as early as January 13, 2014, when its contractor, CHA, provided the Company with a new Project cost estimate of $112.2 million, which represented a cost estimate increase of 30 percent. Additionally, CHA updated its cost estimate again on January 17, 2014, increasing it to $121.2 million, which translates to a cost estimate increase of 40 percent. Thus, we conclude that as of January 13, 2014, VGS had incurred a reporting obligation pursuant to Rule 5.409 and the Company should have reported the estimated increase at that time.

We find no merit in VGS's position that the Company needed additional time to vet its numbers so that it could report the reasons for the cost estimate increase at the same time that it provided notice of the increase itself. First, Rule 5.409 contemplates that, through ongoing monitoring, VGS should have had at least a general idea of the main cost drivers behind the increase at the time the increase became known.[30]

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29. The Department, Ms. Peyser, and CLF all agree that VGS violated the reporting requirement of Rule 5.409, although they disagree on the amount of the civil penalty that should be imposed as a result of that violation, with the Department recommending a penalty of $35,000, and Ms. Peyser and CLF both recommending a penalty in the amount of $100,000.

30. In fact, attachments A.DPS:VGS.1-3, A.DPS:VGS.1-4, A.DPS:VGS.1-5.1, and A.DPS:VGS.1-5.2 to the Company's responses to the Department's discovery show in spreadsheet form that VGS was provided with various specific cost categories for the January 2014 budget estimates that the Company could have compared to earlier budget estimates to develop a sense of the reasons behind the cost estimate increase for reporting to the Board. These documents were not introduced into evidence by either VGS or the Department. Accordingly, we are admitting them into the evidentiary record as exhibits Board-2, Board-3, Board-4, and Board-5. Any party that

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Second, while VGS's goal of having a specific understanding of the drivers behind the overall cost estimate for purposes of commencing construction is understandable, that concern bears no relation to the Company's duty to keep the Board and relevant parties informed of overall Project cost estimate increases. In addition, this goal did not excuse the Company's failure to comply with its reporting obligation under Rule 5.409.

We have also considered and rejected the idea that VGS's reporting obligation under Rule 5.409 did not arise until mid-March, when the Company received a re-baselined budget from PwC, confirming the 40 percent increase in estimated Project costs. During the technical hearing, VGS conceded that it was not reasonable to expect that further vetting of the details behind a cost estimate increase of that magnitude would result in a downward adjustment that would bring Project costs below the 120 percent reporting threshold established in Rule 5.409. That same reasoning applies to the 30 and 40 percent increases that CHA reported to VGS on January 13 and 17, 2014. While vetting the details behind those cost estimate increases might have led to some downward adjustment in the numbers, we conclude it would have been unreasonable to assume that such an adjustment would reduce the increases below the 20 percent reporting threshold established by Rule 5.409.[31] And, in any event, VGS was required to report the increased estimated cost "when" it occurred, not when it occurred and was verified to the utility's satisfaction. If further vetting of the numbers had subsequently reduced the increase below the 20 percent threshold, VGS at that time could have brought the new, lower estimate to the attention of the Board and the parties.

We also reject VGS's reasoning for the delay in reporting due to its desire to obtain all collateral permits so that it could include in its report any additional costs that might result from those permits. VGS had an obligation to report the Project's estimated cost increase once that figure reached 20 percent. By January 13, 2014, the cost estimate had increased by 30 percent, and by January 17, 2014, it had increased by 40 percent – both representing percentage increases

30. (...continued)
objects to the admission of these documents must file its objection and the reasons therefor within 10 days of the date of this Order.

31. We note that VGS considered CHA's calculations to be reliable throughout Docket 7970 and would therefore have had no reason to suspect that CHA would have made a mistake of such magnitude in its January 2014 estimates.

that placed VGS under an obligation to report the changed estimate to the Board. The fact that additional permits to be obtained at a later date might result in additional cost increases did not excuse VGS from reporting the change in estimate when it first exceeded the parameters set forth in Rule 5.409. If conditions in yet-to-be-obtained permits had resulted in additional estimated cost increases that again met the 20 percent threshold, then VGS would have been required to report those increases at that time, as it would with any new cost estimate increases that met the reporting threshold.

