# 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

# **BRIEF OF THE APPELLANT**

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# STATEMENT OF THE ISSUES

- 1. Did the Vermont Public Service Board err in refusing to require Vermont Gas Systems, Inc. to seek a new or amended Certificate of Public Good following a significant cost increase for the proposed project and significant changes in the energy marketplace?
  - a. Did the Vermont Public Service Board err in failing to determine that a change to a proposed project includes significant changes in cost of the project and changes in the energy marketplace that have the potential to affect the determinations made regarding the project's compliance with the criteria of 30 V.S.A. § 248?
  - b. Did the Vermont Public Service Board err in eliminating all but physical changes to an approved project as constituting changes to the proposed project?

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#### STATEMENT OF THE CASE

The Conservation Law Foundation ("Appellant" or "CLF") challenges the Vermont

Public Service Board's¹ ("Board") denial of CLF's request for a declaratory ruling. Contrary to

the plain meaning of the Board's own rules, the Board refused to require that Vermont Gas

Systems, Inc. ("VGS" or "Appellee") seek a new or amended Certificate of Public Good

("CPG") when the cost of its gas pipeline proposal in Vermont nearly doubled and changes in the

energy markets significantly diminished the value of the proposal for Vermonters.

The Board's decision imposed an additional standard that is not included in the Board's rule, and based on this denied CLF's request. The Board's decision runs contrary to the plain meaning of the Board's own rules regarding when a new or amended CPG is required. The failure to require a new or amended CPG forecloses a careful and meaningful re-evaluation of the proposal in light of changed circumstances that affect the determinations made as part of the initial evaluation. The Board's failure to require a new or amended CPG undermines public confidence in the Board's decisions, denies CLF its substantive due process rights and renders meaningless some of the statutory criteria under which the Board initially evaluated the proposal.

Beginning in 2012, VGS proposed to expand its gas pipeline and delivery system from the Chittenden County area south to Middlebury, Vermont. As required by Vermont law, VGS sought and obtained in 2013 the regulatory approval needed – a CPG – to authorize the construction and operation its Addison Natural Gas Project. P.C. at 14. The Board based its CPG approval in part on the proposal's projected cost estimate of \$86.6 million dollars. P.C. at 62.

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<sup>&</sup>lt;sup>1</sup> 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). This brief uses the former name - Vermont Public Service Board – as that was the name at all times relevant to this appeal.

The Board's initial evaluation included determining that the proposed pipeline and the gas it would carry would be needed and would provide energy and economic benefits to Vermont, and would not have an undue negative effect on the environment. 30 V.S.A. §§ 248(b)(2), (b)(4) and (b)(5); *In re Petition of Vermont Gas Systems, Inc.*, Order, PSB Docket 7970 at 64-78, 79-86, 92-96 (Dec. 23, 2013).

In July 2014, the estimated cost of the proposed project increased from \$86.6 million to \$121,655,000. P.C. at 62. The estimated cost increased again in December 2014, to \$153,600,000 – an approximately 78% increase over the original estimated cost. P.C. at 62.

Shortly after the first estimated cost increase, Conservation Law Foundation filed a petition for declaratory ruling. P.C. at 18. CLF's petition requested the Board to determine that pursuant to Vt. P.S.B. Rule 5.408, VGS must seek an amendment to its CPG because the significant cost increase is "a substantial change in the approved proposal." Vt. P.S.B. Rule 5.408; P.C. at 19.

On September 11, 2014, the Board opened the docket in this proceeding, P.C. at 32, and on October 17, 2014, VGS requested that the Board close this docket claiming that the Board's ruling on a V.R.C.P. 60(b) motion in Docket 7970 arising from the same circumstances resolved CLF's petition request. P.C. at 40. Nearly eighteen months later, on March 23, 2016, the Board denied VGS's request to close this docket. P.C. at 48. The Board determined that the issue raised in CLF's petition is distinct from the question resolved by the ruling on the Docket 7970 V.R.C.P. 60(b) motion, and that the V.R.C.P. 60(b) Order is not dispositive of CLF's petition. P.C. at 49-50.

In denying the request to close the docket, the Board identified that the issue presented – whether the estimated cost increase is a substantial change – is a discrete and new legal issue,

arising from the Board Rule 5.408 adopted in 2006. P.C. at 50. Following the filing of comments on the appropriate process going forward, P.C. at 53-61, the parties submitted stipulated facts and an agreed upon schedule that included the filing of briefs, reply briefs and requesting oral argument. P.C. at 62. On July 13, 2016, the Board granted CLF's request for oral argument. P.C. at 107. Oral argument was held on September 7, 2016. P.C. at 108, 111. On March 30, 2017 the Board denied CLF's request for a declaratory ruling and this appeal followed.

