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 REPLY BRIEF

I. Introduction

The plain language of Vt. P.S.B. Rule 5.408 demonstrates that the Vermont Public Service Board (PSB or Board) should grant Conservation Law Foundation's (CLF) petition for a declaratory ruling. An amended certificate of public good (CPG) is required to allow the proposed Addison Natural Gas Project (ANGP or Project) to proceed. The near doubling of the cost of the project, combined with significant changes in the energy markets, and the long and troubled history of this proposed project, show that the Board and the parties are entitled to have Vermont Gas Systems, Inc. (VGS or Company) come forward and clearly demonstrate that the proposed Project satisfies the Section 248 criteria. While problems with the proposed Project continue to mount, the reviews of the Project to date have been incomplete and piecemeal and have not satisfied the requirements of Vt. P.S.B. Rule 5.408.

The Board should reject the VGS and Vermont Public Service Department (PSD) claims that their inconvenience or self-serving perception of need, somehow authorize ignoring the clear requirements of law. The more limited reviews that occurred as part of

the two V.R.C.P. Rule 60(b) evaluations do not override or replace the Vt. P.S.B. Rule 5.408 mandate. Any inconvenience to VGS is a result of VGS's own actions. It had fair notice and many opportunities to seek the amendments needed to comply with Rule 5.408. Instead, VGS attempted to sweep significant changes under the rug. Rather than manage the project responsibly, and come forward with clear evidence that the Project continues to satisfy the Section 248 standards, VGS sought to hide the ball and merely respond to other parties' requests for reconsideration. The Board should hold VGS accountable for its actions and grant CLF's request for a declaratory ruling.

II. Amendment Required to Authorize Construction

The significant cost increases and the changes in the energy markets are a substantial change. The Board should reject both VGS's and PSD's claims that an amendment is not needed, grant CLF's request for a declaratory ruling, and require VGS to seek an amendment to the CPG.

A. Plain Language of Rule 5.408 Supports Granting Declaratory Ruling Request

The plain language of Rule 5.408 requires VGS to seek an amendment in light of the increased costs and changes in the energy markets. The specific language of the rule requires an amendment for any "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. The Board's requests seeking remand, as well as the Board's remand orders recognized the potential for significant impact and thus demonstrate that an amendment is needed. *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); *In re Petition of Vermont Gas Systems, Inc.,* Order

Re: Second Request for Remand, PSB Docket 7970 at 6-7 (Jan. 16, 2015); *In re Petition of Vermont Gas Systems, Inc., (On Remand),* Order Re 60(b) Reconsideration, PSB Docket 7970 at 17 (Oct 10, 2014); *In re Petition of Vermont Gas Systems, Inc.,* Order Re Decision to Seek Remand, PSB Docket 7970 at 7 (Sept. 4, 2014).

B. Physical Change Not Required for Amendment

As recognized by the Vermont Public Service Department, both the text and the history of Rule 5.408 make it clear that the rule applies to all substantial changes and is not limited to only physical changes to a project. (PSD Brief at 4). The review of projects under Section 248 is broader than under Act 250. Compare 10 V.S.A. § 6086 with 30 V.S.A. § 248. For example, there is no evaluation of the "need" for, economics of, or overall promotion of the public good of a project under Act 250. Yet these are critical evaluations under Section 248. 30 V.S.A. § 248(b)(2); 248(b)(4); 248(a).

There is a "substantial change in the approved proposal" here. Vt. P.S.B. Rule 5.408. The cost significantly increased and the energy markets changed. (Stipulated facts). Those changes alone, absent any physical changes, have the potential to affect the overall benefits of the project, and their compliance with the section 248 criteria. The availability of other resources that were not evaluated initially have the potential for a significant impact, including obviating the claimed need for the project, or the extent of any claimed greenhouse gas emission benefits.

C. History of Rule 5.408 Supports Requiring Amendment

As the Vermont Public Service Department also recognizes, Rule 5.408 was adopted after the *Northwest Reliability Project* case, *In re Vt. Elec. Power Co., Inc, et al,* Order on Remand at 20, PSB Docket #6860 (Sept. 23, 2005), and that case did not in any

way "restrict or limit the substantial change test to the manner in which it is applied in matters under Act 250." (PSD Brief at 4). The review the *Northwest Reliability Project* case regarding the cost increase was not undertaken pursuant to Rule 5.408. It also involved a specifically more limited review because the Board determined that the remand from the Vermont Supreme Court allowed only a determination of whether to reopen the case and not whether an amended certificate was required. *In re Vt. Elec. Power Co., Inc, et al,* Order on Remand at 20, fn.29, PSB Docket #6860 (Sept. 23, 2005).

Following the *Northwest Reliability Project* case, the Board adopted Rule 5.408. The text of the rule does not limit review to only physical changes and specifically incorporates project changes that have a potential for an impact on the criteria. The broad text of the rule, following the *Northwest Reliability Project* case, where the issue of the impact of cost increases were raised, demonstrates that significant cost increases, accompanied by changes in the energy markets that undermine the project benefits require an amended CPG.

