# *A Critique of the Vermont Department of Public Service's Ratepayer Advocacy Activities, Organization And Act 56, Section 21(b) Report*

**Prepared on behalf of:**
AARP Vermont

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## Executive Summary

Last year, the Vermont Legislature passed Act 56, Section 21(b), directing the Department of Public Service to conduct a thorough review of its ratepayer advocacy structure and how that compares to other statutorily-created ratepayer advocates around the country. This Act was passed to provide the Legislature with information that could be useful in addressing what has become a significant concern by many consumer-oriented stakeholder groups, individuals, and policymakers regarding the Department's actions, positions, and policies over the past several years.

The Department released its final report on February 22, 2016 ("DPS Report"). It consists of a very general survey of state ratepayer advocacy structures and is devoid of any serious or critical analysis. The report concludes that the Department's current structure is the most beneficial to the public, with any misgivings about the Department's current and prior actions can be attributed to nothing more than problems of public perception. The DPS Report concludes with three recommendations that will do little to nothing to address the fundamental problems associated with its past ratepayer advocacy positions and policies.

The DPS Report fails to recognize that the Department's problems lie deeper than a mere failure to effectively communicate its actions to the public. One of the primary problems with the Department's actions rests with the confusing and sometimes conflicting statutory language that defines the Department's ratepayer advocacy responsibilities. Currently, ratepayer advocacy is pursued in one of four divisions within the DPS: the Division of Public Advocacy, which is directed by a Public Advocate. The Public Advocate and its division, however, are comprised of attorneys who, by statute

and ethical codes, are required to act on the behalf of their client, the Commissioner of the Department of Public Service, not ratepayers. Thus, the office of the Public Advocate is, unfortunately, a misnomer since he or she does not represent ratepayers by statutory definition, but instead, represents the Commissioner – who, in turn, reports to the Governor.

The Department's mission confusion extends further to the agency's Commissioner. Recently, the Vermont Legislature modified the statutory language (30 V.S.A. § 2(f)) defining the Department (and its Commissioner's) mission to emphasize advocacy for ratepayer classes not independently represented in proceedings before the Board (i.e. residential, low-income, and small businesses). The Commissioner of the Department, to this date, appears to be either confused or unaware of this legislatively-directed mission change since the DPS Report, as well as Department's actions and policies over the past several years, still center on protecting what they believe are the state's broader "public interest" considerations, not those specific to residential and small commercial ratepayers. The Department cannot on one hand promote the interests of the state as a whole and, on the other hand, defend the interests of a specific group within the public, such as residential and small commercial ratepayers.

It is also clear from the DPS Report that the Department's current structure is not only mission-confused, but mission-conflicted. The Department currently conducts both energy planning and policy functions alongside its ratepayer advocacy functions. No other state in the U.S. combines these functions given their inherently conflicted purposes. State energy planning and policy offices typically pursue activities that

facilitate energy technology and deployment projects, as well as a number of energy efficiency programs, across a wide range of stakeholders and interests groups; they are not organized to litigate extensive and complex cases before regulatory tribunals to ensure that utilities provide least cost reliable utility service. In addition, state energy offices tend to represent the broad public interest, not those specific and isolated to residential and small commercial ratepayers.

The DPS Report underscores that the Department is not a cost-effective ratepayer advocate: ratepayers are simply not getting any advocacy "bang for their buck" since the Department fails repeatedly to take positions that are consistent with ratepayer interests. Therefore, the Legislature should undertake a considerable and meaningful reform of ratepayer advocacy in Vermont in the following general fashion:

**Major Recommendations**

- The Legislature should eliminate the Division of Public Advocacy and the position of the Public Advocate in the Department of Public Service. In its place, the Legislature should create an independent Ratepayer Advocate ("RA") that supervises an Office of Ratepayer Advocacy ("ORA").[1] The mission of the ORA and RA should be made explicit and unequivocally clear: to focus exclusively on residential and small commercial ratepayers.
- For administrative purposes, the RA and ORA can be housed in any relevant state agency, including the Department or the Office of the Attorney General, provided that a high degree of independence included in the recommendations below, or some version of the recommendations listed below, are adopted. This recommendation is consistent with the 42 other states that possess a clearly defined ratepayer advocate. Further, the majority of states (over three-quarters) have ratepayer advocacy agencies as independent agencies or part of AG's offices.
- If the RA/ORA functions are removed from the Department, it should continue to conduct its statewide energy planning and policy activities like any other state

[1] This new office can remain in the Department if certain organizational, independence, and accountability reforms are undertaken. If the Legislature were to choose to keep this new ratepayer advocate in the Department, the "elimination" of the current PA would effectively consist of a name, mission, and organizational change, rather than a true "elimination." Likewise, a movement to another agency could also be seen as effectively "transferring" rather than eliminating.

energy office. Further, the dollars associated with the former PA's activities (and its division) should be eliminated from the Department's future budget.