### **ARGUMENT**

The near doubling of the cost of the VGS gas pipeline proposal combined with significant changes in the energy marketplace call out for the careful re-evaluation that is required by the Vermont Public Service Board Rule 5.408. The Board erred in depriving Vermonters of the necessary re-evaluation of VGS's beleaguered, delayed, mismanaged and severely over budget gas pipeline expansion proposal. The very foundation of regulatory approval for utility projects is to ensure that proposals by regulated monopolies are carefully scrutinized. 30 V.S.A. §§ 203, 209. The Board's failure to require VGS to come forward and demonstrate that its project continues to "promote the general good of the state" and meet all statutory criteria denies Vermonters the confidence needed in its regulatory processes. The Board's own rules are clear. When a change occurs that has the potential to affect a determination on any of the section 248 criteria, a new review is required. The Court should reject the Board's failure to require a new evaluation and require that VGS seek a new or amended CPG for its proposal.

# I. VGS MUST SEEK A NEW OR AMENDED CERTIFICATE OF PUBLIC GOOD

The Vermont Public Service Board erred in ignoring the plain language of its rules and failing to require VGS to seek a new or amended CPG when the cost of the VGS proposal significantly increased. The cost increase potentially affected the determinations made in awarding the CPG. The plain language of the Board's rule, as well as the rule's history and prior Board determinations clearly demonstrate that VGS was required to seek a new or amended CPG.

#### A. Plain Language of Rule Requires Amendment

Vermont Public Service Board rules are clear that when there is a "substantial change" to a proposal that has received a CPG under 30 V.S.A. § 248, additional approval from the Board is required.

Vermont P.S.B. Rule 5.408 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.

The plain language of Rule 5.408 demonstrates that VGS must seek an amendment in light of the significantly increased costs that have the potential to affect the Section 248 criteria. Vermont Supreme Court precedent is clear that it will enforce the plain language of a rule or statute according to its terms when the language is clear and unambiguous. *Evans v. Cote*, 2014 VT 104, ¶ 13, 197 Vt. 523, 530; *State v. Therrien*, 2011 VT 120, ¶ 9, 191 Vt. 24, 29; *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129, ¶ 7, 185 Vt. 129, 132-133; *State v. O'Neill*, 165 Vt. 270, 275 (1996).

# 1. The cost increase is a change to the approved proposal

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. There is no question that the significant cost increase is a *change*. It is an aspect of the proposal – its estimated cost – that was different in July 2014 and December 2014 than it was in December

2013 when the proposal was approved and a CPG awarded. AMERICAN HERITAGE DICTIONARY 147 (3d ed. 1994) (defining change as "to be or cause to be different; alter").

VGS sought and obtained a CPG based in part on a cost estimate of the project being \$86.6 million. The cost of the VGS proposal then nearly doubled and rose approximately 78%. VGS did not apply for, and the Board did not approve, a CPG for a project to be built at any cost. It applied for a CPG for a project that had an estimated cost of \$86.6 million. The Board relied on that cost estimate. It approved the VGS proposal and awarded a CPG based in part on that cost estimate.

The cost estimate is a necessary and indispensable part of the VGS proposal. To approve a proposal, the Board must determine that it satisfies *all* of the 30 V.S.A § 248 criteria, including that 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. This review requires a careful evaluation of the overall economics of the proposal, including how the proposal compares to other available energy resources, 30 V.S.A. § 248(b)(2), and whether the proposal "will result in an economic benefit to the State and its residents." 30 V.S.A. § 248(b)(4). To make positive findings on these criteria require an evaluation of the cost of the proposal. When the estimated cost changes significantly, the proposal changes.

# 2. The cost increase a substantial change

The near doubling of the cost estimate is a substantial change to the VGS proposal. The Board rule specifically identifies what constitutes a "substantial change." Vt. P.S.B Rule 5.408. The rule states that any change 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)" is a "substantial change." Vt. P.S.B Rule 5.408.

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 the proposal "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 proposal "will result in an economic benefit to the State and its residents; 30 V.S.A. § 248(b)(4), and whether the proposal 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 proposal 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." 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 ("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).

