

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	)	Hearing at
Town of Hinesburg, Vermont, at Shelburne Falls Road,	)	Berlin, Vermont
Hinesburg, Vermont, for the purpose of constructing the	)	August 4, 2016
pipeline authorized in Docket 7970	)	

Order entered: 9/13/2016

PRESENT: James Volz, Chairman  
Margaret Cheney, Board Member  
Sarah Hofmann, Board Member

APPEARANCES: William J. Dodge, Esq.  
Heidi H. Trimarco, Esq.  
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Sheehey Furlong & Behm PC  
for Vermont Gas Systems, Inc.

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Stetler, Allen & Kampmann.  
For Town of Hinesburg Selectboard

James A. Dumont, Esq.  
Law Office of James A. Dumont PC  
for William Marks, Nancy Baker, Linda Gage, Rachel Smolker,  
Melanie Pulley, Stephanie Spencer, and Lawrence Shelton

Louise Porter, Esq.  
for Vermont Department of Public Service

**I. INTRODUCTION**

In today's Order, the Vermont Public Service Board ("Board") authorizes Vermont Gas Systems, Inc. ("VGS" or the "Company"), pursuant to 30 V.S.A. §§ 110, 111(a), and 112, to condemn an easement across Geprags Park ("the Easement") in Hinesburg, Vermont ("Geprags

Park,” the “Park,” or the “Property”). The Easement area to be condemned will be 50 feet wide and approximately 1,987 feet long. The Easement will be used to install an underground pipeline segment to complete the construction of a 41-mile natural gas pipeline extension that was previously authorized in Docket 7970.<sup>1</sup>

The Board has concluded that the Easement to be condemned is reasonably necessary so that VGS may render adequate service to the public. In addition, through the use of horizontal directional drilling (“HDD”), the pipeline segment will be inserted 30 to 50 feet underground running the length of the Easement and will have little or no impact on the Park and its existing uses, both during and after construction. Once the pipeline segment has been installed, the only visible elements will be occasional pipeline markers at locations along the Easement and, if necessary, cathodic protection test leads flush-mounted to the pipeline markers. These will be sited in consultation with the Hinesburg Conservation Commission, which manages the Park on behalf of its owner, the Town of Hinesburg (“Hinesburg” or the “Town”).

The Park was conveyed to the Town by the Estate of Dora Geprags, subject to a restrictive covenant limiting its use to “a public park or school or for public recreational or educational purposes.” Due to this covenant, several residents of Hinesburg have intervened in this proceeding to oppose the condemnation, citing *Vermont Hydro-Electric* and *Middlebury College*, two cases in which the Vermont Supreme Court applied the “Prior Public Use Doctrine” to hold that property already appropriated to a public use cannot be taken for another public use without legislative authority, either express or implied.<sup>2</sup>

For the reasons explained in this Order, the Board has determined that this condemnation presents a case of first impression in applying the Prior Public Use Doctrine under Vermont’s utility condemnation statute. The evidence shows that, unlike in *Vermont Hydro-Electric* and *Middlebury College*, the Easement across Geprags Park would neither destroy nor materially impair the existing public recreational uses of the park. Under similar circumstances in a railway

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1. The Board previously issued a certificate of public good (“CPG”) pursuant to 30 V.S.A. § 248 for the construction of the Addison Natural Gas Pipeline (the “Project”). See *Petition of Vermont Gas Systems, Inc.*, Docket 7970, Order of 12/23/13 (the “7970 Final Order”).

2. See *President and Fellows of Middlebury College et al., v. Central Power Corp. of Vermont*, 143 A. 384 (1928); *Vermont Hydro-Electric Corp. v. Dunn et al.*, 112 A. 223 (1921).

regulation case, the Vermont Supreme Court also examined the applicability of the Prior Public Use Doctrine. In *Rutland-Canadian Railroad*, the Court held that the public good would best be served by requiring the joint use of property that was already subject to a prior public use, having determined that the additional, second public use would not destroy or materially interfere with the prior public use.<sup>3</sup> Accordingly, applying this reasoning to the facts of this case, the Board has concluded that the Prior Public Use Doctrine does not bar the condemnation of an easement that will allow VGS to install an underground pipeline segment across Geprags Park.

## **II. PROCEDURAL HISTORY**

### **General History**

On October 21, 2015, the Company filed its condemnation petition (the “Petition”).

On November 25, 2015, the Board issued an Order pursuant to 30 V.S.A. § 111(a) opening this Docket. At that time, the Board also imposed a stay on this proceeding pending the completion of the remand review in Docket 7970.

On January 15, 2016, the Board lifted the stay in this Docket.

On February 11, 2016, a prehearing conference was convened in this Docket.

Appearances were entered by Danielle Changala, Esq., and William J. Dodge, Esq., Downs Rachlin Martin PLLC, on behalf of VGS; Louise Porter, Esq., for the Vermont Department of Public Service (“DPS” or the “Department”); and Ernest M. Allen, Esq., Stetler, Allen & Kampmann, for Hinesburg.

On April 28, 2016, the Company amended the Petition.

On May 23, 2016, certain residents of Hinesburg were granted permissive intervention in this Docket (the “Residents”).

On May 27, 2016, the Town filed a motion to dismiss the Petition.<sup>4</sup>

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3. *Rutland-Canadian R. Co. v. Central Vt. Ry. Co.*, 47 A. 399 (1900).

4. The motion was withdrawn by the Town on August 4, 2016, tr. 8/4/16 at 9 (Allen).

On June 13, 2016, the Company filed a stipulated proposed schedule. The Company represented that all the parties agreed to the proposed schedule, which included a request from all the parties that the technical hearing be conducted by the Board members pursuant to 30 V.S.A. § 8(e).<sup>5</sup>

On June 16, 2016, a second scheduling Order was issued.

On July 18, 2016, the Company filed supplemental prefiled testimony addressing the Park's prior public use and assessing alternatives to the route through the Park.

On July 26, 2016, the Residents jointly filed a motion seeking the recusal of Board Member Hofmann from this proceeding (the "Recusal Motion"). The Residents also filed a pretrial memorandum identifying various legal issues relating to this Petition (the "Residents' Pretrial Memorandum.")

On August 2, 2016, a site visit was conducted at Geprags Park in Hinesburg, Vermont. Also on that date, the Company filed a response to the Residents' Pretrial Memorandum (the "VGS Response to the Residents' Pretrial Memorandum") in which the Company responded in opposition to each of the Residents' positions.

On August 4, 2016, an evidentiary hearing was convened by the Board in Berlin, Vermont. Also on August 4, the Company filed a motion requesting that the Board shorten the time period for filing any motion for reconsideration .

On August 19, 2016, the Company filed a memorandum of support of the Petition (the "VGS Brief") and the Department filed a brief in support of the Petition (the "DPS Brief").

On August 22, 2016, the Residents jointly filed proposed findings of fact and conclusions of law (the "Residents' Brief").

On August 24, 2016, the Board issued an Order denying the Company's request to shorten the time period for moving for reconsideration.

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5. 30 V.S.A. § 8(e) states: "Upon written request to the board at least five days prior to the hearing by all parties to the case, the chairperson shall appoint at least a majority of the board to conduct the hearing." Accordingly, the full Board conducted the August 4<sup>th</sup> evidentiary hearing.

On August 29, 2016, the Company filed a reply to the Residents' Brief (the "VGS Reply") and the Residents filed separate replies to the VGS Brief (the "Residents' Reply to VGS") and to the DPS Brief (the "Residents' Reply to DPS"). Also on August 29, the Department filed notice that it would not be filing a reply to the Residents' Brief.

### Interventions

On February 17, 2016, William Marks, a resident of Hinesburg, filed a motion to intervene. Also on that date, Nancy Baker, Linda Gage, and Rachel Smolker jointly filed a motion to intervene.

On February 19, 2016, the Company filed objections to both intervention motions filed on February 17, 2016.

On February 26, 2016, Melanie Pulley, Stephanie Spencer, Chuck Reiss, Lawrence Shelton, and Richard Watts jointly filed a motion to intervene.

On March 2, 2016, the Hinesburg Conservation Commission filed a motion to intervene.

On March 4, 2016, the Company filed an objection to the February 26 motion to intervene. Also on March 4, Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Mr. Reiss, Ms. Spencer, Mr. Shelton, and Mr. Watts jointly filed a response to the Company's intervention objections of February 19.

On March 24, 2016, the Hearing Officer denied the motions to intervene of the Hinesburg Conservation Commission, Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Mr. Reiss, Ms. Spencer, Mr. Shelton, and Mr. Watts.

On March 31, 2016, Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Mr. Reiss, Ms. Spencer, Mr. Shelton, and Mr. Watts moved for reconsideration of the Order denying their requests to intervene ("Motion to Reconsider").

On April 15, 2016, the Company and the Department filed objections to the Motion to Reconsider (the "VGS Response" and "DPS Response," respectively).

On April 29, 2016, Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Ms. Spencer, Mr. Shelton, and Mr. Watts jointly filed a reply to the VGS Response and the DPS Response and Mr. Reiss filed notice of the withdrawal of his intervention request.

On May 13, 2016, Mr. Watts filed notice of the withdrawal of his intervention request.

On May 23, 2016, an Order was issued granting the Motion to Reconsider and permitting the intervention of Mr. Marks, Ms. Baker, Ms. Gage, Ms. Smolker, Ms. Pulley, Ms. Spencer, and Mr. Shelton (the “Residents”). The Residents were permitted intervention on reconsideration because the Residents have a substantial interest in the use and enjoyment of the Park different from that of the Town that may be affected by the outcome of this proceeding.

On July 29, 2016, the Company filed a motion to revoke the party status of each of the Residents (the “Motion to Revoke Party Status”).

On August 3, 2016, the Board issued Orders denying the Recusal Motion and denying the Motion to Revoke Party Status.

#### Events Concerning the August 4<sup>th</sup> Hearing

On March 17, 2016, in response to previous disruptions of hearings for related pipeline condemnation dockets, the Board issued a procedural Order concerning the conduct of hearings in this Docket and in Dockets 8641, 8642, and 8645.<sup>6</sup>

On July 15, 2016, the Board issued an Order governing the logistics of the August 4, 2016, technical hearing to be convened at a state-owned training facility in Berlin, Vermont. The July 15 Order closed the hearing site to the public, but ordered alternative ways for the public to monitor the proceeding via live telephone access or by reviewing a transcript that would be published on the Board’s website.