For the reasons discussed above, we conclude that VGS's reporting obligation under Rule 5.409 attached as of January 13, 2014, and that by waiting until July 2, 2014, to report the new cost estimate, VGS violated Rule 5.409.

3. VGS's violation was a continuing violation

VGS violated Rule 5.409 by waiting until July 2, 2014, to inform the Board of the 30 percent cost increase that the Company was made aware of by CHA on January 13, 2014. That violation continued each day until VGS reported the cost increase in its July 2 letter.

We are unpersuaded by VGS's reasoning that we should consider the Company's failure to report until July 2, 2014, to be a single-instance violation. According to VGS, the Board has historically treated failures to provide required information as single-instance violations, citing to several past Board decisions in support of its position. VGS's reliance on these decisions is misplaced.

According to VGS, the Board "briefly addressed whether certain violations were continuing" in its June 16, 1997, Order in Dockets 5841/5859 ("*Citizens*").[32] VGS asserts that in *Citizens* the Department argued for a finding of a continuing violation but that "the Board disagreed, noting that the Department had not adequately demonstrated that the violations should be treated as continuing."[33]

We find VGS's characterization of the Board's decision in *Citizens* to be inaccurate. First, there is no discussion of continuing violations in the passages of the Order cited by VGS, brief or otherwise. Second, the Board assessed penalty amounts in that proceeding under 30 V.S.A. § 30

32. VGS Brief at 12 (*citing Investigation into Citizens Utilities Company*, Dockets 5841/5859, Order of 6/16/97).
33. VGS Brief at 12.

as it existed prior to amendments that took effect in 1996. Under the pre-amendment version of Section 30, there was no such thing as a continuing violation, only a maximum fine of $5,000 per violation. The Board stated, "In reaching our conclusion, we have examined Section 30 as it previously existed. We take no position on whether Section 30, as amended in 1996, may have led to a different result."[34]

None of the other cases cited by VGS support its position that the Company's violation of Rule 5.409 should not be considered a continuing violation. In three of five cases cited by VGS, the Board accepted a proposed settlement as reasonable.[35] In the other two cases cited by VGS, the Board imposed penalties in the amount of $1,500 and $250.[36] In all five cases, the penalty amounts were determined to be appropriate based on the specific circumstances of each case, and were not imposed as a penalty for a continuing violation. Thus, in none of these cases did the Board address the question of whether the violations were of a continuing nature or not.

The only case cited by both VGS and the Department that is on point is Docket 6812, *Petition of Entergy Nuclear Vermont Yankee*. In that proceeding, the Board imposed a penalty of $85,000, having determined that Entergy's failure to obtain approval under 30 V.S.A. § 248 prior to commencing site preparation for the construction of two temporary buildings was a continuing violation that lasted a period of six months, even though the actual site preparation activities lasted for a period of only five days.[37] The Board reasoned that the violation continued for six months until site restoration was complete and the violation was thereby cured.

We see no distinction between Entergy's actions in Docket 6812 and VGS's sustained failure in this case to comply with its reporting obligations under Rule 5.409. VGS violated Rule 5.409 when it failed to report the cost estimate increase upon receipt of the CHA report on January 13, 2014, and VGS remained in violation of the Rule until the Company filed the July 2

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34. *Citizens*, Order of 6/16/97 at 266, n.349.

35. *Petition of St. Albans Solar Partners*, Docket 7871, Order of 10/10/13 at 6; *Petition of UPC Wind Management*, Docket 6884, Order of 4/21/04 at 22; *Petition of Endless Energy Corp*, Docket 6154, Order of 3/30/06 at 2.

36. *Investigation Pursuant to 30 V.S.A. §§ 30, 247 and 248 into Possible Violations of Section 248 by Roderick and Irene Ames*, Docket 7896, Order of 12/20/12 at 9; *Petition of Michael and Denna Benjamin*, Docket 7886, Order of 3/18/13 at 4.

37. *Petition of Entergy Nuclear Vermont Yankee*, Docket 6812, Order of 2/18/05 at 7, 9.

letter. While VGS correctly points out that the Board has the ability to consider the length of time that the violation existed as a factor in setting a penalty amount, that factor does not provide a basis for concluding that the Company's failure to report was not a continuing violation. Indeed, it is that factor that allows the Board to calculate a daily fine amount of up to $10,000 per day when a violation is continuing.