#### B. Reconsideration under Rule 60(b) not Replacement for Amended CPG

The Board decisions in the course of two reconsideration proceedings do not replace the need for VGS to seek a new or amended CPG for its proposal. As recognized by the Board in refusing to dismiss this case, a Rule 60(b) decision is not dispositive of the need for an amended CPG under Vt. P.S.B Rule 5.408; P.C. at 5 (Interim Order of 3/23/16). 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*; *Cobb v. Pozzi*, 363 F.3d 89, 114 (2d Cir. 2004)("A party's success in an earlier proceeding where it faced a lower burden of proof does not mean that, against a higher burden of proof in a subsequent proceeding, that party would achieve the same result."). While similar information may be used to demonstrate in each proceeding that the proposal should or should not move forward, the Rule 5.408 standards are clear, separate and broader than V.R.C.P 60(b). The rulings on the V.R.C.P. 60(b) motions do not eliminate the need for an amendment under Vt. P.S.B Rule 5.408, but rather demonstrate that an amendment is required to provide a full and comprehensive review of the proposal in light of its troubled history and changes to the cost and energy markets.

# C. Public and CLF have Right to Permit Amendment Process

The public, as well as CLF, have a right to be able to rely on requiring VGS to seek a new or amended CPG. As a party 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 proposal changes that requires the proponent to come forward with affirmative information to justify its proposal 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. When a proposal changes significantly, the approval may no longer be justified. The amendment proceeding requires the CPG holder, which is in possession of all the relevant information, to come forward and demonstrate that its proposal is still justified under the statutory criteria. Vt. P.S.B Rule 5.408; 30 V.S.A. § 248; *In re New England Tel. & Tel. Co.*, 135 Vt. 527, 537 (1977).

CLF and its members have due process rights protected by the United States and Vermont Constitutions that are infringed by the failure to require VGS 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 proposal's greenhouse gas 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 (1999)(quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (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).

In re New Cingular Wireless PCS, 2012 VT 46 ¶ 13, 192 Vt. 20. Whether a property interest exists that is protected by procedural 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 (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 (1981).

Section 248 provides for a review of environmental impacts, including greenhouse gas emissions, and protection of environmental resources, including air quality that is affected by greenhouse gas emissions. CLF and its members have 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 for any substantial change to a proposal. 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 proposal 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); *In re Diel*, 158 Vt. 549, 553-554 (1992)(unilateral rescission of policy change violated 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 proposal.

#### II. PHYSICAL CHANGES NOT REQUIRED

The Vermont Public Service Board erred in eliminating all but physical changes to an approved proposal as constituting the changes that require review under Vt. P.S.B Rule 5.408. By eliminating all non-physical changes, the Board effectively ignores clear statutory standards included in 30 V.S.A. § 248 and renders them meaningless.

This Court's long-standing precedent requires that courts give effect to the intent of the legislature and not render parts of a statute ineffective or meaningless. *In re Bennington School, Inc.*, 2004 VT 6, ¶ 13, 176 Vt. 584, 586–87; *Town of Killington v. State*, 172 Vt. 182, 188-189 (2001); *State v. Yorkey*, 163 Vt. 355, 358 (1995); *State v. Baldwin*, 140 Vt. 501, 511 (1981). By imposing a new and non-existent "physical change" requirement as a pre-requisite to needing a CPG amendment, the Board renders meaningless all statutory criteria in Section 248 that do not address the physical aspects of a proposal.

In applying the rules of statutory construction, this Court will "assume the common and ordinary usage of language in a statute unless doing so would render it ineffective, meaningless, or lead to an irrational result." *In re Bennington*, 176 Vt. at 586-587. This Court also construes a statute "in a manner that will not render it ineffective or meaningless." *Yorkey*, 163 Vt. at 358. This Court has repeatedly rejected interpretations of a statute or rule that run afoul of these principles of statutory construction. *See In re R.H.*, 2010 VT 95, ¶ 16, 189 Vt. 15, 23 (Human Services Board's *de novo* review powers meaningless under statutory interpretation that limits its authority to hold a fair hearing); *In re Electronic Industries Alliance*, 2005 VT 111, ¶ 7, 179 Vt.