On July 22, 2016, the Board clarified the July 15 Order by stating that the premises for the August 4 hearing would be open to the news media and that the Board would provide a live video stream of the proceedings on YouTube. Also on July 22, the Board issued a memorandum to the parties further detailing the schedule and logistics for the August 4 technical hearing.

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6. Additionally, in Docket 8698/8710, a public hearing that the Board convened on June 16, 2016, in Colchester, Vermont, was disrupted to the point that the Board was foreclosed from conducting an orderly proceeding to hear from individuals who wished to comment on VGS’s proposed rates and alternative regulation plan.

On August 1, 2016, the Town filed an objection to the Board's decision to close the premises of the hearing to the public.<sup>7</sup>

On August 4, 2016, in compliance with the U.S. District Court Order, members of the public and the media were permitted to attend the evidentiary hearing in person, subject to the legal capacity of the hearing room.

### Miscellaneous Pending Motions

#### *Request for Judicial Notice*

In their proposed findings of fact, the Residents request that the Board take judicial or administrative notice of 49 Code of Federal Regulations ("C.F.R.") § 192.705(a).<sup>8</sup> This federal regulation requires pipeline operators to conduct regular visual inspection of their pipelines. There has been no objection to the Residents' request from the other parties. The contents of 49 C.F.R. § 192.705(a) are generally known, are applicable to VGS, are not controversial, are material to our inquiry here, and are not subject to a legitimate challenge.<sup>9</sup> Therefore, pursuant to Vermont Rule of Evidence ("V.R.E.") 201, the Board grants the Residents' request and takes administrative notice of 49 C.F.R. §192.705(a).

#### *Draft Cornwall MOU*

During the technical hearing, the Residents sought to enter into evidence a certified copy of the minutes of the Town of Cornwall's Selectboard meeting of December 9, 2014. No witness

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7. Also on August 1, 2016, the United States District Court for the District of Vermont issued an Order that "preliminarily enjoined the Board from prohibiting all public attendance at the August 4, 2016, hearing." The District Court's Order did not require the Board "to find an alternative location for the hearing or permit the attendance of every member of the public who seeks to attend." Additionally, the District Court permitted the Board to accord preferential access to the hearing premises to representatives of the media. *Barrett v. Volz et al.*, Opinion and Order Granting in Part and Denying in Part Plaintiff's Motion for a Preliminary Injunction (D.Vt. Aug.1, 2016), Case No. 2:16-cv-209, at 16. The Board complied with the District Court's Order. See Docket 8643, Order of 8/3/16.

8. Residents' Brief at 13.

9. V.R.E. 201. See Jack H. Friedenthal, Mary Kay Kane, Arthur R. Miller, *Civil Procedure* § 5.22 (2<sup>nd</sup> ed. 1993).

was available to lay a foundation for the document or to be subject to cross-examination about the document. Attached to the Selectboard minutes was the text of a draft memorandum of understanding between the Company and the Town of Cornwall (the “Draft Cornwall MOU”). The Draft Cornwall MOU addresses compensation for the Town of Cornwall should it agree not to oppose the pipeline then proposed in Docket 8180.<sup>10</sup> The Company objected to the admission of the Draft Cornwall MOU, questioning the relevance of the draft document to this proceeding.<sup>11</sup> The Residents then requested that the Board take the admission of the Draft Cornwall MOU under advisement.<sup>12</sup> We hereby sustain the Company’s objection to admitting the Draft Cornwall MOU into evidence because there has been no persuasive demonstration of its relevance to the condemnation at issue in this Docket. The Draft Cornwall MOU appears to address compensation terms in a different proceeding that did not concern a condemnation. We find that the document bears no relation to the compensation determination we are required to make in this Docket, or to any other issue within the scope of this proceeding.

#### *Geprags Community Park Plan*

During the technical hearing, the Residents also sought to admit into evidence a copy of the Geprags Community Park Plan (the “Park Plan”) last updated on September 28, 1999.<sup>13</sup> The town administrator, Trevor Lashua, was called to testify regarding this document. He acknowledged an awareness of its existence but testified that he was not familiar with its contents.<sup>14</sup> The Company objected to the admission of the Park Plan into evidence due to a lack of foundation and relevance.<sup>15</sup> The Board took the matter under advisement, stating that the

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10. Tr. 8/4/16 at 88 (Dumont)(referring to *Petition of Vermont Gas Systems to construct a pipeline from Middlebury, Vermont, to Ticonderoga, New York*, Docket 8180, Order of 6/5/15 (dismissed without prejudice after withdrawal of the petition)).

11. Tr. 8/4/16 at 88 (Behm).

12. Tr. 8/4/16 at 90 (Dumont).

13. Tr. 8/4/16 at 209 (Dumont).

14. Tr. 8/4/16 at 209 (Lashua).

15. Tr. 8/4/16 at 209-210 (Behm).

parties could address the admissibility of the document in their post-hearing briefs.<sup>16</sup> The issue was not briefed by any of the parties; therefore, the Company's objection to the admissibility of the Park Plan is sustained.

*The Residents' Show Cause Motion*

On July 8, 2016, the Residents filed a motion for the Company to be ordered to show cause as to why it should not be penalized for failing to comply with the permit requirements contained in the Final Order in Docket 7970. The Residents' motion to show cause is hereby denied as it concerns matters outside the scope of this Docket.<sup>17</sup>

**III. LEGAL STANDARD**

The statutory standard for condemnation is found at 30 V.S.A. Sections 111 and 112, and reads, in pertinent part:

§ 111(a): Such corporation shall present a petition to the public service board and to the public service department describing the property or right, and stating why it is unable to acquire it without condemnation, and why its acquisition is necessary.

§ 112: When the board finds:

(2) That the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public in the conduct of the business which it is authorized to conduct, and in conducting which it will, according to the laws of this state, be under an obligation to serve the public on reasonable terms, and pursuant to the regulations of the board;

(3) That the condemnation of the property or right will not unduly interfere with the orderly development of the region and scenic preservation.

(4) That the condemnation of such property or right is sought in order that the petitioner may render adequate service to the public in the conduct of such business, it shall adjudge the petitioner entitled to condemn such property or right,

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16. Tr. 8/4/16 at 210 (Volz).

17. The claims that were the subject of the Residents' show cause motion are identical to claims that were made in Docket 7970 by Kristin Lyons, a party to that proceeding. Ultimately, Ms. Lyons's motion was denied. *See* Docket 7970, Order of 8/23/16 at fn. 3.

shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment. That compensation shall be based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the value of remaining property or rights of the owner, and consequential damages including but not limited to the damage to the owner's business.<sup>18</sup>

The findings and discussion below address these statutory requirements.

The Vermont Supreme Court has interpreted Section 112(2) as posing two questions to be examined when a utility seeks to condemn a property interest: "Why is the property required at all, and why does it have to be located so as to involve this particular property?"<sup>19</sup> With respect to utility projects authorized pursuant to 30 V.S.A. § 248 (such as the pipeline in Docket 7970), the Vermont Supreme Court has held that a utility effectively is prohibited "from exercising its statutory right of eminent domain until it secures a certificate of public good" for its project.<sup>20</sup> Additionally, the Court has held that a utility is required to show that "the taking of the particular land in question is *reasonably necessary*."<sup>21</sup>

When determining whether the taking of a particular property interest is "reasonably necessary," the Board must determine whether the taking will "accomplish the end in view after weighing all the circumstances which bear on any given situation."<sup>22</sup> In making this determination, the Board examines a variety of factors, such as alternative routes, and the effects

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18. 30 V.S.A. § 112. *See also* 30 V.S.A. § 203.

19. *Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 148-149, 375 A. 2d 975, 981 (1977).

20. *See Auclair v. Vt. Elec. Power Co. Inc.*, 133 Vt. 22, 25, 329 A.2d 641, 643 (1974) (interpreting the enactment of 30 V.S.A. § 248 to prohibit utilities from seeking to exercise eminent domain unless they have secured a CPG). *See also* *Petition of Vermont Gas Systems for the authority to condemn easement rights over real property of Pierre and Napoleon Plouffe*, Docket 7819, Order of 8/21/14 (relying upon existing CPG to find necessity in petition for condemnation of land for additional gas pipeline).

21. *Latchis v State Highway Board*, 120 Vt. 120, 124 (1957)(emphasis added).

22. *Bandel*, 135 Vt. at 149-150 (quoting *Latchis*, 120 Vt. at 124-125); *see also* *Petition of VELCO for authority to condemn easement rights in the property of Olga Julinska et al.*, Docket 7752, Order of 7/13/12 at 10-11, 18, 27 (finding no "reasonable alternative" to communications tower location based on insufficient signal strengths at other locations, as well as exhaustion of siting and design alternatives).

of the proposed condemnation and the alternatives on aesthetics, project costs, and natural resources.<sup>23</sup> The Board has also examined constructability concerns.<sup>24</sup>

#### **IV. FINDINGS**

1. VGS is a statutory “company” authorized to own and operate a natural gas transmission system in Vermont. Petition at 1.

2. The property right to be condemned consists of an easement across and under Geprags Park for the purpose of installing a segment of pipeline that will transport natural gas. Karen Kotecki, VGS (“Kotecki”) pf. supp. at 2-3; Kotecki, Christopher LeForce, and Eileen Simollardes, VGS (“Joint Panel”) supp. pf. at 3; tr. 8/4/14 at 97 (LeForce).

#### **A. Necessity**

3. The condemnation of the Easement is reasonably necessary to enable the Company to render adequate service to the public. This finding is supported by findings 4 through 69, below.

##### **1. Description of Geprags Park**

4. The Park is an approximately 85.5-acre parcel situated on the northern side of Shelburne Falls Road and to the west of VT Route 116 in Hinesburg, Vermont. Kotecki pf. supp. at 2.

5. Most of the Park consists of a hilly, forested area to the east of the parking lot off Shelburne Falls Road. The Park hosts a barn, a tobogganing hill, and a series of walking trails of various lengths, mostly on the eastern forested side of the parcel. Kotecki pf. supp. at 2-3; exh. Pet. KLLK-2.

