

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6270

Investigation into petition of 14 Vermont electric )  
utilities for alteration, modification and construction of )  
power purchase agreements between qualifying facilities )  
and Vermont Electric Power Producers, Inc., and for )  
Amendment of Vermont Public Service Board Rule )  
4.100 )

Hearings at  
Montpelier, Vermont  
May 1 and 2, 2002

Order entered: 1/15/2003

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## **I. INTRODUCTION**

In this Proposal for Decision, I recommend that the Public Service Board ("Board") approve a partial stipulation among some of the parties to this proceeding, but only with specific, significant changes — most notably, a requirement that the utility benefits under the stipulation be shared proportionally among *all* Vermont electric utilities. For the reasons explained in this Proposal for Decision, I conclude that without this change, the stipulation would be fundamentally unfair to the utilities that are not signatories to the stipulation, and to the ratepayers of those utilities. Furthermore, I conclude that the stipulating parties have not presented a sufficient basis for issuance of their requested findings on the prudence, used-and-usefulness, and mitigation efforts with respect to the qualifying facility power purchases that are at issue in this proceeding.

## **II. PROCEDURAL HISTORY**

This proceeding has had a lengthy and rather complex procedural history, with extensive pleadings and numerous orders. The following presents a summary of only those elements of the procedural history that are most significant and relevant to the consideration of the remaining issues.

This Docket was initiated by a petition filed on August 3, 1999, by eighteen Vermont electric utilities ("Petition").<sup>1</sup> In their Petition, the utilities requested that the Board alter, modify, and construe certain power sales and purchase agreements ("Agreements") between qualifying facilities and the Purchasing Agent that the Board has designated pursuant to Board

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1. The eighteen utilities were: Barton Village Inc. Electric Department; City of Burlington Electric Department ("BED"); Central Vermont Public Service Corporation; Citizens Utilities Company ("Citizens"); Village of Enosburg Falls Water & Light Department; Green Mountain Power Corporation ("GMP"); Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Department; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; Town of Stowe Electric Department; and Swanton Village Inc. Electric Department. Subsequently, BED, Citizens, and Hardwick withdrew their status as petitioners. On December 30, 1999, the Chittenden Superior Court issued an injunction prohibiting GMP from voluntarily participating in this Docket. In this Proposal for Decision, the terms "Petitioners" and "Petitioning Utilities" refer to the fourteen utilities who remain as active petitioners.

Rule 4.102(C).<sup>2</sup> The Petition also requests that the Board modify Board Rule 4.100, and investigate the ownership and ownership structure of each such qualifying facility that was organized as a partnership at the time it entered into its Agreement to determine whether it remains entitled to the levelized rates contained in that Agreement.

On September 3, 1999, the Board issued an Order opening an investigation into the claims presented and remedies sought by the Petition, and appointing me as Hearing Officer.

In an Order dated October 1, 1999, I made all Vermont electric distribution utilities parties to this Docket, whether or not they were signatories to the Petition or active party participants in the Docket.<sup>3</sup>

The Petitioning Utilities filed an Amended Petition on December 22, 1999. In the petition as amended, the Petitioners present the following seven claims for relief:<sup>4</sup>

1. For those Agreements that, in whole or in part, establish a long-term levelized rate for the purchase of power from a qualifying facility, the Petitioning Utilities request that, whenever permissible, the Board modify the Agreements prospectively in at least the following four respects:
  - a. Modify the definition of "Cumulative Present Value Difference" ("CPVD") such that the CPVD is equal to the accumulated value of the levelized payments less the short-term avoided capacity and energy costs of the Vermont composite system;
  - b. Remove any limitation on the qualifying facilities' obligation to deposit funds in any security fund or security trust required by the Agreements;
  - c. Modify the dollar amount per kWh that the purchasing agent withholds from payments to the qualifying facilities to increase the funding of the security fund or security trust to the maximum amount possible consistent with protecting first lender interests;
  - d. Reemphasize that the CPVD belongs to Vermont retail customers at the end of the contract term, to the extent that the CPVD is a positive number at that time.

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2. The designated Purchasing Agent is currently VEPP Inc. ("VEPPI").

3. These utilities are currently GMP, Citizens, Vermont Electric Cooperative, Inc. ("VEC"), Washington Electric Cooperative, Inc. ("WEC"), Hardwick, BED, Rochester Electric Light & Power Company, and the Vermont Marble Power Division of OMYA, Inc. Throughout this Proposal for Decision these utilities are referred to collectively as the "Non-Petitioning Utilities."

4. This listing presents a summary, rather than an exhaustive description, of the seven requests for relief.

2. Reduce the contract term (for those Agreements that do not prevent such a reduction) to the shortest period consistent with protection of bona fide, third-party First Lenders, and amend Board Rule 4.100 to the extent necessary to effectuate such a reduction in the contract term.
3. Modify the Agreements to eliminate any "payment lag adders" or reduce such adders to 0.0001%.
4. Construe the Agreements to allow interconnecting utilities to charge the qualifying facilities for transmission to non-interconnecting utilities, alter and modify the Agreements to the extent necessary to allow such a result, and amend Rule 4.100 to the extent necessary to allow such a result.
5. Construe the Agreements as authorizing the pass-through to qualifying facilities of monetary sanctions or "Back Down Charges" imposed by the New England Independent System Operator ("ISO") arising out of qualifying facility conduct that is proscribed by, or inconsistent with, ISO rules, and alter and modify the Agreements to the extent necessary to allow such a result.
6. Amend Board Rule 4.100, and alter and modify the Agreements, to authorize the Purchasing Agent to buy-out or buy down the modified Agreements; also, establish a discount rate for each project, grant authority for financing of such buy-outs or buy-downs, and permit the qualifying facilities to opt out of any modified, bought-down Agreement to realize any possible "green premium" from selling to a third party.
7. For each qualifying facility that was organized as a partnership under Vermont's prior partnership laws at the time it entered into its Rule 4.100 Agreement, investigate whether the partnership has dissolved as a matter of law.<sup>5</sup>

The twenty qualifying facilities that are parties to this Docket (collectively, the "Qualifying Facilities")<sup>6</sup> initiated a number of actions in response to the Petition and Amended

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5. Amended Petition at 4-7, 21-36.

6. In this Proposal for Decision, the capitalized term "Qualifying Facilities" refers to the twenty qualifying facilities that are parties to this Docket. When not capitalized, the term "qualifying facilities" refers generically to qualifying facilities as defined in Federal Energy Regulatory Commission ("FERC") regulations (18 C.F.R. § 292.203). The twenty Qualifying Facilities that are parties in this proceeding are Barnet Hydro Company, Comtu Falls, Dodge Falls Associates L.P., Emerson Falls Hydro, Inc., Hydro Energies Corporation, Killington Hydroelectric Company, Kingsbury Hydro, Martinsville Water Power, Moretown Energy Company, Missisquoi Associates, Nantanna Mill, Newbury Hydro, Ottauquechee Hydro Company, Inc., Ryegate Associates, Springfield Hydroelectric Company, Winooski Hydroelectric Company, Winooski One Partnership, Woodside Hydro, Worcester Hydro, and Vermont Marble Power Division of OMYA, Inc.

Petition.<sup>7</sup> On September 29, 1999, Dodge Falls Associates L.P. and Concord Hydro Associates<sup>8</sup> filed a motion to disqualify Downs, Rachlin & Martin, PLLC ("DRM") from serving as counsel to the Petitioners in this proceeding. On October 4, 1999, the Petitioners filed a Memorandum in Opposition to the disqualification motion. After resolving discovery disputes, and after the Board denied the Petitioners' request that the Board itself hear the disqualification motion, I held evidentiary hearings on the motion on December 1 and 7, 1999. On May 15, 2000, I issued an Order concluding that DRM was disqualified from representing the Petitioners due to work that DRM had performed for Concord Hydro Associates in 1995 to assist that entity in acquiring an ownership interest in Dodge Falls Associates, L.P. I determined that work to have been substantially related to the current proceeding, and that, consequently, Vermont Rule of Professional Conduct 1.9 barred DRM's representation of the Petitioners. The Petitioners did not seek Board review of that Order, electing instead to retain other counsel to represent them in this proceeding.<sup>9</sup>

The Qualifying Facilities also challenged the Board's jurisdiction to grant the relief sought in this Docket. On December 27, 2000, the Qualifying Facilities jointly filed a Motion for Declaration of Public Service Board Jurisdiction, in which the Qualifying Facilities requested that the Board declare that it lacks jurisdiction to grant any of the remedies sought by the Petitioning Utilities in this proceeding. On September 18, 2001, the Board issued an Order, granting in part and denying in part the Qualifying Facilities' Motion. In particular, the Board ruled that it is preempted from considering the second and sixth claims for relief set forth in the Amended Petition, but has jurisdiction to consider the remaining five claims for relief. The

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7. In addition to their actions in this Docket, the Qualifying Facilities filed a related declaratory judgment action and complaint at FERC, and a declaratory judgment action in Washington Superior Court (Superior Court Docket No. 714-12-99 Wncv) seeking a ruling that Rule 4.104(G) contained a scrivener's error which, the Qualifying Facilities contended, would if corrected preclude at least some of the relief sought by the Petitioners. Gallagher pf. at 10. The scrivener's error action was subsequently dismissed by the Superior Court, with that dismissal affirmed by the Vermont Supreme Court (Supreme Court Docket No. 01-083). *Barnet Hydro Co., et. al. v. Public Service Board*, 807 A.2d 347 (Vt. 2002).

8. Concord Hydro Associates was granted leave to intervene in this Docket for the limited purpose of seeking the disqualification of the law firm Downs, Rachlin & Martin, PLLC, from representing the petitioning utilities.

9. Letter from Christopher Roy, Esq., counsel for Petitioners, to Susan Hudson, Clerk of the Board, filed May 25, 2000; Letter from Robert Mello, Esq., counsel for Petitioners, to Susan Hudson, Clerk of the Board, filed May 30, 2000.

