

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Docket No. 8710

Investigation into petition of Vermont Gas Systems, Inc)
for change in rates, and for use of the System Expansion)
and Reliability Fund)

CONSERVATION LAW FOUNDATION'S BRIEF

The Vermont Gas Systems, Inc. (VGS or Company) failed to demonstrate that it is entitled to the requested rate increase or use of the System Expansion and Reliability Fund (SERF). The Vermont Public Service Board (Board) should deny VGS' requests. The near doubling of the cost of the Addison Natural Gas Project (ANGP or Project) combined with the consistent poor management of the Project from its inception precludes the Board finding that the rate relief requested is justified. The failure to have any plant in service, and the use of the SERF before authorized by the Board precludes the Board from allowing VGS to use the SERF funds to prop up this beleaguered project at the expense of Vermont customers.

I. Rate Request Premature

The Board should reject VGS' rate request as premature. As described in Conservation Law Foundation's (CLF) briefs and pleadings in *Petition of Conservation Law Foundation*, VT PSB Docket 8330, (incorporated here by reference) the failure of VGS to seek an amendment to its Certificate of Public Good when the cost of the project significantly increased precludes the Board from allowing the Project to proceed, and thus precludes any rate increase to support the project. A decision on rates to support a project when the validity of the CPG for the project is in question is premature and fails to advance judicial economy. *Petition of Conservation Law*

Foundation, Docket No. 8330, Order of 3/23/16 at 4 fn. 4; *Investigation into petition of AARP*, Docket No. 7535, Order of 7/22/11 at 6. The Board's decision on rates would be advisory absent a sound reevaluation of the merits of the proposed project as called for in Docket 8330. *In Re Green Mtn. Power*, 148 Vt. 333, 335 (1986). The Board should reject the request regarding rates as premature until a final decision in Docket 8330 is provided.

II. Consistent Mismanagement Precludes Rate Request

From the beginning VGS mismanaged the Project and its mismanagement and mistakes demonstrate imprudence that preclude the rate relief requested. Vermont Public Service Board precedent, and general principles of utility regulation are clear that only costs that are reasonably and prudently incurred can be recovered in rates. *Tariff filing of Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 219-20; *Tariff filing of Central Vermont Public Service Corp.*, Docket No. 5132, Order of 5/15/87 at 94-95; *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494, 513, 66 A.2d 135, 147 (1949). The standard set forth in Docket 5983, which addressed the prudence of a utility entering into a long-term power contract, and quoted from a decision regarding investment in Seabrook states:

A prudency [sic] review must determine whether the utility's actions, based on all that it knew (or should have known) at the time, were reasonable and prudent in light of the circumstances which then existed. Such a judgment should not be based on hindsight or after-acquired knowledge, and it must respect the managerial rights of the company. However, it does not merely presume that management operated properly, and it holds the company responsible for making all reasonable efforts to gather relevant information and to respond appropriately.

A utility's obligations include continued monitoring, review, and assessment of its participation in specific power projects. These assessments must, at least, consider the likelihood of the project's coming on-line at expected times and within estimated costs, options available in case of failure to meet expected operating criteria, alternative power sources or conservation efforts that might replace the power project and the effect of continued investment on ratepayers and stockholders. This continuing review and assessment process should be documented so that its prudence can be evaluated when challenged.

Tariff filing of Green Mountain Power Corp., Docket No. 5983, Order of 2/27/98 at 219-20 quoting *Tariff filing of Central Vermont Public Service Corp.*, Docket No. 5132, Order of 5/15/87 at 94-95.

The evidence presented in this case clearly demonstrates that Vermont Gas Systems was in way over its head when it undertook this Project and repeatedly failed to exercise prudence in managing the Project. Vermont customers should not now be saddled with paying for VGS' repeated bungling of the Project. The testimony of VGS' in support of the prudence of its actions should be rejected. Its witness, Mr. Hibbard, while being a former utility regulator, is not a lawyer, and is not qualified to offer a legal opinion. Rebuttal Testimony of P. Hibbard 9/26/16 at 3-4; Tr. 12/12/16 at 143 (Hibbard). The vast majority of Mr. Hibbard's testimony is not credible. He identified no cases where he, as a regulator or an expert actually addressed or decided the prudence of a utility action. Prefiled Rebuttal Testimony of P. Hibbard 9/26/16 at 10-35. He has no specific experience or expertise regarding prudence and his testimony is not credible for this reason. In relying on other regulatory and legal decisions to bolster his evaluation of the prudence of VGS' actions, he is providing a legal opinion beyond his qualifications. The Board should reject Mr. Hibbard's evaluation of prudence as not credible.