D. PSB Ruling Rejecting Dismissal Confirms Amendment Required

The Board's own ruling in rejecting the dismissal of CLF's petition further confirms that an amendment is required in this case. The Board already decided that the Rule 60(b) proceedings in Docket 7970 are not dispositive of the need for an amendment. Docket 8330 Interim Order of 3/23/16 at 3. The burdens of proof are different in the two proceedings, and the issue raised in this case "is distinct from the question resolved" in the remand orders. *Id.* As different issues are presented, the Board is precluded from deciding that the review under the 60(b) motions obviates the Rule 5.408 review.

V.R.C.P. Rule 60(b) and Board Rule 5.408 are separate rules that have separate requirements, and separate burdens of proof. While similar information may be used to demonstrate in each proceeding that the project should or should not move forward, the Rule 5.408 standards are clear, separate and broader than rule 60(b). The rulings on the 60(b) motions do not eliminate the need for an amendment under Rule 5.408, but rather demonstrate that an amendment is required to provide a full and comprehensive review of the Project in light of its troubled history and changes to the cost and energy markets.

E. VGS Actions Disregarded Known Amendment Requirement

Vermont Gas Systems' own actions show a flagrant disregard for the requirements of rule 5.408. The CLF petition was filed in July 2014 shortly after the first cost increase. At least as early as this time, VGS knew that an amended CPG may be required. At this time, VGS was represented by the same counsel that represented VELCO in the *Northwest Reliability Project* case. Indeed, VGS's counsel knew well that an amended CPG may be required for significant cost increases. Despite knowing that an amendment may be required, VGS chose not to seek an amendment. While not seeking an amendment for the cost increases, VGS filed many other requests for amendments to the CPG. VGS clearly knows how to seek an amendment, and to put forward information needed to substantiate an amendment.

In this situation, VGS simply chose not to seek an amendment. The Board should not condone VGS's blatant failures and flagrant refusals to comply with the Board's rules. This is yet another example of poor management of the Project. VGS chose not to come forward with information to justify the continued viability and "public good" of the Project in the face of significant management problems, cost increases and changes in the

energy market. At a minimum, if VGS believed that the 60(b) information it provided was sufficient to justify an amendment, it could, and should have provided that information as a justification for an amendment. VGS chose not to do this. This demonstrates not only a lack of good Project management, but a lack of transparency and a failure to provide the Board and the parties with information needed to determine whether the Project promotes the general good of the state.

F. VGS Inconvenience Should Not Thwart Amendment Requirement

The mere inconvenience of VGS, when it chose not to seek an amendment, fails to justify either ignoring Rule 5.408 in this circumstance, or providing only for prospective application of Rule 5.408. Board Rule 5.408 has been in place since 2006. It was developed in specific response to a case where the impact of a significant cost increase was evaluated, but only in the context of a 60(b) motion. VGS's claims of inconvenience mask what it really seeks, which is the ability to ignore the application of Rule 5.408 for significant cost increases and other changes. The Board should reject VGS's request.

G. Public and CLF Have Right to Amendment Process Being Followed

The public, as well as CLF and public policy are well served by requiring VGS to seek an amendment. As a participant in the CPG proceeding CLF relied on the information presented in that case. Rule 5.408 protects the public and ensures that there will be a careful review of project changes. A careful review would follow the rule and include requiring the project proponent to come forward with affirmative information to justify its project in the face of significant changes.

The 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. When a project changes an amended CPG must be obtained before construction. *Investigation into Citizens Utility Co.,* Order at 132, PSB Docket #5841/5859 (June 16, 1997).

Failure to require VGS to seek an amendment condones VGS evading review of its Project. The process and requirements for an amendment are clear. They have been used in the past by VGS, and VGS has known for nearly two years that this review may be forthcoming. If VGS and PSD are so confident that the previous reviews were sufficient, they can produce the same information to support an amendment. It would not be an onerous process, but would confer greater confidence in the review. The fact that VGS has not sought to do this suggests that it knows the previous reviews were insufficient. Rather than comply with the rule, VGS instead seeks to evade review and further scrutiny of its Project.

CLF also has due process rights protected by the United States and Vermont Constitutions that would be infringed if VGS is not required to seek an amendment to its CPG. U.S. CONST. amend. XIV § 1; VT CONST. chap. I, art. 4. As a party, CLF actively participated in the CPG proceeding, presented evidence, and the Board's CPG order reflected CLF's claims and provided conditions specifically addressing CLF's claims regarding the Project's GHG emission impacts. *In re Petition of Vermont Gas Systems, Inc.,* Order, PSB Docket 7970 at 98-104, 148 (Dec. 23, 2013); CLF as an organization,

and on behalf of its members, has specific interests in the environment that are protected by Section 248. The Vermont Supreme Court has recognized that:

inchoate property interests “are not created by the Constitution, but rather are ‘created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’ ” *Brennan v. Town of Colchester,* 169 Vt. 175, 179, 730 A.2d 601, 605 (1999)(quoting *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). A property interest arises when a person has a “ ‘legitimate claim of entitlement’ ” to a governmental benefit rather than a “ ‘unilateral expectation.’ ” *Id.* (quoting *Roth,* 408 U.S. at 577, 92 S.Ct. 2701).