4. Penalty analysis

Having determined that VGS's violation of the reporting requirement of Rule 5.409 was of a continuing nature, we establish a base penalty amount for the Company's initial failure to report,[38] as well as a per diem penalty for each day that VGS remained in violation of its obligation, utilizing the factors established by 30 V.S.A. § 30(c), and subject to the limitations of 30 V.S.A. § 30(b). The maximum penalty amount available in this matter is $109,284 based on VGS's gross revenues for 2014 of $109,283,509.[39] Our decisions regarding both the base penalty amount and the ongoing per diem penalty amount are informed by our consideration of the factors found in 30 V.S.A. § 30(c). We address each, in turn, below.

1. <u>The extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers</u>

We agree with VGS and the Department that VGS's failure to report the cost estimate increase in a timely manner did not result in harm, either actual or potential, to the public health, safety or welfare, the environment, or the reliability of utility service.

However, we disagree with VGS and the Department that there was no potential for harm to the other interests of utility customers. As of January 13, 2014, when VGS learned that the cost estimate had increased 30%, the Board still retained jurisdiction over the Project and had several motions for reconsideration pending. The Board was thus in a position at that time to conduct a review of VGS's changed cost estimates and consider their effects on existing and prospective customers. In turn, the Board could have conducted this review and exercised its

38. Pursuant to 30 V.S.A. § 30(b), the base penalty amount can be no larger than $40,000.

39. *See* exh. Cross-DPS-8. Section 30(b) provides that continuing violations may be penalized up to the greater of $100,000 or one-tenth of one percent of a company's gross Vermont revenues from regulated activities in the preceding year.

authority to modify the December 23rd Order or impose additional conditions. The Board could have proceeded in this manner without first having to seek and obtain a remand from the Vermont Supreme Court.

We find the harms described by Ms. Peyser to be too remote and speculative to take into account under this factor in assessing the amount of the penalty to be imposed for VGS's violation.

2. Whether VGS knew or had reason to know the violation existed and whether the violation was intentional

We conclude that VGS had reason to know the violation existed when the Company failed to report the cost estimate increase at the time it received the January 13, 2014, update from CHA. It would have been unreasonable for VGS to think that any amount of vetting of a cost estimate increase of the magnitude reported to VGS that day would reduce the increase so that it would be below the 20 percent reporting threshold established by Rule 5.409. Moreover, when VGS received notice from CHA of an even greater cost estimate increase only four days later, any doubts the Company may have had about its reporting obligation should have been immediately dispelled. As discussed earlier, the Rule's language is clear and requires that a report be made "when" the cost estimate increase becomes known to the utility, and not when the estimated increase becomes known and is confirmed to the Company's satisfaction.

VGS had further cause to know its reporting violation existed after it began discussions with the Department in February of 2014, and when the Department began repeatedly urging VGS, in March of 2014, to report the increase as required by Rule 5.409.

Thus, we conclude that the record supports a determination that VGS had reason to know, and therefore should have known, that it was violating Rule 5.409. However, the record does not support a determination that VGS intentionally set out to violate the Rule.[40]

40. *See e.g.,* tr. 3/25/15 at 50 (Simollardes). "What the Department said to us is you need to report pursuant to 5.409. . . . Nobody at Vermont Gas sat there and said we are violating 5.409, but we are going to let it go a little bit longer."

3. The economic benefit, if any, that VGS could have anticipated from an intentional or knowing violation

The record in this case contains no evidence of an economic benefit that VGS could have anticipated from an intentional or knowing violation of the Company's reporting obligation under Rule 5.409.

4. The length of time that the violation existed

The record demonstrates that VGS's obligation to report under Rule 5.409 arose as of January 13, 2014, when the Company received a report from CHA that the Project's cost estimate had increased by 30 percent. Therefore, VGS was in violation of the Rule's reporting requirement from January 14, 2014, through July 1, 2014, a period of 164 days.

5. The deterrent effect of the penalty

The penalty we impose today will have a deterrent effect by encouraging compliance with Rule 5.409. The knowledge that the Board imposed a significant penalty for the conduct at issue in this case will provide a strong incentive for utilities to meet their Rule 5.409 obligations to both monitor and report their project costs.