Board also ruled that the Qualifying Facilities could renew their preemption claim with respect to the first claim for relief after the evidentiary record is complete.<sup>10</sup>

After the Board issued this Order determining its jurisdiction to issue the relief sought, the Petitioners and the Qualifying Facilities submitted a stipulation on October 1, 2001, seeking a stay of these proceedings to allow them an opportunity to seek a negotiated resolution of the claims presented in the Docket. The stay was to last until the earlier of 90 days or a date by which the Board rescinded the stay upon motion by any party. In response to this request, the Docket was stayed through January 4, 2002, or until such time as a motion to rescind the stay was granted.<sup>11</sup>

On January 4, 2002, the Petitioners submitted a request for an extension of the stay for an additional seven days. The request was granted.<sup>12</sup> Again, on January 10, 2002, the Petitioners requested that the stay be further extended until January 25, 2002, and indicated that the Qualifying Facilities joined them in the request. The Vermont Department of Public Service ("Department" or "DPS") filed a letter on January 14, 2002, stating that it had no objection to the requested extension, which I granted on January 16, 2002.<sup>13</sup>

On January 28, 2002, the Petitioning Utilities and the Qualifying Facilities filed a Memorandum of Understanding ("MOU") among them which represents a bottom-line settlement and which, if approved, would resolve the remaining issues in this proceeding.<sup>14</sup> The Memorandum of Understanding includes the following provisions:

- The Qualifying Facilities will provide approximately \$6.69 million in "Power Sales Credits" for the benefit of the Petitioners' customers, pursuant to the "Savings Proposal" included as Attachment A of the MOU.
- The Settlement Parties agree to support efforts before the Vermont legislature and the Board to authorize the use of low-cost financing, through securitization, to buy-out or buy-down Qualifying Facility power sales agreements. This agreement includes the commitment of the

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10. Order of 9/18/01.

11. Order of 10/18/01 at 1.

12. Memorandum to Parties from Hearing Officer dated 1/9/02.

13. Memorandum to Parties from Hearing Officer dated 1/16/02.

14. The MOU was admitted into evidence as exh. Petitioners-39.

Vermont Qualifying Facilities to negotiate buy-out and buy-down proposals in good faith.

- Two of the Qualifying Facilities — Ryegate Associates and Missisquoi Associates — each agree to develop a dispatch plan for their facilities, with the savings from such plans to be provided for the benefit of Petitioners' customers. The MOU provides for a minimum of \$1 million in savings from the Ryegate dispatch plan.
- The Qualifying Facilities will provide an additional \$3 million in "Power Sales Credits" for the benefit of Petitioners' customers.

These and other provisions of the MOU are more fully described in the Findings, below.

After holding a status conference on February 11, 2002, I adopted a schedule that provided for discovery, prefiled testimony, and evidentiary hearings on the MOU. In addition, after receiving comments from the parties, I ordered GMP to participate in the review of the MOU, with GMP's participation limited to the issues of the distribution of benefits under the MOU, and whether the potential benefits of the MOU outweigh its potential costs.<sup>15</sup>

Technical hearings on the MOU were held as scheduled on May 1 and 2, 2002.

On May 24, 2002, briefs and/or proposed findings were filed by the Petitioners, the Department, VEPPI, GMP, and BED. On June 7, 2002, reply briefs were filed by those same parties, and also by the Qualifying Facilities.

### **III. FINDINGS**

Based on the substantial evidence of record and the testimony presented at the hearings, I hereby report the following findings to the Board in accordance with 30 V.S.A. § 8. All findings proposed by the parties that are not incorporated herein are rejected.

#### **A. The Petition and Amended Petition**

1. On August 3, 1999, eighteen Vermont electric utilities filed a Petition with the Board asking that the Board alter, modify or construe certain power sales and purchase agreements (the "Agreements") between the twenty Qualifying Facilities and VEPP, Inc. ("VEPPI"), which is the Board's Rule 4.100 Purchasing Agent. The Petition also requested that the Board modify Board

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15. Order of 3/6/02 at 2-3.

Rule 4.100, and investigate "the ownership and ownership structure of each QF that was organized as a partnership at the time such QF entered into its Levelized Agreement in order to determine whether such QF continues to be entitled to the levelized rates contained in such Agreement." Petition of 8/3/99; Docket 6270, Order of 9/3/99 at 1.

2. The Petition presented the following seven claims for relief:

a. For those Agreements that, in whole or in part, establish a long-term levelized rate for the purchase of power from a qualifying facility, the Petitioning Utilities request that, whenever permissible, the Board modify the Agreements prospectively in at least the following four respects:

I. Modify the definition of "Cumulative Present Value Difference" ("CPVD") such that the CPVD is equal to the accumulated value of the levelized payments less the short-term avoided capacity and energy costs of the Vermont composite system;

ii. Remove any limitation on the qualifying facilities' obligation to deposit funds in any security fund or security trust required by the Agreements;

iii. Modify the dollar amount per kWh that the purchasing agent withholds from payments to the qualifying facilities to increase the funding of the security fund or security trust to the maximum amount possible consistent with protecting first lender interests;

iv. Reemphasize that the CPVD belongs to Vermont retail customers at the end of the contract term, to the extent that the CPVD is a positive number at that time.

b. Reduce the contract term (for those Agreements that do not prevent such a reduction) to the shortest period consistent with protection of bona fide, third-party First Lenders, and amend Board Rule 4.100 to the extent necessary to effectuate such a reduction in the contract term.

c. Modify the Agreements to eliminate any "payment lag adders" or reduce such adders to 0.0001%.

d. Construe the Agreements to allow interconnecting utilities to charge the qualifying facilities for transmission to non-interconnecting utilities, alter and modify the Agreements to the extent necessary to allow such a result, and amend Rule 4.100 to the extent necessary to allow such a result.

e. Construe the Agreements as authorizing the pass-through to qualifying facilities of monetary sanctions or "Back Down Charges" imposed by the New England Independent System Operator ("ISO") arising out of qualifying facility conduct that is proscribed by, or inconsistent with, ISO rules, and alter and modify the Agreements to the extent necessary to allow such a result.

f. Amend Board Rule 4.100, and alter and modify the Agreements, to authorize the Purchasing Agent to buy-out or buy down the modified Agreements; also, establish a discount rate for each project, grant authority for financing of such buy-outs or buy-downs, and permit the qualifying facilities to opt out of any

modified, bought-down Agreement to realize any possible "green premium" from selling to a third party.

g. For each qualifying facility that was organized as a partnership at the time it entered into its Rule 4.100 Agreement, investigate whether the partnership has dissolved as a matter of law.

Petition of 8/3/99 at 4–7, 21–36; Docket No. 6270, Order of 9/18/01 at 3–4.

3. On December 22, 1999, the Petitioners filed an Amended Petition in which they clarified that the seventh claim for relief — an investigation into Qualifying Facilities' partnership status — relates only to the status of those Qualifying Facilities that were partnerships organized under Vermont's prior partnership laws when the Qualifying Facility entered into its Agreement with the Purchasing Agent. Amended Petition of 12/22/99 at 7, 35–36.

**B. The Memorandum of Understanding ("MOU")**

4. The signatories to the MOU (together, the "Signatories") are: Barton Village Electric Department; Central Vermont Public Service Corporation; Village of Enosburg Falls Water & Light 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 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 Swanton Village Inc. Electric Department (hereafter the "Petitioners" or "Petitioning Utilities") and Barnet Hydro Company; Comtu Falls; Dodge Falls Associates L.P.; Emerson Falls Hydro, Inc.; Hydro Energies Corporation; Killington Hydroelectric Company; Kingsbury Hydro; Martinsville Water Power; Moretown Energy Company; Missisquoi Associates; Nantanna Mill; Newbury Hydro; Ottauquechee Hydro Company, Inc.; Ryegate Associates; Springfield Hydroelectric Company; Winooski Hydroelectric Company; Winooski One Partnership; Woodside Hydro; Worcester Hydro; and Vermont Marble Power Division of OMYA, Inc. (hereafter the "Qualifying Facilities"). Exh. Petitioners-39.

5. The MOU is intended to resolve with finality all claims raised by the Petitioners in this Docket. The MOU represents a "bottom-line" settlement that does not specifically address the

Petitioners' claims, but instead provides certain identified value to the Petitioners in exchange for assurances to the Qualifying Facilities that the Petitioners will not bring future litigation to modify the Power Sales Agreements. Gallagher pf. at 5–6, 17–19; Gallagher pf. reb. at 6, 17, 24; tr. 5/1/02 at 31, 33, 35–36, 43 (Gallagher).

### **1. Provisions of the MOU**

#### **a. Modification of the Public Service Board Rule 4.100 Agreements and resulting power sales credits**

6. Each Qualifying Facility has entered into a power sales and purchase agreement with the purchasing agent designated by the Board under Board Rule 4.100 ("Agreement" or, collectively, the "Agreements"). Exh. Petitioners-39 at ¶ 2; exh. Petitioners-61 through 82, inclusive.

7. The Agreements, or some of them, require the Qualifying Facilities to ensure that their respective facilities will continue to operate for the entire term of their respective Agreements and to ensure repayment of the cumulative present value difference ("CPVD")<sup>16</sup> applicable to their respective Agreements. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 1 and 3.

8. The Agreements, or some of them, require security for the continued operation of the respective Qualifying Facility facilities by way of a capital replacement and reserve fund. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 2–3.

9. The Agreements, or some of them, require security for repayment of the CPVD by way of a trust or escrow account fund, or by having in place security devices such as, but not limited to, bonds or letters of credit. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 3.

10. The Agreements, or some of them, also require the Qualifying Facilities to purchase property insurance, business interruption or earnings insurance, liability insurance or worker's

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16. CPVD provisions arise in Agreements that involve long-term levelized rates. CPVD is the accumulated value of the payments received by a Qualifying Facility under levelized rates, less the payments the Qualifying Facility would have received if payment were made under non-levelized rates, plus interest calculated on the total outstanding CPVD.

compensation insurance that names the Purchasing Agent as a loss-payee. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 3.

