STATE OF VERMONT
PUBLIC SERVICE BOARD

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| Amended Joint Petition of Central Vermont Public Service Corporation, Danaus Vermont Corp., Gaz Métro Limited Partnership, Gaz Métro inc., Northern New England Energy Corporation for itself and as agent for Gaz Métro Limited Partnership's parents, Green Mountain Power Corporation and Vermont Low Income Trust for Electricity, Inc. for approval of: (1) the merger of Danaus into and with Central Vermont, (2) the acquisition by Northern New England of the common stock of Central Vermont, (3) the amendment to Central Vermont's Articles of Association, (4) the merger of Central Vermont into and with Green Mountain, and (5) the acquisition by VLITE of a controlling interest in Vermont Electric Power Company, Inc. | ) | Docket No. 7770 |

**RESPONSE OF THE DEPARTMENT OF PUBLIC SERVICE TO MOTION TO INTERVENE AND OPPOSITION TO PETITION TO APPOINT INDEPENDENT COUNSEL**

The Department of Public Service ("the Department" or "DPS") files this Memorandum in Opposition to the Motion to Intervene and Petition to Appoint Independent Counsel. As set forth below, the Board should deny the petition to appoint independent counsel and should deny the motion to intervene as of right based upon the Movants' failure to satisfy the criteria set forth under Board Rule 2.209(A). The Department does not oppose intervention by permission.

FACTUAL BACKGROUND

In June 2011, Gaz Metro announced a bid to acquire CVPS and merge it with GMP, seeking to displace an acquisition bid made a month earlier by a Newfoundland utility holding company, Fortis. The CVPS board accepted the Gaz Metro offer.

Governor Shumlin voiced support for the GMP/CVPS merger, stating:

I have always said that I prefer Vermont ownership of our state's utilities, but if that goal is not achievable, I have also said that I have three criteria for any sale involving utilities. First, I want to know that the transaction is good for ratepayers. Shareholders will do just fine in any acquisition — my interest is in getting the best rates for Vermonters and growing jobs. Second, I want to know that our transmission infrastructure will be modernized to distribute community-produced power. Third, I want to know that this will lead to greater use of renewables, because I believe our energy future depends on growing our renewable portfolio.

With those criteria in mind, I have given initial review of the offer made today by the parent company of Green Mountain Power to consolidate GMP with Central Vermont Public Service. At first glance, I believe this proposal has value for Vermonters and for job creation.

While the details need careful review, the proposal addresses a set of key goals, by bringing significant savings through consolidation without worker layoffs. The savings are very important — we all know that energy costs and transmission costs likely will rise into the future, and we need smart efficiencies to counteract those pressures. The proposal as described also brings a piece of Vermont's transmission company, and the value it generates, to state ownership, giving all Vermonters a seat at the table as we meet our transmission challenges. Finally, GMP has a strong commitment to investing in Vermont's renewable energy future and a track record to prove it.

I have asked our Department of Public Service to review this proposal carefully. Ultimately, they and the Public Service Board will determine the outcome of the regulatory process.

That process is underway. The Director for Public Advocacy, John Beling, is leading the DPS review of the merger. He has assigned DPS's longest-serving legal staff member, Geoff Commons, who has over 21 years of experience regulating the utilities involved in this merger, as co-counsel. The Department has propounded 89 separate requests for information, which are on file with the Board. A number of these requests are directed at that aspect of the proposal dealing with VELCO. In addition, the Department has retained the services of Michael Dworkin, former Chair of the Public Service Board and currently a professor and Director of the Institute for Energy and the Environment at Vermont Law School. Mr. Dworkin has been retained specifically to assist the Department and provide testimony regarding the VELCO portion of the merger. The Department is also retaining a financial expert to assist its review.

The Department has concerns regarding several aspects of this transaction, including the structure and accountability of the VLITE/VELCO proposal, and expects to vigorously advocate for the public interest in this matter.

In addition, to date, fifteen parties[1] other than the Movants have moved to intervene in this docket, including six that have asserted specific interest under the intervention criteria in the VELCO aspects of this transaction. The Department does not object to their motions.

I. The Petition to Appoint Independent Counsel Should be Denied

A. The Role of the Department and Public Advocate

The Department of Public Service directs "the execution of all laws relating to public service corporations and firms and individuals engaged in such business," including acquisitions, consolidations, and mergers of such companies. 30 V.S.A. §§ 2(a)(1) & (8). The legislature vested appointment of the commissioner of the DPS in the governor, and further required that in all proceedings before the Public Service Board, "the department, through the director for public advocacy shall represent the interests of the people of the state, unless otherwise specified by law. In any hearing, the board may, if it determines that the public interest would be served, request the attorney general or a member of the Vermont bar to represent the public or the state." 30 V.S.A. §§ 2(b).

