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VIA EMAIL
September 20, 2016

VERMONT
ACT 250 District Commission # 1, 8
Application #: JO 1-390
Exhibit #: 003a
Date Received: 09/21/2016

Mr. William Burke
District 1 Coordinator
Natural Resources Board
440 Asa Bloomer State Office Building
Rutland, VT 05701

Dear Mr. Burke:

I write on behalf of Vermont Gas Systems, Inc. ("VGS") in response to your request for memoranda of law regarding a request for two Jurisdictional Opinions ("JOs") recently filed by Jim Dumont on behalf of unnamed clients (the "Dumont Request"). Mr. Dumont requests an opinion as to whether construction of the Addison Natural Gas Pipeline (the "ANGP") requires an Act 250 permit. We appreciate the opportunity to submit the legal arguments and facts as set forth below to support a conclusion that the ANGP project is not subject to Act 250 jurisdiction.

Attached hereto are maps depicting the ANGP as you requested, with paper copies and a disc to follow by mail. We will be happy to provide any additional information you require before making a decision.

I. Introduction.

VGS has been providing natural gas service to customers in northwestern Vermont since it was founded in 1965. VGS is in the process of building the ANGP, which will for the first time bring natural gas service to Addison County. This will allow both residential and industrial customers to achieve savings over fuel oil or propane, and also help to reduce greenhouse gas emissions.

VGS applied for, and received, a Certificate of Public Good ("CPG") for the ANGP from the Public Service Board ("PSB"). (*See generally* Exhibit 1 to Dumont Request.) The CPG was issued at the end of 2013. Numerous parties participated in the CPG proceeding, including the communities of Vergennes, Middlebury, Hinesburg, and Monkton, as well as the Addison County Regional Planning Commission. None of the parties raised the issue of PSB jurisdiction. Now, almost three years later, Mr. Dumont essentially seeks reconsideration of the PSB's decision. But he does not ask the PSB to reconsider its decision – rather, he questions the PSB in this forum, seeking a JO that the PSB did not have jurisdiction to approve the ANGP.

Mr. Dumont's conclusions that the ANGP project constitutes development under Act 250 requiring an Act 250 permit fail for a number of reasons.

First, the Section 248 process is designed to be mutually exclusive of Act 250 review. A project that is subject to PSB jurisdiction under Section 248 is not also subject to review under Act 250. Here, the ANGP is subject to Section 248 jurisdiction; the PSB reviewed the project under that statute and issued a CPG. Mr. Dumont should not be permitted to question the PSB's jurisdiction in any forum, much less a different forum, almost three years later. After-the-fact jurisdictional challenges as Mr. Dumont requests conflict with the finality of the PSB's order and hold the potential to inject significant uncertainty into the Section 248 process. Simply put, the PSB took jurisdiction, issued a final order and there are no pending appeals; the matter is closed.

Second, Mr. Dumont's collateral challenge on the PSB's jurisdiction is plainly without merit. The ANGP project reviewed by the PSB under Section 248 consisted of a transmission main line and clearly delineated facilities reasonably related to the transmission line consisting of interconnected distribution main line and three "gate stations," all of which were within the project boundaries. The facilities constitute an integrated project and were properly reviewed together by the PSB under its Section 248 jurisdiction. Mr. Dumont's suggestions to the contrary are incorrect.

Third, with respect to the "distribution improvements" in Middlebury, Vergennes, Hinesburg, and Monkton, VGS has conducted an analysis of the distribution systems and correctly concluded that no Act 250 permit is necessary. Under Rule 70 of the Act 250 Rules, the total involved land in each municipality is not more than 10 acres (the minimum acreage required for Act 250 review) and therefore does not trigger Act 250 jurisdiction.

For all of the foregoing reasons, and as explained in further detail below, the ANGP project is not subject to Act 250 jurisdiction.

II. Relevant Facts.

On November 7, 1963, the PSB granted VGS a CPG to organize and operate as a natural gas utility in Vermont. The CPG authorizes VGS to provide natural gas service throughout the

state, but until recently it only served customers in Franklin and Chittenden counties. On December 20, 2012, VGS submitted a petition to the PSB for a CPG for the ANGP. On December 23, 2013, the PSB issued a CPG, finding that the ANGP "will promote the general good of the State of Vermont" because it will provide residential and industrial customers with cost savings as well as reduce greenhouse gas emissions. (Exhibit 1 to Dumont Request at 146.) The PSB heard and considered the concerns of a number of intervenors in that proceeding as well as several post-CPG proceedings in which Mr. Dumont participated.