6. The Park is encumbered by a 150-foot-wide electric transmission corridor owned and operated by VELCO. The Park’s trail head and parking area are located just east of the VELCO

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23. See, e.g., *Bandel*, 135 Vt. at 150-151 (discussing the environmental and aesthetic impacts along I-89); *Amended Petition of VELCO for authority to condemn easement rights in the property interests of the Harley A. Grice Revocable Trust*, Docket 7121, Order of 12/05/06 at 17-18 (assessing the threat to system reliability, increase in costs, and aesthetics of three different site alternatives).

24. *Id.*

corridor. Kotecki pf. supp. at 3; Michael Buscher, VGS (“Buscher”) pf. at 4; exh. Pet. MJB-2 at 45; exh. Pet. JAN-2.

7. The VELCO easement and the power lines in the VELCO transmission corridor pre-date the conveyance of the Property to the Town. Joint Panel pf. at 4.

## 2. Site Selection

8. In April 2012, the Company began discussions with Hinesburg’s town administrator regarding the Company’s proposal to construct the pipeline through the Park. Kotecki pf. supp. at 8.

9. In October 2012, an environmental survey was conducted at the Park, followed by an informational session with town residents. The Company then determined that the best route for the pipeline within the Park would be to the west of the VELCO corridor to avoid wetlands and community wells located in the corridor. Kotecki pf. supp. at 9.

10. The proposed 1,987-foot pipeline route through Geprags Park is the same segment that was included in the proposed pipeline that was part of the Company’s petition in Docket 7970 seeking a CPG for the Project in December 20, 2012. Kotecki pf. supp. at 4; Joint Panel pf. supp. at exh. B.

11. The alignment of the Easement crossing the Park was developed using a set of criteria that included the ability for the route to: (1) be constructed and allow the system to be operated safely, (2) provide reliable service to existing and new customers, (3) minimize impacts on communities along the pipeline route, (4) minimize environmental impacts, (5) minimize construction challenges, and (6) control costs. LeForce pf. at 9.

12. The Easement has been thoroughly reviewed from an engineering, natural resources, archeological, and aesthetics perspective, and VGS has the necessary upstream and downstream easements for the pipeline. Joint Panel pf. supp. at 9.

13. The pipeline to be installed in the Easement will have no effects on the current or planned uses of the Park. Therefore, the construction and operation of the pipeline will not be inconsistent with the Park’s existing public uses. Joint Panel pf. supp. at 5.

14. The pipeline to be installed in the Easement will not be adverse to the overall intended use of the Park. The public uses the Park's various trails, most of them to the east of the VELCO corridor, for recreation and birdwatching. The Easement will be perpendicular to and 30 to 50 feet below the Hill Spur trail, the only trail to the west of the VELCO corridor. Exh. Pet. KLK-2; tr. 8/4/16 at 33 and 45 (Kotecki), 97 (LeForce), and 189-190 (Buscher).

15. The Easement conforms to industry best practices for pipeline construction. The route of the pipeline through the Park is linear and will have no turns or elbows. Industry best practices for general pipeline design are to use a linear design to the greatest extent practicable. Exh. Pet. JAN-4; LeForce pf. at 6.

16. The Department's gas engineer supports the Easement through the Park as the shortest and most direct route. G.C. Morris, DPS ("Morris") pf. at 2; tr. 8/4/16 at 195 (Morris).

### 3. Necessity for Condemnation (30 V.S.A. § 112(2))

17. The Company commenced construction of the Project during the summer of 2014. The Project corridor has been cleared, stumped, and prepared up to the northern and southern boundaries of Geprags Park. LeForce pf. at 4; tr. 8/4/16 at 126 (LeForce).

18. The condemnation is reasonably necessary because: (1) the Easement route conforms to industry best practices for pipeline construction, given that it is the shortest, most linear path between the existing pipeline corridors to the north and south of the Park, which were the routes identified in the Docket 7970 Project CPG and have already been substantially constructed; and (2) the Company has already acquired easement rights on both the north and south sides of the Park, as well as from all other upstream and downstream owners; (3) the Easement will allow the Company to complete the construction of the 41-mile pipeline between Colchester and Middlebury, Vermont, and render adequate service to the public in the conduct of the business that it is authorized to conduct. Morris pf. at 1; LeForce pf. at 13; tr. 8/4/16 at 101-102 (Simollardes) and 197-198 (Morris); findings 15, above, and 41, below.

4. Need for Condemnation (30 V.S.A. § 111(a))

19. The Town acquired the Property by way of a partial decree of distribution from the Estate of Dora E. Geprags, dated December 2, 1991, and recorded on January 14, 1992, in the Town's land records (the "Decree of Distribution"). Kotecki pf. supp. at 3; exh. Pet. KLK-3.

20. A covenant set forth in the Decree of Distribution provides that "the property conveyed hereby shall be used only as a public park or school or for recreational or educational purposes, and the Town of Hinesburg shall properly maintain and care for the property decreed hereby." Kotecki pf. supp. at 3; exh. Pet. KLK-3.

21. The condemnation is necessary because the Town will not voluntarily convey the necessary easement rights in light of the covenant in the Decree of Distribution. Kotecki pf. at 6; tr. 8/4/16 at 58 (Kotecki).

5. Description of the Easement Area

22. The Easement area is approximately 1,987 feet long running from north to south through the western edge of Geprags Park. The Easement area will be 50 feet wide, with 25 feet on either side of the pipeline's centerline. The land area of the Easement will be approximately 2.3 acres in permanent easement. LeForce pf. at 5; exh. Pet. KLK-6 at exh. B.

23. The pipeline will be 12 inches in diameter and will be installed 30 to 50 feet below the surface of Geprags Park using HDD. The drill bores and pipeline preparation for the HDD construction at Geprags Park will occur at sites north and south of the Park. LeForce pf. at 12; tr. 8/4/16 at 33 (Kotecki).

24. After construction, the only elements of the pipeline that will be visible above-ground inside Geprags Park will be pipeline markers and cathodic test access points, if needed. Buscher pf. at 4-5; exh. Int. AM; exh. Int. AN; tr. 8/4/16 at 43 (Kotecki), and 185 and 192 (Buscher).

25. In order to conduct required inspections, the Company will need to traverse the Easement area by foot or aircraft after completion of construction. 49 C.F.R. § 192.705(a).

6. Horizontal Directional Drilling (“HDD”)

26. Because the Company will use HDD to construct the pipeline, the public’s use of the Park will not be disturbed during construction of the pipeline in the Easement area, and there will be few maintenance requirements. Tr. 8/4/16 at 148-149, 168, 179 (Nelson).

27. Through the use of HDD, there will be no construction impacts on the Park’s wetlands. Tr. 8/4/16 at 148, 168 (Nelson).

28. The pipeline will cross beneath a Class II wetland within the Park. However, because of the use of HDD to install the pipeline 30 to 50 feet underground, the pipeline will have no impact on the wetlands of the Park. Nelson pf. at 6-7; Joint Panel pf. supp. at 3; tr. 8/4/16 at 168 (Nelson).

29. The pipeline laydown area for the proposed HDD will be located outside the Park at the drill bore exit, where it will be welded, staged, and then pulled through the drill bore. This staging area must therefore be as long as the HDD bore (approximately 2,000 feet). The Company has secured easement areas for staging the proposed HDD laydown area outside the Park. Tr. 8/4/16 at 127 (LeForce).

30. The HDD installation will occur outside the Park on the properties to the north and to the south of the Park. Tr. 8/4/16 at 32-33 (Kotecki) and 116 (Simollardes).

31. The Company has completed approximately twelve large HDD constructions on the Project to date, in addition to smaller drills crossing beneath roads. The Company’s contractor responsible for performing the HDDs is a large, experienced firm based in the United States that operates worldwide. Tr. 8/4/16 at 128-129 (LeForce).

32. The Company has used HDD under other thoroughfares without disturbing surface use by the public, including a drill beneath I-89 in Williston that did not require any interruption of traffic. It has also performed HDD installations beneath a number of streams and wetlands, including a drill under the Winooski River. Tr. 8/4/16 at 129-130 (LeForce) and 163 (Nelson).

33. The Company has developed a plan for responding to inadvertent returns. Inadvertent returns occur when the drilling material is released through fissures in the vicinity of the drill bore route. Such inadvertent releases may result in the clay-slurry drilling material leaking through the drill bore to adjacent areas, including the ground’s surface. The Company has used

its inadvertent return plan successfully to ensure no significant or ongoing impacts to natural resources as a result of inadvertent returns associated with other HDD constructions along the Project route. Tr. 8/4/16 at 75-76, 136 (LeForce), and 174 (Nelson).

34. Analysis of two soil test borings near the Easement route indicates that there is enough depth of unconsolidated material so that the HDD drill bore will likely not have to pass through rock. While the Company would like to verify this conclusion by conducting a third soil test bore on the north side of the Park, this third test bore is not necessary because the results from the two test borings that have already been undertaken suffice to determine that HDD would be feasible under the Park. Tr. 8/4/16 at 76-77, 97 (LeForce) and 166-67 (Nelson).

35. As a result of the HDD construction and the 30- to 50-foot depth of the pipeline, the Company will not need to clear the Easement area of vegetation. The vegetation within the Easement corridor is primarily grass, shrubs, and small trees that do not pose a threat to the pipeline. Tr. 8/4/16 at 115-116 (Simollardes) and 131 (LeForce).

36. In light of the Company's experience with its existing 50-year-old transmission system and the measures used to test the integrity of the pipeline, it is unlikely that the pipe buried in the Park will need to be replaced after it is installed. Tr. 8/4/16 at 130 (LeForce).

37. The extra cost of the HDD construction will be borne by the Company and will not be charged to its ratepayers. Tr. 8/4/16 at 105 (Simollardes).

## 7. Alternatives

38. The Company conducted an analysis of four potential alternative routes to the Easement route through Geprags Park: (1) the VELCO corridor; (2) an eastern route; (3) a western route; and (4) a far western route. The Company's conclusion, based on this analysis, was that all of the alternatives were less desirable than the Easement route because of: (1) uncertainty and schedule delay; (2) the alternatives' U-shaped designs, which deviate from the industry best practices for straight line routes; (3) the additional cost associated with obtaining agreements for alternative rights-of-way; (4) the need for additional due diligence review; and (5) the amendment of collateral permits required for any alternative route. Joint Panel pf. supp. at 9; tr. 8/4/16 at 137-139 (Simollardes); exh. Pet. JAN-4.

