

STATE OF VERMONT
PUBLIC SERVICE BOARD

Joint Petition of Central Vermont Public Service Corporation)
("CVPS"), Danaus Vermont Corp., Northern New England)
Energy Corporation ("NNEEC") for itself and as agent for Gaz)
Metro Limited Partnership and its parents, Green Mountain Power)
Corporation ("GMP") and Vermont Low Income Trust for)
Electricity, Inc. ("VLITE"), for approval of: (1) the merger of)
Danaus into and with CVPS; (2) the acquisition by NNEEC of)
CVPS and certain other Vermont companies; (3) the amendment)
to CVPS's Articles of Association; (4) the merger of CVPS into)
and with GMP; and (5) the acquisition by VLITE of a controlling)
interest in Vermont Electric Power Company, Inc.)

Docket No. 7770

REPLY TO PETITIONER'S SECOND OPPOSITION and VELCO's OPPOSITION TO
RATEPAYERS PETITION FOR APPOINTMENT OF INDEPENDENT COUNSEL

NOW COMES Vincent Illuzzi ("Ratepayers")¹ and files this rebuttal memorandum in further support of the motion filed October 17, 2011 and the October 25th Reply Memorandum and to respond to the additional arguments presented in the second Opposition filed by the Petitioners and to VELCO's recent Opposition to appointment of Independent Counsel.

Introduction

Petitioners state that, "the Board has addressed and rejected requests for appointment of public counsel on the grounds identified by the Ratepayers." (Opposition at p. 2) Petitioners are patently incorrect. At no time has the Public Service Board ("Board") rejected a request containing the elements before it today. At no time has this Board confronted the factual situation where:

- i. the commissioner's spouse is the managing partner of the utility's law firm; and
- ii. the spouse has publicly acknowledged he receives monetary benefits derived from work his law firm performs for the utility; and

¹ And those ratepayers who stand in substantially similar position as I and who signed a signature page agreeing with my position, all filed with the Public Service Board with my motion and petition. I am representing myself in this filing due to time constraints but note that the signatories agreed with my filing and are deserving of the same affirmative ruling.

- iii. the proceeding before the Board has the expectation by the regulated utility (and the law firm representing the merged company) of more than doubling the service territory and customer base of the utility and therefore increasing the fees associated with the firm's client and therefore both the resulting merged utility company and law firm stand to benefit from the proposed merger; and
- iv. should the Department not oppose the underlying proposal, the ultimate appearance will be that the commissioner and the Department of Public Service i. e., the Public Advocate, have a conflict of interest and have prejudged the matter.

The fact the spouse does not directly participate in utility work for GMP is not the critical issue since he receives income from the utility work done by the firm. No matter how the Petitioners or VELCO wish to parse the issues, it does not change the fact that we are left with a commissioner whose husband works for a law firm that receives (and will continue to receive) significant financial benefits from the law firm's work for Green Mountain Power Corporation.

The Petitioners argue that simply because Attorney Miller's law firm represents GMP, which is merging with CVPS, it would be improper to assume "the lawyer will benefit from business provided from this arrangement." Petitioner's Opposition, 10/26/11, at 7. Petitioners dismiss the appearance of a conflict by calling such benefits speculative, unsubstantiated and remote. However, the conflict is not speculative, unsubstantiated, or remote. Petitioners' arguments are advanced by relying upon two out-of-state "advisory opinions" from state Ethics Offices where a commissioner voluntarily came forward and outlined both her spouse's work and sources of income.

The critical distinction is that in both cases the spouse was an associate with a law firm, receiving yearly compensation with no monetary ties to utility income. That is not the present

situation. Here, the commissioner's spouse derives income from the work that his firm engages in, including work representing GMP. In addition, this is an unusual proceeding which could bring sizeable fees to Attorney Miller's law firm in the future.

The appearance of a conflict is in plain sight. It is not a question if Attorney Eric Miller receives financial remuneration whether or not GMP prevails in Docket No. 7770. It can be assumed GMP will pay its law firm – win or lose. Unlike a consumer affairs complaint or even an isolated rate case, this proceeding has the significant ramification of expanding GMP's customer base and service territory by significantly more than 100 percent.

If GMP prevails in its arguments and it is allowed to merge with CVPS, presently the largest retail electric company in the state, it is virtually assured that the corporate, business, real estate and regulatory issues would expand for GMP as well as its law firm. So while it is true that the utility's law firm gets paid whether or not GMP prevails in this docket, the real question is whether GMP's law firm and Attorney Eric Miller would benefit more if the Board allows the merger. And if so, whether the lawyers in his law firm will benefit more by handling significantly more utility related work. If so, does Attorney Eric Miller in turn benefit because he is the managing partner of the utility's law firm? The answers seem to be yes on all counts.