In its final order issuing the CPG, the PSB defined the ANGP project to include the following elements:

- "Approximately 41.2 miles of new 12-inch transmission pipeline, extending from a new tie-in to be located at Vermont Gas' existing 10-inch mainline north of Severance Road in Colchester ("Colchester Tie-In"), Vermont, to just north of the intersection of U.S. Route 7 and Exchange Street in Middlebury, Vermont (the "Transmission Mainline");"

- "Approximately 5.1 miles of new six-inch distribution mainlines ("Distribution Mainlines") that will extend distribution service to Vergennes (3.73 miles) and Middlebury (1.35 mile[s]); and"

- "Three new pressure regulation stations ("gate stations"), one located near Route 2 in Williston to reinforce the existing distribution system, one off Plank Road in New Haven, and the third north of the intersection of U.S. Route 7 and Exchange Street in Middlebury."

(Exhibit 1 to Dumont Request at 32-33.)[1]

The PSB took jurisdiction, reviewed and approved the Transmission Mainline, Distribution Mainlines, and gate stations in detail and issued extensive findings in its 149-page final order approving construction of the Transmission Mainline and Distribution Mainlines. (*See* Exhibit 1 to Dumont Request.) The proceeding was comprehensive, including the submission of hundreds of pages of pre-filed testimony, exhibits, extensive discovery and several days of hearings.

As noted by Mr. Dumont, in addition to the ANGP infrastructure already approved by the PSB, VGS plans to construct local distribution networks in Middlebury, Vergennes, Hinesburg, and Monkton. VGS has construction plans for the distribution networks in those municipalities,

[1] Mr. Dumont's request for a JO does not include the gate stations, but even if it did, they were part of the Section 248 CPG petition and were fully reviewed by the PSB in its final CPG order, and are accordingly not subject to Act 250 review.

but as explained further below, those plans are subject to change. Further, in the case of Monkton, service to the community will require the construction of a new gate station. The location for the gate station, which will require PSB approval pursuant to Section 248, has not yet been selected.

Current plans for the Middlebury distribution network contemplate 32.6 total miles of pipe throughout the town to distribute natural gas to future customers. To date, slightly less than half of that has been constructed. Most of the pipe in the Middlebury distribution network is within road rights of way where other utility lines exist. VGS has obtained the appropriate permit from the Middlebury Select Board to do work in the rights of way. The Vergennes distribution network is projected to consist of 14.5 miles of pipe, but none has yet been constructed. The Hinesburg and Monkton networks are projected to consist of 2.42 and 3.88 miles of pipe respectively. Like Middlebury, most of the pipe in the Vergennes, Monkton, and Hinesburg distribution networks will be within the road rights of way co-located with other utility lines, and will be constructed pursuant to Select Board permits to work in the right of way.

As explained further below, VGS has conducted an analysis under Rule 70 of the Act 250 Rules and correctly concluded that no Act 250 permit is required for its construction in Middlebury and Vergennes. Because most of the work to be performed is within the road rights of way or along private roads with existing utilities, most of the project does not involve construction of new corridor. The new corridor projected to be built involves approximately 2.86 acres of involved land in Middlebury, 0.69 acres of involved land in Vergennes, 0.32 acres of involved land in Hinesburg, and 0.24 acres of involved land in Monkton, well below the 10-acre threshold individually and collectively.

In Mr. Dumont's August 15, 2016 letter to you, requesting two JOs on behalf of "several" unnamed residents of Hinesburg and Monkton, he poses two fairly convoluted questions, but in essence he asks: (1) Does the entire ANGP require an Act 250 permit?; and (2) Do the 5.1 miles of Distribution Mainlines and local distribution networks require an Act 250 permit? In considering Mr. Dumont's requests, it may be more helpful to answer the questions reorganized as follows:

1. Does the ANGP project as approved by the Public Service Board, including 41.2 miles of Transmission Mainline, 5.1 miles of Distribution Mainlines, and three gate stations, require an Act 250 permit?; and

2. Do the local distribution networks in Middlebury, Vergennes, Hinesburg, and Monkton require Act 250 permits?

For the reasons set forth below, the answer to all of these questions, regardless of how they are framed, is no. Neither the portions of the ANGP approved by the PSB nor any of the local distribution networks require Act 250 permits.

III. Discussion.

A. Mr. Dumont's Collateral Attack On The PSB's Jurisdiction Is Improper In This Forum.

The PSB is a specialized regulatory agency tasked with reviewing and approving the construction of significant utility projects in the state. Among other things, it reviews and approves "natural gas facilities." A natural gas facility is a "natural gas transmission line, storage facility, manufactured-gas facility, or other structure incident to any of the above." 30 V.S.A. § 248(a)(3)(A).[2] Almost three years ago, the PSB issued a CPG under Section 248 for the ANGP. By its express terms, the Board's order approving the project and the associated CPG included the Transmission Mainline and Distribution Mainlines. (Exhibit 1 to Dumont Request at 145-46.)

Mr. Dumont does not, and cannot, deny the fundamental principle that governs his JO request: Construction projects subject to PSB review under Section 248 are not subject to review under Act 250. "[F]acilities that require a certificate of public good under 30 V.S.A. § 248 are defined out of the term 'development' by 10 V.S.A. § 6001(3)(D)(ii), and therefore do not trigger Act 250 jurisdiction." *In re Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, (Vt. Envt'l Ct. May 18, 2006) at 3-4.

