

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 5980

Investigation into the Department of Public        )  
Service's proposed Energy Efficiency Plan Re:        )  
Phase II    )

Hearing at Montpelier, VT  
November 5, 1999

Order entered: 4/13/2000

**ORDER RE: PROVISION FOR ENERGY EFFICIENCY CHARGE ADJUSTMENT**

PRESENT:       Sandra A. Waldstein  
                  Hearing Officer

APPEARANCES:   Aaron Adler, Esq.  
                                  for Vermont Department of Public Service

Morris Silver, Esq.

\* Mary Marzec, Law Clerk  
                                  for Central Vermont Public Service Corporation

\* Michael P. Drescher, Esq.

\* Donald J. Rendall, Jr., Esq.  
Sheehey, Brue, Gray & Furlong, P.C.  
                                  for Green Mountain Power Corporation

Edward V. Schwiebert, Esq.

\* James C. Leary, Esq.  
Reiber, Kenlan, Schwiebert, Hall & Facey, P.C.  
                                  for Vermont Marble Power Division of OMYA, Inc.

\* William F. Ellis, Esq.

McNeil, Leddy & Sheahan, P.C.  
                                  for City of Burlington Electric Department

- Trevor R. Lewis, Esq.  
\* William B. Piper, Esq.  
Primmer & Piper, P.C.  
for Villages and Towns of Barton, Enosburg Falls, Hardwick, Hyde Park, Jacksonville, Johnson, Ludlow, Lyndonville, Morrisville, Northfield, Orleans, Readsboro, Stowe and Swanton Electric Departments
- \* Avram Patt, General Manager  
\* William A. Powell  
for Washington Electric Cooperative, Inc.
- \* M. Jerome Diamond, Esq.  
Diamond & Associates, P.C.  
for Washington Electric Cooperative, Inc.
- \* Michael Burak, Esq.  
Burak, Anderson & Melloni, PLC  
for Vermont Electric Cooperative, Inc.
- \* Martin K. Miller, Esq.  
\* Victoria J. Brown, Esq.  
Miller, Eggleston & Cramer, Ltd.  
for Citizens Utilities Company
- \* Thomas Pierce, President  
for Rochester Electric Light & Power Company
- \* Leigh Seddon, Representative  
for Vermont Natural Resources Council
- \* Jenny L. Carter, Esq., Policy Director  
for Vermont Public Interest Research Group
- \* Leonard H. Singer, Esq.  
\* Algird F. White, Jr., Esq.  
\* Barbara S. Brenner, Esq.  
Couch White, LLP  
for IBM Microelectronics & IBM Corporation
- \* Gary Farrell, Chair  
for Vermont Electricity Consumers Coalition

- \*\*Parker M. Riehle, Esq.  
for Vermont Ski Areas Association
- \* Charles R. Nichols, Director, Environmental Issues  
for Vermont Chamber of Commerce
- \* Matthew Rubin, Director  
for Vermont Independent Power Producers Association
- \* David Tucker, Director  
for Vermont Office of Economic Opportunity
- \* Caryl J. Stewart, President of the Board  
for Vermont Development Credit Union
- \* Glenn A. Jarrett, Esq.  
for Vermont Housing Finance Agency
- \* Deirdre O'Callaghan, Esq., Vice President  
for American Skiing Company
- \* Mark Elwood Bennett, Esq.
- \* David W. Marshall, Esq.  
for Conservation Law Foundation
- \* Sheri Larsen, Director of Government Relations  
for Lake Champlain Regional Chamber of Commerce
- \* Raymond J. Obuchowski, Esq.  
for Associated Industries of Vermont

\*Filed Notice of Appearance but did not attend hearing

\*\*Attended hearing but has not yet filed a Notice of Appearance

## **I. Introduction**

### **A. Background and Summary of Issue**

In an Order dated November 19, 1999, the Public Service Board ("Board") approved a comprehensive settlement among the parties for implementation of the Energy Efficiency Charge ("EEC") to fund programs to be delivered through the Energy Efficiency Utility.<sup>1</sup> The EEC was approved on a bills-rendered basis effective as of February 1, 2000. The Energy Efficiency Utility ("EEU") is now under contract to the Board and began delivery of state-wide core energy efficiency programs on March 1, 2000.