**Mission Recommendations**

One of the most important policy recommendations that can be made to the Legislature in this matter is to clearly and unambiguously identify the RA's mission as being one dedicated to:

- Representing and forcefully advocating for residential and small commercial ratepayer interests.
- Supporting low-income and disadvantaged utility customers.
- Being fuel and technology neutral, focusing on securing the lowest cost, most reliable utility service possible.
- Defending residential and small commercial ratepayers from assuming utility business, financial, and regulatory risk without appropriate and reasonable compensation.

**Organizational Recommendations**

The RA and the ORA need an independent organizational and oversight structure. This can be accomplished through the following recommendations:

- A volunteer stakeholder committee (Committee for Ratepayer Advocacy or "Committee") should be established that provides guidance on ratepayer advocacy and governance issues.
    - The committee should be comprised of six members: two appointed by the Governor; one appointed by the Senate President Pro Tempore; one appointed by the Speaker of the House; and two appointed by the Committee itself.
    - Members will serve staggered four-year terms and should represent a balanced, cross-section of stakeholder groups, including small business groups, consumer groups, low-income groups, and environmental groups.
    - Committee members can be removed by a majority vote of other committee members.
- The Committee shall solicit qualified RA candidates that have prior consumer advocacy experience. The RA does not have to be an attorney.
- The Committee will submit three RA candidates to the Governor for selection. The Governor will appoint the RA who will also be confirmed by the Senate Finance Committee.

- The RA will serve a four year term and can be re-nominated and re-confirmed for additional terms.
- The RA can be removed for cause by a recommendation of the Governor provided that recommendation is approved by both the majority of the Committee and the Senate Finance Committee.
- The RA and ORA may operate within any state agency. However, the RA and ORA shall be completely independent of any agency Secretary, Commissioner, or other type of administrative director. The RA and ORA will have a separate line item budget from the agency in which it is housed that will be funded through regulatory assessment fees.
- The ORA shall be comprised of a moderate-sized staff that is composed primary of attorneys with one attorney serving as a Director of Litigation.
    - The RA can serve as the Director of Litigation if she/he is a Vermont Bar-certified attorney in good standing.
    - The ORA should be comprised of a small number of professional staff members such as economists, engineers, accountants, and other policy/utility analysts to assist in case management and non-docketed regulatory matters.
    - The RA/ORA will primarily rely on outside consultants for litigated matters. The RA will be limited to a total consulting budget not to exceed $125,000 per docket. The RA can increase this expenditure to $175,000 per docket upon a showing of special circumstances provided this amount is approved by the Committee. Consulting fees will be recovered through the regulatory assessment fee, or a direct utility reimbursement, and will not be part of the ORA's normal operating budget.

**Other Recommendations**

- All settlement agreements, memoranda of understanding, or other agreements entered into by the RA with other parties (including utilities) in litigated proceedings before the Board must be approved by the Committee.
- The RA will brief the Committee on a quarterly basis. At least two of these briefings will be on an in-person basis.
- The RA shall prepare an annual report that will be submitted to the Committee that will also be submitted to the Governor and the Senate Finance Committee. The report will explicitly discuss: the RA's actions during the prior year; the specific positions taken by the RA on each major proceeding during the prior year and how those positions compare to the Board's final decision in each matter; an explicit discussion regarding the rationale and basis for any settlements or memoranda of understanding entered into by the RA during the prior year (prepared in a fashion that does not compromise the statutorily-required confidentiality of such agreements); the RA's position and status associated with any pending proceedings; and a

discussion and analysis of the value delivered to ratepayers during the course of the prior year. Assumptions, caveats, and other conditions associated with the analysis of ratepayer value and any quantification of this value shall be clearly provided in the report.