39. The Geprags Park alternatives analysis considered factors such as constructability, natural resource impacts, and right-of-way acquisition. Joint Panel pf. supp. at 9; tr. 8/4/16 at 101-102 (Simollardes); exh. Pet. JAN-4.

40. The Geprags Park alternatives analysis did not include an analysis of the comparative costs of the Easement and the alternative routes. Tr. 8/4/16 at 105-106 (Simollardes).

41. Possible alternative routes considered by the Department's gas engineer would require less direct and longer courses than the Easement route. Exh. Pet. JAN-4; Morris pf. at 2; tr. 8/4/16 at 195-196 (Morris); Joint Panel pf. supp. at 6.

42. The eastern and western alternative routes would result in U-shaped lengths of pipeline whereas the Easement route is straight and shorter. Major deviations from a linear route create difficulties for operations. For example, because of added pipeline fittings and elbows, substantial deviations can decrease efficiencies in gas flow and make it more difficult to use inline inspection tools. Joint Panel pf. supp. at 6; exh. Pet. JAN-4.

43. The Company concluded that it would not be possible to complete any of the alternative routes in 2016. A delay beyond 2016 has the potential to increase overall construction costs because of the need to stop crews in the field in 2016 and then bring them back once an alternative site is determined. In addition, the potential gas customers in Addison County would not receive gas service in 2016-2017, and Project costs would increase. Joint Panel pf. supp. at 9-10; tr. 8/4/16 at 94 (Simollardes).

#### The VELCO Corridor Alternative

44. The Company considered and rejected the option of constructing the pipeline in the VELCO corridor in Geprags Park. The co-location of the pipeline in the VELCO corridor was determined not to be a viable pipeline route for several reasons, including: (1) the natural resources in that area, (2) the need to align the route with the route on adjacent properties to the north and south, and (3) the Town's concern that placing the pipeline within the VELCO corridor might interfere with the Town's plans for expansion of its water system. LeForce pf. at 12-13; Joint Panel pf. supp. at 3.

45. As part of its alternatives review, the Company reevaluated co-locating the pipeline within and on the western side of the VELCO corridor in the Park using HDD. The Company concluded that if it were to use HDD in the VELCO corridor, the drill could result in impacts on wetlands on land parcels to the north of the Park because of the need to establish a staging area to drill and pull pipe through the VELCO corridor. Tr. 8/4/16 at 95-96 (LeForce).

46. Further, an HDD drill through the VELCO corridor would necessitate turns in the pipeline that would require multiple HDDs, as opposed to the single HDD required for the proposed straight line alignment in the Easement route. Using multiple drills could result in temporary impacts on the wetlands within the VELCO corridor because the ground would need to be excavated at each turn to pull the pipe. Tr. 8/4/16 at 95-96, 115 (LeForce), 114 (Simollardes), and 169 (Nelson).

47. The Company was also concerned that co-location in the VELCO corridor might interfere with the Town's plans for expansion of its water system. LeForce pf. at 12; Joint Panel pf. supp. at 5.

48. In 1996, the Town sought and received the right to construct a community water system in the Park consisting of drilled water wells, water distribution lines, and other infrastructure. Kotecki pf. supp. at 3-4; exh. Pet. KLK-4.

49. If the pipeline segment were laid in the VELCO corridor, it would not align with the existing pipeline route north and south of the Park. Constructing the line in the VELCO corridor using HDD would require altering the route on the parcels upstream and downstream of Geprags Park, and VGS does not have the easements on the other parcels to the north and south necessary to accommodate that change. If those landowners were not amenable to granting the requisite easements, the Company would need up to 18 months to complete negotiations and eminent domain proceedings. Tr. 8/4/16 at 126-28 (LeForce), 137 (Simollardes), and 98-99 (Kotecki).

50. A private residence is located to the south of the Park adjacent to Shelburne Falls Road and the VELCO corridor. The proximity of the residence to the VELCO corridor would make HDD challenging because there would be limited space to stage equipment and route the pipeline through the corridor. Tr. 8/4/16 at 95, 98 (LeForce); LeForce pf. at 10; *see* exh. Pet. MJB-2 at 44.

### The Eastern Route

51. The Company considered three alternatives outside the Park. The first of these alternatives makes a U-shape east of the Park (the “Eastern Route”). The Eastern Route departs from the Easement route approximately 2,000 feet north of where the proposed Easement corridor would enter Geprags Park. From this point of departure, the Eastern Route proceeds along the VELCO corridor to a point approximately 250 feet north of the Park’s northern border. The Eastern Route then heads east until it reaches VT Route 116. The Eastern Route then runs south along VT Route 116 for approximately 2,000 feet. From VT Route 116, the Eastern Route heads west and rejoins the pipeline route approximately 1,500 feet south of the southern border of the Park. Exh. JAN-4.

52. The Company determined that the Eastern Route was not a viable alternative to the proposed Easement route for several reasons. Joint Panel pf. supp. at 7.

53. The Eastern Route would deviate from the industry best practice of linear construction by requiring nine elbows to be installed in the pipeline route and would add several thousands of feet of pipeline to the project. Joint Panel pf. supp. at 6; tr. 8/4/16 at 133 (LeForce).

54. Pipeline construction along VT Route 116 would be very challenging because it would require blasting through significant lengths of ledge. Blind spots along the roadway would pose traffic management concerns, and the general topography of the area would be difficult. Joint Panel pf. supp. at 7; tr. 8/4/16 at 65-66 (Kotecki) and 134-135 (LeForce).

55. While the Company has blasted through ledge for other segments of the pipeline, the blasting required for the Eastern Route would raise specific public safety concerns given its proximity to VT Route 116 and the steep topography of the ledge in that area. Tr. 8/4/16 at 64-65 (Kotecki).

56. The Eastern Route would require negotiations with numerous additional landowners to secure easement rights over approximately seven additional parcels of land that the pipeline would traverse. Joint Panel pf. supp. at 7; tr. 8/4/16 at 66-68 (Kotecki) and 133 (LeForce).

57. Building the pipeline along the Eastern Route would also require VGS to procure more pipe to build the several-thousand-foot addition to the Project, which would result in additional delay and cost. Tr. 8/4/16 at 139 (Simollardes).

#### The Western Route

58. Another alternative route assessed by the Company is outside the western borders of Geprags Park (the “Western Route”). The Company considered two variations for the Western Route, HDD and trench construction. At 3,800 feet, the HDD for the Western Route would be nearly twice as long as for the proposed Easement route. At approximately 4,200 feet, the trenched Western Route would be longer still. Exh. Pet. JAN-4.

59. The Company determined that both variants of the Western Route were inferior to the Easement route because of significant logistical and construction challenges. LeForce pf. at 13; Joint Panel pf. supp. at 7; tr. 8/4/16 at 135 (LeForce).

60. The trenched Western Route would necessitate substantial cutting of mature forest on a steep, rocky slope, creating a high potential for undue adverse effects on natural resources, such as forest habitat fragmentation as well as soil stability problems on the hill. LeForce pf. at 13; Joint Panel pf. supp. at 7; tr. 8/4/16 at 135 (LeForce).

61. The HDD for the Western Route would require tree clearing in order to create an HDD pipeline laydown area at least as long as the HDD pipeline north of the drill bore entry point. Joint Panel pf. supp. at 7-8; tr. 8/4/16 at 69 (LeForce).

62. The Western Route would require a significant amount of blasting to remove ledge. Joint Panel pf. supp. at 8.

63. The clearing associated with the Western Route could create a substantial aesthetic impact because the loss of trees would be visible from the field areas of the Park. Joint Panel pf. supp. at 8; tr. 8/4/16 at 192 (Buscher).

64. Moving the alignment farther to the west from the proposed Easement route would be less consistent with industry best practices because the western alignment would significantly depart from the linear, north-to-south alignment of the proposed Easement corridor. LeForce pf. at 13.

65. The Western Route would cross the property of two new landowners from whom easements would have to be secured through negotiation or condemnation. New or modified rights-of-way with existing upstream and downstream landowners would also be required to account for a changed pipeline alignment along the western alternative re-route. Joint Panel pf. supp. at 7.

#### The Far Western Route

66. The Company also assessed an additional alternative farther to the west of the Western Route (the “Far Western Route”). Exh. Pet. JAN-4.

67. The Far Western Route would add thousands of feet of new pipeline to the Project and would cross approximately five additional parcels of land. This alternative would create a “horseshoe” curve in the pipeline around the steep bluff immediately west of the Park, cross and follow Shelburne Falls Road, and eventually reconnect with the permitted corridor to the south. Joint Panel pf. supp. at 8.

68. The Far Western Route would create right-of-way access and permitting delay concerns. Joint Panel pf. supp. at 8, 9.

69. The Company concluded that the Far Western Route was not preferable to the proposed Easement route. Construction challenges would result from changes in elevation and ledge and require the purchase of thousands of feet of additional pipe, which might not be immediately available. Also, the extended U-shaped route does not compare favorably to the linear character of the Easement route. Joint Panel pf. supp. at 6, 9; tr. 8/4/16 at 135-36 (LeForce).

#### **B. Orderly Development and Scenic Preservation**

70. The condemnation of the Easement will not unduly interfere with the orderly development of the region or scenic preservation. This finding is supported by findings 71 through 83, below.

71. The Town administration supports the Easement route in the Park. Kotecki pf. supp. at 8.

72. The 2013 Hinesburg Town Plan contains broad statements on scenic beauty and landscape character but no specifics or standards with regard to this particular Park. Nor does the 2013 Town Plan identify the Park as a recreational asset. David Raphael, DPS (“Raphael”) pf. at 3-4.

73. Construction of the pipeline is consistent with the 2013 Chittenden County Regional Plan. Buscher pf. at 8.

74. Locating the pipeline in the Easement area does not violate any clear, written community standard intended to preserve the aesthetic or scenic beauty of the area, considering the goals and policies outlined in the regional and Town plans. Buscher pf. at 6-8; Raphael pf. at 3.

