IN THE SUPREME COURT IN THE STATE OF VERMONT

No. 2017 - 162

IN RE:

PETITION OF CONSERVATION LAW FOUNDATION,

Appellant

Appeal from the Vermont Public Service Board
Docket No. 8330

REPLY BRIEF OF THE APPELLANT

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The Appellees' arguments fail to recognize fundamental legal principles and clear precedent in their efforts to avoid the careful review that Vermont law requires for the Vermont Gas Systems (VGS) pipeline proposal. Their positions seek to complicate and sidestep Vermont's clear regulatory requirements, and deny Vermonters the oversight needed to ensure the proposal promotes the public good and responsibly advances Vermont's energy policies.

I. NO SUBSTANTIAL DEFERENCE FOR BOARD'S INTERPRETATION OF RULE

The Appellees first seek to cloud the legal requirements by claiming a very narrow limit to the scope of this Court's review. A clear legal question is presented to this Court. It must determine the meaning of the Vermont Public Service Board's[1] rule. Since the plain meaning of the text of the rule shows that a new or amended Certificate of Public Good (CPG) is required, no deference is accorded to the Board's interpretation.

It is well settled that determining the meaning of a rule or statute is a legal issue. *Murdoch v. Shelburne*, 2007 VT 93, ¶ 5, 182 Vt. 587. Questions of law are reviewed *de novo* without deference to the decision below. *Cenlar FSB v. Malenfant*, 2016 VT 93, ¶ 13, ¶19. Appellee VGS appropriately acknowledges that administrative rules are like statutes and that the primary goal is to give effect to the drafter's intent. (Appellee VGS Brief at 9). It also acknowledges that the primary evidence of intent is the plain language of the regulation. *Id.* Where the meaning of a rule or statute is plain on its face, there is no need for interpretation, and

[1] Effective July 1, 2017, the name of the Vermont Public Service Board was changed to the Vermont Public Utilities Commission. 3 V.S.A. § 3 (2017); 2017 Vt. Acts & Resolves (Act 53, Section 9). For consistency with the initial brief, this reply brief uses the former name - Vermont Public Service Board – as that was the name at all times relevant to this appeal.

the rule or statute will be applied according to its express terms. *Levine v. Wyeth*, 2006 VT 107, ¶ 31, 183 Vt. 76, 97, *affd,* 555 U.S. 555, (2009)(deference only when statute silent or ambiguous); *Ran–Mar, Inc. v. Town of Berlin,* 2006 VT 117, ¶ 5, 181 Vt. 26.

Without legal support or citation, the Appellees seek to ignore or sidestep the plain meaning rule, by substituting it with a substantial deference standard in applying the plain meaning of a rule. (Appellee VGS Brief at 9; Appellee DPS Brief at 2). Deference is only accorded to an agency's interpretation of a rule when the rule's meaning cannot be determined from the plain language of the rule's text. *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)(no deference if intent clear); *In re Williston Inn Group,* 2008 VT 47, ¶ 14, 183 Vt. 621, 626. An agency may enjoy substantial deference in creating a rule. An agency determines what language it will use in crafting a rule, and the rule itself provides an interpretation of the underlying statute that is due substantial deference if it does not conflict with the statute. *Auer v. Robbins,* 519 U.S. 452, 457–58 (1997); *Levine v. Wyeth, supra* at ¶ 31. Once the rule is drafted and put into effect, the agency's interpretation in applying the rule is no longer afforded substantial deference unless there is an ambiguity or the plain language of the rule is not conclusive. See *Levine v. Wyeth, supra* at ¶ 31 (deference only when statute silent or ambiguous); *In re Williston Inn Group, supra* at ¶ 14 (regulations construed in same manner as statutes and use tools of construction only when plain meaning not clear).