## 1 Introduction

The Acadian Consulting Group ("ACG") was asked by AARP-VT to examine the current structure of the Department of Public Service ("DPS" or the "Department") and to offer a critical assessment of the final report issued by the DPS on February 22, 2016 (hereafter, "DPS Report").[2] ACG is a research and consulting firm specializing in the analysis of economic, statistical, financial, and accounting issues that arise through public policy and in the regulation energy and related industries.[3] ACG provides expert witness testimony, research, and reports primarily for state consumer counsels, ratepayer advocates, Attorneys Generals, and regulatory commission staff.[4] Founded in July 1995, ACG consists of a professional staff with more than 95 years and 500 regulatory proceedings worth of combined experience in the electric, natural gas, water, and telecommunications fields, in over 20 states. AARP is a non-profit, nonpartisan organization, which advocates on behalf of more than 37 million citizens 50 and older nationwide.[5] AARP advances a variety of issues its members find important to them, including the high costs of electric and natural gas utility rates. AARP Vermont represents AARP interests in Vermont, on behalf of the 128,000 members in the State.[6]

The DPS Report was prepared in direct response to Act 56, Section 21(b) of the Vermont Legislature directing the Department to:

> …evaluate the pros and cons of various forms of ratepayer advocate offices and report on or before December 15, 2015, to the House Committee on Commerce and Economic Development and the Senate Committee on Finance with

[2] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department.

[3] http://www.acadianconsulting.com

[4] http://www.acadianconsulting.com/pages/clients.html

[5] http://www.aarp.org/about-aarp/

[6] http://web.vermont.org/Family-Household-Resources/AARP-Vermont-1407

> any recommendations on how to improve the structure and effectiveness of the Division for Public Advocacy within the Department of Public Service.[7]

A close examination of the DPS Report, as well as the actions of the Department over the past eight years, suggests that there are a number of opportunities to improve ratepayer advocacy in Vermont. The current structure is not only mission-confused, but mission conflicted. The Department currently conducts both energy planning and policy functions, alongside its ratepayer advocacy functions. As will be discussed later in this Report, no other state in the U.S. combines these functions given their inherently conflicted purposes. State energy planning and policy offices typically pursue activities that facilitate energy technology and deployment projects, as well as a number of energy efficiency programs, across a wide range of stakeholders and interests groups; these state energy offices are not developed to litigate extensive and complex cases before regulatory tribunals to ensure that utilities provide least cost reliable utility service. While the goals of these state energy policy and planning agencies may appear to be consistent with certain ratepayer goals, that is not often the case and there are numerous examples (provided later) where state energy planning offices and ratepayer advocates have taken opposing positions in utility regulatory proceedings.

The remainder of this Report is organized into four remaining sections. Section 2 discusses the DPS Report's failure to conduct any critical self-examination of the Department's past activities and positions before the Vermont Public Service Board, and offers a series of examples of past DPS actions that may be leading to the current crisis of confidence regarding the Department's ratepayer advocacy activities. Section 3 discusses the conflict of interest problem alluded to earlier, and explains how the DPS

[7] Act 56 of the 2015-2016 Legislative Session, §21(b)(a).

Report fails to address the fundamental problem with the Department's mission and structure. Section 4 examines the DPS Report's recommendations and explains why they are deficient and unlikely to result in any positive improvement in Vermont ratepayer advocacy. Section 5 presents a series of recommendations that could lead to an improvement in ratepayer advocacy in Vermont.

## 2 Critical Assessment of the Department's Prior Regulatory Activities

### 2.1 Overview

The DPS Report recognizes that several interested stakeholders have expressed concerns about the Department's past actions before the Vermont Public Service Board (the "Board") and whether those actions have been in ratepayer's best interests.[8] Act 56, Section 21(b), while not explicitly referencing frustration with the Department's actions, was certainly not passed to satisfy the academic curiosity of the Vermont Legislature. Despite ratepayer concerns, the DPS Report dances around addressing how its current structure has impacted its recent actions and policies, either in practice or appearance. Instead, the DPS Report provides a rather cursory tally of the organization of other state ratepayer advocates,[9] and concludes that the Department's current structure, and presumably the Department's recent activities before the Board, are "the most beneficial to the public."[10] Any misgivings about the Department's current and prior actions, according to the DPS Report, can be attributed to nothing more than public perception problems.[11]

The DPS Report provides no context or response to what has been a series of actions taken in a variety of proceedings before the Board that have been unexplainably contrary to ratepayer interests. Examples of these types of actions can be found in

[8] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 9.

[9] *Ibid.*, Appendix A.