75. Based on observations of the Park and surrounding area and upon review of the Hinesburg Town Plan and the regional plan developed by the Chittenden County Regional Planning Commission, the condemnation of the Easement will have no undue effect on scenic preservation or the scenic beauty of the area. Raphael pf. at 3.

76. The condemnation of the Easement will not unduly interfere with the orderly development of the region or scenic preservation. Morris pf. at 2; tr. 8/4/16 at 195-198 (Morris).

77. The pipeline will be located underground and, therefore, will not be visible. Buscher pf. at 2; tr. 8/4/16 at 97 (LeForce).

78. The landscape of the Park is pleasing, but does not constitute an outstanding or highly sensitive scenic area or an outstanding aesthetic resource. Raphael pf. at 2.

79. The Park is adjacent to a well-traveled road and commuter route—Shelburne Falls Road—and includes an area of open fields that are abandoned farmland as well as mowed areas. Raphael pf. at 2.

80. The Easement would encumber a small amount of land located slightly west of the VELCO corridor, within an area of open fields that are abandoned farmland. Buscher pf. at 4.

81. No above-ground infrastructure is proposed to be located within the Easement area save for a few pipeline markers. Buscher pf. at 4-5.

82. The presence of pipeline markers would not disrupt the use of the Park. Tr. 8/4/16 at 190 (Buscher).

83. The pipeline will not result in a noticeable change to the Park. Installing the pipeline in the Easement will not have a permanent aesthetic impact on the Park, nor cause any perceptible change to the visual landscape in the vicinity of Vermont Route 116, Shelburne Falls Road, or the Park. Buscher pf. at 5; Raphael pf. at 2.

### **C. Condemnation Compensation**

84. To establish the acquisition value of the property rights proposed for condemnation in this proceeding, the Department retained an appraiser who completed an appraisal report in conformity with the requirements of the Uniform Standards of Professional Appraisal Practice. Peter I. Nault, Department (“Nault”) pf. at 3.

85. The Property is subject to a restrictive covenant that runs with the land in perpetuity and provides that the Property shall be used only as a public park or school or for public recreation or educational purposes. In light of these legal restrictions on the Property, the highest and best use of the Property is as a park or school, for public recreation or educational purposes. Exh. DPS-PIN-1 at 18.

86. The Property contains a land area of approximately 85.5 acres. The “before” value of the Property without any structures, after adjustments, is \$141,075, using \$1,650/acre as the reasonable per-acre price. Exh. DPS-PIN-1 at 24.

87. The proposed permanent Easement area is approximately 2.3 acres. The “after” value of the Property without any structures, after adjustments, is (rounded) \$137,655, using \$1,610/acre as the reasonable per-acre price. Exh. DPS-PIN-1 at 34.

88. The Department’s analysis concluded that the Town is entitled to compensation in the amount of \$3,500, comprised of an Easement acquisition value of \$3,500 and no severance value to the remainder property. This figure included \$99 for a temporary easement for certain originally proposed construction activities. Exh. DPS-PIN-1 at 34-35.

89. Because the pipeline will be installed using HDD construction, the Company no longer has a need for the temporary easement rights that were included in the \$3,500 condemnation calculation. Therefore, excluding the value of the temporary easement rights would result in

compensation of \$3,400 (rounded). Nault pf. at 2; exh. DPS-PIN-1 at 39; tr. 8/4/16 at 116-117 (Simollardes).

## V. DISCUSSION

The Board has previously found that the construction of the Addison Natural Gas Pipeline Project will meet the demand for natural gas in Addison County where natural gas is not currently available.<sup>25</sup> In turn, based on the findings in this proceeding and as discussed below, the Board has concluded that the Company has satisfied the requirements of 30 V.S.A. §§ 110, 111, and 112 and that: (1) the condemnation of the Easement is reasonably necessary for the Company to render adequate service to the public in the conduct of its business; (2) the condemnation of the Easement will not unduly interfere with the orderly development of the region or scenic preservation; and (3) the Town is entitled to compensation in the amount of \$3,400.

### A. Necessity

The “necessity” standard in 30 V.S.A. §112 requires the petitioning utility to demonstrate that a condemnation is reasonably necessary to provide adequate service to the public.<sup>26</sup> To justify the taking of an interest in particular land, it must be shown that the taking is required, “but only to the extent that it is reasonably necessary to accomplish the end in view after weighing all the circumstances which bear on any given situation.”<sup>27</sup>

The evidence in this case demonstrates that the condemnation of the Easement across Geprags Park is reasonably necessary so that the Company may provide adequate natural gas service in Addison and Chittenden counties.<sup>28</sup> The Easement is approximately 1,987 feet in

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25. 7970 Final Order at 3.

26. *Amended Petition of VELCO for authority to condemn easement rights in the property interests of the Harley A. Grice Revocable Trust*, Docket 7121, Order of 7/21/06 at 9-12 (citing and discussing *Latchis*, 120 Vt. at 124-125 (1957)).

27. *Bandel*, 135 Vt. 149-150 (quoting *Latchis* 120 Vt. 124-125).

28. See findings 3, 4-11, and 17-21.

length and is the shortest, most direct route to connect the north and south ends of the Project's existing pipeline right-of-way. Condemnation of the Easement in order to install the pipeline segment in Geprags Park will have no adverse aesthetic, archaeological, or environmental effects, particularly given the limited scope of the Easement granted in this Order, as discussed below. The construction of the pipeline will not disturb the surface of the Park because it will be installed 30 to 50 feet underground using HDD, the extra cost of which will be borne by VGS, not its ratepayers.<sup>29</sup> VGS has performed all necessary natural resource and archaeological reviews and has all permits necessary to construct the pipeline segment in the Easement area.

#### Proposed Route and Alternatives

The Company also considered several siting and design alternatives to the proposed Easement route. The Company considered a route through the VELCO corridor in the Park, as well as three alternatives outside the Park, but none of these four other routes proved to be a reasonable alternative to the proposed Easement route.

All four alternative routes shown in exh. Pet. JAN-4 are inferior options.<sup>30</sup> The evidence shows that none of the alternative routes compares favorably to the proposed Easement route in terms of conforming with industry best practices. None of the four alternatives would follow a straight line, and all four would be significantly longer than the pipeline to be installed in the proposed Easement route.<sup>31</sup> The alternatives would encounter terrain challenges because of soil instability and elevation changes, would result in tree clearing that would be visible from the Park, and would require ledge blasting in proximity to a state highway and several residences.<sup>32</sup> These longer alternatives would also require the acquisition of more pipe.<sup>33</sup>

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29. VGS Reply at 3-4; tr. 8/4/16 at 105 (Simollardes).

30. Findings 15, 16, and 38.

31. Findings 38, 46, 53, 58, 64, and 67.

32. Findings 54, 55, and 59-63.

33. Findings 53, 57, and 69.

The Residents oppose the proposed Easement route, and they have presented no evidence to support the choice of any alternative route that is preferable to the Easement route. Instead, the Residents contend that the Company has not met the standard of proof required by 30 V.S.A. §112(2), arguing that VGS has failed to demonstrate the inadequacy of its identified alternatives. In light of VGS's alternatives analysis, we are not persuaded by the Residents' argument that the Company failed to demonstrate the inadequacy of the alternatives it identified to the proposed Easement route.

Rather, we find the evidence demonstrates that the proposed condemnation is reasonably necessary within the meaning of § 112(2), a judgment that is also informed by recognizing that requiring VGS to pursue an alternative to the Easement would introduce the risk of further delay in completing the construction of the pipeline extension in Chittenden and Addison Counties, where Vermonters have been incurring the economic costs of waiting for natural gas service since December of 2013.<sup>34</sup>

*Obligation to Provide Services (30 V.S.A. § 112(2))*

In addition to the reasonable necessity determination, Section 112(2) requires a determination that the proposed condemnation has a public purpose because the petitioner is “under an obligation to serve the public on reasonable terms, pursuant to the regulations of the board.” This public purpose determination is satisfied if the petitioner is “subject to the Board’s control and obligated to serve the public interest.”<sup>35</sup>

The Residents argue that the Company has no obligation to serve the public.<sup>36</sup> We disagree. The Company is a public service corporation with a certificate of public good for gas

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34. Findings 43, 49, 56, 57, 65, 68, and 69, above.

35. *Grice v. Vt. Elec. Power Co.*, 184 Vt. 132, 139-140, 956 A.2d 561 (2008) (citing the Board’s authority to control and oversee the activities of VELCO as a public service corporation pursuant to 30 V.S.A. §§ 102, 209, 210, and 213).

36. Residents’ Pretrial Memorandum at 9-11.

operations throughout the state of Vermont.<sup>37</sup> As such, the Company is statutorily obligated to serve the public subject to the Board's regulatory oversight.<sup>38</sup> As a company subject to the Board's jurisdiction, VGS is "required to furnish reasonably adequate service, accommodation and facilities to the public."<sup>39</sup> The Company has a tariff requiring that it provide service to customers situated within one hundred feet of a distribution line.

Therefore, we conclude that the Company has the requisite public purpose and the authority to seek condemnation under Section 112(2) based on its obligation to serve the public.

### **B. Orderly Development and Scenic Preservation**

Pursuant to § 112, the property right to be condemned must not unduly interfere with the orderly development of the region and scenic preservation. The Board concludes that the location and construction of the pipeline segment in the Easement area in Geprags Park is consistent with this statutory requirement. The Easement will not violate any written community standard intended to promote scenic preservation. The pipeline segment will be installed 30 to 50 feet beneath the surface of the Park using HDD construction technology. With the exception of pipeline markers and cathodic protection test access points, if any, the underground pipeline will not be visible to the public. There are no public vantage points from which the pipeline would be considered "shocking" or "offensive." Finally, the construction phase of the pipeline will not affect the use of the Park. All current uses will be preserved.

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37. *Petition of Vermont Gas Systems, Inc.*, Docket 4808, Order of 9/19/83, at 3-4, 6, 13-14 (approving VGS CPG for natural gas transmission and distribution).