The Appellees skip over the plain meaning rule and wrongly jump to claiming the Board's interpretation is due substantial deference without first showing that the rule's plain language is not clear or conclusive. The stipulated facts demonstrate that there was a change in the approved proposal. (PC at 62) The cost of the proposal changed, and that cost increase has

the potential for a significant impact with respect to some of the criteria under which the proposal is evaluated. Vt. P.S.B. Rule 5.408. If the Board had wanted to limit application of its rule to only physical changes in an approved proposal, it needed to include that limitation in the text of the rule. *Burden v. Snowden*, 2 Cal. 4th 556, 562, 828 P.2d 672, 676 (1992), *as mod* (May 28, 1992)(not add words through interpretation that do not appear in statute). Since the language of the rule is plain on its face, and Appellees have made no claim that it is not plain, the rule must be applied according to its express terms and no deference is due to the Board's interpretation that adds requirements not included in the text of the rule. *Id.; Levine v. Wyeth, supra* at ¶ 31; *In re Williston Inn Group, supra* at ¶ 14.

The Appellees' remaining arguments flow from this first error. Since the plain meaning of the rule is clear on its face and the rule can be applied according to its express terms, the Court need not address the Appellees' remaining arguments that seek to justify the Board ignoring the plain meaning and rewriting the rule to require a physical change. In the alternative, the Appellee's remaining claims are otherwise unsupported and should be rejected. First, the fact that other proceedings also evaluate the cost and economic impact of a cost increase does not change the meaning of an "approved proposal." (Appellee VGS Brief at 10-11). The cost of a proposal is part of the Board's review and the Board necessarily relies on the cost estimates in determining whether a proposed project meets the statutory criteria and whether it promotes the general good of the state. 30 V.S.A § 248(a)(3)(promote general good); 30 V.S.A. § 248(b) (must satisfy all subsequent criteria). *In re Vermont Elec. Power Co., Inc.*, 2006 VT 69, ¶ 3, 179 Vt. 370, 374. Appellee VGS advances a circular argument by claiming that since the Board stated it does not specifically approve a cost estimate, it is not part of the proposal. (Appellee VGS Brief at 11). The Appellee VGS's claim is wrong for two reasons. First, it is circular and

simply relies on it being so because the Board said it was so. Second, cost is a necessary part of the initial filing, and is part of the Board's overall review, and is therefore part of the proposal. Both are faulty arguments that the Court should reject.

The Court should also reject claims that the meaning of a companion rule limits the Court's review. (Appellee VGS Brief at 11-13). Vt. P.S.B. Rule 5.409 addresses only notice that is required for an estimated cost increase. That rule is silent on whether a new or amended CPG is required as a result of the cost increase. That issue is addressed in Vt. P.S.B. Rule 5.408. Since Rule 5.409 simply addresses notice, it does not limit the substantive review required by Rule 5.408. As confirmed by the Board's failure to dismiss CLF's petition, the review requested here by CLF, and required by Rule 5.408, is not replaced by the notice required by Rule 5.409 and a following V.R.C.P. Rule 60(b) review. (PC at 48) (Interim Order of 3/23/16).

Legislative history also fails to support Appellee VGS's claims. Vermont P.S.B. Rule 5.408 and 5.409 were adopted following the Northwest Reliability Project case. *In re Vt. Elec. Power,* Order on Remand at 20, PSB Docket 6860 (Sept. 23, 2005). In adopting the rules, the Board specifically rejected the Vermont Public Service Department's request that Rule 5.409 explicitly include a provision to reopen a proceeding based on increased costs. (SPC at 22). In doing so, the Board expressly rejected separate treatment for reviewing cost increases and left Rule 5.408 to be the mechanism for review of changes to a proposal, including changes in the estimated cost of a proposal. (SPC at 22) The Court should reject Appellees' additional arguments as they fail to support Appellees' claims regarding the rule's meaning.

II. OTHER CASES DO NOT DEMONSTRATE THAT ONLY PHYSICAL CHANGES CAN BE REVIEWED.

The cases cited by Appellees fail to demonstrate that only physical changes can be reviewed in a proceeding under Vt. P.S.B. Rule 5.408. None of the cases cited have specifically

considered the question presented here. While cases have addressed physical changes, none have held that those are the only changes that may be considered. The *In re Citizens Utilities Co.* case supports broad review and specifically recognizes that analysis of Rule 5.408 considers potential impacts to all Section 248 criteria and not only those that are part of the Act 250 criteria. *In re Citizens Utilities Co.*, Order at 135-36, PSB Docket 5841/5859 (June 16, 1997).