6. The economic resources of VGS

The record reflects that in 2014, VGS had gross revenues in Vermont of $109,283,509, which, using the statutory percentage in Section 30(b)(2), yields a penalty cap of $109,284 – an amount greater than the alternative statutorily created penalty cap of $100,000. There is no evidence in the record of this case that would support a finding that VGS does not have the resources to pay a fine in that amount.

7. VGS's record of compliance

VGS has a generally positive history of compliance with its regulatory obligations in Vermont. As VGS points out in its brief, the Company was subject to a penalty in Docket 6758 for providing service to several customers at unauthorized rates, in many cases by continuing to serve certain customers under the terms and conditions of previously approved, but subsequently

expired, special contracts. In that proceeding, VGS agreed to pay a penalty and implement several corrective actions to ensure that such violations did not occur in the future.[41]

VGS has also been penalized on several occasions for its failure to comply with Chapter 86 of Title 30 and Board Rule 3.800, which together establish the system for preventing excavation-related damage to underground utility infrastructure in Vermont. However, those penalties were imposed for incidents that occurred over a span of more than 10 years and therefore can be fairly described as isolated occurrences. Accordingly, we do not view these regulatory failures by VGS as an aggravating factor.

VGS's generally positive record of compliance with its Vermont regulatory obligations counsels us against imposing the maximum fine in this proceeding. We view VGS's long delay in bringing the cost estimate increase to the attention of the Board and the parties in Docket 7970 as a very serious matter, and therefore have considered imposing the maximum penalty for a continuing violation. However, VGS's overall record of compliance with its Vermont regulatory obligations leads us to impose a lesser penalty amount than we otherwise could have imposed.

8. Any other aggravating or mitigating circumstance

VGS states that its agreement with the Department to provide voluntary quarterly cost updates for the Project "demonstrates a good faith effort to increase transparency and constitutes a mitigating circumstance under 30 V.S.A. § 30." The Company also views Rule 5.409's "lack of specificity regarding when updates should be filed or the degree of accuracy that a cost estimate should meet" as a mitigating factor in this proceeding.[42]

We disagree with this reasoning.

First, we view the quarterly reporting that VGS has undertaken in a positive light because it may assist VGS in meeting its Rule 5.409 obligations going forward. However, it is not a cure-all because VGS could conceivably receive information regarding another cost estimate increase in excess of 20 percent shortly after filing one of its quarterly reports, and under this

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41. *Investigation into Fourteen Utilities' Provision of Service to Customers Pursuant to Expired Special Contracts or at Special Rates Without Prior Board Approval*, Docket 6758, Order of 12/16/02 at 15-18. In that proceeding, VGS was one of fourteen regulated Vermont utilities that were found to have provided services at unauthorized rates.

42. VGS Brief at 8.

quarterly reporting approach, could choose to wait approximately three months before reporting such an increase. Such a decision to delay reporting would be no more acceptable than the decision VGS made to delay reporting the cost estimate increase at issue in this Order. We also note that this reporting schedule was agreed to only after the Department made clear in Docket 7970 that it was "requiring VGS to provide quarterly cost estimate updates" for the Project pursuant to the Department's authority under 30 V.S.A. §§ 18 and 206.[43] Lastly, we decline to mitigate the penalty amount for a past failure based on VGS's assertions that it will comply with its Rule 5.409 obligations going forward. It would be poor public policy to accept the Company's assurance of future compliance for such purposes when VGS is already under a legal duty to comply with Rule 5.409.

Second, as discussed above, we reject VGS's contention that Rule 5.409 is ambiguous. The Rule requires VGS to report a cost estimate increase of 20 percent or more "when" that increase occurs, the plain meaning of which is when the increase becomes known to VGS. In this case, VGS's long delay in reporting is particularly egregious given that the January 13 and 17, 2014, increases were approximately 30 and 40 percent, respectively – increases of a magnitude that no reasonable person would have expected to fall below the reporting threshold after additional vetting. We also find no merit in VGS's suggestion that the absence of specificity as to the "degree of accuracy that a cost estimate should meet" functions as a mitigating factor in this proceeding. VGS submitted cost estimates to the Board in Docket 7970 that the Company believed met a degree of accuracy that the Board could rely on in determining whether the Project should receive a CPG – cost estimates that the Board did in fact rely on. VGS has presented no plausible basis for why the Company could have believed that the level of detail and accuracy for the cost estimates that it submitted to the Board to support its CPG petition would not also suffice to determine when there was a need to update those estimates pursuant to Rule 5.409.