11. In addition, the Agreements, or some of them, permit the Purchasing Agent to place a mortgage lien upon the respective Qualifying Facility's facility or to exercise a right of entry to that facility to secure the performance by that Qualifying Facility under the Agreement or the repayments of the CPVD. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 2.

12. The Agreements, or some of them, require the respective Qualifying Facilities to have an engineering inspection and/or appraisal conducted on a periodic basis. The purpose of this requirement is to ensure the continued operation of the Qualifying Facility during the term of its Agreement and until the CPVD is reduced to zero. Exh. Petitioners-61 through 82, inclusive; exh. Petitioners-39 Attachment A at 2.

13. Under the MOU the Agreements will be modified to eliminate all of the requirements described above in Findings number 7 through 12, inclusive. Exh. Petitioners-39 Attachment A at 1-3.

14. Under the MOU, elimination of the above-described requirements will result in savings to the Qualifying Facilities that will be passed on to the Petitioning Utilities and their ratepayers in the form of "Power Sales Credits." Exh. Petitioners-39 at ¶¶ 9 and 10 and Attachment A at 3.

15. The Signatories estimate that these Power Sales Credits will have a total value of \$6,693,589 (in nominal dollars) for the years 2002 through 2020, inclusive. The Power Sales Credits are subject to (a) pro rata adjustment for delay in implementing the modifications to the Agreements beyond January 1, 2002, and (b) adjustment to the extent that the Purchasing Agent determines that the estimated Credits are not calculated on a rational commercial basis to reflect the net savings realized by the Qualifying Facilities from implementation of the modifications to the Agreements. Exh. Petitioners-39 at ¶ 11.

16. The elimination of the security provisions as proposed in the MOU appears to present little financial risk to the utilities and their ratepayers, given that the expected cost of replacement power is substantially lower than the prices paid for the Qualifying Facility power under the Agreements. The opportunity to sell power at the rates provided in the Agreements provides

sufficient incentive for the Qualifying Facilities to continue to produce power over the remaining terms of the Agreements. Furthermore, a failure by a Qualifying Facility to deliver power under its Agreement is unlikely to impose higher costs on the Vermont utilities from replacement power, and instead would likely result in cost savings to the utilities. Gallagher pf. at 14.

b. Modification of dispatch plans for Ryegate Associates facility and for Sheldon Springs facility

17. Under the MOU, Ryegate Associates will develop a plan in cooperation with the Petitioning Utilities for the dispatch of the Ryegate facility. In addition, under the MOU, the implementation of this dispatch plan will result in savings to the Petitioning Utilities' ratepayers, with the amount of the savings to be the greater of \$1 million or 80% of the power cost savings achieved through dispatch of the Ryegate facility over the remaining life of the Ryegate Agreement. Exh. Petitioners-39 at ¶ 15.

18. Under the MOU, Missisquoi Associates will confer with the Petitioning Utilities and will use reasonable efforts to develop a plan in cooperation with the Petitioning Utilities to identify any changes in the operation of the Sheldon Springs facility that will optimize the cost-effectiveness of that facility. The MOU also provides that within 30 days of the date of the MOU, Missisquoi Associates and the Petitioning utilities will tender any such plan to the Purchasing Agent. Exh. Petitioners-39 at ¶ 16.

19. The MOU provides that the Purchasing Agent will be authorized to allocate to the Petitioning Utilities' bills 100% of the power cost savings attributable to the implementation of the dispatch plans described above in Findings number 17 and 18. Exh. Petitioners-39 at ¶ 17.

c. Additional power sales credits

20. The MOU provides that, in addition to the Power Sales Credits described above in Findings numbers 14 and 15, the Purchasing Agent will apply nominal "Additional Power Sales Credits" for the benefit of the Petitioning Utilities and their ratepayers. Exh. Petitioners-39 at ¶¶ 18 and 19.

21. These Additional Power Sales Credits will have a total value of \$3,000,000 (in nominal dollars) for the years 2002 through 2011, inclusive. Exh. Petitioners-39 at ¶ 18.

22. The MOU provides that the Purchasing Agent will be authorized to allocate to the Petitioning Utilities' bills 100% of the Additional Power Sales Credits. Exh. Petitioners-39 at ¶ 19.

d. Securitization efforts

23. Under the MOU, the Signatories will coordinate with the Purchasing Agent to support efforts before the Vermont General Assembly and the Board to authorize the use of securitization in order to effect mutually agreeable buyouts or buydowns of the Agreements.<sup>17</sup> Exh. Petitioners-39 at ¶ 13.

24. Under the MOU, the Signatories will negotiate in good faith with the Purchasing Agent the development of mutually agreeable buydowns or buyouts of the Agreements through the use of securitization debt or other financings as may be authorized by the Vermont General Assembly and within the lawful authority of the investor-owned utility or municipal or cooperative utility to undertake. Exh. Petitioners-39 at ¶ 13.

25. The MOU provides that the Purchasing Agent will be authorized to allocate any securitization savings achieved under the MOU for the benefit of the customers of all Vermont utilities subject to the terms of any said securitization proposal. Exh. Petitioners-39 at ¶ 14.

e. Vermont Partnerships

26. Under the MOU, the Qualifying Facilities will deliver to the Purchasing Agent an opinion of counsel, or opinions of counsel, confirming that each Qualifying Facility that is organized as a Vermont partnership and whose average installed capacity exceeds 500 kW, or whose average annual generation over the past three years is in excess of that of a 500 kW facility with a ninety percent plant factor, has been validly organized and that it has not been dissolved over the entire term of its Agreement. Exh. Petitioners-39 at ¶ 20.

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17. On June 21, 2002, the Vermont General Assembly gave final approval to securitization legislation P.A. No. 145 (2001 Vt., Adj. Sess.). However, I observe that this does not, in and of itself, render moot the parties obligations under MOU ¶ 13.

27. Under the MOU, should any such Qualifying Facility not be able to present such an opinion of counsel, the Petitioning Utilities may seek to invalidate that individual Qualifying Facility's Agreement if it would be prudent for the Petitioning Utilities to expend ratepayer monies to pursue such a remedy. Exh. Petitioners-39 at ¶ 20.

f. Implementation of the MOU benefits provisions

28. The MOU provides that, upon its approval by the Board, each Petitioning Utility is to file a plan with the Board to assure that the benefits of the MOU, net of the Petitioners' costs of obtaining the settlement, are delivered to and for the benefit of the utility's ratepayers. The MOU further provides that the Petitioners' costs of obtaining the settlement include unrecovered litigation costs and any incremental fees or expenses billed to the Petitioning Utilities by the Purchasing Agent or otherwise incurred as required to implement the MOU. Exh. Petitioners-39 at ¶ 21.

g. Role of the Purchasing Agent in implementation of the MOU

29. The MOU calls for the Purchasing Agent to verify that the Actual Power Sales Credits to be provided under the MOU "are the net savings realized by the Vermont QFs and are rationally derived from the Rule 4.100 Contract Amendments." VEPPI is willing and able to perform this work. Exh. Petitioners-39 at ¶¶ 11, 26; Spencer pf. at 3, 9–10.

30. Administration of the dispatch plans for the Ryegate and Sheldon Springs facilities may impose additional work on VEPPI. VEPPI is willing and able to perform such additional work. Exh. Petitioners-39 at ¶¶ 15–17; Spencer pf. at 3; tr. 5/2/02 at 12–14 (Spencer).

31. The MOU requires each Qualifying Facility that is organized as a Vermont partnership to deliver to the Purchasing Agent an opinion (or opinions) of counsel confirming that it has been validly organized and has not been dissolved over the entire term of its Agreement. (This requirement only applies to such Qualifying Facilities with an average installed capacity in excess of 500 kW or with an average annual generation over the past three years in excess of that of a 500 kW facility with a 90 percent power factor.) The Purchasing Agent is then to verify and

report the results to the Board and to the Signatories. VEPPI is willing and able to perform this work. Exh. Petitioners-39 at ¶ 20; Spencer pf. at 3; tr. 5/2/02 at 12 (Spencer).

32. VEPPI's Board of Directors consists in part of representatives of electric utilities and qualifying facilities. VEPPI functions as an independent legal entity, and its directors understand that their fiduciary responsibilities are to VEPPI. VEPPI's Board of Directors also includes three public representatives, who help ensure that VEPPI functions independently of the utilities and of the qualifying facilities. Spencer pf. at 3–4.

h. Authorizations and findings contemplated by the MOU

33. The MOU provides that a Board Order (a) approving and implementing the MOU in all respects, without modification or condition, and (b) authorizing the Purchasing Agent to implement the MOU provisions requiring action by the Purchasing Agent is a condition precedent to the agreements contained in the MOU. Exh. Petitioners-39 at ¶ 23.

34. In the MOU, the Signatories agree that a Board order approving the MOU must include a finding that the Petitioning Utilities acted prudently in all respects in connection with the resolution of the dispute in this docket and entry into and performance under the MOU. Exh. Petitioners-39 at ¶ 24.

35. In the MOU, the Signatories agree that a Board order approving the MOU must include a finding that Petitioning Utilities have satisfied their obligation to prudently manage the purchase of power from the Qualifying Facilities, including any obligation to mitigate the cost of said power, for the benefit of their ratepayers. Exh. Petitioners-39 at ¶ 24.

36. In the MOU, the Signatories agree that a Board order approving the MOU must include a finding that the power sold pursuant to the Agreements shall not, in this or any future proceeding to determine any of Petitioning Utilities' rates, be subject to any penalty or disallowance of costs incurred in the purchase of said power based on the application of any "used or useful" theory. Exh. Petitioners-39 at ¶ 25.

### I. Other provisions of the MOU

37. The MOU is conditioned upon verification and certification of the Ryegate and Sheldon Springs dispatch plans. Exh. Petitioners-39 at ¶ 27.

