

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8330

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

Order entered: 3/23/2016

ORDER DENYING REQUEST TO CLOSE DOCKET
AND SEEKING COMMENT ON PROCESS

In today's Order, the Vermont Public Service Board ("Board") denies a request from Vermont Gas Systems, Inc. ("VGS" or the "Company") to close this Docket. Instead, the Board seeks comments on how to proceed with this case.

On September 11, 2014, the Board opened this Docket in response to a petition from the Conservation Law Foundation ("CLF") requesting a declaratory ruling to the effect that Board Rule 5.408 requires VGS to seek an amendment to the Certificate of Public Good ("CPG") issued in Docket 7970 for the construction of the Addison Natural Gas Project (the "Project"). At the time, CLF's declaratory judgment petition was prompted by certain estimated cost increases for the Project that the Company reported to the Board in July of 2014 pursuant to Board Rule 5.409 (the "July 2014 Cost Estimate.")

VGS's request to close this docket

On October 17, 2014, VGS requested that this Docket be closed in light of the Board's ruling in Docket 7970 on October 10, 2014, that it would not reconsider the decision made in

December of 2013 to grant a CPG for the Project (the "October 10th Order").¹ VGS argued that in the October 10th Order, the Board had already considered and decided "whether the updated cost estimates have any likelihood [of] impacting the Board's prior determination and Certificate of Public Good."

On October 22, 2014, CLF responded that in the October 10th Order, the Board determined pursuant to V.R.C.P. 60(b)(2) that the July 2014 Cost Estimate was not of such a material and controlling nature so as to probably change the Board's previous approval of the Project pursuant to the criteria of 30 V.S.A. 248. According to CLF, that ruling did not dispose of the issues raised in CLF's declaratory judgment petition because (1) the only ultimate decision reached in the October 10th Order was whether to reopen the Final Order in Docket 7970, and (2) in that proceeding, it was incumbent on CLF and other parties objecting to the Project to carry the heavy burden of proof mandated by Rule 60(b)(2). CLF emphasized that, by comparison, in a Rule 5.408 amendment proceeding, it is the project proponent (in this case VGS) who would be required to bear the burden of persuasion and the "risk of nonpersuasion" in a proceeding to consider "whether to issue an amended CPG" Therefore, according to CLF, the Board is precluded from relying on the "very limited and different Rule 60(b) determination" in the October 10th Order to dismiss CLF's declaratory judgment petition and to close this Docket.

On October 24, 2014, VGS filed a reply arguing that the October 10th Order unambiguously held that the new cost information did not have the "potential for significant impact with respect to any of the criteria under Section 248(b) or on the general good of the state under Section 248(a)." Thus, the Company insisted, this declaratory judgment proceeding should be closed because "there are no unresolved issues to be examined under Board Rule 5.408." The Company also pointed out that CLF has failed to "identify what aspects of VGS' CPG need to be amended."

1. On December 19, 2014, the Company notified the Board of a second significant increase that would bring the total estimated cost of the Project to \$154 million (the "December 2014 Cost Estimate"). On January 8, 2016, the Board ruled in Docket 7970 that it would not reconsider its decision to issue a CPG for the Project, notwithstanding the December 2014 Cost Estimate. See Docket 7970, Order of January 8, 2016 (the "January 8th Order").

We find that the October 10th Order in Docket 7970 is not dispositive of CLF's declaratory judgment petition.² The gist of CLF's declaratory judgment request is to resolve whether a cost estimate increase for an approved Section 248 project constitutes a "substantial change" to the project within the meaning of Board Rule 5.408, thus necessitating an amendment to an existing CPG. This issue is distinct from the question resolved in the October 10th Order, namely, whether the July 2014 Cost Estimate was of such a material and controlling nature so as to probably change the Board's decision in December of 2013 to approve the Project and issue a CPG pursuant to 30 V.S.A. § 248. Accordingly, we deny VGS's request to close this Docket.

Board request for comments on process going forward

Since this Docket was opened in September of 2014, we have issued two orders that have considered whether either of the cost estimate increases for the Project constituted cause to reopen the final Order issued in Docket 7970 on December 23, 2013, which authorized the construction of the Project. Furthermore, three parties have since intervened in this declaratory judgment proceeding on a permissive basis: AARP, Claire Broughton, and Terence and Kari Cuneo. All of these intervenors have joined in CLF's declaratory judgment petition and arguments. VGS and the Vermont Department of Public Service have opposed the petition.

Having reviewed the CLF petition and accompanying memorandum of law, as well as the memorandum of law filed by AARP in this Docket on July 8, 2015, we understand the issue to be resolved in this declaratory judgment proceeding to be as follows:

Whether either of the estimated Project cost increases that VGS disclosed in July of 2014 and December of 2014 constitutes a "substantial change" within the meaning of Board Rule 5.408, thus requiring VGS to seek an amendment of the Section 248 CPG that was issued in Docket 7970 in December of 2013.

To our knowledge, this is the first time the Board has had occasion to determine whether a change in project cost estimate by itself constitutes a "substantial change" within the meaning of Rule 5.408. Board Rule 5.408 was adopted in 2006, in the wake of our proceedings in Docket 6860 concerning the Northwest Reliability Project. The resolution of this issue will serve the

2. The same is true of the January 8th Order dealing with the December 2014 Cost Estimate Increase.

useful purpose of providing guidance to regulatory stakeholders in applying Rule 5.408 and in clarifying the interplay between Board Rule 5.408 and Board Rule 5.409 — the rule that requires cost estimate increases for Section 248 projects to be reported to the Board when such increases reach 20% and equal at least \$25,000.

The issue presented in this Docket would appear to pose a question of law that lends itself to resolution based on the Parties' filings, without need of a hearing.³ However, in light of the passage of time since this Docket was opened, we find it is appropriate to offer the Parties an opportunity to comment on what additional process, if any, they believe is needed and to submit any additional materials (affidavits, factual stipulations, memoranda of law) to inform the Board's decision.⁴

Any such comments and materials shall be filed with the Board by close of business on April 18, 2016. Any replies shall be filed by close of business on May 2, 2016.

SO ORDERED.

3. Indeed, to date no party has requested a hearing or oral argument in this proceeding.

4. In the interest of judicial economy and administrative efficiency, we encourage the Parties to consider the extent to which, based on the evidentiary record developed in Docket 7970 (to include the record underlying the October 10th Order and the January 8th Order), they are able to stipulate to any material facts they believe are needed for decision in this declaratory judgment proceeding.

Dated at Montpelier, Vermont, this 23rd day of March, 2016.

s/James Volz)

) PUBLIC SERVICE

s/Margaret Cheney)

) BOARD

s/Sarah Hofmann)

) OF VERMONT

OFFICE OF THE CLERK

FILED: March 23, 2016

ATTEST: s/Ann Bishop
Acting 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)