B. Grounds for Appointing Independent Counsel

The Board has discretion to appoint an independent public advocate under 30 V.S.A. § 2(b) and 30 V.S.A. § 217 ("[i]n any proceeding, the board may request the appearance of the

[1] These are: the American Association of Retired Persons ("AARP"), Assoc. Indust. of Vt. (AIV), Ampersand Gilman Companies, Burlington Electric Department ("BED"), The International Brotherhood of Electric Workers ("IBEW"). International Business Machines ("IBM"). Omya, Stowe Electric ("SED"), Renewable Energy Vermont ("REV"), the City of Rutland, Vermont Electric Cooperative ("VEC"), VELCO, Vermont Public Interest Research Group )"VPIRG"), Vermont Public Power Supply Authority ("VPPSA"), Vt. Ski Areas ("VSAA") and Washington Electric Cooperative ("WEC").

attorney general or appoint a member of the Vermont bar to represent the interests of the public or state"). Though the statutory provisions do not themselves specify the grounds for the appointment, the Board has used this power "sparingly, focusing on instances in which 'specific institutional or structural reasons that seemed likely to conflict with the Department's ability to carry out the role that the laws of the State have assigned to it.'" *In re New England Telephone and Telegraph Company dba Bell Atlantic-Vermont*, Docket No. 6000, Order of 3/20/98 at 2 (citation omitted).

The Board has found independent counsel appropriate "when (1) a conflict appears to exist between the Department's role as a public advocate and its role pursuant to a separate statutory requirement,[2] or (2) when the Department is not able to commit the resources to adequately review and present a case." *See Tariff filing of Citizens Utilities Company requesting an 8.5% rate increase to take effect April 1, 1995*, Docket 5809, Order of 9/14/94 at 3-4.

The Department is not expected to be a disinterested party, but is charged with evaluating the evidence and formulating a position:

> [O]ur decision whether to appoint independent experts does not depend on whether the Department has – or (as in some other cases) has not -- taken a position. Instead, we focus on the more important question of whether the parties and the record they present (or are expected to present) provide adequate information for our consideration and resolution of the issues presented by a petition before us.

*Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output*, Docket 6812, Order of 3/15/04 at 6-7.

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[2] Examples of this were where the Department acted as a buyer and seller of Ontario power to other Vermont utilities, and where the approval of the Vermont Telecommunications contract expressly provided for the appointment of a public contract advocate to represent the interests of the public. *See Petition of Vermont Department of Public Service for Approval of Ontario Hydro Electric Power Purchase Contracts, and Associated In-State and Out-of-State Wholesale Sales*, Docket No. 5248 Order of 2/26/88; *Investigation of proposed Second Vermont Telecommunications Agreement*, Docket No. 5540 Order of 10/23/91.

C. There Is No Basis for Appointment of an Independent Counsel Here

Under this precedent, the Movants' request for independent counsel should be denied. Movants have not shown that the Department's role as public advocate in this case is inconsistent with its role pursuant to a separate statutory requirement, nor have they shown that the Department lacks sufficient resources to fulfill its role.

While Movants have not cited or relied on any Board precedent to support their petition, the Department recognizes that the Board's appointment authority under Section 2(b) of Title 30 can extend to other situations "if it determines the public interest would be served." The Department submits that no such situation exists in this Docket.

The first basis identified by the Movants as a reason for appointment of an independent counsel is Governor Shumlin's stated support for the merger, coupled with the fact that the governor appoints the commissioner of the Department. *See* Motion to Intervene and Petition to Appoint Independent Counsel at 7.

It is expected that a governor will comment upon and offer opinions regarding important events and matters of public policy, including those involving energy. Yet the Department is designated to represent "the interests of the people of the state," and serves in that role as an expert in utility issues. A conclusion that the Department cannot serve its assigned role due to a governor's expression of general support in a particular matter would render the Department routinely unable to fulfill its statutory function.

Moreover, the governor's statement following announcement of Gaz Metro's bid is entirely consistent with the Department's mandate as set forth in statute:

> To assure, to the greatest extent practicable, that Vermont can meet its energy service needs in a manner that is adequate, reliable, secure and sustainable; that assures affordability and encourages the state's economic vitality, the efficient use of energy

> resources and cost effective demand side management; and that is environmentally sound.