In re New Cingular Wireless PCS, 2012 VT 46 ¶ 13. Whether a property interest exists that is protected by due process “depends upon the legal framework applicable to the permitting scheme in question.” *Id.* at ¶ 14. A permitting scheme that requires a finding that implicates specific rights of a party is sufficient to create due process rights to be protected. *Id.* citing *In re St. George,* 125 Vt. 408, 412–13, 217 A.2d 45, 47–48 (1966). In contrast, merely allowing participation and providing notice does not it itself create a property interest protected by due process. *In re Great Waters of Am., Inc*., 140 Vt. 105, 109-10, 435 A.2d 956, 959 (1981).

Section 248 provides for a review of environmental impacts, including GHG emissions, and protection of environmental resources, including air quality that is affected by GHG emissions. CLF has a specific interest in environmental resources that the Board’s Section 248 review and rulings are required to protect. That interest is sufficient to assure CLF the protections afforded by Board Rule 5.408, which requires an amendment be authorized for any substantial change to a project. The rule provides a legal process that is due to protect CLF’s interests in the environment. CLF has a right to rely on the amendment process to protect its interests and ensure that the Project is not

substantially changed without undergoing a review that includes VGS coming forward with evidence demonstrating compliance with all the affected section 248 criteria. *Goldberg v. Kelly,* 397 U.S. 254 (1970)(benefits created by rule or statute are protected and cannot be withheld absent due process). The process that is due in this case is the one that is set forth in Rule 5.408. CLF is entitled to the protection afforded by Rule 5.408 that requires VGS to seek an amendment to authorize the substantial change to the Project.

H. Later History Shows Need for More Thorough Review

The more recent history of this Project also shows the need for the Board to have the opportunity to review this Project in the context of an amendment proceeding. Clearly, the prior two remand proceedings were not successful in flushing out and evaluating all the changes to the project. The remand proceedings did not require VGS to come forward with a demonstration that the affected Section 248 criteria are satisfied in light of the significant cost increases and the changes in the energy markets. Specifically, in the latter remand proceeding, VGS did not provide a comparison of greenhouse gas (GHG) emission impacts that took into account the use of compressed natural gas (CNG) by some of the larger potential industrial users. The GHG emissions evaluation continued to compare pipeline natural gas only with oil. Docket 7970 (Second Remand) at 11-12. An amendment proceeding would afford the Board and the parties an opportunity to evaluate the Project and its impacts based on the real-world circumstances on the ground now, rather than comparing impacts to some circumstances that existed previously, when the Project was first reviewed. The proposed pipeline has not been completed. Given the very troubled history of the Project management and the continued problems with costs

and lack of access to property that have recently surfaced, it is more important than ever to make sure that the Project as it exists now undergoes a complete review. Vermonters shouldn't be asked to buy a pig in a poke. Vermonters should know what they are getting in a pipeline project and be confident that any project approved by the Board actually benefits Vermont. Unfortunately, the limited reviews in the remand proceedings failed to provide these assurances. It is no surprise that the piecemeal reviews that presented only limited updates of information proved to be unreliable – not once, not twice, but likely now a third time. A complete review is needed that is based on the circumstances as they are now, and with VGS coming forward with a full justification as to how the proposed Project satisfies all the criteria affected by the significant cost increases and the changes in the energy markets.

I. PSD Claim of No Need for Amendment Not Supported.

The Public Service Department recognizes that significant cost increases can require an amendment. (PSD Brief at 4). However it then claims that this requirement should be waived in this case because the previous reviews that occurred during the remand proceedings result in further review being "duplicative and unnecessary." *Id.* at 3, 5. There is no support for PSD's claims. The review provided by an amendment proceeding is different than what occurred during the remand proceedings. The different standards and different burdens of proof demonstrate that requiring an amendment would not be duplicative and unnecessary. The Rule 5.408 requirement also should not be waived. Failure to require an amendment denies CLF of its due process rights protected by the procedure established in Rule 5.408. The PSD supported the CPG during the initial proceeding as well as during the two remand proceedings. It is simply self-serving and an

abdication of the PSD's duties to the public to now claim an additional review, that it acknowledges is required by the rule, would be unnecessary.

III. Conclusion

For the foregoing reasons, the Vermont Public Service Board should reject the claims of VGS and the PSD and 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 14th day of June 2016.

CONSERVATION LAW FOUNDATION

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