STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8643

Petition of Vermont Gas Systems, Inc. for authority	)
to condemn easement rights in property interests of	)
the Town of Hinesburg, Vermont, at Shelburne	)
Falls Road, Hinesburg, Vermont, for the purpose of	)
constructing the pipeline authorized in Docket 7970	)

Order entered: 3/24/2016

PROCEDURAL ORDER RE: INTERVENTION MOTIONS

I. INTRODUCTION

In this Order, I deny the motions to intervene in this proceeding filed by William Marks, Nancy Baker, Linda Gage, Rachel Smolker, Melanie Pulley, Chuck Reiss, Stephanie Spencer, Lawrence Shelton, Richard Watts, and the Hinesburg Conservation Committee ("HCC").

II. PROCEDURAL BACKGROUND

On October 21, 2015, Vermont Gas Systems, Inc. ("VGS") filed a petition with the Vermont Public Service Board ("Board") pursuant to 30 V.S.A. §§ 110-124 to condemn easement rights over the real property of the Town of Hinesburg in Geprags Park at Shelburne Falls Road, Hinesburg, Vermont. Included in the VGS filing was a stipulation signed by VGS and the Town of Hinesburg ("Hinesburg") in which VGS and Hinesburg agreed to certain terms allowing for VGS's acquisition of an easement by eminent domain on property owned by Hinesburg (the "Stipulation").

On February 17, 2016, Mr. Marks filed a motion to intervene (the "Marks Motion") and Ms. Baker, Ms. Gage, and Ms. Smolker also jointly filed a motion to intervene (the "February 17th Motion").

On February 19, 2016, Vermont Gas Systems, Inc. ("VGS" or the "Company") filed a response to the Marks Motion and the February 17th Motion (the "February 19th Response").

On February 26, 2016, Ms. Pulley, Mr. Reiss, Ms. Spencer, Mr. Shelton, and Mr. Watts jointly filed a motion to intervene (the "February 26th Motion").

On March 2, 2016, HCC filed a motion by email to intervene pursuant to Board Rule 2.209 (the "HCC Motion").

On March 4, 2016, VGS filed a response to the February 26th Motion and the HCC Motion (the "March 4th Response").

Also on March 4th, Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Mr. Reiss, Ms. Spencer, Mr. Shelton, and Mr. Watts (the "Residents") jointly filed a reply to the February 19th Response (the "Residents' Reply"). The Residents' Reply included as attachments a notice to the Town of Hinesburg of the Residents' intention to file a complaint in Chittenden County superior court against the Hinesburg Selectboard for violations of the Open Meeting Law, 1 V.S.A. § 314, and a copy of the draft complaint against the Hinesburg Selectboard.

On March 9, 2016, the Residents filed a letter (the "Residents Letter") with the Board stating that the Hinesburg Selectboard "scheduled a public meeting for March 21, 2016, at which it will engage in the process set forth in § 314(b)(4)."[1]

No other comments were filed.

III. INTERVENTION REQUEST

Motions to Intervene[2]

The Residents

The Residents request intervention as of right pursuant to Board Rule 2.209(A) and alternatively request permissive intervention pursuant to Board Rule 2.209(B). The Residents all represent that they are residents of Hineburg who are frequent users of Geprags Park. The Residents oppose the proposed condemnation because it will "interfere with [their] use and

1. Letter from James A. Dumont, Esq., to Judith Whitney, Clerk of the Board, dated March 9, 2016, at 1.

2. Four motions for intervention have been filed in this case. Three of these motions have been filed by residents of Hinesburg, all of whom are represented by the same counsel as reflected in the Residents' Reply and the Residents Letter, which were jointly filed by all the Residents. Though the Residents' initial motions were filed separately, I will address all three motions collectively as if they had been filed jointly. The fourth motion was filed by the HCC. I will address the HCC Motion separately.

enjoyment of the Park and violate the deeded purpose of the Park."[3] The Residents argue that the Board lacks the authority to issue the requested condemnation.

Hinesburg Conservation Commission

HCC states that it "objects to the use of eminent domain to obtain easement rights to use the Park as requested by Vermont Gas Systems." HCC requests that it be permitted to intervene in order to "monitor all developments in this matter that may affect the Commission's interests including the potential effects of the pipeline's location, construction, operation, and ongoing management" as the entity "responsible for the stewardship of the park."[4]