As the Environmental Court explained in *Glebe Mountain*, Section 248 was designed to be mutually exclusive with Act 250 to avoid the problems often associated with "two stop shopping," where an applicant for a project must go through multiple review bodies that could come to conflicting decisions:

> There are strong policy arguments, upon which the record establishes that the Legislature relied, supporting the sole jurisdiction of the PSB over such facilities, chief among them is the wisdom of having one statewide board handle the integrated electric generation and transmission network, so that no single local body can put up a roadblock. Also, the PSB has an institutional memory and an ever-growing body of knowledge regarding the cases it oversees, in contrast to local or regional boards which would have to reinvent the wheel with every case.

Id. at 15

[2] Throughout this letter, citations to legal authority will be accompanied by hyperlinks to publicly available sources.

For similar reasons, Section 248 projects are also exempt from municipal zoning regulation. *See* 24 V.S.A. § 4413(b) ("A bylaw under this chapter shall not regulate public utility power generating plants and transmission facilities regulated under 30 V.S.A. § 248."). As the Vermont Supreme Court has explained, Section 248 projects are not subject to local zoning because if they were, it would give "single municipalities the power to subvert utility projects statewide in scope and broadly entrusted to a single planning and supervisory agency." *City of South Burlington v. Vermont Elec. Power Co., Inc.*, 133 Vt. 438, 448 (1975).

Because the Section 248 process is mutually exclusive of Act 250, the relevant Act 250 factors that would otherwise apply to a project are incorporated into the PSB's Section 248 review and given due consideration. *See generally* 30 V.S.A. § 248 (incorporating definitions from 10 V.S.A. § 6001 and review of projects pursuant to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K)); Exhibit 1 to Dumont Request, Findings 286 through 506. The Agency of Natural Resources ("ANR") is a statutory party to every Section 248 proceeding; it provides evidence and makes recommendations concerning the relevant Act 250 factors.

Mr. Dumont argues that the ANGP is not a "natural gas transmission line" as defined by Section 248 and therefore PSB did not have jurisdiction to approve it. This argument is inappropriate in this forum, and it should be rejected because such a review would contradict the principle of exclusive PSB jurisdiction under Section 248 and undermine the PSB's specialized expertise and judgment. Further, it would be contrary to Vermont Supreme Court precedent that warns against appeals to different tribunals in an effort to obtain a more favorable result. Finally, as noted above, the ANGP CPG was fully vetted, including two public hearings and numerous intervening parties. At no time was the PSB jurisdiction challenged.

Instead of challenging the PSB's jurisdiction over the ANGP in the PSB's permitting proceeding, Mr. Dumont mounts a collateral challenge to the PSB's jurisdiction in another forum. But to allow another forum to second-guess the PSB's jurisdiction – particularly years after it has ruled – would be to undermine the legislative wisdom the Environmental Court discussed in *Glebe Mountain* under which one statewide board handles review of an integrated utility network, also described as "one-stop shopping."

The Vermont Supreme Court considered the kind of conflict among decision-makers that Mr. Dumont's request invites in the *City of South Burlington* case. There, VELCO applied to the PSB for approval for a project largely located in South Burlington. South Burlington sought to require VELCO to obtain local zoning permits for the project, which would have effectively prevented its construction. VELCO sought a declaratory judgment from the PSB that it did not need a zoning permit. Rather than argue that point to the PSB, the City filed a declaratory judgment action in civil court. The two tribunals reached contradictory results, and both cases were appealed to the Vermont Supreme Court. The Court held that although the civil court had

concurrent jurisdiction to consider the question, it should have deferred to the PSB to make that determination:

> In general, as between two tribunals with concurrent subject matter jurisdiction, the one which first acquires such jurisdiction should exercise it, and the second in point of time should defer to the first . . . . We hold that the action of the Superior Court in proceeding to judgment, without honoring Velco's request for continuance pending action by the Public Service Board, was an abuse of discretion as a matter of law.

133 Vt. at 443. In its ruling, the Vermont Supreme Court cautioned against tactics like the one Mr. Dumont employs here, favoring resolution of disputes in a single forum rather than a competition between decision-makers: "It goes without saying that the spectacle presented by the pending cases, of parties resorting to different tribunals in a contest to secure a speedy and favorable result, is not one calculated to inspire public confidence in the judicial process." *Id.*

The Section 248 process is exclusive of other avenues of review in order to give applicants finality and eliminate the possibility of conflicting decisions among different decision-makers. The only way to honor the Legislature's intention is to defer to the PSB to decide questions affecting the scope of its jurisdiction.