38. The MOU provides that it is a settlement of all the claims of the Signatories. Exh. Petitioners-39 at ¶ 22.

39. In the MOU, the Signatories agree to refrain from engaging in any activity "that is intended to have, has had, or is reasonably likely to have a material adverse effect upon another [Signatory's] reputation or financial interest." Exh. Petitioners-39 at ¶ 22(c).

40. The MOU provides that to the extent there are any claims in this Docket that are not addressed by the MOU, the Petitioning Utilities and Qualifying Facilities intend and agree that all such claims are dismissed with prejudice with regard to all parties to the Docket. Exh. Petitioners-39 at ¶ 23.

41. In the MOU, the Signatories address the Qualifying Facilities' claim that Public Service Board Rule 4.104(G) contains a scrivener's error. The Signatories agree that, if the Board approves the MOU, the Petitioning Utilities will irrevocably withdraw from Vermont Supreme Court Docket No. 2001-083 and will stipulate to strike their brief filed therein.<sup>18</sup> The Petitioning Utilities further agree that they will not, in the future, participate in or oppose any efforts undertaken by the Qualifying Facilities, in the Vermont Supreme Court or before the Board, to resolve the Qualifying Facilities' claim that the current language of Public Service Board Rule 4.104(G) contains a scrivener's error. The Signatories also agree that the Petitioners will not attempt to employ Rule 4.104(G) against any of the Qualifying Facilities in connection with Agreements. Exh. Petitioners-39 at ¶ 28.

42. The MOU is a global settlement of all disputes between the Signatories in which they agree that, should the Board fail to approve the MOU in its entirety, and without conditions or

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18. Vermont Supreme Court Docket No. 2001-083 has been resolved. In its order dated April 22, 2002, the Vermont Supreme Court held that, within the context of this docket, the Board has jurisdiction (concurrent with Washington Superior Court's jurisdiction) to determine the question raised here concerning the validity of Public Service Board rule 4.104(G). *Barnet Hydro Co., et. al. v. Public Service Board*, 807 A.2d 347 (Vt. 2002). The underlying issue (i.e., whether the Board rule contains a scrivener's error) has not yet been resolved.

modifications, the agreements set forth in the MOU shall terminate. Exh. Petitioners-39 at ¶¶ 8 and 29.

## **2. Distribution of the MOU's benefits**

43. All of the guaranteed financial benefits for utilities under the MOU as proposed — the Actual Power Sales Credits, the Additional Power Sales Credits and the Dispatch Savings Credits — would go to the Petitioning Utilities, with none of those guaranteed benefits going to the non-petitioning utilities. Given that the Petitioners serve approximately 45 percent of the state's ratepayers, this means that over half of Vermont's electric ratepayers would receive no value from the non-contingent benefits proposed in the MOU. This is because the Petitioners, in negotiating the MOU, decided to direct all of the MOU's guaranteed financial benefits to themselves and thereby exclude the remainder of Vermont's electric distribution utilities and their customers from sharing in these benefits. Exh. Petitioners-39 at ¶¶ 10, 12, 17, 18 and 19; Gallagher pf. rebuttal at 8–9; tr. 5/1/02 at 50, 62, 86 (Gallagher).

44. The savings that might be realized in any future securitization plan could potentially flow to all retail electric utilities in the state, assuming that all utilities are able to participate in the securitization plan. Gallagher pf. rebuttal at 10; tr. 5/1/02 at 50, 109–112 (Gallagher).

45. While approval of the MOU may increase the likelihood of a successful securitization transaction in the future, it is not clear that the MOU is necessary to achieve such a result. Tr. 5/2/02 at 32–33, 128 (Steinhurst).

46. Future savings from securitization transactions are not assured. Tr. 5/1/02 at 50 (Gallagher).

47. The original Petition stated that the "relief sought by this Petition is designed to have the [Qualifying Facility] Agreements interpreted and reformed in a manner benefitting all Vermont retail customers (collectively, the Vermont Retail Customers)," and that the relief requested was "for the benefit of all Vermont Retail Customers." Petition of 8/3/99 at 2, 4. The Amended Petition did not modify these asserted beneficiaries of the relief sought. Amended Petition of 12/22/99 at 1, 4; tr. 5/1/02 at 44–49.

48. Prior to the filing of the Petition in this Docket, representatives of both the Petitioning and the Non-Petitioning Utilities had been negotiating potential cost reductions with the Qualifying Facilities with respect to the Agreements. Most, if not all, of Vermont's electric distribution utilities had representatives on either the negotiating team or an advisory panel that provided support and direction to the negotiating team. Tr. 5/1/02 at 180–181 (Richards).

49. Representatives of the Vermont electric utilities (both Petitioning and Non-Petitioning Utilities) met on July 12, 1999, to discuss a draft of the Petition. At that meeting, the lead utility in drafting the Petition stated that it would file the Petition even if all Vermont electric utilities did not join the Petition, and that even without universal participation by the Vermont utilities, the Petition would nonetheless seek relief for all Vermont ratepayers. The Petitioners did not inform the Non-Petitioning Utilities of any change in the proposed distribution of the relief sought, prior to the filing of the MOU. Tr. 5/1/02 at 181–184 (Richards).

50. As early as April, 2001, the Petitioners began to consider excluding the Non-Petitioning Utilities and their ratepayers from the distribution of the guaranteed benefits under a potential settlement agreement in this Docket. Petitioners never disclosed this fact to the Non-Petitioning Utilities, who continued to operate under the assumption that they would be included in any potential settlement should one be forthcoming. Tr. 5/1/02 at 79–80, 128 (Gallagher) and 183–184 (Richards).

51. At no time prior to the filing of the MOU did the Non-Petitioning Utilities have any reason to suspect that the Petitioners had changed their objective and were seeking to exclude the Non-Petitioning Utilities and their customers from the benefits of a settlement. It was only upon receipt of a copy of the MOU as filed with the Board that the Non-Petitioning Utilities first learned of the change in the intent of Petitioners. Tr. 5/1/02 at 79–80 (Gallagher) and 183–184 (Richards).

52. The proposed MOU not only prohibits the Non-Petitioning Utilities from seeking relief on behalf of their own customers due to its dismissal-with-prejudice provisions, it also effectively uses up the potential for the types of savings created by the proposed modifications to the Agreements and thus deprives the Non-Petitioning Utilities of mitigation opportunities. Steinhurst/Lamont pf. at 3.

53. The MOU's proposed distribution of its benefits would take away from the Non-Petitioning Utilities benefits already being provided to all Vermont distribution utilities created by an existing waiver of appraisal, engineering inspection and letter of credit requirements from the Ryegate Agreement, from Docket No. 6062. Approval of the MOU would eliminate corresponding requirements from all of the Agreements and distribute the cost savings to only the Petitioners, without exception for the existing benefits created by the Order in Docket No. 6062. The Petitioners acknowledge the result would be to take those existing benefits away from the ratepayers of the Non-Petitioning Utilities and redirect them for the exclusive benefit of the Petitioners. Tr. 5/1/02 at 28–29 (Gallagher); Docket No. 6062, Order of 3/19/98 at 1–2.

54. The MOU if approved would impose certain costs or obligations on the Non-Petitioning Utilities without providing them with any compensation in return. Principal among those costs or obligations are the elimination of certain provisions in the Agreements which are designed to protect the ratepayers of all the retail electric utilities in Vermont and the dismissal of all claims in this Docket with prejudice as to all parties, i.e., both Petitioning and Non-Petitioning Utilities alike. Brown pf. at 8–9; exh. Petitioners-39 at ¶¶ 9 and 10, and Attachment A.

55. The MOU and, in particular, the dispatch plans proposed for the Ryegate and Sheldon Springs facilities may result in unreasonable increased costs to the Non-Petitioning Utilities in the form of increased uplift payments associated with the dispatch of Ryegate and the possible loss of self-scheduled status for both facilities, as well as the possibility that the Non-Petitioning Utilities may have to pay more than the Ryegate Agreement contract price for power in securing replacement power during a Ryegate shutdown if the cost of replacement power is greater than the facility's avoided fuel costs. It is also possible that the Non-Petitioning Utilities will incur transmission charges should they have to seek power outside of Vermont during Ryegate shutdowns. The concerns over increased costs to the Non-Petitioning Utilities that may result from the proposed dispatch plans are eliminated if the Board requires the MOU benefits to be shared pro-rata among all Vermont electric distribution utilities. Steinhurst/Lamont pf. at 4; tr. 5/1/02 at 173–176 (Richards); tr. 5/2/02 at 142–143, 152 (Lamont).

56. The Petitioning Utilities' witness, William Gallagher, has represented that the proposed dispatch plans will cause no increased costs to the Non-Petitioning Utilities in any

form. However, Mr. Gallagher admits that he is not an expert on the operation of the proposed plans. Tr. 5/1/02 at 25–26, 88 (Gallagher).

57. While Mr. Gallagher has represented that the Petitioners will reimburse the Non-Petitioning Utilities for any unanticipated cost increases resulting from the dispatch proposals, there is nothing in the documents themselves that insures against such costs or provides for their reimbursement. Tr. 5/1/02 at 176–177 (Richards).

58. GMP contributed \$21,560.14 to the costs of preparing the Petition and prosecuting this Docket up to the point it was enjoined from further voluntary participation by the Chittenden Superior Court. Petitioners concede that, until the issuance of the injunction, GMP stood ready and willing to contribute to the expenses of the Docket and to assume any risks associated with its pursuit. Brown pf. at 3; tr. 5/1/02 at 52 (Gallagher).