Response to Motion

VGS opposes the intervention requests of both the Residents and HCC. The Company argues that "[t]he Selectboard is charged with managing Geprags Park on behalf of the Town, and holds exclusive authority to convey an easement interest on the property to Vermont Gas" and the "Residents have articulated no statutory right, nor do they have a substantial interest"[5] that will be affected by this proceeding. As to HCC's request, VGS responds that the HCC "exercises a purely advisory role with respect to [s]electboard decisions over Commission-administered properties, and can only make recommendations with respect to expenditures relating to land conservation."[6] VGS argues that "[l]ongstanding Board precedent in Section 248 proceedings holds that selectboards (as legislative bodies comprised of elected representatives) are the proper parties to represent a municipality."[7] The Company concludes that there is a substantial risk of costly delay should the intervention requests be granted and that "it is critical

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3. Marks Motion at at 1; February 17th Motion at 1; February 26th Motion at 1.
4. HCC Motion at 1-2.
5. February 19th Response at 2; March 4th Response at 5.
6. March 4th Response at 6.
7. *Id.* citing *Northwest Vermont Reliability Project,* Docket 6860, Order of 10/17/03 at 7 (intervention request from a planning commission denied where the town selectboard had already been granted party status in the case); *Joint Petition of VELCO, GMP, and Town of Stowe Electric Dept.,* Docket 7032, Order of 3/8/05 at 4 (selectboard, rather than a planning commission, is the proper entity to participate in a proceeding before the Board); and *Petition of UPC Vermont Wind, LLC,* Docket 7156, Order of 6/21/06 at 2 (allowing planning commission to participate in a Section 248 proceeding only where formally designated by a selectboard as its representative).

that Vermont Gas commence its construction . . . in order to ensure operation of the pipeline by prior to the winter 2016 heating season."[8]

IV. Legal Standard

PSB Rule 2.209 governs intervention in proceedings before the Board. Rule 2.209(A) provides that upon timely application, a person shall be entitled to intervene as of right in a proceeding in three circumstances:

> (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.

In addition, Rule 2.209(B) reserves to the Board the power to grant intervenor status on a permissive basis, when an applicant "demonstrates a substantial interest which may be affected by the outcome of the proceeding." In exercising the discretionary authority reserved in Rule 2.209(B), the Board considers three factors:

> (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.

V. Discussion and Conclusion

I deny the Residents' request for intervention as of right because there is no statutory right mandating their participation and because, as the Residents note in their Reply, there is an alternative means available for them to challenge the Hinesburg Selectboard's authority to enter into the Stipulation. No showing has been made that the Board has the requisite jurisdiction to determine whether the Hinesburg Selectboard is acting within its legal authority to enter into the

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8. March 4th Response at 3.

Stipulation. As the Residents have noted, other fora exist for them to seek relief or redress of these alleged wrongs.

I also deny the Residents' alternative request for permissive intervention because I am not persuaded a "substantial interest" within the meaning of Board Rule 2.209 includes the Residents' loss of the use and enjoyment of the Park. The members of the Hinesburg Selectboard are the Residents' representatives responsible for the management and use of specific municipal property, including the Park.[9] The Residents have not shown how their interest in the use of the Park is distinct from the interest of Hinesburg's residents in general – an interest that is properly represented by the duly-elected Selectboard of Hinesburg. Finally, given the potential cost of untimely completion of the Project, as well as the documented escalating cost of the Project,[10] I am concerned that the Residents' intervention may also create an undue delay and prejudice the interests of the rate-paying public.

Similarly, I also deny the HCC request for permissive intervention. Like the Residents, the HCC disputes the Selectboard's authority to enter into the Stipulation. HCC further states that its substantial interest is to "monitor all developments in this matter"[11] to meet its stewardship responsibilities over the Park. The HCC is an advisory body subordinate to the Hinesburg Selectboard.[12] The HCC's stated interest in understanding the potential effects of this proceeding does not substantially differ from that of Hinesburg Selectboard which, for the Town of Hinesburg, is a party to these proceedings. The Board does not have the requisite jurisdiction to adjudicate a dispute between elements of municipal government. The HCC has not persuaded me that its interest in the proceeding is so distinct from the Selectboard's interest as to warrant HCC's intervention in this case. The HCC's interest will be adequately protected by the Selectboard. Finally, the HCC can follow this proceeding by contacting the Clerk's office to be listed as an "interested person" for purposes of receiving orders and scheduling notices.

For these reasons, the Marks Motion, the February 17th Motion, the February 26th Motion, and the HCC Motion are denied.

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9. *See* 24 V.S.A. § 4505.
10. *See Petition of Vermont Gas Systems, Inc.,* Docket 7970, Order of 1/8/16 at 51-52.
11. HCC Motion at 2.
12. *See* 24 V.S.A. § 1061.

SO ORDERED.

Dated at Montpelier, Vermont, this 24th day of, March, 2016.

s/Michael E. Tousley
Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: March 24, 2016

ATTEST: s/Ann Bishop
Acting Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)