B. The PSB Properly Exercised Jurisdiction Over The ANGP.

Even assuming *arguendo* that a request for JOs is a proper means by which to question the PSB's jurisdiction, Mr. Dumont's argument is meritless. The 41.2 miles of Transmission Mainline in the ANGP is a "natural gas transmission line" under 30 V.S.A. § 248. The Transmission Mainline is being designed, constructed, and operated as a transmission line pursuant to U.S. Department of Transportation, Office of Pipeline Safety, Code of Federal Regulations Title 49, Part 192 – Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards ("Code").

The 5.1 miles of Distribution Mainlines are reasonably related to the Transmission Mainline, and so they are also subject to PSB jurisdiction.

Under 30 V.S.A. § 248, a natural gas transmission line "shall include any feeder main or any pipeline facility constructed to deliver natural gas in Vermont directly from a natural gas pipeline facility that has been certified pursuant to the Natural Gas Act." Contrary to Mr. Dumont's assertions, Section 248 does not purport to list everything that constitutes a transmission line. The phrase "shall include" indicates an illustrative list, not an exclusive one. *See, e.g.*, *Bradshaw v. Joseph*, 164 Vt. 154, 156 (1995) ("The statute uses the word "includes," which ordinarily signifies an intent to enlarge a statute's application, not to limit it."); *Vermont Ass'n of Realtors, Inc. v. State*, 156 Vt. 525, 531 (1991) ("[T]he word 'including' in a statute is

ordinarily a word of enlargement, not one of limitation.") (citing cases); Black's Law Dictionary (8th ed.) 777 ("The participle *including* typically indicates a partial list.").

As its name suggests, the Transmission Mainline of the ANGP is plainly a transmission line, designed, constructed and operated pursuant to transmission-line standards. The 41.2 miles of pipeline from Colchester to Middlebury is essentially an express highway designed to extend the major infrastructure of VGS's natural gas service into Addison County. No customers are served directly from the Transmission Mainline. As the name suggests, the Transmission Mainline *transmits* natural gas from Chittenden County to Addison County, rather than *distributing* it to customers.

Mr. Dumont's reliance on a rate-making and cost allocation proceeding as the basis for calling the Transmission Mainline a distribution line is irrelevant and misplaced. (*See* Exhibit 4 to Dumont Request, hereinafter *McNeil Rate Decision*.) In that case, the PSB addressed whether the rate the owner of the McNeil power plant (Burlington Electric Department) would pay for natural gas purchased as a customer of VGS was just and reasonable. The *McNeil Rate Decision* involved the allocation of utility costs among different types of customers and the quantity of product used by larger customers (like industrial customers), determined under complex rate-design analysis. The *McNeil Rate Decision* is not relevant to the ANGP because that case did not involve the scope of Section 248 review – or Act 250.

McNeil asked for a different rate than other VGS customers based on the theory that it receives a so-called "transmission-only transportation service" because it did not use Vermont Gas' distribution infrastructure. The PSB denied McNeil's request to force VGS to offer a transmission *service*, ruling that for purposes of setting rates among customers, VGS's service to McNeil as a customer in Chittenden County was properly characterized as distribution, not transmission service.

As part of its discussion about what rate McNeil should pay for its natural gas service, the PSB made clear that VGS's system includes both transmission and distribution components, but held for cost allocation purposes in setting rates, the entire VGS system *functioned* as a distribution system. *Id*. at 25, 27, 32 (explaining that VGS does not meter gas flows between its "transmission and distribution facilities," discussing "transmission-or distribution-rated plant," and explaining that the question *for purposes of setting rates* is "whether the various plant[s] classified as 'transmission' and 'distribution' are functionally distinct"). Nowhere in the decisions did the PSB address the issue of Section 248 jurisdiction, much less conclude that transmission pipelines are not subject to Section 248, notwithstanding the clear and unambiguous language of the statute. Further, VGS has applied for and received multiple Section 248 CPGs for transmission pipeline facilities both before and after the 2003 *McNeil Rate Decision*. Because the *McNeil Rate Decision* addressed a rate-setting issue completely separate from the

scope of jurisdiction under Section 248, it has no bearing on the questions Mr. Dumont presents here.

In sum, the 41.2 miles of main line in the ANGP meets the plain definition of "transmission line," and thus the PSB properly exercised its jurisdiction over the project as it has done in other VGS pipeline cases.

The PSB also properly exercised jurisdiction over the 5.1 miles of Distribution Mainlines included in the Section 248 CPG. For more than ten years, the PSB has consistently held that "Section 248 review applies to facilities that are reasonably related to a generation or transmission facility." *In Re Vermont Elec. Co-Op., Inc.*, Docket No. 7201 (Vt. Pub. Serv. Bd. Aug. 24, 2006) at 3; *see also In Re UPC Wind Mgt.*, Docket No. 6884 (Vt. Pub. Serv. Bd. Apr. 21, 2004) (exercising jurisdiction over wind measurement towers that were "not only reasonably related, but directly related, to a generating facility").