The *Vicon* case also fails to support Appellee VGS's position. *In re Vicon Recovery Systems,* Procedural Order of 3/23/87, incorporated into Final Order of 12/16/87, PSB Docket 4813-A. The Board in *Vicon* expressly noted that the financial viability was not an issue in that case because the proposed project did not put ratepayer dollars at risk. *Id.* at 7. That same situation is not present here. Vermont Gas Systems is a regulated monopoly utility and its project puts ratepayer dollars at risk. The *Vicon* case does not support Appellee VGS's position.

The remaining cases cited by Appellee VGS also fail to support its position. The Vermont Yankee case cited merely confirms that an alteration to a facility does require an amendment. It does not stand for the proposition that only a physical alteration requires an amendment. *In re Vermont Department of Public Service,* Order at 26, PSB Docket 7195 (Sept. 18, 2006). Similarly, the Morrisville Water and Light Department case addresses only the change in ownership and not changes to a proposal, and also fails to support a claim that only physical changes require an amendment. *In re Morrisville Water and Light Dept. and Village of Johnson Water and Light Dept.,* Order at 6, PSB Docket 8186 (Feb. 21, 2014). The cases relied on by Appellees fail to demonstrate that only physical changes require a new or amended Certificate of Public Good.

III. OTHER PROCEEDINGS DO NOT ELIMINATE NEED FOR NEW OR AMENDED CERTIFICATE OF PUBLIC GOOD

The Appellees arguments fail to demonstrate that the other proceedings regarding the proposed gas pipeline eliminate the plain requirement of the Board's rule. The Board itself recognized that a Rule 60(b) decision is not dispositive of the need for a new or amended CPG as required by Vt. P.S.B. Rule 5.408. (PC at 48)(Interim Order of 3/23/16). The burdens of proof in the two proceedings are different, and the specific issues to be resolved are different. The mere fact that both V.R.C.P. Rule 60(b) proceedings and amendment proceedings address the broader issues of the effect or the impact of a cost increase and changes in the energy markets does not eliminate the need for the re-evaluation required by Vt. P.S.B. Rule 5.408.

Appellees do not claim that the V.R.C.P. Rule 60(b) decisions have a *res judicata* effect on CLF's petition. They cannot. At best, Appellee VGS claims that the Board undertook similar analysis in the course of its Rule 60(b) review as it would undertake in the course of reviewing whether to grant a new or amended CPG. (Appellee VGS Brief at 19). The mere existence of similar analysis does not eliminate a required review. This is especially true where the elements or burdens of proof differ. In the context of criminal proceedings, a court or jury may undertake similar analysis in determining whether a defendant committed both reckless endangerment and manslaughter. There may be overlapping elements of the two crimes, and the same act may constitute two separate crimes, but unless the elements are identical, or wholly subsumed, so that one is a lesser included offense of the other, there can be a prosecution for each. *State v. Forbes,* 147 Vt. 612, 616–17 (1987). The same is true here. There may be overlapping elements and analysis between the Rule 60(b) review and an amendment review, but one does not replace the other.