One issue was left unresolved in that comprehensive settlement: the request of the 14 Municipals<sup>2</sup> for authority to petition the Board for an adjustment of the EEC during calendar year 2000. For the reasons set out below, I recommend that the Board deny the request of the 14 Municipals.

### **B. Procedural History**

The general background to this issue is provided in prior Board Orders and need not be repeated here.<sup>3</sup> The Vermont Department of Public Service ("Department" or "DPS") filed a Stipulation on October 27, 1999 ("Stipulation"), between itself and most parties, settling the specific issues of rate design for the EEC. However, the 14 Municipals were not parties to that Stipulation. On November 2, 1999, the Department filed an agreement between itself and the 14 Municipals ("Municipal Agreement") resolving all but one issue between them. A technical hearing was held on November 5, 1999, during which parties gave evidence supporting the

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1. *See also* Order re: Motion to Alter issued on 12/21/99.

2. Barton Village, Inc. Electric Department, Enosburg Falls Electric Light Department, Town of Hardwick Electric Department, Village of Hyde Park Electric Department, Village of Jacksonville Electric Department, Village of Johnson Electric Light Department, Village of Ludlow Electric Light Department, Village of Lyndonville Electric Light Department, Village of Morrisville Water & Light Department, Village of Northfield Electric Department, Village of Orleans Electric Department, Town of Readsboro Electric Department, Town of Stowe Electric Department, and Village of Swanton Electric Department.

3. *See* Orders of 1/19/99, 9/30/99, 11/19/99, and 12/21/99.

Stipulation and Agreements.<sup>4</sup> At that hearing, the parties also had an opportunity to present evidence and argument upon the one issue that is still in dispute; this Order resolves that issue. On November 10, 1999, the Department filed a memorandum on the Municipal's request for adjustment of the EEC and on that date the Municipals filed a brief in support of their request.

### C. Parties' Positions

The 14 Municipals argue that they should be allowed to ask the Board for an adjustment of the EEC during calendar year 2000 because they anticipate that several municipal utilities will file rate increases just before or during that year which will result in material over-collection of the EEC when compared to the specific dollar-based funding levels as set out in the Memorandum of Understanding ("MOU").<sup>5</sup> The 14 Municipals argue that such over-collection would violate the MOU and other terms of the settlement.<sup>6</sup> Since under 30 V.S.A. §§ 225(a) and 226(b) municipal rate increase requests are allowed to go into effect 45 days after filing, subject to refund, the 14 Municipals argue that any such rate filing would be a known and measurable change. Thus they take the position that upon the filing of a rate increase, a municipal utility should be allowed to petition the Board for a decrease in the EEC. Any transaction costs involved in such a petition to the Board would be incremental, according to the 14 Municipals, for it would occur in the context of the rate filing.<sup>7</sup>

The Department's response is two-fold: (1) a legal argument that a utility lacks authority to make such a request for adjustment to the EEC; and (2) a substantive challenge to the impact of an individual utility's rate increase on the EEC and a concern over the transaction costs of reviewing such a request. The Department argues that such a request would be expensive to review and the impact on the ratepayers of any individual utility from such intra-year over- or

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4. The Stipulation, the Municipal Agreement, and bilateral Agreements were entered into the record without objection at the hearing, as exh. DPS-MOU-23, exh. DPS-MOU-24 and exh. DPS-MOU-25, and exh. DPS-MOU-26 respectively.