30 V.S.A. § 202a. The governor noted his views on the key factors that are indeed at issue in this merger, and also noted that the Department must review the merger proposal to ensure that the public good is fulfilled. Ultimately, of course, in this and other utility matters the legislature has vested decisional authority in the Board.

As the Board has noted,

> Vermont statutes make it clear that the Department is expected to take and advocate explicit positions upon difficult policy questions. Doing so will inevitably lead to disputes about the merits of its choices. Experience persuades us that it will be more productive for the Board to resolve those disputes by considering the evidence in specific cases, rather than by requiring examinations of the Department's internal policy deliberations.

*Tariff filing of Green Mountain Power*, Order of 10/22/91, Docket 5532, at 3.

The second basis for appointment identified by the Movants is the Commissioner's husband's employment at a law firm that represents GMP, among other utilities; there is no allegation that he has represented GMP or any other utility in front of the Public Service Board. *See* Motion to Intervene and Petition to Appoint Independent Counsel at 7. The allegations regarding Commissioner Miller are without merit.

State appointees such as Commissioner Miller and the director for public advocacy are subject to and follow Executive Order 09-11, Executive Code of Ethics ("Ethics Code"). The Ethics Code states:

> "Conflict of interest" means a significant interest, of an appointee or such an interest, known to the appointee, of a member of his or her immediate family or household or of a business associate, in the outcome of any particular matter pending before the appointee or his or her public body. "Conflict of interest" does not include any interest that (i) is no greater than that of other persons generally affected by the outcome of the matter, or (ii) has been disclosed and found not to be significant.

Appearance of conflict is also defined in the Ethics Code:

> "Appearance of a conflict of interest" as used below in §§ III (A) (2) and (7) means the impression that a reasonable person might have, after full disclosure of the facts, that an appointee's judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest.

Ethics Code § I (B) & (C).

The Ethics Code further provides specific requirements for direct and indirect financial interests of appointees:

> (1) No full-time appointee shall be the owner of, or financially interested, directly or indirectly in any private entity or private interest that is subject to the supervision of his or her respective department or agency, except as a policyholder in an insurance company or a depositor in a bank. (3 VSA 204). For the purpose of this Executive Order, a direct or indirect financial interest excludes:
>
> > (i) any insignificant interest held individually or by a member of the appointee's immediate household or by a business associate, or
> >
> > (ii) any interest which is no greater than that of other persons who might be generally affected by the agency's or department's supervision.

Ethics Code § III (A)(1).

There are no allegations made, nor is there factual support for a finding, that any of these provisions have been or will be violated by the Department's service in this matter. The employment of the Commissioner's spouse at a law firm which, through other lawyers at the firm, represents some of the Petitioners here does not lead to "the impression that a reasonable person might have, after full disclosure of the facts, that an appointee's judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest." Ethics Code, § I (B). There are no allegations made, nor is there factual support for a finding, that the Commissioner's husband has a financial interest in any entity subject to supervision of

the Department (or Board), or financially benefits from the outcome of any individual matter before the Board, when this merger or any other regulatory matter is handled by other members of his law firm.

Although Commissioner Miller does not serve as counsel for the Department, there is also no legal conflict presented by her husband's employment. In an analogous situation, courts have found that no conflict of interest exists due to a financial interest where the spouse of a government lawyer is a partner at an opposing law firm. *See U.S. v. Tierney*, 947 F.2d 854 (8th Cir. 1991), *reh'g denied,* (8th Cir.1991). In *Tierney*, a prosecutor's spouse, who did not participate in the case, was a partner in a law firm representing an insurance company which had sued the criminal defendant in a civil matter and would benefit from a guilty verdict. *Id.* at 865. The District Court found that because the law firm was paid on an hourly basis, the law firm itself would not benefit from a guilty verdict. *Id.* The husband's interest as a partner in the firm was therefore too remote and speculative an interest to be prohibited. *Id*; *see also In re TPI International Airways, Inc. v. United States Trustee*, 1998 WL 34064504, *6 (Bkrtcy.S.D.Ga.) (no conflict of interest due to financial interest where spouse of Assistant U.S. Trustee was partner in law firm involved in bankruptcy litigation and billed on an hourly basis).

Movants have not made any allegations that support a finding that either the Commissioner or the director of public advocacy has an actual conflict of interest or that there is a basis for finding an appearance of the conflicts of interest noted in the applicable legal and ethics codes. A reasonable person should not have the impression that either the Commissioner's or the director's "judgment might be significantly influenced by outside interests" due to the remote and speculative interest that the Commissioner's spouse may have in work his firm is performing but in which he is not participating.