#### **IV. DISCUSSION**

##### **A. Positions of the Parties**

The Petitioners urge that Board approval of the MOU and issuance of the authorizations and findings requested in the MOU are justified, will result in a just and reasonable resolution of the issues in this proceeding, and will promote the public interest.<sup>19</sup>

The Department recommends that the Board approve the MOU, but only with certain specified conditions. First, the Department contends that the Board should condition approval of the MOU with the requirement that its non-contingent benefits be distributed on a proportionate basis to all Vermont electric distribution utilities. The Department contends that this proposed condition is necessary because, without it, the limited distribution of the non-contingent benefits to only the Petitioning utilities:

is inconsistent with Rule 4.100, because the MOU as proposed has the potential to impose costs on the Non-Petitioning Utilities with no corresponding benefits, and because the MOU deprives the Non-Petitioning Utilities of mitigation opportunities for the Agreements without compensation for that loss of opportunity.<sup>20</sup>

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19. Petitioners' Proposal for Decision at 34.

20. DPS Brief at 16.

The Department next recommends that the Board adjust the provisions of Paragraph 22(c) of the MOU — which seeks to preclude the Signatories from engaging in activities that adversely affect another Signatory's reputation or financial interest — to clarify that those provisions are inapplicable to responses by utilities and by the Qualifying Facilities to inquiries from state regulators or the Vermont legislature.<sup>21</sup>

The Department further proposes that the Purchasing Agent's verification of net savings realized by the Qualifying Facilities be performed under the supervision of the public representative members of the Purchasing Agent's Board of Directors.<sup>22</sup>

The Department also recommends that the Board, if it approves the MOU, require that the benefits of any securitization program that may be developed be offered on non-discriminatory terms to all utilities purchasing Qualifying Facility power under Rule 4.100. The Department further recommends that the Board require that, subject to any securitization statute that may be enacted, the utilities ensure that any securitization program not be structured in a way that unreasonably inhibits participation by any utility that is purchasing power under Rule 4.100.<sup>23</sup>

Next, the Department recommends that any Board approval of the MOU include a clarification that the prohibition on new or additional charges for ancillary services (Paragraph 22(b) of the MOU) is not limited to transmission service, but instead applies to ancillary services generally.<sup>24</sup>

Finally, the Department proposes that if the Board approves the MOU, the Board also expressly waive relevant sections of Rule 4.100. According to the Department, this waiver is required to implement the MOU's proposed elimination of certain provisions in the Agreements because those provisions are otherwise required under Rule 4.100.<sup>25</sup>

GMP asserts that the Board should only approve the MOU with the express condition that the MOU's provisions extend to all Vermont electric utilities, as if those utilities were signatories to the MOU. GMP contends that such a condition is required for three reasons:

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21. DPS Brief at 32.

22. DPS Brief at 33.

23. DPS Brief at 34.

24. DPS Brief at 35.

25. DPS Brief at 36.

1. The MOU can only be approved with the consent of GMP pursuant to Board Rule 4.104(G), because the MOU requires modifications to the Agreements that materially affect GMP's rights, and because the MOU would result in different utilities paying different rates for Qualifying Facility power, contrary to Rule 4.104(A).
2. The Petitioning Utilities have failed to demonstrate the good cause that is necessary, pursuant to Rule 4.111(A), for the Board to grant exceptions to the provisions of Rule 4.100.
3. The Petition and Amended Petition expressly provide that they sought relief on behalf of all Vermont electric ratepayers, and the Petitioning Utilities so promised to all the Vermont electric utilities.<sup>26</sup>

BED opposes approval of the MOU, contending that BED and its ratepayers have substantial rights that will be materially affected by the MOU's proposed changes to the Agreements. In light of this asserted effect on its rights, BED contends that the MOU cannot be approved unless BED consents to the Agreement modifications, as provided in Board Rule 4.104(G). BED will, however, consent to the proposed modifications if the benefits of the MOU are shared with all Vermont electric utilities. BED also does not object to paying its share of reasonable and appropriate legal costs.<sup>27</sup>

WEC, VEC, Citizens, and Hardwick request that the Board reject the MOU unless modified so that the utility savings under the MOU are shared by all Vermont utilities and their ratepayers. These four utilities also propose that, if they share in the MOU's benefits, they share the "relevant" costs incurred by the Petitioners, with those relevant costs consisting of only the \$48,096 expended in the settlement negotiations that resulted in the MOU, and the Petitioners' direct costs in the development of the Ryegate and Sheldon Springs dispatch plans.<sup>28</sup>

The Qualifying Facilities support the distribution of benefits as proposed in the MOU, asserting that the MOU's proposed modifications of the Agreements would not affect any rights of the Non-Petitioning Utilities themselves. The Qualifying Facilities assert that the utilities are not themselves parties to the Agreements, and that the security provisions to be modified under the MOU would not have returned any proceeds to the utilities in the event of a default by a Qualifying Facility. (Instead, contend the Qualifying Facilities, such proceeds would have inured

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26. GMP Brief at 1–2, 6–14.

27. BED Brief at 1.

28. WEC, VEC, Citizens, and Hardwick Brief at 1–7.

to the benefit of the utilities' *ratepayers*, not the utilities themselves.) The Qualifying Facilities further assert that the Non-Petitioning Utilities have not formally objected to the MOU's proposed modifications to the Agreements. The Qualifying Facilities also argue that Board Rule 4.104(A) does not require uniform, proportional financial impact on Vermont's distribution utilities. Instead, assert the Qualifying Facilities, Rule 4.104(A) only addresses the distribution of electricity purchased by the Purchasing Agent, and the distribution of the costs associated with that electricity. Finally, the Qualifying Facilities contend that GMP had bargained away its right to pursue any contract mitigation claims not only directly against Winooski One Partnership, but also indirectly through the pursuit of claims against the other Qualifying Facilities.<sup>29</sup>

### **B. Overall Merits of the MOU**

The MOU if approved is expected to provide over \$10 million in monetary payments to Vermont electric ratepayers.<sup>30</sup> (The distribution of these benefits is addressed below.) Those payments would, in turn, be passed on to the utilities' ratepayers, net of the utilities' costs of obtaining the benefits. In addition to these monetary payments, the MOU provides the utilities with the additional benefit of the Qualifying Facilities' support in securitization efforts.

These monetary and other benefits under the MOU would come at the price of all Vermont utilities giving up the claims presented in the Amended Petition in this Docket and future claims, and releasing the Qualifying Facilities from certain security obligations currently required under the Agreements. As noted in the Findings above, releasing the Qualifying Facilities from the security obligations appears to present little risk to the utilities and their ratepayers, given that expected market prices for replacement power are substantially lower than the prices paid for Qualifying Facility power under the Agreements; thus, a Qualifying Facility failure to deliver power under its Agreement is unlikely to impose higher costs on the Vermont

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29. Qualifying Facilities' Reply Brief at 1–8.

30. As noted in the Findings, the payment estimates in the MOU are given in nominal dollars. The Petitioners presented net-present-value calculations for these payments over a range of discount rates (from 5% to 30%). Those calculations indicate that the net present value of the total payments, in 2002 dollars, is expected to fall between \$4.4 and \$10.9 million, depending on the discount rate and the estimated dispatch savings credits. For example, using a discount rate of 10% yields a net present value of \$7.64 million based on the minimum expected dispatch credits, and \$9.00 million based on the maximum expected dispatch credits. Exh. Petitioners-66.

utilities from replacement power, and instead would likely result in cost savings to the utilities. I thus conclude that it is reasonable and appropriate for Vermont's electric utilities to relinquish these security obligations in exchange for the monetary benefits they would receive under the MOU.

I further conclude that the utilities' giving up the claims presented in this Docket and future claims is a reasonable concession in order to obtain the monetary and other benefits of the MOU. Given the Board's prior Order on the scope of its authority to award the relief sought in the Amended Petition, in which the Board determined that it was without authority to award certain of the remedies sought, the utilities' relinquishment of the remaining claims is a reasonable price to pay (especially in light of their concomitant savings in costs and human resources in avoiding further litigation on those remaining claims).

### **C. Distribution of the MOU's Benefits**

As noted above, under the MOU certain of the monetary benefits would flow only to the Petitioning Utilities. For the reasons that follow, I conclude that the Board should not condone this exclusion of the non-Petitioning Utilities from those benefits. Accordingly, I recommend that the Board approve the MOU only with the condition that all Vermont electric distribution utilities receive a pro rata share of the benefits under the MOU.

The Petitioning Utilities assert that it is appropriate for them to obtain all of the non-contingent benefits of the MOU because those benefits were secured through their efforts, without the participation of the Non-Petitioning Utilities. The Petitioners point to the substantial time and money that they spent in prosecuting this Docket and in other related proceedings, in contrast to the minimal expenditures of the Non-Petitioning Utilities, in support of their position. The Petitioners assert that the Non-Petitioning Utilities thus had no right to expect to receive any benefits from this Docket, and had no right to expect that their ratepayers' interests would be protected by the Petitioners. Furthermore, contend the Petitioners, the MOU's benefits are not achieved at the expense of the Non-Petitioning Utilities, as those utilities will continue to pay the

same rates for Qualifying Facility power under the Agreements, and those utilities had already decided not to pursue the remedies that the Petitioners sought in this Docket.<sup>31</sup>

The Petitioners additionally claim that allowing the Non-Petitioning Utilities to reap the benefits of the MOU would be bad policy:

because it would encourage utilities to stand by and do nothing, knowing that they will probably get to share in the fruits of other companies' mitigation efforts anyway. To require sharing here would also discourage utilities from being proactive in their mitigation efforts, if they know that failure will be at their sole cost but success will have to be shared with everyone else.<sup>32</sup>

While I agree with the Petitioners that sharing the MOU's benefits with the Non-Petitioning Utilities could send an inappropriate signal, here that policy concern is outweighed by three significant factors. First, a proportionate share of the MOU's benefits *do* come at the expense of the Non-Petitioning Utilities, by depriving them of the opportunity to seek similar savings associated with their shares of the power purchased under the Agreements and by reducing the value of the existing power (through the reduction and elimination of the security provisions). While the Non-Petitioners (other than GMP) had chosen not to participate actively in this Docket, they retained the possibility of other avenues to obtain savings, such as negotiation with the Qualifying Facilities. Second, the proposed distribution of the MOU's non-contingent benefits to only the Petitioning Utilities is fundamentally inconsistent with Vermont's composite system for purchase and distribution of qualifying facility power. The composite system is premised on Vermont's electric utilities proportionate sharing of costs and power; under the MOU, some utilities would get less than their share of costs and in the process bar the other utilities not only from getting, but also seeking, their share of lowered costs. Third, the Petitioners had expressly told the Non-Petitioning Utilities that they would share in any benefits achieved in this proceeding. These three factors are discussed more fully in the paragraphs that follow.