5. The MOU referred to here is that approved by the Board in its Order of 9/30/99 (Exh. DPS-MOU-1).

6. Brief of 14 Municipals, 11/10/99 at 1.

7. Comments of the 14 Municipals, 11/2/99 at 3; *id.* at 2.

under-collection would be *de minimis*. The Department urges the Board to reject the request of the 14 Municipals.<sup>8</sup>

## **II. FINDINGS OF FACT AND DISCUSSION**

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

### **A. Findings of Fact**

1. The MOU in Phase II of Docket 5980 and bilateral agreements approved in the Board's September 30, 1999, Order set the annual budget amounts to fund the EEU on a service territory basis; each utility agreed to a given dollar allocation to fund the EEU. The EEU collections for the year 2000 have been allocated by service territory.<sup>9</sup>

2. The basis for calculating the EEC for each service territory that was party to the MOU was generally 1998 utility revenue as reported to the Federal Energy Regulatory Commission. For some utilities (those with rate cases pending or temporary rates in effect) the base used was adjusted test year revenue.<sup>10</sup> Those revenues were then adjusted by the amount of revenues that will be lost as a result of the rate reductions associated with the EEC.<sup>11</sup> To calculate the EEC, the allocations were adjusted to include the gross receipts and weatherization tax. The EEU funding allocation was then divided by the adjusted base revenue to derive the percent energy efficiency charge or EEC.<sup>12</sup>

3. The EEC calculation was designed to collect a specific amount of money, assuming a given revenue in the year 2000.<sup>13</sup>

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8. DPS Memorandum, 11/10/99, *passim*.

9. Order of 11/19/99 at 12-13; tr. 11/5/99 at 11 (Koliander).

10. *Id.* at 9 (Koliander) and 42-3 (Welch).

11. The reduction in rates for each utility is calculated based upon the amount of DSM costs now in rates as agreed upon by the parties through either MOU ¶ 22, or under the terms of each bilateral agreement associated with that MOU. Exh. DPS-CEW-1; MOU at ¶ 22 and all bilaterals generally.

12. Tr. 11/5/99 at 42 (Welch); exh. DPS-CEW-1.

13. *Id.*

4. The actual dollar amount collected from the EEC at any particular point during a calendar year can only be projected, therefore over- or under-collection of the EEC can only be projected as well.<sup>14</sup> The actual amount of EEC collections in any given year is bound to differ from the agreed-upon funding allocations.

5. The parties to the MOU agreed to an end-of-year adjustment mechanism that would adjust the dollar allocations going forward to the next year. The 14 Municipals agreed to paragraph 11 of the Stipulation which states:

"For each service territory in which the EEC is in effect, the DU (distribution utility) will send to the Fiscal Agent the total amount of the EEC billed to customers no later than 23 days after the end of the billing month. The Fiscal Agent will receive the amount so billed. To the extent that, in a given year, the total EEC amount received by the Fiscal Agent exceeds or is less than the approved EEU budget for that year, the over- or under-collection will be trued up in the following year's EEC. During years in which the EEU budget is allocated on a service territory basis, to the extent that, in a given year, the total EEC amount received by the Fiscal Agent from a service territory exceeds or is less than the approved EEU budget allocation during that year for that service territory, the over- or under-collection will be trued up in the following year's EEC for that service territory. However, no true-up shall be required to the extent that amounts collected above an approved annual EEU budget or budget allocation include funds necessary to pay any applicable taxes described in paragraph 3, above, or to pay for uncollectible amounts in accordance with paragraph 13, below."<sup>15</sup>

6. The procedure for over- and under-collection of the EEC as outlined in ¶11 of the Stipulation is different from the rate treatment that would occur if a municipal utility collected more in revenues than its approved revenue requirement. In that case, the over- or under-collection would stay with the municipal utility until either the utility filed for a rate increase or the Board initiated an investigation into the utility's rates.<sup>16</sup>

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14. Tr. 11/5/99 at 90 (Underhill).

15. Stipulation at ¶ 11 (parenthetical added).

16. Tr. 11/5/99 at 12-13 (Koliander).

7. The funds collected via the EEC are ratepayer funds that are used to support the EEC and do not belong to the utilities.<sup>17</sup>

8. Any change in the EEC may not be implemented unilaterally by a utility and may only take effect and be implemented after Board approval of such change. Board approval is not necessarily limited to an approval of an EEC adjustment issued at the end of, or in connection with, a rate investigation, but may be, if ultimately determined to be proper by the Board, approval of an adjustment prior to and/or independent of an order in a rate investigation.<sup>18</sup>