Specific examples of VGS failing to exercise prudence in its actions, and thus precluding cost recovery for its investments, include failing to take reasonable actions to obtain rights of way and failing to responsibly manage planning and construction of the Project. Prefiled testimony H. Schultz 8/22/16 at 53-72.

A. Imprudent Planning

From the outset, VGS failed to follow a reasonable or prudent course in planning its project. While VGS claims to have undertaken stakeholder outreach, it hand-picked a limited "stakeholder advisory group" that only looked at routing for a pipeline, failed to include a review

of key environmental impacts, and failed to include key interests, including landowners and people and organizations that had opposed previous pipeline projects. Tr. 12/12/16 at 208-09 Simollardes; Exhibit CLF-1; CLF-2.

As the Project proceeded, VGS repeatedly failed to exercise prudence in presenting sound cost estimates. VGS was fined for its failure to notify regulators and parties in a timely manner about a significant cost increase. *Investigation into Violation by Vermont Gas Systems, Inc.*, Docket No. 8328 Order of 7/31/15 at 2. The penalty is a de facto admission that VGS acted imprudently in estimating costs. The estimated cost of the Project rose not once, not twice, not three times, but four times over the course of the Project demonstrating clearly that VGS never had a good handle on Project costs or took the reasonable and prudent actions needed to evaluate costs.

VGS' excuses for its poor cost estimates do not demonstrate prudence. Prudence requires a utility to act in a responsible manner based on what they "knew (or should have known) at the time." *Tariff filing of Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 219. A utility must make "reasonable efforts to gather relevant information and to respond appropriately." *Id.* at 220. The evidence presented demonstrates VGS took on a project far larger than any it had undertaken before. It knew that. It then undertook both Phase I and Phase II at the same time, so it had two large projects demanding attention and oversight. It failed to stay on top of rising costs and failed to put in place reasonable management oversight of the Project. Prefiled Testimony of H. Schultz, 8/22/16 at 54-56, 58-60; Exhibit DPS-L&A-6. The cost increases are well beyond what would have been expected for a well- managed project. Testimony of H. Schultz, 10/31/16 at 51. VGS failed in its obligation to "contin[ually] monitor[], review and

assess[]” its participation and “consider the likelihood of the project’s coming on-line at expected times and within estimated costs....” *Green Mountain Power Corp.*, Docket No. 5983 at 220.

B. Imprudent Right of Way Acquisition

VGS failed to prudently manage its acquisition of rights of way for this Project. As noted by Mr. Schultz:

... the delays in the Project have been, without question, attributable at least in part to the Company’s failure to secure the access of the right of ways in a timely manner. In addition, the Company either planned poorly when estimating the Project costs for rights of ways or the Company just wasn’t qualified to handle securing the number of right [of] ways required in a project of this magnitude.

Prefiled Testimony of H. Schultz, 8/22/16 at 56. In addition, from the beginning, VGS did not include landowners in the initial VGS-selected stakeholder group. And; during the course of right of way acquisition, VGS acknowledged misconduct occurred in connection with landowners “complain[ts] of unauthorized entries upon their lands by VGS employees and/or subcontractors.” *In re VGS*, Docket No. 7970, Order of 12/23/13 at 29.