While the Department strongly believes that the Petition for appointment of independent counsel is without merit, it agrees with one allegation made in the Petition: this is a very important and complex case for the State of Vermont. If the Board finds it useful, the Board may, as it has done in other matters, invoke its authority under 30 V.SA. § 20(a)(1) to hire its own expert consultant or consultants to assist it in this proceeding.

II. The Motion to Intervene as of Right Should be Denied

The Movants make three arguments to support their intervention argument: (1) that 30 V.S.A § 208 provides a statutory basis to intervene in this proceeding; (2) that they meet the substantive criteria for intervention as of right under Board Rule 2.209(a) and (3) the Board should grant permissive intervention under Board Rule 2.209(b). *See* Motion and Petition at 2-5.

30 V.S.A. § 208 provides a mechanism for five ratepayers to bring a complaint against a utility "concerning any claimed unlawful act or neglect adversely affecting the complainant," and does not grant such complainants the right to intervene in any proceeding against that utility. While the Vermont Supreme Court has recognized that 30 V.S.A. § 208 "clearly indicates the Legislature's determination that those who wish to do so are to be allowed to have a voice in power supply issues," and that "[i]ntervention allows ratepayers to assert their *own interests* in appropriate cases," it has also made clear that those ratepayers must demonstrate a particularized, individual interest in the proceeding. *See In re Vermont Public Power Supply Authority*, 140 Vt. 424, 432 (1981)(emphasis supplied). The court in that case found that the particularized interest of the ratepayers in that case, repayment of a loan, was sufficient to permit intervention as of right. *Id.*

Therefore, while 30 V.S.A. § 208 is relevant insofar as it indicates legislative intent to ensure that ratepayers with an individual interest be heard, it does not provide a separate

statutory basis for intervention as of right. Instead, motions to intervene by ratepayers are governed by Board Rule 2.209. *See Tariff filing of Green Mountain Power*, Docket 5532, Order of 11/21/91 at 1 ("[w]hile [a petition signed by five ratepayers] may satisfy the requirement under 30 V.S.A. § 208 that a claimant represent five or more ratepayers, it does not establish that any of the ratepayers has a legitimate interest in intervening in this proceeding").

Board Rule 2.209(A) provides as follows:

> Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

Movants have not identified a statute which provides them with an unconditional or conditional right to intervene under 2.209(a)(1) & (2). Movants have also failed to establish the criteria required under 2.209(a)(3). Movants identify their "substantial interest" in this matter as:

- Concerns over the future operation and ownership of VELCO;
- The long term impacts of the VELCO transaction on the state, its economy and its environment.

*See* Motion and Petition at 3. Putting aside whether the Movants' factual statements regarding these interests as set forth in the Petition are accurate, these are general concerns that are not particularized as to the Movants, and they provide an inadequate basis for a motion to intervene as of right.

As stated by the Board:

> To establish a right to party status, it is not sufficient simply to assert historical, speculative and tangential "interests;" it is necessary to demonstrate a material impact on a legally cognizable interest that could result or could be avoided by the relief sought by the petitioner.

*Investigation of Alpine Haven, Inc.*, Docket 5555, Order of 5/12/93 at 17; *see also Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (citing *Donaldson v. United States,* 400 U.S. 517,531,91 S.Ct. 534,542 (1971) (a putative intervenor's interest in the proceeding must be direct, substantial, and legally protectable)). In addition, Movants' claim that the interests that they have identified will not be adequately protected by other parties is belied both by the DPS's activity to date as set forth above, and also by the intervention of multiple other parties with particularized interests in this proceeding, including asserted interests in the VELCO aspect of the merger.

III. The Department Does Not Oppose Permissive Intervention

Board Rule 2.209(B) provides as follows:

> (B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Recognizing the general policy in favor of permitting ratepayers a say in matters affecting their interests, the Department does not oppose Movants' intervention by permission, provided that, as with other parties granted permissive intervention, the issues the ratepayers are to be heard on are limited to the individual issues identified in their filing.

## CONCLUSION

The Department respectfully asserts that Movants have failed to establish that independent counsel should be appointed in this matter and have not met the criteria for intervention as of right. The Department does not oppose Movants' permissive intervention in this docket.

Dated at Montpelier, Vermont, this 21st day of October, 2011.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: _____ for
John Beling, Director for Public Advocacy

scc: Service list