539, 541 (rejecting trade organization's interpretation of consumer product labeling statute that makes statutory requirement illusory); *Elkins v. Microsoft Corp.*, 174 Vt. 328, 335-336 (2002) (rejecting Microsoft's interpretation of "and the courts of the United States" as so broad as to render meaningless consumer protection statute's guidance); *Dutton v. Department of Social Welfare*, 168 Vt. 281, 285 (1998) (rejecting Department's interpretation of a federal low-income housing subsidy that rendered key statutory term meaningless.); *Medical Center Hospital of Vermont, Inc. v. City of Burlington*, 152 Vt. 611, 623 (1989) (rejecting interpretation allowing hospital property to qualify for tax exemption that "would lead to the irrational result of rendering portions..." of the statute meaningless). The Board's interpretation of its rule that requires a physical change as a prerequisite to seeking an amended CPG violates these clear rules of statutory construction by rendering meaningless the non-physical standards that are part of the required review under 30 V.S.A. § 248.

## A. No Physical Change Requirement in Text of Rule

The text of the Board rule is silent about the need for a "physical" change as a prerequisite to seeking a CPG amendment. Vt. P.S.B. Rule 5.408. Ignoring the plain language of the rule that the Board itself wrote, the Board added a threshold requirement that there must be a physical change to a project before the need arises to seek an amendment to the CPG. By adding a requirement that is not in the text of the rule the Board failed to apply the rule in a manner that gives effect to rule's plain meaning. *Lemieux v. Tri-State Lotto Commission*, 164 Vt. 110 (1995) (rule imposed limits inconsistent with statutory authorization); *Burden v Snowden*, 2 Cal. 4th 556, 562, 828 P.2d 672, 676 (1992), as mod (May 28, 1992) ("Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." Citing *California Teachers Assn. v. San Diego* 

Community College Dist., 28 Cal.3d 692,698, 621 P.2d 856, 859 (1981)); Jane Doe No. 8 v. Royal Caribbean Cruises, Ltd., 860 F.Supp.2d 1337, 1340 (S.D. Fla. 2012)(canon of statutory construction that "courts may not add or subtract words from a statute").

The plain meaning of the word "change" does not require a "physical" change. The dictionary definition of "change" is simply that something is altered or caused to be different.

AMERICAN HERITAGE DICTIONARY 147 (3d ed. 1994). A change can occur to matters that are not physical. Laws can change, ideas can change, and costs can change. The Board ignored the plain meaning of the word "change" by adding "physical" as an additional requirement or modifier, and then eliminating all but "physical changes" from the rule's application. By adding the requirement that only "physical changes" require an amendment, the Board ignored the plain meaning of the text of the rule it adopted.

When the Board adopted Vt. P.S.B. Rule 5.408 it certainly could have included an express requirement that "change" means "physical change" or that an amendment is only required for a "physical change" to a proposal. The Board did neither. The Board is bound to apply its rules as written. *Heffernan v. Harbeson*, 2004 VT 98, ¶ 7, 177 Vt. 239, 242. It cannot later flout the plain meaning of its own rule and provide an interpretation that changes the rule's application and meaning. *In re Middlebury Coll. Sales and Use Tax*, 137 Vt. 28, 31 (1979).

#### B. History of Rule Supports No Physical Change Required

The Board's decision recognizes that it has considered changes to proposals and cost increases for projects a number of times in the past. *Vicon, supra* at 3-4; *Investigation into Citizens Utility Co.*, Order at 131, PSB Docket 5841/5859 (June 16, 1997); *In re Petition of* 

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<sup>&</sup>lt;sup>2</sup> The rule separately requires that changes be significant. Vt. P.S.B. Rule 5.408. Applying the rule as written does not open the door to requiring amendments for small or *de minimis* changes. *Vicon, supra* at 3-4.

Vermont Electric Cooperative, Inc., Declaratory Ruling at 6, PSB Docket 6544 (Feb. 20, 2002). The Board also recognizes that since 1997, it "has applied the Environmental Board's 'substantial change test' when determining whether a CPG holder must obtain Board approval prior to implementing a change to a certificated project." P.C. at 6. The Board's prior cases and later rule specifically modified the Environmental Board "substantial change" test to include changes that are potentially significant under any of the Section 248 criteria. Vermont Electric Cooperative, supra at 6; Vt. P.S.B Rule 5.408. This broadening the rule to include changes that have the potential for a significant impact expands the scope of the rule to include non-physical changes, since those changes have the potential to have an impact on the criteria.

Rule 5.408 was specifically 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). In that case there was also a significant cost increase. *Id.* That case did not limit the substantial change test to the manner in which it is applied in matters under Act 250. *Id.* The Board reviewed the change in that case pursuant to Vermont Rule of Civil Procedure 60(b) 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, supra* 20, fn.29.

