

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)

CONSERVATION LAW FOUNDATION'S BRIEF

The near doubling of the cost of the Addison Natural Gas Project (ANGP or Project) combined with significant changes in the energy marketplace since the Vermont Public Service Board (Board) approved the original Certificate of Public Good (CPG) requires the Board to determine that a substantial change to the Project has occurred. As a result, the Vermont Gas Systems, Inc. (VGS or Company) is required to seek a new or amended CPG and come forward with convincing evidence that the Project satisfies the Section 248 criteria. Fundamentally, the Board, the parties and the public deserve a careful evaluation of the Project in light of the significantly changed circumstances.

I. A substantial change requires an amended CPG.

Vermont Public Service Board precedent and Board rules are clear that when there is a "substantial change" to a project that has received a CPG under 30 V.S.A. sec. 248, additional approval from the Board is required. *In re Vt. Elec. Power Co., Inc, et al*, Order on Remand at 20, PSB Docket 6860 (Sept. 23, 2005); *Petition of Vermont Electric Cooperative, Inc.*, Declaratory Ruling at 6, PSB Docket 6544 (Feb. 20 2002); *Investigation into Citizens Utility Co.*, Order at 131, PSB Docket 5841/5859 (June 16, 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 is explicit in its requirements. It 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.

In determining whether a change to a project is substantial, the Board considers the potential effect of the change on the Section 248 criteria. *Citizens, supra* at 132; *Vicon, supra* at 3-4; Vt. P.S.B. Rule 5.408. The Board adopted the "substantial change" standard that is used in Act 250 proceedings. *Petition of Vermont Electric Cooperative, Inc., Declaratory Ruling*, PSB Docket 6544 at 6 (Feb. 20 2002). Specifically, the Board stated:

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)."¹ 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.

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

¹ 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).

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).

The Board's cases and rule are clear that where project changes have the potential for an impact under any of the 248 criteria, these constitute a “substantial change” that require further review and approval by the Board. This requirement advances sound policy and the entire purpose of a CPG. Issuance of a CPG is necessarily based on a determination that based on the evidence presented by an applicant, 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. A substantial change has occurred.

The significant cost increase and the changes to the energy market constitute a substantial change to the Project. Specifically, the parties’ stipulation confirms the following changes have occurred.

1. On December 23, 2013, the Board issued a Certificate of Public Good ("CPG") approving the Project based in part on a projected cost estimate of \$86.6 million.
2. On July 2, 2014, the estimated cost of the proposed project increased from \$86.6 million to \$121,655,000.
3. On December 19, 2014, the estimated cost of the proposed project increased from \$121,655,000 to \$153,600,000.
4. The cost estimate has risen approximately 78% to \$153.6 million.
5. Other changes in the energy marketplace have also occurred since the Board's original Order:

- (1) declining oil prices that reduce the competitive price advantage of natural gas;
- (2) the availability of compressed natural gas (“CNG”) as an alternative to pipeline-supplied gas; and
- (3) the availability of cold climate heat pumps (“CCHPs”), which may be more cost-effective for some customers than natural gas.

Letter from Peter Zamore to Judith Whitney, Docket 8330 (May 2, 2016).

The significant cost increase, combined with the changes in the energy market clearly demonstrate 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 and changes in the energy market have the potential to affect 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 and changes in the energy market also potentially affect 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”), an approximately 78% cost increase when alternative energy supplies have become more cost competitive cannot be inconsequential. With regard to the significant cost increase and the changes in the energy market, the Board itself recognized: “Collectively these changes raise significant concerns. The need for the Project has

been affected by higher estimated Project costs and changes in the market, the anticipated economic benefits have been reduced....” *In re Petition of Vermont Gas Systems, Inc., (On Second Remand)*, Order Denying rule 60(b) Motions, PSB Docket 7970 at 2 (Jan 8, 2016). Furthermore, the Board’s own actions in twice seeking a remand from the Vermont Supreme Court to hold evidentiary hearings on the requests for reconsideration prompted by the new cost estimates show that these cost estimates have the potential for significant impact on the Section 248 criteria. *Id; In re Petition of Vermont Gas Systems, Inc., (On Remand)*, Order Re 60(b) Reconsideration, PSB Docket 7970 at 17 (Oct 10, 2014).

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.” *In re Vt. Elec. Power Co., Inc, et al*, Order on Remand, PSB Docket 6860 at 20 fn. 29 (Sept. 23, 2005). Here, the significant cost increases combined with the changes in the energy markets have the potential, as the Board recognized, to have a significant impact with respect to some of the criteria. At a minimum the cost increase and changes in the energy market significantly undermine the claimed economic and environmental benefits of the Project. To ensure adequate review in light of the significant changes, the statute, Board precedent and Board rules, VGS is required to seek a new or amended CPG.

III. Construction not authorized

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 and the changes in the energy markets, 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 and changes in the energy

market is required. 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 changes in the energy market and the failure of VGS to seek an amendment has modified the proposed project and VGS is not authorized to construct the revised project under the authority of the CPG issued in Docket 7970 in December 2013.

The significant cost increase and change in the energy markets are changes that have the potential for significant impact with respect to the Section 248 criteria. Since cost and relative competitiveness and need for the Project are key elements and key factors in determining whether the Project “promotes the general good of the state” the significant cost increase, changes in the energy markets and failure to seek an amendment for the Project constitute a “substantial change” and require an amended CPG to authorize.

IV. Conclusion

For the foregoing reasons, the Vermont Public Service Board should:

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 31st day of May 2016.

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