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31. Petitioners' Brief at 11–17.

32. Petitioners' Brief at 15, footnote omitted.

The MOU provides three categories of monetary benefits to the Petitioning Utilities: Power Sale Credits; Dispatch Savings Credits; and Additional Power Sales Credits. The Power Sales Credits reflect the Qualifying Facilities' savings from the Rule 4.100 Contract Amendments; the Power Sales Credits are estimated to total \$6,693,589 (in nominal dollars).

The Dispatch Savings Credits will be based on the power cost savings attributable to the implementation of dispatch plans for the Ryegate and Sheldon Springs facilities, with a minimum of \$1 million in such credits from the Ryegate dispatch plan.

The Additional Power Sales Credits are not tied to any identified cost savings of the Qualifying Facilities. The Additional Power Sales Credits will total \$3,000,000 (in nominal dollars) over ten years.

The MOU's monetary benefits for the Petitioners are thus derived in large part through modifications to the Agreements that, by altering or eliminating certain of the Qualifying Facilities' obligations, reduce the Qualifying Facilities' costs, with those cost savings then being passed on to the Petitioning Utilities. Under Vermont's composite Rule 4.100 regime, each Qualifying Facility has a single Agreement with the state's Purchasing Agent, rather than each Qualifying Facility having contracts directly with the individual utilities. The Purchasing Agent then allocates the costs and the power from these Agreements to each of the Vermont electric utilities. Consequently, the contract modifications called for under the MOU are modifications to the Qualifying Facilities' contracts with the Purchasing Agent. Those modifications would apply to all power sales and purchases under the Agreements, including the power allocated to the Non-Petitioning Utilities. The MOU would thus appropriate the value of cost savings associated with the Non-Petitioning Utilities share of the Qualifying Facility power and divert that value to the Petitioning Utilities. If the proposed changes to the security provisions of the Agreements represent a value of approximately \$6.7 million, as the Petitioning Utilities assert, then the MOU would require the Non-Petitioning Utilities to pay the same prices for less value.

The MOU's proposed assignment of all non-contingent benefits to the Petitioners would deprive the Non-Petitioning Utilities of specific safeguards they presently enjoy, and pay for, under the Power Purchase Agreements. For example, under the Agreements as currently in force, at least some of the Qualifying Facilities are required to maintain security for the continued

operation of the facility. While I have concluded, above, that in light of expected costs of replacement power, elimination of these safeguards is justified by the benefits that the utilities and their ratepayers will receive in return (the estimated \$6.69 million of Power Sales Credits), the safeguards nonetheless carry some value to the utilities and ratepayers. The Signatories have not justified eliminating these safeguards for the Non-Petitioning Utilities without providing those utilities with any benefits in return.<sup>33</sup>

Similarly, the Signatories of the MOU seek to preclude the Non-Petitioning Utilities from pursuing claims against the Qualifying Facilities to the same extent that the Petitioners would be precluded, thereby foreclosing the Non-Petitioning Utilities from seeking to obtain similar benefits outside of the MOU.<sup>34</sup> If allowed, this would preclude the Non-Petitioning Utilities from attempts to capture the corresponding savings associated with their pro rata share of the Qualifying Facility power, because those savings would already be assigned to the Petitioners. Such a result would be fundamentally unfair to the Non-Petitioning Utilities and their customers.

Furthermore, assigning all of the non-contingent benefits to the Petitioning Utilities would violate the intent of the Rule 4.100 composite system, which has been designed to share all of the costs and benefits of Rule 4.100 Agreements among the state's electric utilities and their ratepayers.<sup>35</sup> The MOU, without modification, would result in an allocation of costs and benefits that fundamentally alters the proportionate sharing of those costs and benefits established by the Rule 4.100 composite system.

Finally, in the Petition, the Amended Petition, and in discussions with the non-Petitioning Utilities, the Petitioners expressly represented that the relief they sought in this Docket was on behalf of *all* Vermont ratepayers, not just their own. Having made such a commitment, and failing to give the Non-Petitioning Utilities timely notice that they intended to renege on that commitment, the Petitioners cannot now complain that the relief they obtained should not extend

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33. The safeguards provide some assurances that, should the market price for power exceed the levelized prices in the Agreements in the future, Vermont ratepayers will receive the benefits of the levelized rates.

34. Exh. Petitioners-39 at ¶ 23.

35. See Board Rule 4.104(A); see also *In re Vermont Power Exchange*, 159 Vt. 168, 171–172 (1992).

to the non-Petitioning Utilities (especially given that, as discussed above, the relief obtained comes at a cost to those non-Petitioning Utilities).

#### **D. Allocation and Recovery of Petitioners' Costs**

There are two issues to be resolved concerning the Petitioning Utilities' costs in pursuing the Petition. First, because I have concluded that the benefits of the MOU ought to be shared proportionally among all Vermont electric utilities, I need to address whether the Petitioners' costs should likewise be shared. Second, I must address the MOU's provision that would allow the Petitioners to deduct from the MOU's monetary benefits all of their costs from this and related proceedings.

No party disputes that, if the Non-Petitioning Utilities share in the benefits of the MOU, they should also share in the Petitioners' costs in obtaining those benefits. However, the parties disagree over which of Petitioners' costs should be shared. The Department and certain of the Non-Petitioning Utilities assert that the Non-Petitioning Utilities should pay a proportionate share of the Petitioners' costs in this Docket, with the exception of the costs associated with litigating the disqualification of DRM.<sup>36</sup>

I conclude that all of the Petitioners' costs of the current Docket, including the costs to litigate the disqualification of DRM, should be borne proportionately by all Vermont electric distribution utilities. If ratepayers of all Vermont electric utilities benefit from the MOU, it is reasonable that they should share in the costs of obtaining those benefits. Moreover, just because the Petitioners failed in their efforts to retain DRM as counsel, does not mean that those efforts were unreasonable.

Furthermore, I conclude that it is appropriate for the Petitioners' costs of related proceedings to be included among the costs in which the Non-Petitioning Utilities share. Those related proceedings are the "scrivener's error" proceedings in the state Superior and Supreme Courts, and the FERC proceeding initiated by the Qualifying Facilities. These related proceedings resulted from the filing of the Petition in this Docket, and the Petitioners'

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36. Department Brief at 19 n. 8.

involvement in those related proceedings was thus reasonably related to their efforts to obtain the relief that they sought in this Docket.

Accordingly, I recommend that the Board require the Non-Petitioning Utilities, as a condition of receiving a proportionate share of the MOU's benefits, be required to pay their proportionate shares of the Petitioners' costs of this and related proceedings. I also recommend that if the Petitioning and Non-Petitioning Utilities are unable to mutually agree upon an appropriate allocation of these costs, that their disagreement be presented to the Board for resolution.

Turning to the method by which the utilities' should recover their costs, the MOU proposes to allow the Petitioners to recover their costs of this proceeding, and related proceedings, by setting off the costs against the monetary benefits of the MOU.<sup>37</sup> The Department recommends that, instead, those costs that are recoverable be recovered in the usual manner (i.e., by inclusion in a utility's cost of service in a rate case).<sup>38</sup>

Furthermore, the Department has asserted that one of the Petitioning Utilities, CVPS, is precluded from recovering approximately \$452,373 of costs in this Docket.<sup>39</sup> The Department points to the Board-approved settlement in Docket Nos. 6120/6240 under which CVPS agreed, and was ordered, to write down approximately \$452,373 of Docket No. 6270 costs through June 30, 2001 (such costs having been subject to a previous accounting order directing CVPS to defer recognition of the costs of Docket No. 6270 and to amortize them over a 60-month period beginning with the implementation of rates in any rate proceeding). The Department thus recommends that the write-down of \$452,373 should be applied to CVPS's share of costs of the MOU incurred through June 30, 2002, to determine if CVPS is entitled to any cost recovery. To the extent that any costs remain for CVPS after the write-down and those costs were not booked as required by the accounting order, the Department recommends that CVPS be required to explain why any such costs were not so booked. The Department further recommends that if the

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37. Exh. Petitioners-39 at ¶ 21.

38. Department Brief at 19 n. 8; Steinhurst/Lamont pf. at 7.

39. The write down amount of \$452,373, was included in Attachment 2 of the CVPS Docket Nos. 6120/6240 Memorandum of Understanding dated May 7, 2001. Pursuant to the CVPS compliance filing required in that docket, the write down was actually \$477,334. See: CVPS Compliance filing of 9/10/02 at Attachment D.

Board is satisfied with CVPS's explanation, the Board should require that those remaining costs not be netted from the MOU's proceeds, and instead be subject to recovery "in the normal course."<sup>40</sup> CVPS asserts that it agrees with the Department's description of the terms of the Docket Nos. 6120/6240 settlement and Order and the Accounting Order, but that the issues raised by the Department should be addressed at the time that CVPS has filed its proposed plan for delivery of MOU savings to ratepayers.<sup>41</sup>

I generally agree with the Department's recommendations. The Petitioners have presented no persuasive reason for departing from the usual practice of reviewing the recovery of their costs in a rate proceeding. Also, the MOU provides that the Petitioners need not file their proposed plans for assuring that their ratepayers receive the benefits of the MOU until the MOU has been approved by the Board.<sup>42</sup> It would be premature, to say the least, to assure the Petitioning Utilities' recovery of costs without any determination of how those utilities would pass on the remaining MOU benefits to their ratepayers.