Following the *Northwest Reliability Project* case, the Board adopted Rule 5.408. The text of the rule does not limit review only to physical changes and specifically incorporates project changes that have a potential for an impact on the criteria. Vt. P.S.B. Rule 5.408. 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 alone are sufficient to require an amendment where they have the potential to have an impact on the criteria.

#### C. Review Under Section 248 Broader than Act 250

The Board impermissibly applied the physical change requirement from case law interpreting Act 250 rules without recognizing the very real differences in the standards applied by Act 250 and 30 V.S.A § 248. Act 250 is Vermont's land use development law. 10 V.S.A. § 6081 et seq. The Act 250 criteria are incorporated into part of the 30 V.S.A § 248 review. 30 V.S.A. § 248(b)(5). The full review under Section 248 is far broader than Act 250 and it includes not only the environmental criteria that are part of Act 250, but also the broader criterion of whether the proposal will "promote the general good of the state," 30 V.S.A § 248(a)(3), and a wide range of criteria that are not affected by the physical attributes of a proposal. Review of a proposal under 30 V.S.A § 248 includes an evaluation of the economics of a proposal and an evaluation of overall need for a project. 30 V.S.A § 248(b)(2) and (b)(4). Review under 30 V.S.A § 248 also applies to more than physical projects, or physical manifestations of projects. 30 V.S.A § 248(b)(2), (b)(3) and (b)(4). It includes, for example, reviewing proposals for power contracts. 30 V.S.A. § 248(i). The broader review under 30 V.S.A. § 248, including whether a proposal promotes the public good and whether there is a need for the proposal, demonstrates that limiting an amendment to only physical changes undermines the statutory standards in 30 V.S.A § 248.

# D. Scope of Section 248 Review Precludes Physical Change Threshold

By imposing a "physical change" requirement as a prerequisite to seeking a new or amended CPG, the Board effectively removed, or rendered meaningless, the non-physical standards from the 30 V.S.A § 248 statute. By requiring a physical change before an amendment must even be sought, the Board's interpretation allows the clear standards affecting non-physical

aspects of a proposal to be ignored. Including this restrictive threshold forecloses consideration of the actual rule requirements and impacts on statutory criteria. *Yorkey*, 163 Vt. at 358.

The Board's narrow and erroneous interpretation fails to recognize that the VGS proposal is more than just a pipe in the ground. The pipe in the ground is simply the physical aspect of the project. The proposal also includes authorization to sell the gas that will flow through the pipe, the ability to charge all Vermont customers for the reasonably prudent costs associated with the proposal, 30 V.S.A. § 218, and a determination that the use and availability of such natural gas benefits Vermont's economy and environment. 30 V.S.A. § 248. The approval addresses how natural gas fits into Vermont's broader energy supply. 30 V.S.A. § 248(b)(2) and (b)(6). Those specific issues are allowed to be ignored by the Board's narrow interpretation of its rule.

The Board's "physical change" requirement allows proposals to move forward that ignore or undermine the clear statutory requirements. The Board's narrow and erroneous "physical change" threshold unreasonably shields companies from meaningful review. The Board's interpretation allows a company to submit unreasonably favorable – and even false – cost estimates or energy supply information that paint a rosy picture and entice approval. Once the approval is obtained – even if it is based on the unreliable or false information – unless a later physical change occurs, there will be no further, careful review to ensure the proposal actually delivers on the rosy promises and will "promote the general good of the state." 30 V.S.A § 248. Since it is only through an amendment process that the applicant – which itself has all the cost information – has the burden of proof and the burden of production, the Board's interpretation shields the applicant from thorough review and denies Vermonters the accountability they should expect from the regulatory process. See In re: Vermont Verde Antique International, Inc, 2001

WL 101739, at \*3 (burden on party with access to the information); 9 J. Wigmore, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981).

Knowing that a proposal must only be amended when a physical change occurs, companies are guaranteed a level of safety that shields their project from accountability to the very people the project is supposed to serve – Vermonters. This Court should not allow an erroneous standard that reduces accountability by requiring a "physical change" threshold before considering the actual statutorily mandated criteria. Instead, a re-evaluation through a CPG amendment process should advance whenever there is a change that might have a significant impact under the Section 248(b) criteria. This standard gives meaning to all the requirements of the statute, grants greater accountability to Vermonters, and encourages companies to submit project proposals that are sound and can reasonably be relied upon to satisfy the statutory criteria.

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 proposed project are key elements and key factors in determining whether the proposal "promotes the general good of the state" the Board erred in refusing to require an amendment and limiting review to only "physical" changes.

#### CONCLUSION

For the foregoing reasons the Court should 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.