9. If a utility were to over-collect on the EEC in a given calendar year, the only incremental cost to the ratepayers, given that an adjustment would occur at the end of the year, would be the carrying costs on the amount of the over-collection for that portion of the calendar year during which over-collection occurred.<sup>19</sup>

10. The transaction costs of reviewing a utility request for an adjustment in the EEC to compensate for over- or under-collections during a calendar year would exceed the benefit to the ratepayers of an intra-year adjustment to the EEC.<sup>20</sup>

## B. Discussion

The 14 Municipals take the broad position that their arguments as to the merits of intra-year adjustment of the EEC should not be precluded in the abstract in advance of consideration of the facts.<sup>21</sup> The 14 Municipals are concerned that anticipated municipal utility rate increases filed at the end of 1999 or the beginning of 2000 will result in material over-collection of the EEC when compared to specific dollar-based levels of funding. Two of the 14 Municipals have made

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17. *Id.* at 15 (Koliander).

18. Municipal Agreement at ¶ 3; tr. 11/5/99 at 14 (Koliander).

19. Tr. 11/5/99 at 16 (Koliander).

20. *Id.* at 20 (Koliander).

21. Comments of 14 Municipals, 11/10/99 at 2, citing *Association of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446-47 (1985).

double-digit rate filings in this time period and others have rate cases pending before the Board.<sup>22</sup> Thus the 14 Municipals claim that there is a factual basis for double digit over-collection of the EEC.

The 14 Municipals also argue that their agreement to an adjustment of the EEC at the end of the year is "of little to no consequence in regard to concern over the specific funding level and rate impacts in year one."<sup>23</sup> They argue that the proposed end-of-year adjustment is only suitable for changes that are NOT known and measurable; the over-collection that results from a municipal rate filing is a known and measurable change.<sup>24</sup> Thus they should be allowed to petition the Board for an intra-year adjustment to the EEC.

The Department argues that there is no legal authority that allows a municipal utility to seek an adjustment to the EEC, there is no legal authority that gives the Board authority to allow such a petition, nor is there any legal authority for the Board to grant an adjustment to the EEC upon a utility's request. The DPS points out that Vermont is not a home rule state and the Vermont Supreme Court has held that a municipality only possesses the powers granted to it by the General Assembly or those necessary or essential to the legislative grant of authority.<sup>25</sup> The Department notes that 30 V.S.A. § 209(d)(3), 30 V.S.A. Chapter 709, and 30 V.S.A. § 225, do not contain language expressly or necessarily implying authority for a municipal utility to petition the Board to adjust the EEC since the EEC is not the municipal's rate.<sup>26</sup>

The Department also argues that since actual sales revenues, upon which the EEC calculation was originally based, can never be predicted with certainty there is always bound to be a discrepancy between the dollar amount for funding the EEU as agreed to in the MOU and the dollar amounts collected via the EEC. Such discrepancy is not a violation of the MOU. In fact the parties anticipated this discrepancy and have agreed to an end-of-year adjustment to the EEC

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22. Barton Village, Inc. Electric Department filed for a 15.92% rate increase on November 16, 1999. Northfield Electric Department filed for a 15.59% rate increase on November 15, 1999.

23. Brief of 14 Municipals, 11/10/99 at 3.

24. Comments of the 14 Municipals, 11/2/99 at 1; tr. 11/5/99 at 88 (Underhill).

25. DPS Memorandum, 11/10/99 at 1, citing *Conn v. Middlebury Union High School #3*, 162 Vt. 498, 501 (1994).

26. *Id.* at 1-2.

for any over- or under-collection. The request of the 14 Municipals for an adjustment to the EEC *during* a calendar year would be in addition to the end-of-year adjustment.

The Department also asserts, using an example put forward by the 14 Municipals, that any economic impact from an over-collection of the EEC within a calendar year is not material and in fact is *de minimis* for an individual utility. In the example, the 14 Municipals posit a scenario in which a utility has agreed to an initial funding level of \$50,000 for the EEC. During the year they hypothesize a rate increase for that utility, resulting in an EEC collection of \$55,000. The Department argues that the carrying cost on the \$5,000 over-collection for a twelve-month period, assuming an interest rate of six percent, would be \$300.