I. The Kentucky and Connecticut State Ethical Opinions support Ratepayers' request for Independent Counsel.²

A. Kentucky Ethics Opinion Supports Ratepayers Request for Independent Counsel

In the Kentucky Ethics Opinion, the commissioner's spouse was "an associate attorney in a large Kentucky law firm employing approximately 148 attorneys." The Opinion stated it this way:

You state that because your spouse is an associate with the firm and not a member, he receives a set yearly salary and does not receive a direct and specific apportionment for fees or other financial benefit generated from

²As well established case law makes clear each instance of alleged conflict or adverse pecuniary interest must be individually addressed. See Ratepayers' Reply 7, 10/25/11 at pp. 6-7.

matters the law firm has with the PSC.

Opinion at pp. 1-2.

In Docket No. 7770 the facts are directly opposite. Attorney Eric Miller is not only a member of the utility's law firm, he is the managing partner. As Ratepayers argued in their Reply, Attorney Miller stands to gain personally from this transaction and in future endeavors. (Reply at pp. 4-5.) Indeed, Mr. Miller acknowledged this in an e-mail sent to a columnist for Seven Days stating, *inter alia*:

While I do derive some indirect benefit from the fees concerning matters on which I do no work, none of those fees are dependent in any way on the positions taken by the Department of Public Service or the commissioner or who the commissioner is.

<http://www:7dvt.com/2011sale-owner>

What Attorney Miller was trying to say was “how can there be a conflict” because “I get paid from GMP whether or not they prevail?” He’s right – and he’s wrong. If this were a simple line extension case or perhaps a consumer affairs case, he might have an argument. However, this is possibly the largest merger that has ever been proposed in the State, and his client is proposed to be the company standing when it’s all over.

As Ratepayers argued in their Reply, if the Department were not to vigorously oppose the merger and the Board were to approve the merger, “[h]is firm stands to represent what would be the largest electric economic entity in Vermont, which would generate a large and steady volume of business for the Sheehey law firm and secure the success of the firm for which Attorney Miller, as managing partner, is responsible.” Reply, 10/25/11, at p. 5. This is no regular PSB proceeding. This is a mega deal that will directly benefit Attorney Miller for years to come.

In the Kentucky Opinion, the Ethic's Office cautioned the commissioner that if her husband ever began "to directly benefit from decisions involving the law firm made by your agency, then it would certainly be appropriate for you to recuse yourself from such matters as well." As explained below, recusal is not an option for the commissioner of the Department at this time.

II. Connecticut Ethics Opinion Supports Ratepayers' Request for Independent Counsel.

The Connecticut utility commissioner was married to an associate with the law firm that represented public utilities. The spouse did not practice in the utility field but rather practiced corporate law. But that was not the deciding factor. Similar to the Kentucky situation, the salary of the spouse was that of an associate whose salary was limited to a yearly salary with no benefits from the firm's utility representation. To wit:

. . . Mr. George's salary is comprised of a base salary and a bonus that is based on performance and longevity. The firm confirms that the performance or profitability of the law firm's utility law practice does not have any influence on Mr. George's compensation.

Opinion at p. 1.

Under Connecticut law – and we submit Vermont law as well – a public official has a potential conflict of interest if her actions affect the financial interest of the spouse or other family members unless that interest is so *de minimis* or not distinct from that of a substantial segment of the general public.

In Connecticut the Office of State Ethics found "none of the concerns raised . . . creates a substantial or potential conflict of interest, as there is no direct monetary benefit that will accrue to her or her spouse as a result of her official action." Opinion at 2. That, however, is not the situation created in this proceeding under Vermont law where the commissioner's spouse is a managing partner of GMP's law firm and publicly acknowledges he receives direct remuneration from the firm in connection with work done by other lawyers in his firm. <http://www.7dvt.com/2011sale-owner>

In the Kentucky and Connecticut situations, although the Ethics Opinions dealt broadly with public servants, the commissioners sat as decision-makers. Nevertheless, they were governed as “public servants” under those states’ ethical regulations.³ When confronted with a potential conflict each affirmatively asked for guidance from the office of State Ethics. They both had two alternatives: i) recuse themselves from the particular matter; or ii) prepare a written statement, signed under penalty of false statement, describing the matter requiring action and the nature of the potential conflict and explaining why, despite the potential conflict, she was able to participate fairly, objectively and in the public interest.

In both instances, the commissioners were pro-active in their search for guidance and filed their requests for guidance before they became involved in a proceeding in which their spouses’ law firms were involved. In the instant proceeding, however, this matter has been before the Department for many weeks and probably much, much longer, during which time the commissioner has already had the opportunity to discuss the administration’s very public intervention in making the deal happen and in support for the deal with her staff,⁴ including the Public Advocate, by providing input, if not strategic directions. She cannot simply recuse herself at this late date because of the appearance of conflict and the opportunity to give direction and formulating positions in response to the proposal.