To determine whether a facility is "reasonably related" to one that is subject to Section 248 jurisdiction, the Board asks whether the related facility would have been built "but for" the facility subject to Section 248 jurisdiction. *In Re Vermont Elec. Co-Op., Inc.* at 7 ("[B]ut for the proposed generation project, the upgrades to the Richford Road distribution lines would not be necessary."). The more "essential" or "necessary" the related component is to the component subject to Section 248 jurisdiction, the more likely it is to be reasonably related. *See, e.g.*, *Petition of Meridan Group, Inc.*, 4813-B (Vt. Pub. Serv. Bd. Feb. 4, 1993) (hearing officer holding that trash separating equipment was "essential part" of solid waste electric generation plant and therefore Section 248 rather than Act 250 applied); *In Re Emdc, LLC*, Docket 7037 (Vt. Pub. Serv. Bd. July 29, 2005) ("The Board has jurisdiction over wind measurement towers because such towers are a necessary component precursor to wind generation facilities."); *Petitions of Vermont Electric Power Co., Inc.*, Docket No. 6860 (Vt. Pub. Serv. Bd. Aug. 15, 2007) ("Although the proposed lay-down area is not, by itself, a transmission facility, it appears to be a necessary component for the construction of the Northwest Reliability Project.").[3]

Here, the Distribution Mainlines are both essential and necessary to the Transmission Mainline. The purpose of the ANGP is to bring gas to Addison County, including Middlebury and Vergennes. The Distribution Mainlines are an integral part of that purpose, and would not be built but for the Transmission Mainline. VGS could have achieved its purpose by designing the ANGP so that it included all Transmission Mainline and no Distribution Mainlines by locating the New Haven and Middlebury gate stations right at the beginning of the distribution

[3] When the Board holds that a component is not "reasonably related," that component is typically something unrelated to the utility business, like a brewery or a furniture factory. *In Re Vermont Elec. Co-Op., Inc.*, Docket No. 7154 (Vt. Pub. Serv. Bd. May 12, 2006) (no jurisdiction over Ethan Allen furniture manufacturing facility integrated with Section 248 jurisdictional generator); *Petition of PurposeEnergy, Inc.*, Docket No. 7570 (Vt. Pub. Serv. Bd. Dec. 31, 2009) (no jurisdiction over brewery that was closely integrated with Section 248 jurisdictional generator).

networks, but it would have required adding an additional transmission pipeline. Instead, VGS accomplished that same purpose by utilitizing Distribution Mainlines to reach those towns. Thus, the Distribution Mainlines are "reasonably related" to the Transmission Mainline. The Distribution Mainlines were properly within the scope of Section 248, and the PSB properly authorized their construction as part of the CPG:

> **The proposed construction of the "Addison Natural Gas Pipeline" consisting of** approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, **approximately 5 new distribution mainlines in Addison County**, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont (the "Project"), by Vermont Gas Systems, Inc. ("VGS"), **will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248 and a certificate of public good to that effect shall be issued**.

(Exhibit 1 to Dumont Request at 145-46; *see also id.* at 36-37 (describing the Distribution Mainlines in detail.))

Because the PSB properly exercised jurisdiction over the Distribution Mainlines, they are not subject to Act 250. In Docket 7201 (the 2006 VEC case), the PSB exercised Section 248 jurisdiction over distribution lines that connected to a power generation project. Considering whether those distribution lines were subject to Act 250 review, the PSB held:

> As for whether particular facilities fall under the jurisdiction of the Board or the District Environmental Commissions, that issue is determined by reference to the definition of "development" in Act 250. "Electric generation or transmission facilities that require a certificate of public [good] under 30 V.S.A. § 248 are defined out of the term 'development' by 10 V.S.A. § 6001(3)(D)(iii), and therefore do not trigger Act 250 jurisdiction." Again, the pertinent question is whether the upgrade of the distribution lines is reasonably related to the proposed Berkshire project such that the upgrades should be considered a part of the generation project and therefore reviewed under Section 248.

In Re Vermont Elec. Co-Op., Inc., Docket No. 7201 (Vt. Pub. Serv. Bd. Aug. 24, 2006) at 8.

Simply put, because the PSB appropriately considered the 5.1 miles of Distribution Mainlines as part of the project, reviewed them under Section 248, and issued a CPG for them, they are not subject to Act 250 review and jurisdiction.

C. There Is No Act 250 Jurisdiction Over The Local Distribution Networks.

Before conducting the analysis to determine whether Act 250 jurisdiction attaches to the local distribution networks, it is worth noting that while VGS has construction plans for Middlebury, Vergennes, Hinesburg, and Monkton, there is some uncertainty as to whether all of the planned pipe will actually be built. Outside of the public rights-of-way, VGS needs easements from private landowners in order to build out its distribution network to serve those landowners. For example, in order for a private development to receive natural gas service, it must grant an easement to allow VGS to expand its distribution network to the development. VGS cannot force its services on residents and customers and does not build distribution networks if the customers on a given street do not want gas service.