38. *See, e.g.*, 30 V.S.A. § 102 (explaining that a company may become a public service corporation only if it will "promote the general good of the state" and providing that the Board may revoke the certificate for good cause); 30 V.S.A. § 203 (providing that the Board has jurisdiction over companies, including natural gas, and providing that the "board and the department may, when they deem the public good requires, examine the plants, equipment, lines, exchanges, stations and property of the companies subject to their jurisdiction"); 30 V.S.A. § 209 (vesting the Board with broad jurisdiction over "all matters respecting" a public service corporation); 30 V.S.A. § 231(b) (providing that a company must obtain approval from the Board in order to abandon or curtail any service subject to the Board's jurisdiction or to abandon all or any part of its facilities if that would result in the abandonment, curtailment, or impairment of service, which approval will be based upon a determination that such abandonment or curtailment is consistent with the public interest).

39. 30 V.S.A. § 219; *see also* 30 V.S.A. § 216 (providing that the Board has "authority to fix rates and determine the minimum standards of service for consumers" of pipeline natural gas).

### **C. Condemnation Compensation**

In Vermont, condemnation compensation typically is measured by the “difference between the value of the whole parcel immediately before the taking and the value of the remaining part immediately after the taking.”<sup>40</sup> Pursuant to 30 V.S.A. § 112(4), compensation for a condemnation of private property rights “shall be based upon the value of the property on the day the petition is presented to the board.”<sup>41</sup> The Department’s independent appraiser recommended compensation in the amount of \$3,500, a figure that was derived by subtracting the “before” value of the Property (\$137,500) from its “after” value (\$141,000). However, because we have decided to authorize the condemnation of an easement that requires the use of HDD for placing the pipeline segment within the easement corridor, there will be no need for the temporary construction rights that the Company originally contemplated and were included in the Department’s appraisal (at a value of \$99). We therefore conclude that the Town is entitled to condemnation compensation in the amount of \$3,400.<sup>42</sup>

### **D. Prior Public Purpose Doctrine**

The Company has petitioned the Board for authority to condemn an easement through Geprags Park, a property that is presently in use for a public purpose. The Residents argue, therefore, that such a condemnation is prohibited by Vermont Supreme Court precedent recognizing the applicability of the Prior Public Use Doctrine in Vermont. In turn, VGS and the Department maintain that the Prior Public Use Doctrine does not bar the proposed condemnation because that doctrine has widely been construed as allowing a condemnation of public land if it “will not destroy or materially interfere with the prior public use.”<sup>43</sup>

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40. *Petition of Central Vermont Public Service Corporation for authority to condemn easement rights in property interests of Michael Bladyka, located in Weathersfield, Vermont, Docket 7437, Order of 3/16/09 at 7.*

41. 30 V.S.A. § 112(4).

42.  $\$3,500 - \$99 = \$3,400$  (rounded). There is no evidence in the record to support a separate award of severance damages or consequential damages.

43. VGS Response to Residents’ Pretrial Memorandum, re Prior Public Use Doctrine, at 1-3, (citing *Rutland-Canadian Railroad*, 47 A. at 400 and *Vermont Hydro-Electric*, 112 A. at 151).

In the context of utility condemnation proceedings, the Vermont Supreme Court has characterized the Prior Public Use Doctrine as follows: “It is the well-settled law of this state that property already appropriated to a public use cannot be taken for another public use without legislative authority, either express or implied.”<sup>44</sup> This doctrine was applied by the Vermont Supreme Court in *Vermont Hydro-Electric* and *Middlebury College*, two cases cited by the Residents in support of their argument. Both of these cases involved a taking of the entire ownership interest in the condemnee’s land for a use by the condemning utility that would have destroyed the condemnee’s prior public use.<sup>45</sup>

In *Vermont Hydro-Electric*, the Court construed the Prior Public Use Doctrine to prohibit the condemnation of a utility’s planned hydroelectric site by a city that wished to convert the site to a public water source that the Court found “would wholly destroy” the development of the site for hydroelectric production.<sup>46</sup> In *Middlebury College*, the Court applied the doctrine to prevent condemnation by the utility of the entire ownership interest of Middlebury College in large swaths of forest that, pursuant to a testamentary trust, were to be preserved in their “virgin” and “primeval” state along a river for enjoyment by the public as a park. The utility had intended to use the condemned land to construct a hydroelectric dam and reservoir.<sup>47</sup> Thus, both *Vermont Hydro-Electric* and *Middlebury College* dealt with circumstances where the proposed condemnation would have destroyed or materially impaired the existing public use.

By contrast, in this proceeding the Board is faced with a very different factual context, one that the Vermont Supreme Court does not appear to have previously had occasion to consider in applying the Prior Public Use Doctrine under Vermont’s utility condemnation statute. The evidence in this Docket does not show that the limited condemnation we are authorizing would destroy or materially impair the existing public recreational use of Geprags Park.<sup>48</sup> Rather, the

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44. *Middlebury College*, 143 A. at 388.

45. *Middlebury College*, 143 A. at 387, 389-390; *Vermont Hydro-Electric Corporation*, 112 A. at 226.

46. *Vermont Hydro-Electric Corp.*, 112 A. at 226.

47. *Middlebury College*, 143 A. at 387.

48. In seeking permissive intervention, the Residents represented themselves as “regular, active users of Geprags Park who have a personal and substantial interest in the use and enjoyment of the park that may be affected by the

evidence demonstrates that placing a pipeline segment 30 to 50 feet below the surface of the Park would be compatible with the existing recreational uses above ground.<sup>49</sup> Visitors to Geprags Park use the various existing trails for recreation and birdwatching. Most of these trails are located to the east of the VELCO corridor in the Park. The construction itself will have no surface impact on the Property. The proposed pipeline segment will be inserted perpendicular to and 30 to 50 feet below the Hill Spur trail, the only trail to the west of the VELCO corridor. The Hill Spur trail and the other trails will be affected by neither the HDD construction nor the presence of the pipeline underground after construction.<sup>50</sup> The Easement corridor will only be observable from the Hill Spur trail through occasional pipeline markers, a small trail for inspection on foot of the Easement route, and, if necessary, cathodic protection test ports positioned in consultation with the Hinesburg Conservation Commission.<sup>51</sup> Finally, the limited Easement that we have authorized will substantially preserve the Town's continued use of the property.

Neither *Vermont Hydro-Electric* nor *Middlebury College* required the Court to address how the Prior Public Use Doctrine would be applied when the facts demonstrate, as they do in this case, that the proposed taking is compatible and would not materially interfere with the prior public use of the property to be condemned. Therefore, in this proceeding we must address what appears to be a legal question of first impression in Vermont.

Relying on *City of Burlington*, the Residents argue that, for purposes of applying the Prior Public Use Doctrine, it is irrelevant under Vermont law whether the proposed condemnation would interfere with the existing use of Geprags Park.<sup>52</sup> Rather, they contend that “[c]hange in

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outcome of this proceeding.” Docket 8643, Order of 5/23/16 at 3. The Residents were granted permissive intervention because their participation “may be helpful to the Board with developing a clear understanding of the nature and extent of the public use that is made of Geprags Park, and what impact could be expected” if the condemnation petition were approved. *Id.* at 6. However, the Residents did not present any testimony or other evidence regarding the existing uses of the Park, or how such uses might be materially impaired by introducing the pipeline segment below ground in the Park.

49. Findings 14 and 26.

50. Findings 24, 80, and 81.

51. *Id.*

52. *Vermont Gas Systems, Inc., v. City of Burlington*, 130 Vt. 75 (1971).

use” is the issue, and not the degree to which the condemnation would interfere with or harm the prior public use.<sup>53</sup> We do not find this to be a persuasive characterization or use of *City of Burlington* to support the Residents’ position.

At issue in *City of Burlington* was whether VGS could obtain compensation for being required to take out of service its gas lines beneath certain streets that the City had decided to abandon as part of an urban renewal project. The Court initially declined to award such compensation to the utility.<sup>54</sup> The Court reasoned that the gas distribution lines had been installed under the streets pursuant to a “gratuitously supplied right of way,” and that this did not invest the utility with a property interest in the streets that would “impinge on the judgment” of city officials in “locating and relocating” its roads. The Court pointed out that the streets were City-owned, not utility-owned, and then followed this point with an observation that the utility was without power to condemn a property interest in the streets because they were already dedicated to a public use. However, this observation from the Court was not the holding of the case.

The holding in *City of Burlington* is that a city has the right to close its street, and a utility enjoys only a subordinate privilege to locate its line beneath that street, except the utility is entitled to some reimbursement for the cost of taking its line out of service when the city elects to abandon the street.<sup>55</sup> Thus, we are not persuaded by the Residents’ view that *City of Burlington* informs the application of the Prior Public Use Doctrine in a condemnation by making clear that “interference is irrelevant” or that “change in use” is the issue. At most, the relevance of *City of Burlington* is that it marks the most recent indication from the Vermont Supreme Court that the Prior Public Use Doctrine still has currency in Vermont law, a proposition that nobody disputes in this case.

Other jurisdictions have accepted the principle that where land is already devoted to a prior public use, a subsequent additional condemnation is not foreclosed when the second taking

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53. Residents’ Brief at 29.

54. On reconsideration, some compensation was awarded to VGS after all, for reasons not relevant to this discussion of the case. *City of Burlington*, 130 Vt. at 82.

55. *City of Burlington*, 130 Vt. at 78 and 82-83.

will also serve a public use and will neither destroy nor materially impair the existing public use.<sup>56</sup> For instance, in a case with facts similar to the evidence in this Docket, a New York state court concluded that the City of Mechanicville's prior public use of property along a former canal and towpath for hiking, biking, and winter sports did not preclude the Town of Halfmoon's condemnation of an easement for a water main that would be placed under the towpath. In reaching this conclusion, the court reasoned that Halfmoon's water main under the towpath was a public use that would not interfere with Mechanicville's prior use of the towpath's surface for public recreational purposes.<sup>57</sup>

Closer to home, in the *Rutland-Canadian Railroad* case, the Vermont Supreme Court reviewed a judgment made by railroad commissioners concerning certain property rights sought by the Rutland-Canadian Railroad Company over property already in use for a public purpose by the Central Vermont Railway Company. Uncertain of their jurisdiction, the commissioners reached a contingent decision. Subject to confirmation of their jurisdiction by a reviewing court, the commissioners authorized Rutland-Canadian to bisect Central Vermont's railyard with an independent railway line. In the alternative, the commissioners authorized Rutland-Canadian to interconnect with Central Vermont's existing tracks and to use its station.