³The Connecticut Office of State Ethics observed that the commissioner was being evaluated only under the state’s Code of Ethics. It commented that “(w)here applicable, the canons of professional ethics and the canons of judicial ethics . . . govern the conduct of commissioners . . .” Connecticut Advisory Opinion, p. 2. The State office observed correctly that those codes “impose additional restrictions on the Commissioner’s ability to hear such matters that are beyond the requirements of the Code of Ethics.” *Id.* Similarly, the commissioner of the Department, as a licensed lawyer, is directed by the restrictions of Vermont’s code of professional conduct and this state’s long adherence to the constitutional principles of a fiduciary responsibility of public officers.

⁴ In a recent press article commissioner Miller stated:

I reject the notion that my husband’s job creates an appearance of conflict . . .

* * * * *

. . . the department is not satisfied with the merger as filed with respect to a number of areas, including the structure and accountability of the offered VELCO ownership . . .

Attachment A.

III. VELCO Does Not Address the Ethical Issues.

VELCO argues that because Ratepayers argued that Gaz Metro “will play a significant role in deciding in which regions and towns it wishes to propose constructing transmission lines and infrastructure” (VELCO at p. 2), the Ratepayers do not understand transmission regulation. VELCO argues that an Independent Advocate is not appropriate because he or she will “have to come up to speed” to understand the complex utility regulatory regime and the particular facts and circumstances at issue here with VELCO and its owners. VELCO at 3. VELCO argues that all informed Americans know that “high voltage systems in the United States, including VELCO’s in Vermont, must be open to all users in a non-discriminatory and transparent manner.” (Citation omitted”) VELCO at p. 2. Essentially it shrugs and asks, “What’s the problem?” It argues, no Independent Counsel is required, and if one were retained (with his or her independent consultants) they would be lost in the woods, unable to decipher the complex world of VELCO and its specialized, highly trained lawyers.

Ratepayers strongly disagree. VELCO’s simplistic and misleading arguments assume, for instance, that ownership of VELCO doesn’t matter, and that membership of various utilities on the VELCO Board of Directors is not important because regulators like FERC and the Department have “years of experience” in this field with federal and state open access. The assumption is that VELCO and its parent company(ies) would not or could not construct transactions that would exclude others or that would always be fair to smaller participants and the state’s ratepayers.⁵ Like the Petitioners and the Department, VELCO’s comments are not healthy views of the hearing process or the laws of this

⁵Based on available information, the owners or operators of the transmission grid in Quebec are preventing or planning to prevent certain electric producers, or prospective electric producers, from outside the province from using the transmission grid physically located in Quebec. The argument goes something like this: the Quebec transmission system is at capacity (whether contractual or physically is unknown to the undersigned) and if an electric supplier wants to use it, it will be that user’s responsibility to upgrade the grid -- at of course a prohibitively expensive cost. The Quebec transmission system owners or operators also suggest that in any event, there is an alternative. Any power which may be produced by the Maritime Provinces at places like Lower Churchill Falls can flow into Newfoundland and from there into Maine and then to other New England locations like Boston, Providence and Hartford. The problem with that argument is that the transmission grid between northern Maine and southern Maine isn’t robustly developed and for transmission purposes doesn’t connect to southern Maine and other population centers in New England.

state intended to protect the integrity of that hearing process. VELCO clearly misses the mark when it comes to conflicts and transparency for several reasons.

Ratepayers are not attacking the Department's experience or expertise, or its knowledge or integrity. Ratepayers have raised a conflict of interest issue. Conflicts do not apply only to the inexperienced, unknowledgeable public servants or those lacking in moral principles.

They happen to qualified, morally upright people who find themselves in difficult and conflicted positions because of a complex world where spouses and family members often find themselves being paid by others and therefore appear to have different loyalties from that of the public official. Conflict laws are critical for maintaining a civilized and lawful society. Ratepayers trust the Board will appreciate the public involvement by this ratepayer and the many others who signed onto the petition for spending their time and effort in attempting to do the right thing for upholding the integrity of the process.

CONCLUSION

At a minimum an appearance of a conflict exists. This undermines the public confidence in the integrity of the process. Rather than disqualify the commissioner and the Department of Public Service, the Board has the opportunity to provide for a vigorous untainted case by appointing independent counsel for the public under 30 V.S.A. §§ 20 & 217.

The schedule should be reassessed once the Independent Counsel is appointed and has been provided sufficient time to retain independent consultants.

There is no reason to rush this case. There is no crisis. The ratepayers are being served. The utilities are operating. Blackouts, brownouts and outages are not looming issues that this merger will address. Reliability is overseen by FERC or ISO New England, or both.

There should be no reason not to take the time necessary for a thorough review of the major consequences of this proposed merger on the ownership and control of VELCO. It will be a decision that will change the electric transmission landscape in Vermont forever.

Given the upcoming holidays, several additional weeks will provide the assurance of impartiality to the other participants as well as the public at large.

DATED: November 1, 2011

Respectfully submitted,

Vincent Illuzzi, Ratepayer

cc: Certificate of Service
Other Ratepayers