The Department suggests that the fact that VGS began sharing the increased cost estimates for the Project with the Department before reporting those increases to the Board and

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43. *See* Department of Public Service Response to CLF Petition, Docket 7970, filed 7/31/14 at 4, and VGS Response to Parties' Comments and Motions for Declaratory and Injunctive Relief, Docket 7970, filed 8/5/14 at 10.

other parties in Docket 7970 constitutes a mitigating factor in this proceeding. We find the opposite to be true.

Rule 5.409 requires VGS to report the cost increases to the Board and to all parties in Docket 7970. The fact that VGS saw fit to share this information with the Department suggests that VGS was aware of a responsibility to share it with its regulators not long after it received the information from CHA in January of 2014. However, the Company has not explained why the increased estimate was important enough to share with the Department, yet not important enough to report to the Board and the other parties to Docket 7970 concurrent with its disclosure to the Department.[44] Thus, we find no basis to view VGS's communications with the Department as a mitigating factor for the Company's violation of Rule 5.409.

Further, we find an aggravating factor in VGS's failure to report the increases to the Board and all Docket 7970 parties once the Department began repeatedly urging VGS to do so. If VGS had reported the cost increase in a timely manner, the Board would still have retained jurisdiction over the case at the time of the report. The parties to Docket 7970 could have sought to reopen the record in light of the reported cost estimate increases without having to first expend the time and resources associated with the appeal and eventual remand from the Vermont Supreme Court, a remand so that the Board could consider those very increases. Even VGS acknowledges that by March 18, 2014, it had no reasonable expectation that the new cost estimate could decrease by a degree that would eliminate the Company's Rule 5.409 reporting obligation.[45] At that time, a notice of appeal had not yet been filed, the Board still retained jurisdiction over the case, and the parties still had the ability to pursue relief subject to applicable rules of procedure. VGS effectively deprived the parties to Docket 7970 of a more efficient process in which to present their concerns over the Project's new cost estimate than the eventual appeal and remand process that was necessitated by the Company's late reporting. We therefore view the Company's ongoing failure to report once the Department began urging VGS to do so as an aggravating factor in arriving at the penalty amount we impose in today's Order.

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44. The record indicates that VGS first alerted the Department about a Project cost increase in February of 2014. Recchia pf. at 3.

45. Simollardes pf. at 7; tr. 3/25/15 at 28-29 (Simollardes).

Lastly, we find an aggravating factor in the negative effects VGS's conduct has had upon the regulatory process. As we noted at the outset of this Order, trust and transparency are essential for effective regulation. VGS's delay in reporting the cost estimate increase ignored this need for transparency, added to the level of procedural complexity required to analyze the increase once it was reported, and called into question the level of trust that members of the public have in the regulatory process.

5. The Penalty Amount

We have given due consideration to each of the statutory factors enumerated in 30 V.S.A. § 30(c). Having determined that VGS's failure to disclose a reportable cost increase as of January 13, 2014, constituted an initial violation of Rule 5.409, and that the Company's ongoing failure to so report until July 2, 2014, constituted a daily continuing violation for a period spanning 164 days, we have decided to impose a total civil penalty in the amount of $100,000.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that pursuant to 30 V.S.A. § 30, Vermont Gas Systems, Inc. shall pay a penalty of $100,000 by sending to the Public Service Board at 112 State Street, Montpelier, VT 05620-2701, a check in that amount made payable to the State of Vermont within 30 days of the date of this Order.

Dated at Montpelier, Vermont, this 31st day of July, 2015.

s/James Volz)
)
s/Margaret Cheney) BOARD
)
) OF VERMONT
s/Sarah Hofmann)

PUBLIC SERVICE

OFFICE OF THE CLERK

FILED: July 31, 2015

ATTEST: s/Susan M. Hudson
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.