Accordingly, I recommend that the Board approve the MOU only with the condition that the MOU's benefits that are passed on to ratepayers *not* be reduced by the utilities' costs, with the utilities instead being allowed to seek recovery of their costs in appropriate rate proceedings. If the Board agrees with this proposal, I see no need for the Board to address the implications of the Docket Nos. 6120/6240 Order and the January 29, 2000, Accounting Order *now*, rather than in a future CVPS rate proceeding in which CVPS seeks recovery of these costs. However, I recommend that the Board make clear, so there is no confusion, that CVPS's \$452,373 write-down is to be applied to *CVPS's share* of costs, and not to the total costs for all utilities.<sup>43</sup>

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40. DPS Reply Brief at 21–25.

41. Letter of Morris Silver, Esq., to Susan M. Hudson, filed June 13, 2002.

42. Exh. Petitioners-39 at ¶ 21; *see also* Order of March 6, 2002.

43. Because this issue was not raised until briefing, I encourage CVPS and the Department to note in their comments on this Proposal for Decision any practical or other difficulties with my proposed treatment of the write-down.

### **E. Requested Prudence, Mitigation and Used-and-Usefulness Findings**<sup>44</sup>

The Petitioning Utilities contend that the Board should find that they acted prudently in the resolution of this Docket and entry into and performance under the MOU because, they assert, they have acted reasonably in entering into the MOU, by their performance of its terms, and by submitting it to the Board for approval. The Petitioners assert that there is no evidence that they were imprudent in entering into the MOU, and that no party has contended that there are opportunities to mitigate the costs of the Qualifying Facility power that the MOU fails to capture. The Petitioners further contend that any problems with the MOU should be addressed now, rather than waiting for a rate case to review their prudence, because any such problems could not be remedied at that later time, especially in light of the finality provisions of the MOU. The Petitioners also assert that sound policy reasons counsel for issuance of the requested prudence finding, because otherwise the Non-Petitioning Utilities, who took little or no actions in obtaining the benefits of the MOU, would be insulated from potential imprudence disallowances while the Petitioners — who actively worked for their ratepayers' benefit in obtaining the MOU — would face such possible disallowances. That result, assert the Petitioners, would discourage utilities from actively seeking mitigation opportunities. Finally, claim the Petitioners, the Qualifying Facilities have clearly stated that they will abandon the MOU if the Board fails to issue the requested prudence finding.<sup>45</sup>

The Petitioners also propose an alternative to their requested prudence finding. If the Board agrees that the prudence of the Petitioning Utilities in this proceeding is not of concern, but that policy reasons dictate against issuance of a prudence finding, the Petitioners (and the Qualifying Facilities) would accept the following alternative: a ruling making explicit that the costs allocated by VEPPI to the Petitioners under the Agreements as modified by the provisions

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44. Technically, the Board could approve the MOU without modification or condition without the Board including the requested prudence, mitigation, and used-and-useful findings in its Order. As drafted, the MOU does not actually call for the Board to issue the requested findings. Instead, the relevant sections of the MOU (¶¶ 24 and 25) each provide that the Signatories "agree that the order approving this MOU must contain an express finding by the Board" on the prudence, mitigation, and used-and-usefulness of the Qualifying Facility power. Thus, the Board could approve the MOU — thereby approving *the agreement of the Signatories* that the Board's Order must include the findings — without actually including the findings. However, the intent of the Signatories is clear, and thus I recommend that the Board address the issue of whether to include the requested findings.

45. Petitioners' Brief at 4–9; Petitioners' Reply Brief at 1–9.

of the MOU, and other reasonable costs incurred by a Petitioner pursuant to Rule 4.100, shall be included in each Petitioning Utility's revenue requirement for ratemaking purposes, and will not be subject to disallowance based on the prudence doctrine.<sup>46</sup>

The Petitioners contend that they are entitled to a finding that power sold pursuant to the Agreements will not be subject to any disallowance based on the used-and-useful principle. The Petitioners note that they did not choose to enter into the Agreements, and that instead they are required by Board Rule 4.100 to purchase the power.<sup>47</sup>

The Department contends that the Board should not issue the requested findings on prudence and mitigation. According to the Department, the Petitioners have failed to show that they are entitled to such findings, and the Petitioners should not be excused from their ongoing obligations to act prudently and to pursue potential future mitigation efforts.<sup>48</sup>

The Department also contends that the Board should not issue the requested used-and-usefulness finding. The Department asserts that the Petitioners have not demonstrated that they are entitled to such a ruling, and that the Petitioners' actions with respect to Qualifying Facility power after it is purchased should remain subject to scrutiny and possible disallowances. The Department acknowledges that, as provided in Board Rule 4.112, the Petitioners are entitled to include in their revenue requirements all reasonable costs that they incur pursuant to Rule 4.100. The Department contends that costs incurred by the utilities subsequent to the purchase of that power should remain subject to the used-and-useful doctrine. According to the Department, instead of issuing the requested used-and-useful finding, the Board should explicitly acknowledge that the costs allocated to the utilities by the Purchasing Agent pursuant to Board Rules 4.104(A) and (D) for the purchase of power under the Agreements, and other costs directly incurred due to a requirement of Rule 4.100, are to be included in each utility's revenue requirement for ratemaking purposes, and are not subject to a used-and-useful disallowance, due to Board Rule 4.112. The Department further recommends that the Board expressly state that all

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46. Petitioners' Reply Brief at 9–10. The Petitioners note their contention that their costs in this Docket and in all ancillary proceedings fall under the provisions of Board Rule 4.112.

47. Petitioners' Brief at 9–11.

48. DPS Brief at 23–26.

other costs of the Qualifying Facility power, including the costs of this and related proceedings, do not fall within the scope of the ratemaking inclusion provision of Rule 4.112.<sup>49</sup>

In Docket No. 6545, the Board reviewed a request to sell the Vermont Yankee Nuclear Power Station ("Vermont Yankee") to Entergy Nuclear Vermont Yankee, LLC ("ENVY"). The petitioners in that proceeding asked the Board to issue findings that actions of CVPS and GMP in connection with the Vermont Yankee sale will be treated as if they were prudent and used and useful. The Board considered, first, whether it had the authority to issue the requested findings, and concluded that it did. "[S]tatutes, logic, and precedent all indicate that the Board has the legal authority under which we *could* issue the requested findings as they relate to the entry into the transactions (but *not* as to future performance)."<sup>50</sup>

At the same time, however, the Board noted that issuance of such findings would constitute extraordinary relief, departing from the Board's well-established past practice of reviewing the prudence and used-and-usefulness of utility actions after the fact, typically in the context of a rate proceeding.

In exercising our statutory discretion [in setting rates that are just and reasonable], Vermont's rate-making policies explicitly *balance* after-the-fact reviews against the fact that utilities have substantial discretion to manage their own affairs without day-to-day regulatory intervention.<sup>51</sup>

The Board observed that issuance of the requested prudence and used-and-useful findings would alter this balance:

Instituting such a change in policy essentially constitutes a request that we waive the ratepayer protections provided by the prudence and used-and-useful standards. Although the statute would permit the Board to abstain from applying these principles, as long as the resulting rates were just and reasonable, we conclude that we should only do so in rare circumstances and only when the requesting party makes a greater showing than a mere demonstration that the proposed transaction promoted the general good. As the Vermont Supreme Court has observed:

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49. DPS Brief at 29–30; DPS Reply Brief at 18–19.

50. Docket No. 6545, Order of 6/13/02 at 97 (emphasis in original).

51. Docket No. 6545, Order of 6/13/02 at 94 (emphasis in original).

If a utility's income were guaranteed, the company would lose all incentive to operate in an efficient, cost-effective manner, thereby leading to higher operating costs and eventual rate increases.

A party seeking to significantly alter the long-standing balance of responsibilities must make a strong showing of clear and compelling benefits to ratepayers that would not be attainable without such recovery guarantees.<sup>52</sup>

Applying this standard to the present case, the Board must therefore determine whether the Petitioning Utilities have made "a strong showing of clear and compelling benefits to ratepayers that would not be attainable without such recovery guarantees." I conclude that the Petitioners have not made such a showing. The MOU does provide benefits to ratepayers, as discussed above. However, the Petitioners have not shown that those benefits — which largely represent the dollar savings to the Qualifying Facilities of the security provisions that the Qualifying Facilities would no longer be required to meet — could not be attained without the requested prudence and used-and-useful findings.

More fundamentally, Vermont's regulated utilities are under an obligation to strive to provide service to their customers at the least possible cost (taking into account both price and non-price costs, and the maintenance of high-quality service). The utilities must fulfill this obligation without the guarantees of rate recovery that the Petitioners seek in this proceeding (or that the requesting utilities sought in the Vermont Yankee sale proceeding). As in the Vermont Yankee case, the petitioners here have asserted that the other party to their transaction (here, the Qualifying Facilities, and with the Vermont Yankee sale, ENVY) has required that the Vermont utility petitioners obtain a guarantee of rate recovery in order to ensure that those other parties are paid. The Petitioners contend that the Qualifying Facilities have asserted that they consider the requested findings to be essential.<sup>53</sup> However, as the Department correctly notes in its Reply Brief, neither the Petitioners nor the Qualifying Facilities have presented any testimony in support of this assertion.<sup>54</sup>

Although I do not recommend that the Board grant the requested findings, in light of Board Rule 4.112 — which requires that "[a]ll reasonable costs incurred by a utility pursuant to

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52. Docket No. 6545, Order of 6/13/02 at 95 (citation and footnote omitted).

53. Petitioners' Proposal for Decision at 58; Petitioners' Brief at 8.

54. DPS Reply Brief at 16 n. 6.

[Rule 4.100] shall be included in that utility's revenue requirement for ratemaking purposes" — it is highly unlikely that Vermont's electric utilities face any prospect of a used-and-useful disallowance for their purchases of power under the Agreements. Accordingly, just as the Board rejected a similar argument in Docket No. 6545, I recommend that it reject the Petitioners' contention that a guarantee of rate recovery is essential in order to obtain the benefits provided by the MOU. At the same time, I agree with the Department that it is appropriate for the Board to acknowledge the effect of Board Rule 4.112 in precluding any used-and-useful disallowance for those costs that fall within the scope of the rule; the state has mandated that the utilities purchase the power that is provided under the Rule 4.100 Agreements, and as Rule 4.112 provides, it would be inappropriate to exclude those mandated costs from a utility's rates.