C. Imprudent Construction Management

Throughout the Project, VGS demonstrated that it was not up to the task of managing a project of this magnitude and failed to reasonably recognize this shortcoming or take reasonable steps to address it. This is imprudence as it demonstrates a failure to “make[] all reasonable efforts to gather relevant information and to respond appropriately.” *Tariff filing of Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 220. As described in Mr. Schultz’s testimony, the Price, Waterhouse, Cooper (PwC) Report (Exhibit DPS-L&A-6) “chronicles one failure of planning after another.” Prefiled Testimony of H. Schultz, 10/31/16 at 12. The report documents “problems plaguing the Company’s management of this Project and it strongly suggests pervasive imprudence during the Project’s early stages.” *Id.* The PwC Report

“is more than enough to demonstrate that the Company acted imprudently in the pre-construction phase of the Project...” *Id.* at 13. In particular, witness Schultz identified a number of specific actions and major decisions that were imprudent, noting that “[w]hile each of these decisions is troublesome in its own right, ... the larger point is that “the Company did not perform the necessary due diligence to ensure that it was able to plan, manage and construct the Project in a prudent fashion.” *Id.* at 17. Some of the major decisions demonstrating these failures include:

- Decision to retain CHA to serve as project manager, and to keep them on as project managers even after it became apparent that they were not up to the task;
- Decision to have inexperienced VGS personnel co-lead the Project with CHA, especially in the lead up and beginning of the Project’s construction phase;
- Decision to retain O&U and allow them to begin without a contract;
- Decision to retain ECI and to retain them prior to and in isolation from a mainline contractor;
- Absence of formal project management procedures throughout the early phases of the Project through the commencement of construction.

Id. at 17.

At each turn, VGS failed to demonstrate that it took reasonable action to responsibly manage a Project of this magnitude. The mistakes compounded, caused further delays, and further cost increases. Collectively these demonstrate an abject failure to responsibly monitor, review and access the Project so that customers can be required to pay for the VGS mistakes.

III. Use of SERF not Allowed

VGS has failed to demonstrate that it is entitled to use any of the System Expansion and Reliability Fund (SERF).

1. Failure to have Plant in Service

The first shortcoming with regards to using the SERF is that VGS has not demonstrated that it will have plant in service or used and useful when it seeks to use the SERF. Only a small portion of the overall Project is actually in service and VGS failed to identify what amount of that limited expansion (Phase VII looping) is actually benefitting existing customers. It was put in service after last winter and was (obviously) not needed during the winter. It does not satisfy any existing need, and is not used and useful. Tr. 12/8/16 at 146 (St.Hilaire).

VGS has demonstrated no basis to use any of the SERF funds for the portion of the Project that is not now placed in service. Given the multitude of delays that have already occurred, as well as the cloud over the CPG because VGS failed to seek an amendment as required, there is no assurance the facility will actually be in service during the time these rates will be in effect.

Overall, VGS has failed to demonstrate it is entitled to use any of the SERF funds and they should be returned to customers.

2. Use of SERF Not Authorized

The VGS has already used the SERF without authorization. VGS has collected the SERF and has paid taxes on the monies collected and has then collected in rates from customers the amount of taxes it has paid. Tr. 12/13/16 at 82-83 (Schultz). In practice, VGS has effectively “rate-based” the SERF monies and collected a return on investment for these monies. In doing so, it has used the SERF without authorization from the Board. The Board’s Order was clear that use of the SERF was not allowed until its use was specifically authorized by the Board. The unauthorized use of the SERF by VGS requires VGS to return to customers the SERF funds and any additional rates collected because of the SERF.

IV. Memorandum of Understanding

Conservation Law Foundation recognizes that the Memorandum of Understanding (MOU) filed late in the day on February 2, 2017, between the Vermont Department of Public Service and Vermont Gas Systems, Inc., addresses some of the issues raised by CLF in this brief. CLF will respond to the MOU terms in its rebuttal brief.

V. Conclusion

For the foregoing reasons, the Vermont Public Service Board should deny VGS' request for a rate increase.

1. The rate request is premature prior to a decision in Docket 8330.
2. All costs in excess of the \$86 million cost approved in Docket 7970 are imprudent.
3. The unauthorized use of the SERF and the failure to have plant in service require the return of SERF funds to customers.

Dated at Montpelier, Vermont, this 3rd day of February 2017.

CONSERVATION LAW FOUNDATION

By: s/ Sandra Levine
Sandra Levine, Senior Attorney
Vermont Advocacy Center
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992
(802) 223-0060 (fax)
slevine@clf.org