The difference is more pronounced where the burdens of proof are different. In a V.R.C.P Rule 60(b) proceeding, the party seeking to reopen has the burden of proof and must demonstrate that the Board would likely reach a different conclusion. V.R.C.P. 60(b). In contrast, in a proceeding seeking a new or amended CPG, the applicant must come forward with evidence to demonstrate that it is entitled to the amended or new CPG. Vt. P.S.B. Rule 5.408; 30 V.S.A. § 248. These differences matter and can affect the outcome, especially where the party with the burden of proof has less access to the information necessary to prevail. It is not unlike the differences between a criminal and a civil proceeding arising from the same facts. In a criminal proceeding, the State must prove beyond a reasonable doubt that a defendant committed a crime, while in a civil proceeding arising from the same circumstances, an injured plaintiff must only show that the events occurred by a preponderance of the evidence. *State v. Baker*, 154 Vt. 411, 414 (1990)(criminal conviction only by proof beyond a reasonable doubt). One commonly known example that demonstrates this difference is the trials involving O.J. Simpson. He was acquitted of the criminal charge of murder, but found liable in a civil proceeding for wrongful death. David Margolick, *Not Guilty: Jury Clears Simpson in Double Murder,* N.Y. Times, Oct 4, 1995, at A1; B. Drummond Ayers Jr., *Civil Jury Finds Simpson Liable in Pair of Killings,* N.Y. Times, Feb. 5, 1997. Just as the State cannot rely on a verdict in a wrongful death case to convict a defendant, the Appellees here cannot rely on the Rule 60(b) proceeding to demonstrate the same outcome in a different proceeding with a different burden of proof. The differences are even more pronounced in the context of a Rule 60(b) proceeding, where the differences are not merely a difference in magnitude of the burden of proof, as they are in a criminal versus a civil case, but actual differences in who is responsible to come forward with evidence and prove liability, guilt or entitlement to the relief requested.

Appellee VGS also seeks to rely on extraneous facts, not part of the stipulated facts in this case, in an effort to bolster its claim. (Appellee VGS Brief at 19). The Board's findings of fact in the underlying case and in the Rule 60(b) proceedings are not part of the factual record in this appeal. (PC at 62; Appellee VGS Brief at 5). They cannot be relied upon as factual support for Appellee VGS's claims. *Christian Legal Soc. Ch. of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 662 (2010)(parties bound by and cannot contradict stipulations). The Court should reject any reliance on the facts that are not part of the record in this proceeding.

IV. CLF'S INTERESTS PROTECTED BY PROCEDURAL DUE PROCESS

The cases relied upon by the Appellee VGS fail to demonstrate any lack of a property interest and right to procedural due process protected by the Vermont and United States Constitutions. U.S. CONST. amend. XIV § 1; VT CONST. chap. I, art. 4. Conservation Law Foundation and its members have an interest in the protection of environmental resources. In granting CLF permission to intervene in the underlying proceeding, the Board necessarily made a determination that CLF has "a substantial interest which may be affected by the outcome of the proceeding." Vt. P.S.B. Rule 2.209(B). The determination necessarily requires considering whether CLF's interests are protected by other parties and whether alternative means exist for CLF to protect its interests. *Id.* CLF's interests are different than that of a neighboring property owner who was not provided notice of a proceeding. *In re New Cingular Wireless PCS,* 2012 VT 46, ¶ 12, 192 Vt. 20. It is also different than that of a party entitled only to notice in a proceeding that does not specifically address the private interest. *W. Farms Assoc. v. State Traffic Com'n of State of Conn.*, 951 F.2d 469, 472 (2d Cir. 1991). And it is different than the interest of landowners asserting interests not specifically protected in a 30 V.S.A. § 248 proceeding.

Vermont Elec. Power Co., Inc. v. Bandel, 135 Vt. 141, 145 (1977). Finally, under the Vermont Administrative Procedures Act, the underlying proceeding is a contested case, and unlike the situation in *Parker v. Town of Milton*, 169 Vt. 74, 80 (1998), is adjudicative and not legislative in nature. 3 V.S.A. § 801(b)(2); *Beaupre v. Green Mtn. Power Corp.*, 172 Vt. 583, 587 (2001); *McTighe v. New England Tel. & Tel. Co*., 216 F.2d 26, 29 (2d Cir 1954). Conservation Law Foundation demonstrated it has a fundamental property interest and is entitled to the process set forth in the Board's rules to ensure that its property interests are protected.

CONCLUSION

For the foregoing reasons the Court should reject Appellee's claims, reverse the Vermont Public Service Board's Order denying Conservation Law Foundation's request for a declaratory ruling and require Vermont Gas Systems, Inc. to seek a new or amended certificate of public good for its Addison Natural Gas Project.