On appeal, Central Vermont invoked the Prior Public Use Doctrine to challenge the commissioners' judgment. Ultimately, after affirming the commissioners' jurisdiction to award both types of authorization (i.e., the authority to construct a crossing or the authority to interconnect), the Court upheld the interconnection authorization because "the interest of both parties, as well as that of the public, will be best served by a joint use of [Central Vermont]'s tracks and station."<sup>58</sup> The Court found the record did not support a showing of any need to authorize Rutland-Canadian to construct the crossing, which would have destroyed Central

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56. See Linda A. Sharpe, 49 A.L.R. 5<sup>th</sup> 769, §13 (1997) (collecting cases).

57. *City of Mechanicville v. Town of Halfmoon*, 805 N.Y.S.2d 666, 668 (3d Dep't 2005).

58. *Rutland-Canadian Railroad*, 47 A. at 401.

Vermont's prior public use of the property, thereby running afoul of the Prior Public Use Doctrine and putting Rutland-Canadian in "exclusive possession and control" of the premises.<sup>59</sup>

The *Rutland-Canadian Railroad* case was not decided under the condemnation statute at issue in this Docket. Nonetheless, we find the case to be persuasive authority because it reflects a measured approach taken by the Vermont Supreme Court in applying the Prior Public Use Doctrine to the facts of that case. The Court "disaffirmed" the crossing authority because it would have wholly destroyed Central Vermont's prior public use. However, in that same case, the Court affirmed the interconnection authority awarded to Rutland-Canadian, notwithstanding Central Vermont's prior public use of its tracks and station. This outcome suggests that the application of the Prior Public Use Doctrine in Vermont is to be tempered in cases where the public good will best be served by requiring the joint use of a property that is already subject to a prior public use, provided the additional public use will not destroy or materially interfere with the prior public use.

In this case, we are persuaded that the public good will best be served by authorizing a condemnation that will result in the joint use of Geprags Park for both the existing public recreational purpose and the second, additional public use proposed by VGS. As the *Halfmoon* case illustrates, it is reasonable to conclude that a utility pipe installed underground is a public purpose use that is compatible and will not interfere with prior public recreational uses above ground.

#### **E. Other Legal Issues Raised by the Residents**

The Residents argue that the Revised Stipulation between VGS and the Hinesburg Selectboard embodies an illegal agreement to change the use of Geprags Park. According to the Residents, the Selectboard lacked the authority to agree to a change in the use of Geprags Park without the approval of a court of competent jurisdiction and therefore the Revised Stipulation is void and cannot form the basis for granting the eminent domain petition.

This argument mischaracterizes the nature of the Revised Stipulation. That document memorializes several terms by which VGS and the Town expect to be bound in the event that the Company's petition for condemnation is granted. On its face, the Revised Stipulation is not

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59. *Id.*

intended to have any operative effect unless VGS first succeeds in obtaining a Board Order authorizing the Company to condemn a pipeline right-of-way through Geprags Park. Given that such a taking is inherently involuntary, an agreement reached in expectation of a condemnation order cannot reasonably be characterized as an agreement to a “change in use” in Geprags Park. In any event, today’s Order neither relies upon nor approves the Revised Stipulation. Accordingly, there is no need for us to resolve the merits of the Residents’ argument that the Revised Stipulation is void.<sup>60</sup>

Finally, the Residents allege that “if the Board accepts proof of need based on the findings and C.P.G. in Docket 7970, and if the Board or the Supreme Court in Docket 8330 determines that an amended C.P.G. in Docket 7970 is required, the statutory and constitutional foundation for the taking in this case will crumble.” Thus, the Residents contend that if VGS prevails in this condemnation proceeding, then the Board should condition its order upon VGS making a commitment to “cease use of the condemned property, to remove all improvements ... and to completely remediate the property, upon an adverse ruling in Docket 8330 by the Board or the Supreme Court.”<sup>61</sup> We find this argument to be without merit. For one, it is premised entirely upon speculation regarding the outcome of a separate case that deals with matters well beyond the scope of this condemnation proceeding. For another, today’s Order makes clear that our necessity determination in this condemnation proceeding is not based on findings made in Docket 7970.<sup>62</sup> Finally, this argument ignores that the Company holds a valid CPG for the Project in Docket 7970, and that no order has been issued revoking that CPG, notwithstanding that there have been two subsequent proceedings in which the Board twice ultimately declined to re-open the final judgment in Docket 7970 to reconsider the decision to grant VGS a CPG for the Project.<sup>63</sup>

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60. Similarly, there is no need for us to address the argument that the Revised Stipulation is void for lack of voter approval. *See* Residents’ Brief at 31.

61. Residents’ Reply to VGS at 8.

62. *See* findings 3-69, above.

63. Docket 7970, Orders of 10/10/14 and 1/8/16.

**F. Description of the Easement Approved for Condemnation (30 V.S.A. § 114)**

30 V.S.A. § 114 requires that any Board order authorizing a utility condemnation must include a description of the property right to be condemned. Specifically, Section 114 provides:

When the board renders judgment, it shall send by registered mail to each of the parties in interest or their attorneys, within 30 days thereafter, a certified copy of such judgment. If the judgment is in favor of the petitioner, the board, in the same manner, shall send to such parties a certified copy of the findings which shall include a description of the property or right to be condemned. The petitioner shall cause a certified copy of the judgment and findings to be recorded in the clerk's office of the town or towns in which such property is located, within 30 days after such copies are received by him or her.

To fulfill this statutory requirement, VGS submitted a proposed easement description for the Board's consideration.<sup>64</sup> However, as the record of the proceeding shows, the Company's proposed easement would have included some property rights that are no longer necessary for laying the pipeline segment through Geprags Park.<sup>65</sup> For instance, given that the pipeline segment will now be installed in the Park using HDD, the Company no longer needs a right to use temporary construction easements, or the right to clear vegetation within three feet on either side of the Easement area, or the right to prevent the Town from installing fencing in the Easement area. Accordingly, for purposes of complying with Section 114, we decline to adopt in full the Company's proposed easement description.<sup>66</sup> Instead, we hereby describe the Easement to be condemned as follows:

(1) Vermont Gas Systems, Inc., a Vermont corporation having its principal place of business at South Burlington, in the County of Chittenden and State of Vermont ("VGS" or the "Company"), shall have the right (the "Easement") to construct a pipeline no larger than twelve (12) inches in diameter (the "Pipeline") under

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64. See Petition at Exhibit C. This proposed easement was later modified and admitted into evidence as exh. Pet. KKK-6.

65. VGS Reply at 8-10; *see also* tr. 8/4/16 at 17-18, 20 (Kotecki), 116-117 (Simollardes), 131 (LeForce), and 153 (Behm).

66. In light of today's Order, there is no need for us to address the Residents' argument that the language of the Company's proposed easement would alter the public purpose of the Park because it "does not restrict VGS to the use of HDD other than for the initial construction of the pipeline." Residents' Brief at 25.

certain lands and premises presently designated by the Town of Hinesburg (“Town”) as “Geprags Park,” Parcel ID: 16-20-26.1 (the “Property”). The Property is real property and is more fully described as only a portion of the real property conveyed to the Town of Hinesburg by Partial Decree of Distribution for the Estate of Dora E. Geprags, dated December 2, 1991, and recorded on January 14, 1992, at Book 80, Page 106 of the Town of Hinesburg Land Records. The Pipeline shall be used by VGS only for the transportation of natural gas, consistent with the terms and conditions set forth in the Vermont Public Service Board Docket 7970 Certificate of Public Good (“CPG”) and any related orders issued in Docket 7970. The diameter and operating pressure capacity of any replacement pipeline shall be no greater than authorized in Docket 7970 unless an amendment is granted by the Vermont Public Service Board, and provided that any alterations do not require the use of any land outside of the Easement Area as defined below.

(2) The “Easement Area” as used herein shall mean a corridor that is approximately 1,987 feet long, running from north to south through the western edge of the Property, and is depicted as the “Permanent Easement” in Attachment A to Exhibit Pet. KKK-6 as admitted into evidence in Vermont Public Service Board Docket 8643 on August 4, 2016. The Easement Area shall be 50 feet wide, extending 25 feet on each side of the pipeline’s centerline as initially installed on the Property. The Company shall use horizontal directional drilling to insert the pipeline 30 to 50 feet below the surface of the Easement Area.

(3) In construing the rights conferred in the Easement, VGS at all times shall endeavor, to the greatest extent practicable, to preserve, protect, and enhance the existing recreational and educational uses of Geprags Park and the quality of the foregoing, without compromising the public safety and environmental standards required for safe construction and operation of the pipeline. At all times, the Company’s right to construct, operate, maintain, repair, replace, or remove the pipeline shall be accomplished by minimizing the extent and duration of any impacts of these activities on the Property. The Company’s activities shall be undertaken using reasonable care and judgment of industry professionals, while affording substantial deference to the Town’s recommendations.

(4) The Easement shall be non-exclusive, so that VGS may not exclude members of the public from continuing to access the Easement Area both during and after initial construction, save for periods where, in the reasonable judgment of Vermont Gas, construction or public safety conditions require temporary exclusion of individuals or groups to render adequate service to the public. During initial construction of the pipeline, Vermont Gas shall work with the Hinesburg Conservation Commission to sequence construction so as to allow for continued access to the Hill Spur trail via existing and alternate routes, or resumption of use as expeditiously as possible, provided that the foregoing can be accomplished without unnecessarily prolonging the timing of construction or

compromising public safety. Any subsequent exercise by VGS of a right of temporary exclusion of the public from the Easement Area shall be tailored toward preserving public trail access to the Hill Spur and any future trails to the greatest extent practicable, and to restoring full public access as expeditiously and as safely as possible.

(5) The Company shall have the right within the Easement Area to inspect, maintain, repair, replace, reconstruct, and remove one subsurface pipeline no larger than twelve (12) inches in diameter. Except in the case of an emergency, the Company shall use HDD to the extent feasible to repair, maintain, replace, reconstruct, or remove the pipeline.