The Department makes a further point. While 30 V.S.A. § 226(b) allows rates for municipal utilities to go into effect subject to refund, the Department asks what happens if the full amount of such a rate request is not approved. Indeed another round of intra-year adjustments may become necessary. If a municipal utility successfully petitions the Board for an adjustment to the EEC as a result of filing for a rate increase, the adjustment would presumably be made based upon the revenue requirement filed at the time of the rate filing. If the Board later issues a final order in the rate case reducing the revenue requirement filed by that utility and ordering refunds to that utility's customers, then it is possible that the EEC would have to be adjusted again to reflect the new rate levels approved by the Board.

While the Department also takes the position that no provision of 30 V.S.A. § 209(d)(3), which confers authority upon the Board to set the EEC, allows a municipal utility to petition the Board concerning adjustment of the EEC, the Department believes that the Board does have the authority to act upon its own motion for an adjustment to the EEC if it determines (based in part on reports from the Fiscal Agent) during the course of a year that over- or under-collections are occurring.<sup>27</sup> And the Department notes that under 30 V.S.A. § 2(c) the DPS is authorized to bring proceedings, with respect to any matter within the Board's jurisdiction, to the Board. The Department is not ruling out the possibility of requesting that the Board make such a

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27. DPS Memorandum at 2.

determination in the future. However, the Department urges the Board to use its authority sparingly.

### **III. CONCLUSION AND RECOMMENDATIONS**

The EEC is an administrative mechanism for collecting money from ratepayers to fund the Energy Efficiency Utility. Its design was intended, for the year 2000, to be both simple and reasonable.<sup>28</sup> Under the terms of the MOU, each utility agreed to a given dollar allocation to fund the EEU. The EEC was then calculated using a specific methodology based upon past years' revenues adjusted for various known changes to the base.

The 14 Municipals argue that the filing of a rate adjustment by a utility is a known and measurable change and thus the Board should allow the 14 Municipals to petition for an intra-year adjustment to the EEC. I do not find the 14 Municipals' argument persuasive for reasons elaborated upon below.

First, I agree with the Department's position that the change requested by the 14 Municipals is not to the utility's rate per se, rather the change is to the EEC which is an administratively determined mechanism set outside of the context of a rate case. 30 V.S.A. 209(d)(3) clearly gives the Board the authority to set the EEC. The Board also concluded in its Order of November 19, 1999, that "[T]he funds collected under the energy efficiency charge do not belong to the utilities charged with their collection. Although the distribution utilities collect the efficiency funds, the funds themselves belong to the ratepayers."<sup>29</sup> I concur with the Department that because the EEC is not the utility's rate, an adjustment to the EEC would not be an appropriate part of a utility's rate filing. However, the Board does have a longstanding tradition of accepting petitions concerning any matter within the Board's jurisdiction. I would not want a ruling in this matter to reverse that tradition and preclude a utility from filing a petition on a matter that could have material consequences for the utility. Nevertheless, in this case, for

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28. Order of 11/19/99 at 12.

29. *Id.* at 19.

reasons set out below, I conclude that the over-collection of the EEC from a rate increase even as high as 20 percent would not have a material impact upon either a utility or its customers.

Second, the calculation of the EEC for the year 2000 was made based upon projections of revenues for that year. While the budget amounts for each utility were stated in fixed dollar terms, it is clear that deviations from those agreed-upon amounts will occur within any given year. Thus the amount of any hypothetical under- or over-collection cannot be known with any certainty within any given year; it can only be determined on an ex-post basis.

Third, any impact upon ratepayers from an over-collection of the EEC due to a rate increase would not be "known" with any finality until the Board issues a final decision on the matter and the appeal period has run its course. While municipal rate increases are allowed to go into effect 45 days after filing, if the Board orders an investigation into the municipal rate request, those rates are subject to refund pending a final determination of that investigation.

While I do not deny the possibility that over-collection (compared to amounts agreed upon to fund the EEU in a given year) of the EEC may occur, I conclude that, since there will be an adjustment for over- or under-collection at the end of the year, the harm to the utilities' customers from any over- or under-collection during a given year is not material. I concur with the Department that the carrying costs to the ratepayers of any utility for any hypothetical over-collection of the EEC is *de minimis*.