At the moment, VGS does not have agreements with private landowners for all of the planned portions of its distribution networks. Those may be built in the future if the landowners desire natural gas service, or they may never be built. For purposes of this Act 250 analysis however, VGS takes a conservative view and includes all proposed, planned portions of the local distribution networks, even the ones that may never be built.

Pursuant to the Act 250 Rules adopted by the Natural Resources Board, the installation of utility lines is governed by Rule 70 (entitled "Utility Line Jurisdiction, Installation and Applications"). Under that Rule, Act 250 jurisdiction is triggered if the utility line project involves more than ten acres of land in a municipality with permanent zoning and subdivision bylaws. All of the municipalities involved here have permanent zoning and subdivision bylaws and are therefore 10-acre towns for purposes of Act 250 jurisdiction.

To calculate whether a project involves more than ten acres of land is a multi-step process. First, the only portions of the project that count toward the acreage calculation are those involving "new corridor," not "existing corridor." Existing corridor is "a right-of-way cleared and in use for electrical distribution, communication lines, natural gas distribution lines and related facilities." New corridor is any corridor outside of an existing corridor, or an existing corridor that is to be substantially changed. Second, the involved acreage is calculated by multiplying the linear feet of new corridor by the larger of a minimum width, or the width of the area to be physically altered. The Rule assumes that natural gas distribution lines will involve a 10-foot width unless the width of the area to be physically altered is greater than ten feet.[4] The area to be physically altered by the distribution networks is 10 feet or less in width and therefore the proper width for calculation acreage is the minimum 10 feet required by Rule 70 for natural gas distribution pipelines. Here, the amount of new corridor involved in the Middlebury and

[4] In his request for a JO, Mr. Dumont references a "75-foot wide corridor" for construction, but as Mr. Dumont acknowledges, that figure is only for the Transmission Mainline and Distribution Mainlines. (Dumont Request at 6.)

Vergennes distribution networks is well under the 10-acre threshold to trigger Act 250 jurisdiction.[5]

Attached to this letter is a list of all of the locations included in the local distribution networks, along with the relevant information about the locations. Each location includes: (1) what municipality it is located in; (2) the linear feet of pipe associated with that location; (3) its construction status; (4) whether it is in a public right-of-way or on private land; and (5) whether it is "new" or "existing" corridor, based on whether the right-of-way also includes existing utility lines.[6] The pipes whose construction status is "Customer Choice" indicate pipes that will only be constructed if the customers they would serve desire natural gas service, and allow VGS easements over land necessary to reach them. Also attached is a summary table with acreage calculations for new and existing corridor in each municipality based on the data in the list.

As shown in the attached list, the distribution networks involve mostly existing corridor, not new corridor. That is because the majority of the pipes in the distribution network are within public rights-of-way that have existing utility lines in them.[7] Additionally, where VGS places pipes on private land outside of the public right-of-way, it is often doing so along private roads that also have other utilities on them.

The local distribution network in Middlebury is projected to involve construction of 165,259 linear feet of pipe along existing corridor.[8] The Vergennes network is projected to include 73,759 linear feet of pipe along existing corridor. Hinesburg is projected to involve 11,390 linear feet of pipe along existing corridor, and Monkton is projected to involve 19,465 linear feet of pipe along existing corridor.

Installation of the pipes for the local distribution networks does not constitute a "substantial change" to the existing corridor, because it will not have a significant adverse impact under any of the ten Act 250 criteria listed in 10 V.S.A. § 6086(a). Before examining the criteria individually, it is helpful to more generally describe the process for installing the distribution pipe.

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[5] If the amount of new corridor is more than the 10-acre threshold, there is an additional step that may then be taken to exclude acreage for underground utility lines involving a determination of whether those lines cross through certain sensitive areas. *See* Rule 70(B)(1)(d). Because the total new corridor involved here is less than 10 acres, that analysis is not necessary for this project.

[6] Any portions of the distribution networks that were once planned but that VGS no longer intends to install are not included on the attached list.

[7] VGS obtains permits from the Town Select Boards to do work within the road right-of-way.

[8] Note that Orchard Lane, Otter Creek Lane, Pleasant View Terrace, and Pulp Mill Bridge Road are just across the border in Weybridge, but classified as part of the Middlebury distribution network. Those portions do not include any new corridor.

VGS uses one of two methods to install the pipe for its distribution networks: (1) open trenching; or (2) direct boring. Open trenching for a pipe in the local distribution network (*i.e.* not the Distribution Mainline) involves digging a trench that is one foot wide and three feet deep, and placing the disturbed soil a few feet away from the trench. After the pipe is laid, the same soil is placed back into the trench and re-seeded within 24 hours. Typically, the trenches are not open for more than a day. There is no blasting associated with placing the pipe. If construction crews encounter ledge, they hammer it.