(6) The Company shall not construct any above-ground appurtenances on the Easement Area, except for mandatory and lawfully required safety and operational appurtenances necessary for the pipeline's safe operation, including pipeline markers and cathodic test leads, as necessary and not to exceed the minimum size requirements under state or federal law. The Company shall have the right to conduct regular route inspections on foot. All pipeline markers and cathodic test leads shall be installed and maintained in consultation with the Hinesburg Conservation Commission or other entity assigned by the Town Selectboard. To the extent feasible, VGS shall flush-mount any necessary cathodic test leads to the pipeline markers to minimize the number of above-ground structures in the Easement Area. The Company shall not install above-ground valve sites, compressors, fences or gates, or any other similar above-ground pieces of equipment within the Easement Area or elsewhere in Geprags Park. The Town, acting by and through the Hinesburg Conservation Commission or other entity assigned by the Selectboard, and the Company shall mutually agree on the location of pipeline markers and any cathodic test leads prior to their placement, with appropriate consideration for legal and safety requirements related to placement of such structures.

(7) VGS shall coordinate and communicate with the Hinesburg Conservation Commission through the office designated by the Selectboard on matters relating to the initial construction of the pipeline and placement of pipeline markers, and associated restoration and enhancement activities as set forth herein, and shall wherever practicable accept the recommendations and directions of the Conservation Commission related to the foregoing. Once initial construction is complete, VGS shall furnish to the Conservation Commission periodic reports, no less than once per calendar year, concerning any maintenance, repair, or replacement activities in the Easement Area and shall meet with the Conservation Commission at least annually at the invitation of the Commission. Any dispute or disagreement between the Conservation Commission and VGS shall first be brought to the Hinesburg Selectboard for review prior to any enforcement action being sought.

(8) Except in exigent circumstances that pose a risk to public health or safety, the Company shall provide the Town and the Hinesburg Conservation Commission with reasonable notice in advance of performing any activities for maintenance, repair, replacement, reconstruction, or removal in the Easement Area. Such notification shall include the expected dates and a description of the purpose of the planned activity.

(9) Except in an emergency, the Company shall access the Easement Area after providing reasonable notice to the Town, preferably in advance, and such access shall be only from limited existing access points where the Easement Area meets the Property's boundaries (i.e., Shelburne Falls Road to the south of Geprags Park, and from the property to the north of Geprags Park presently owned by Ballard). The Company shall only traverse other areas of the Property to access the Easement in exigent circumstances posing a significant risk to public health or safety or to prevent damage to the Property or to the pipeline.

(10) The Company shall immediately notify the Town of any significant condition(s) on the Property posing an imminent danger to persons or property as soon as the Company becomes aware of any such condition, in accordance with the Town's Local Emergency Operations Plan.

(11) The Company shall indemnify and hold harmless the Town from any claims, losses, damages, demands, costs, or actions arising from construction, maintenance, and use of the pipeline and related facilities and appurtenances, regardless of whether the action occurs within the Easement Area or elsewhere in Geprags Park, except to the extent that any claim or action results principally from the intentional, reckless, or grossly negligent acts or omissions of the Town, its agents, licensees, or invitees.

(12) In the event the Company disturbs the surface of the Property during an emergency following initial construction and restoration, whether inside the Easement Area or elsewhere, the Company shall, as much as reasonably possible, remediate the Property's surface to the condition that existed before the disturbance. Remediation shall include re-seeding (using the specified seed mixes in the Company's erosion protection and sediment control plans approved in Docket 7970, and where feasible taking into account the recommendations of the Hinesburg Conservation Commission to the extent consistent with existing permits) of any areas of the Property disturbed. Unless upon terms agreed upon by the Conservation Commission and the Company, any such remediation shall take place outside of the warbler nesting season that takes place from April 15 through July 31, and in dry conditions to the extent reasonably possible.

(13) The Town shall have the right to continue to use and enjoy the Easement Area in a manner that is consistent with educational, recreational, and municipal

uses, and that shall not prevent, or interfere with, the Company's use of the Easement Area, except as otherwise described herein. The Town's uses may include, but shall not be limited to, using the Easement Area for educational, recreational, agricultural, open space, setback, density, trails, unpaved roadways, and utility purposes, provided, however, that:

- a. The Town's installation and use of trails, unpaved roadways, and utilities shall not unreasonably interfere with the Company's pipeline within the Easement Area;
- b. The Town shall construct unpaved roadways, utilities, and related improvements as perpendicular to the Easement Area as is reasonably practicable; and
- c. The Town, the Hinesburg Conservation Commission, and their respective agents, successors, and assigns shall consult with the Company and obtain written consent before beginning any construction on any trails, unpaved roadways, and utilities within the Easement Area, which consent the Company shall not unreasonably withhold, condition, or delay.

All Town trails, unpaved roadways, and utilities shall be installed and maintained by the Town, its agents, successors, and assigns at their sole cost and risk provided that the Company, its successors, and assigns shall bear all costs and risks (i) of monitoring the Town's installation and maintenance of the trails, unpaved roadways, and utilities where they cross the Easement Area; and (ii) of the construction and maintenance of the Company's pipeline where it overlaps with any pre-existing easements for utilities, the utilities themselves, and related appurtenances, such as water pipes and lines, wastewater pipes and lines, and electrical transmission lines and related appurtenances.

(14) The Town shall not construct, install, or permit the construction or installation of any structures or objects of any kind upon or under the surface of the Easement Area, shall not store or place any objects within the Easement Area, and shall not change the elevation of the Easement Area without the Company's prior written agreement or approval, which the Company may withhold or condition in its reasonable discretion.

(15) Following initial construction of the pipeline, except in exigent circumstances posing a risk to public safety, the Company shall notify the Town and the Hinesburg Conservation Commission in advance of any work or maintenance in the Easement Area. Such notification shall include the expected dates and purpose of planned work. The noticed dates of work may shift to account for unexpected weather or scheduling issues. Any damage caused by these activities, whether in the Easement Area or other areas of the Property, shall be promptly repaired by the Company at its sole expense. If any such work would require disturbance to the Hill Spur trail or any future trails, VGS shall coordinate

in advance with the Conservation Commission to prepare an alternate means of access.

(16) At no time shall the Company use herbicides in exercising its rights under this Easement, except as may be required by permitting authorities to prevent the spread of invasive species. In instances where permitting authorities provide various options for herbicides to stop the spread of invasive species, the Company shall consult with the Hinesburg Conservation Commission in advance to select which herbicides to employ, methods of application, and means for advance public notice.

(17) The Company shall maintain the Easement Area clean of all litter, trash, and debris created by the Company during periods of construction, repair, or removal. The Company shall only use the Easement Area for the purposes specified in this Easement. The Company, its officers, agents, employees, contractors, invitees, guests, and representatives are strictly prohibited during the conduct of official business from hunting, fishing, and other recreational activities in the Easement Area, or anywhere on the Property, and from bringing firearms onto the Easement Area, or anywhere on the Property.

(18) The Company shall at all times remain in compliance with the terms and conditions of all permits, including those issued by federal and state authorities with respect to wetland impacts, water quality protection, and environmental protection, as well as the applicable terms and conditions of the Docket 7970 CPG (and any future orders that may be issued with respect to the pipeline). The responsibility to observe all permit conditions as set forth herein, including those protecting water quality and avoiding releases of hazardous materials, shall apply to the entire Property and not only to the Easement Area.

(19) The Company and its successors and assigns shall have the right, subject to prior Vermont Public Service Board approval, to assign to others, in whole or part, any or all of the rights under the Easement, provided that in the event of an assignment, the assignor shall notify the Town in writing within thirty (30) days of the assignment. If the Easement is abandoned, the Company, its successors, and assigns shall, at their sole cost and expense, quitclaim to the Town, its heirs, successors, and assigns any rights in this Easement conveyed to the Company. For purposes of this provision, "abandoned" shall mean that the Vermont Public Service Board or its successor has issued a final and binding determination that the Company has abandoned the Easement. In all cases of abandonment, the Company shall be permitted to leave in place any underground structures or facilities associated with the Easement Area, if abandonment shall create less disturbance than removal.

(20) Because this Easement has been awarded to VGS via condemnation, the Town has made no representation or warranty as to the existence of any condition on the Property related to hazardous wastes and/or toxic substances, nor regarding any spill or release of any hazardous substance and/or toxic waste during or before the Town's ownership of the Property, except that the Town is not personally aware of the presence of hazardous wastes and/or toxic substances on the Property.

## VI. CONCLUSION

For the reasons discussed in this Order, we find that the condemnation of the Easement described above is reasonably necessary for VGS to render adequate natural gas service to the public in the conduct of its business. The weight of the evidence demonstrates that the condemnation of the Easement will not unduly interfere with the orderly development of the region and scenic preservation, and that the total just compensation due for the condemnation is \$3,400.

To the extent the findings of fact and conclusions of law in this Order are inconsistent with any proposed findings of fact or conclusions of law submitted by any party, such proposed findings or conclusions of law, having been considered, are hereby rejected.

## VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont (the "Board") that:

1. Vermont Gas Systems, Inc., ("VGS" or the "Company") is authorized to condemn the property rights that are described in Section F of this Order (the "Easement").
2. The condemnation of the Easement is reasonably necessary for the Company to render adequate natural gas service to the public in the conduct of its business.
3. The condemnation of the Easement will not unduly interfere with the orderly development of the region and scenic preservation.
4. Within 30 days of issuance of this Order, the Company shall cause a certified copy of this Order to be recorded in the Town Clerk's Office of Hinesburg, Vermont.
5. The total just compensation due to the Town of Hinesburg as a result of this Order for the Easement in Geprags Park, based on its value as of May 3, 2016, is \$3,400.

6. Full payment of the \$3,400 shall be made to the Town of Hinesburg within 30 days of the date of this Order, which shall occur before the recording of this Order in the Town Clerk’s Office of Hinesburg, Vermont.

7. The use of the Easement condemned pursuant to this Order shall not be authorized and shall not begin until after the Company has caused a certified copy of this Order to be recorded in the Town Clerk’s Office of Hinesburg, Vermont.

Dated at Montpelier, Vermont, this 13th day of September, 2016.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/Margaret Cheney</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	

OFFICE OF THE CLERK

FILED: September 13, 2016

ATTEST: s/Judith C. Whitney  
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)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.*