Thus, I recommend that the Board expressly state that: (1) the costs allocated to the utilities by the Purchasing Agent pursuant to Board Rules 4.104(A) and (D) for the purchase of power under the Agreements, and other costs directly incurred due to a requirement of Rule 4.100, are to be included in each utility's revenue requirement for ratemaking purposes, and are not subject to a used-and-useful disallowance, due to Board Rule 4.112; and (2) all other costs of the Qualifying Facility power, including the costs of this and related proceedings, do not fall within the scope of Rule 4.112.

#### **F. Uncontested Issues**

As noted above, the Department recommends that if the Board approves the MOU, the Board should also:

- adjust the provisions of Paragraph 22(c) of the MOU (which precludes the Signatories from activities that adversely affect another Signatory's reputation or financial interests) to clarify that those provisions are inapplicable to responses by utilities and by the Qualifying Facilities to inquiries from state regulators or the Vermont legislature;
- require that the Purchasing Agent's verification of net savings realized by the Qualifying Facilities be performed under the supervision of the public representative members of the Purchasing Agent's Board of Directors;
- require that the benefits of any securitization program that may be developed be offered on non-discriminatory terms to all utilities purchasing Qualifying Facility power under Rule 4.100, and — subject to any securitization statute that may be enacted — require that the utilities ensure that any securitization program not be

- structured in a way that unreasonably inhibits participation by any utility that is purchasing power under Rule 4.100;
- clarify that the MOU's prohibition on new or additional charges for ancillary services (Paragraph 22(b) of the MOU) is not limited to transmission service, but instead applies to ancillary services generally; and
  - expressly waive relevant sections of Rule 4.100, which the Department contends is required to implement the MOU's proposed elimination of certain provisions in the Agreements because those provisions are otherwise required under Rule 4.100.<sup>55</sup>

In their briefs, no party opposed these five Department recommendations. VEPPI has affirmatively agreed to the Department's proposal that VEPPI's verification work under the MOU be performed under the supervision of the public representatives.<sup>56</sup> I conclude that these unopposed recommendations are appropriate to allow the full and fair implementation of the MOU's provisions, for the reasons presented by the Department in its testimony and briefing.

#### **V. CONCLUSION**

For the reasons stated above, I recommend that the Board approve the MOU, but only with the conditions and modifications described above.

#### **VI. PARTIES' COMMENTS ON THE PROPOSAL FOR DECISION**

On December 9, 2002, my Proposal for Decision was served on all parties to provide them the opportunity to submit comments and request oral argument, pursuant to 3 V.S.A. § 811.

On January 6, 2003, the Petitioners filed a Stipulation entered into by and between the Petitioners, the Department, the Non-Petitioning Utilities that have been active parties in this Docket, and VEPPI. In the Stipulation, these parties agree to the terms and conditions of the Proposal for Decision, with five corrections that are identified in the Stipulation, subject to the terms of the Stipulation. The five corrections identified in the Stipulation are:

- a. footnote 3 should be amended to clarify that the Burlington Electric Department, Rochester Electric Light & Power Company, and the Vermont Marble Power Division of OMYA, Inc., are also Non-Petitioning Utilities;

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55. DPS Brief at 31–36.

56. VEPPI Brief at 4.

- b. page 9, first line, should be amended to read "buy-~~down~~ out and buy-down proposals";
- c. page 18, finding no. 39, first line, should be amended by adding the words "to refrain" between the words "agree" and "from";
- d. page 38, first line of first double-spaced paragraph, the "(" before the word "VEPPI" should be deleted; and
- e. page 31, first full sentence of the third paragraph, should be amended by inserting a footnote that states: "The write down amount of \$452,373, was included in Attachment 2 of the CVPS Docket Nos. 6120/6240 Memorandum of Understanding dated May 7, 2001. Pursuant to the CVPS compliance filing required in that docket, the write down was actually \$477,334. See: CVPS Compliance filing of 9/10/02 at Attachment D."

The Stipulation further provides that the parties' agreements contained in the Stipulation shall terminate if the Board does not adopt and issue the Proposal for Decision in its entirety without modification or condition except as set forth in the Stipulation.

On January 7, 2003, the Qualifying Facilities filed comments in which they agree that the Board may approve the Memorandum of Understanding between the Petitioning Utilities and the Qualifying Facilities, as modified by the recommendations contained in Sections IV.C, D, E and F of the Proposal for Decision.

Also on January 7, 2003, the Petitioners filed a statement confirming that they agree to the modifications and conditions set forth in Sections IV.C, D, E and F of the Proposal for Decision.

No party has requested oral argument on the Proposal for Decision.

I have reviewed the parties' comments on the Proposal for Decision, and conclude that the five corrections identified in the Stipulation are all appropriate. Accordingly, I have made those corrections to the Proposal for Decision that I am forwarding to the Board for its consideration.<sup>57</sup>

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<sup>57</sup>. Because these corrections are not adverse to any party, I have not circulated the corrected Proposal for Decision to the parties for further comments. See 3 V.S.A. § 811.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

Dated at Montpelier, Vermont, this 13<sup>th</sup> day of January, 2003.

s/Kurt R. Janson

Kurt R. Janson

Hearing Officer

## **VII. BOARD DISCUSSION**

We have reviewed the Hearing Officer's Proposal for Decision and the parties' comments on the Proposal for Decision. We agree with the Hearing Officer that the five corrections identified in the Stipulation filed on January 6, 2003, are appropriate. We thus adopt the Proposal for Decision, as corrected in accordance with the January 6 Stipulation.

## **VIII. ORDER**

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

1. The findings, conclusions and recommendations of the Hearing Officer are adopted.
2. The Memorandum of Understanding ("MOU") between the Petitioning Utilities and the twenty Qualifying Facilities is hereby approved, but only if the Signatories agree to the modifications and conditions set forth in this Order. Within thirty days of the date of this Order, each Signatory to the MOU shall file a statement indicating whether it agrees to the modifications and conditions.
3. The modification of the Qualifying Facilities' obligations under their Agreements in order to achieve savings through the reduction of security and compliance requirements, as specifically described in Attachment A of the MOU, is approved. To the extent necessary to implement this modification, relevant sections of Board Rule 4.100 are hereby waived.
4. The monetary benefits to the Petitioning Utilities under the MOU shall be shared proportionally among all Vermont electric distribution utilities.
5. The Purchasing Agent shall be authorized to take such actions as are necessary to implement fully the MOU, as modified and conditioned in this Order, including allocating each year's actual Power Sales Credits, Dispatch Savings Credits, and Additional Power Sales Credits to all Vermont electric distribution utilities. The Purchasing Agent's verification of net savings realized by the Qualifying Facilities shall be performed under the supervision of the public representative members of the Purchasing Agent's Board of Directors.
6. All Vermont electric distribution utilities shall share proportionally in the Petitioning Utilities' costs incurred in this Docket, in the related declaratory judgment action and complaint

at FERC initiated by the Qualifying Facilities, in Vermont Supreme Court Docket No. 01-083, and in Vermont Superior Court Docket No. 714-12-99 Wncv.

7. The Ryegate and Sheldon Springs Dispatch Plans, filed by the Petitioning Utilities on March 22, 2002, are approved. Within sixty days from the date of this Order, Ryegate Associates, Missisquoi Associates, the Petitioning Utilities, and the Purchasing Agent shall develop and file settlement procedures and formal dispatch agreements as contemplated under the Ryegate and Sheldon Springs Dispatch Plans.

8. Within forty-five days from the date of this Order each Vermont electric distribution utility shall file with the Board its plan for assuring that the benefits achieved through the implementation of the agreements approved as part of the MOU are delivered to and for the benefit of the utility's ratepayers. The benefits to be delivered under the plan are not to be reduced by the utilities' costs of obtaining those benefits; instead, any recovery of those costs shall be determined in appropriate rate proceedings.

9. The Board declines to issue the findings described in Paragraphs 24 and 25 of the MOU.

10. The costs allocated to Vermont's electric distribution utilities by the Purchasing Agent pursuant to Board Rules 4.104(A) and (D) for the purchase of power under the Agreements, and other costs directly incurred due to a requirement of Rule 4.100, are to be included in each utility's revenue requirement for ratemaking purposes, and are not subject to a used-and-useful disallowance, as provided in Board Rule 4.112. All other costs of the Qualifying Facility power, including the costs of this and related proceedings, do not fall within the scope of Board Rule 4.112.

11. The provisions of Paragraph 22(c) of the MOU (which precludes the Signatories from activities that adversely affect another Signatory's reputation or financial interests) are adjusted to clarify that those provisions are inapplicable to responses by utilities and by the Qualifying Facilities to inquiries from state regulators or the Vermont legislature.

12. The benefits of any securitization program that may be developed, as contemplated by Paragraphs 13 and 14 of the MOU, shall be offered on non-discriminatory terms to all utilities purchasing Qualifying Facility power under Rule 4.100. Subject to any securitization statute that

may be enacted, Vermont electric distribution utilities shall ensure that any securitization program not be structured in a way that unreasonably inhibits participation by any utility that is purchasing power under Rule 4.100.

13. The prohibition on new or additional charges for ancillary services, set forth in Paragraph 22(b) of the MOU, shall not be limited to transmission service, but instead shall apply to ancillary services generally.

Dated at Montpelier, Vermont, this 15<sup>th</sup> day of January, 2003.

<u>s/Michael H. Dworkin</u>	)	
	)	
	)	PUBLIC SERVICE
<u>s/David C. Coen</u>	)	
	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: January 15, 2003

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 in writing) of any apparent 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.*