Direct boring involves a boring machine that installs 400-foot sections of pipe at a time. Approximately every 400 feet, crews dig a 3-foot by 3-foot section that is used to fuse two sections of pipe together. If construction is to occur in an area that would have a higher potential for environmental impact, VGS uses the direct boring method rather than open trenching. In the event of inclement weather, construction crews typically do not install pipe, but instead perform other tasks or take the day off.

Installation of the distribution pipelines in existing corridors will not substantially change the existing corridor. Under Rule 70 of the Act 250 Rules, all existing corridor that is substantially changed is included in the acreage threshold for jurisdiction. A "substantial change" means any cognizable change . . . which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10). See Rule 2(C)(7). The Vermont Supreme Court has adopted a two part test for the substantial change analysis. *In re Vermont RSA Ltd. P'ship*, 2007 VT 23, ¶ 10, 181 Vt. 589 (2007). First, there must be a cognizable physical change to the existing development. *Id.* A cognizable change is a physical change or a change in use. See *In re Request for Jurisdictional Opinion re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A*, 2015 VT 41, ¶ 22, 198 Vt. 510. Second, if there is a cognizable change, that change must have the potential for a significant impact under one or more of the Act 250 criteria. *Id.*

Here, the installation of the distribution lines does not trigger either factor of the substantial change analysis. First, there is no cognizable physical change proposed for the existing corridors. The corridor width, integrity, and appearance will all remain the same. Moreover, the existing corridors currently act as routes for one or more utility lines. The addition of a small, unobtrusive natural gas distribution line under the surface in a road right of way used by other utilities is a use contemplated by the existing corridor and in conformance with the existing activity. See *North East Materials Group LLC, Act 250 JO #5-21*, 2015 VT 79, ¶¶ 22–30 (discussing how substantial change analysis incorporates existing activities). An additional line under the surface of the existing corridor is not, therefore, a cognizable physical change to the existing corridor.

Second, even if the addition of the distribution lines constitutes a cognizable physical change, the proposed project does not have the potential to significantly impact any of the Act

250 criteria listed in 10 V.S.A. § 6086(a). Initially, it bears noting that the distribution networks are being constructed in a manner that will minimize the impacts of any land disturbance because the networks are designed to run primarily within road rights of way, and they are all located underground. Rule 70 expressly provides that underground installations should be installed whenever feasible. In the case of natural gas distribution, all the facilities are underground. Further, while Rule 70 specifies a 10-foot easement, the actual disturbed area is less than 2 feet wide when open trenching is deployed and little to no land disturbance occurs when boring technology is employed.

Review of the ten criteria reveals that the local distribution networks will not, to the extent they apply, significantly adversely impact any of them as set forth below.[9]

1. Air and water pollution – As described above, construction involves minimal soil disturbance through small trenches or direct boring, with removed soils being placed back into place following the pipe installation. Pipe installation will not involve the injection of waste materials or harmful or toxic substances into ground water or wells, and will not produce significant air pollution. Re-seeding, where applicable, will occur within 24 hours. The operation of the pipeline will not require water supply or restrict or divert the flow of water. Further, to the extent the local distribution networks will traverse streams or wetlands, the natural condition of the streams, shorelines, and wetlands will be maintained by use of direct boring under the affected area. VGS obtains applicable permits to ensure that there is no adverse impact and that all applicable regulations are complied with.

2. Water Supplies – Operation of the distribution networks does not require a water supply.

3. Burden on Existing Water Supply – Operation of the distribution networks does not require a water supply.

4. Soil Erosion and Drainage – As described above, re-seeding will occur within 24 hours of any land disturbance, and any soils removed from the ground will be replaced, typically on the same day. Installation of the distribution network pipes does not involve the creation of more than one acre of impervious land; in fact no additional impervious surfaces are created.

5. Transportation – Pipelines are buried and therefore do not impede traffic or cause unsafe conditions. During the temporary period of construction in or along road rights of way,

[9] Should you require any additional information about these criteria, please let us know and we will provide it.

VGS implements appropriate traffic control measures and maintains an open lane of traffic during construction.

6. Education – No employees of VGS will be relocated in connection with the construction of the distribution networks, and therefore no unreasonable burden will be placed on schools.

7. Municipal Services – The provision of natural gas service involves the replacement of one fuel service for another and as such do not impose any additional burden on municipal services. Further, Vermont Gas provides regular training, at no cost to the municipality, for local and regional emergency responders. The distribution networks will not require additional municipal services, nor shall they generate additional traffic, require water supply, or waste disposal. VGS obtains permits for work in road rights of way as required.