I therefore recommend that the Board deny the request of the 14 Municipals to petition the Board for an adjustment of the EEC at the time of a rate increase, even when it appears that a rate increase of up to 20 percent will result in over-collection of the EEC. The regulatory review of such a petition is not without significant costs to ratepayers, and given the *de minimis* impact upon ratepayers in a given year, the regulatory costs of an intra-year adjustment to the EEC would, in most cases, outweigh the benefits of merely accelerating such an adjustment by a few months.

In addition, changes to the EEC charge, just like rate changes in general, are confusing to customers. The provision for an end-of-year adjustment to the EEC provides adequate protection

for under-or over-collection of the EEC from most rate increases, prevents customer confusion, and reduces the potential for burdensome regulatory and transaction costs.

I recommend that the Board reserve its right to open an investigation into a mid-year adjustment of the EEC should extraordinary circumstances so warrant. But in this instance, I do not find the request of the 14 Municipals persuasive and I recommend that the Board deny the request.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. §811.

#### **IV. PARTIES' COMMENTS**

The 14 Municipals did not file any comments. The Department raised two concerns in the comments it filed on the proposal for decision. First, the Department requests clarification of the distinction between the impact of the energy efficiency charge upon a utility's ratepayers, versus the impact upon the utility itself. The Department points out that some of the language in the proposed decision equates a utility with its ratepayers. I have reviewed the Order of November 19, 1999, in which the Board ruled upon the rate design for the energy efficiency charge as well as the Stipulation among the parties concerning the energy efficiency charge. The Department's proposed language changes accurately reflect the terms of that Stipulation. Therefore, I accept the changes proposed by the Department and have made those changes in the decision itself.

The Department also requests that the Board require the Fiscal Agent to track and report to the Board and the Contract Administrator how actual EEC collections from the utilities compare to the expected collections. The Board has recently executed a contract with the Fiscal Agent which includes such a requirement. Thus, the purpose of the request has already been met.

DATED at Montpelier, Vermont, this 12<sup>th</sup> day of April, 2000.

s/Sandra A. Waldstein  
Sandra A. Waldstein, Hearing Officer

### V. BOARD DISCUSSION

We have reviewed the Hearing Officer's proposed decision and the Department's comments on that decision. We note that the Hearing Officer adopted the Department's changes to clarify the distinction between the impact of the energy efficiency charge upon a utility's ratepayers, versus the impact upon the utility itself. We agree with the Department that it is an important distinction. The Board has made it clear in a previous Order in this Docket that funds collected by the energy efficiency charge are not funds belonging to the utilities, but are funds of the ratepayers. This Board position is indeed cited by the Hearing Officer in the proposed conclusion.<sup>30</sup> Therefore, we accept the changes made by the Hearing Officer in the proposed decision.

As to the second request of the Department, to include a requirement that the Fiscal Agent track and report EEC collections and compare them against expectations, we agree with the Hearing Officer's conclusion that such a modification to the proposed decision would not serve a useful purpose. The Board's contract with the Fiscal Agent at page nine already requires the Fiscal Agent to include information on the cumulative receipts in the fiscal year, as compared to projections, in its quarterly reports to the Board, the Contract Administrator, and the Department.<sup>31</sup>

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30. See, p. 11 at ¶ 3.

31. Anyone can obtain a copy of the Board's contract with the Fiscal Agent by contacting the Clerk of the Board.

**VI. ORDER**

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

1. The Hearing Officer's findings and recommendation are adopted.
2. The request of the 14 Municipals to petition the Board for an adjustment of the Energy Efficiency Charge at the time of a rate change in order to avoid over-collection is denied.

DATED at Montpelier, Vermont, this 13<sup>th</sup> day of April, 2000.

s/Michael H. Dworkin	)	PUBLIC SERVICE  BOARD  OF VERMONT
	)	
	)	
s/Suzanne D. Rude	)	
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	)	
s/David C. Coen	)	

OFFICE OF THE CLERK

Filed: April 13, 2000

Attest: s/Susan M. Hudson  
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 mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. 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.*