8. Scenic Beauty, Historic Sites and Natural Areas – Service pipelines are all underground, and therefore do not impact scenic views or aesthetic criteria. As required by the Assurance of Discontinuance, VGS notifies Scott Dillon of the Division for Historic Preservation of all potential distribution projects. Because most of the pipes in existing corridor are in or along public rights-of-way, they are unlikely to pass through sensitive areas. However, wherever they do, VGS uses the direct boring method or reroutes to minimize any impact.

9. Criterion 9 contains many different criteria, some of which are of limited applicability. They are briefly summarized as follows.

    a. Criterion 9(A): Installation and operation of the distribution pipelines will not adversely impact the financial capacity of the towns to accommodate economic and population growth and the project will not adversely impact property values or adversely affect the cost of other municipal services.
    b. Criterion 9(B): Because nearly all of the existing corridor is along either public or private roads, there is minimal potential for adverse impact to prime agricultural soils.
    c. Criterion 9(C): The distribution networks will not adversely impact primary forestry soils and will not reduce the capacity of those soils to support commercial forestry. VGS is not aware of any commercial forestry operations along the proposed distribution pipelines.
    d. Criterion 9(D): The distribution pipelines will not interfere with extraction of mineral or earth resources.

e. Criterion 9(F): The pipelines will not increase the demand for public utility supplies and reflects principles of energy conservation by providing homes and businesses with access to natural gas, a cleaner energy source than alternatives that may be used. VGS also offers energy efficiency programs to its customers.
f. Criterion 9(K): The pipelines will be within existing public rights of way, often adjacent to governmental and public facilities. Because the pipes will be placed underground and have a minimal footprint, the pipes will not unnecessarily or unreasonably endanger the public investment in these facilities and will not materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facilities.
g. Criteria 9(H), (F), (G), and (L): These criteria are inapplicable to the proposed pipelines.

10. Local and Regional Plans – The distribution networks are in conformance with the relevant local and regional plans. VGS has memoranda of understanding with all four of the municipalities that are the subject of this JO request and the Addison County Regional Planning Commission.[10]

Excluding the existing corridor described above, there are 12,468 linear feet of new corridor in the Middlebury distribution network; 2,984 linear feet of new corridor in the Vergennes distribution network; 1,380 linear feet of new corridor in the Hinesburg distribution network; and 1,035 linear feet of new corridor in the Monkton distribution network. Installation of that new corridor will not physically alter more than 10 feet in width at any point, so the acreage is calculated by multiplying the linear feet by the assumed 10-foot width for natural gas distribution lines.[11] That calculation results in 2.86 acres of involved land in Middlebury, 0.69 acres in Vergennes, 0.32 acres in Hinesburg, and 0.24 acres in Monkton.

Each of the municipalities involved here is more than five miles apart from every other involved municipality.[12] Because the networks are in different towns and because they are separated from one another by more than five miles, they must be considered separately for

[10] For the same reasons, any portions of the local distribution networks in existing corridor that pass through a parcel of land already subject to an Act 250 permit will not involve a material change such that Act 250 jurisdiction attaches. Further, pursuant to the Assurance of Discontinuance between VGS and the Natural Resources Board, VGS notifies a district commissioner before commencing construction on any portion of a local distribution network subject to an existing Act 250 permit.

[11] While Rule 70 prescribes a 10 foot easement width, and VGS used that for its calculations, the actual disturbed area is far less.

[12] At their closest points, the distance between the Vergennes and Monkton networks is 6.12 miles and the distance between the Monkton and Hinesburg networks is 6.18 miles. All of the other distances between the networks are in excess of 8 miles.

purposes of calculating acreage. 10 V.S.A. § 6001(3)(A)(i) (development is "construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land ***within a radius of five miles*** of any point on any involved land") (emphasis added); *see also* Act 250 Rules, Rule 2(C)(5)(a) (same); Act 250 Rules, Rule 70(B) ("***In a municipality*** with both permanent zoning and subdivision bylaws, this jurisdiction will apply if the rights-of-ways or easements involve more than ten acres of land.") (emphasis added).

The involved land in each of the four municipalities is well under the 10-acre threshold to trigger Act 250 jurisdiction. Even in the municipality with the largest amount of involved land – Middlebury – the total area is under three acres. Further, even if the four municipalities were considered together – which they should not be – the total involved land is still significantly less than the 10-acre threshold at 4.09 acres.

Finally, although it is not relevant to the question of whether there is Act 250 jurisdiction over any aspect of the ANGP or the distribution networks, Mr. Dumont suggests in his request for a JO that VGS has not complied with the Assurance of Discontinuance (AOD) it executed with the Natural Resources Board in 2008. That is simply not true. Consistent with the AOD, VGS has notified a district commissioner when it plans to construct a portion of a local distribution network that would pass through lands already subject to Act 250 permits, and it has notified the Vermont Division of Historic Preservation of its construction plans at least annually to determine whether it could potentially impact archeologically sensitive areas.

Thank you for your consideration of this matter, and please let us know if we can provide any additional information that you need in order to make your decision.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.

Diane M. McCarthy

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