[10] *Ibid.*, p. 6.

[11] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (Draft dated January 15, 2016), Vermont Public Service Department, p. 19; see also, An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 35.

proceedings associated with various utility alternative regulation plans ("ARPs"), special utility ratemaking proposals, as well as recent certificate of public good ("CPG") proceedings before the Board.

### 2.2 Examples of Deficiencies in the Department's Prior ARP Actions

In 2009, the Department entered into a Memorandum of Understanding ("MOU") with Green Mountain Power Corporation ("GMP") recommending the establishment of a second ARP for GMP.[12] ARPs are a form of alternative regulation that allow utilities to change their rates, usually based upon a pre-defined set of formulas, rather than filing a full rate case before regulators. The purported advantages of utilizing ARPs, instead of full rate cases, is that this pricing flexibility should (a) give the utility adequate pricing flexibility to cover its costs and (b) send signals to become more efficient since any excess earnings that are generated from an incentive-based approach (instead of a cost-based approach) will be shared between the utility and its ratepayers.

Unfortunately, the Department settled with GMP even before the company filed its 2009 ARP with the Board.[13] In other words, the Department did not use the 2009 ARP proceeding to closely examine whether or not this new form of regulation was working well for GMP's ratepayers: no reports nor expert witness testimony was filed by the Department on the mechanics of the plan and whether it represented an appropriate sharing of risks and rewards between the utility and ratepayers. The 2009 ARP settlement between the Department and GMP was not the result of a hard-fought proceeding, but instead represented one of several proceedings over the course of the

[12] Petition of Green Mountain Power Corporation for approval of an alternative regulation plan (Plan II), Vermont Public Service Board Docket No. 7585, Memorandum of Understanding between the Vermont Department of Public Service and Green Mountain Power Corporation.

[13] Petition of Green Mountain Power Corporation for approval of an alternative regulation plan (Plan II), Vermont Public Service Board Docket No. 7585, Order dated April 16, 2010, p. 4.

past eight years where the Department summarily settled with a regulated utility without attempting to litigate or go through the standard evidentiary process. Part of the Department's settlement included agreeing to three components of GMP's ARP that were particularly rewarding to the utility and not ratepayers.

One of these components was a relatively generous "earnings sharing mechanism" ("ESM") that was meaningfully modified from that included in GMP's original ARP.[14] This ESM was designed to give the utility incentives to achieve higher and higher levels of efficiency savings. ESMs have been common parts of ARPs used in other states in the past, particularly in telecommunications regulation. The fact that the Department agreed to an ESM was not the problem: it was the structure of the excess earnings sharing between ratepayers and utility shareholders that is so troubling. The Department did not agree to a sharing approach that equitably balanced risks and rewards between ratepayers and the utility, but instead agreed to one that gave the utility and its shareholders a very generous percentage of any excess earnings.

Second, and most importantly, the Department agreed in this settlement to continue to include what was known as a capital expenditure mechanism that would allow GMP to pass-through, in rates, capital expenditures on a dollar-for-dollar basis.[15] Mechanisms of this sort are entirely inconsistent with alternative regulation principles.

[14] *Ibid.*, p. 12.

[15] Petition of Green Mountain Power Corporation for approval of an alternative regulation plan (Plan II), Vermont Public Service Board Docket No. 7585, Green Mountain Power Corporation Alternative Regulation Plan II.

Typically, utilities under ARP-type mechanisms are given pricing flexibility in order to cover rising costs, including any capital-related costs.[16] The Department, however, agreed to a mechanism that effectively allowed GMP to have its proverbial cake and eat it too: GMP could increase rates based upon the ARP's formulaic method, and would also be allowed under the Department's settlement to pass along additional capital expenses on a dollar-for-dollar basis without having to go through a standard rate case. The Department did not impose or require the utility provide any documentation on these capital expenditures, including; identify individual capital projects, the purpose of the capital project and how it met the utility's longer run capital plan, the anticipated and final costs for each capital project, or any other standard information. Quite a good deal for GMP, but not such a good deal for ratepayers.

Third, the Department's 2009 GMP settlement agreement included the continuation of what was called a "ROE Performance Adjustment" mechanism in GMP's pricing/earnings formula.[17] This ROE adjustment mechanism allowed GMP to effectively "double-dip" on excess earnings since the adjustment gave the utility "bonus" rates of return if its overall earnings were higher than a peer group of comparable utilities. In other words, the mechanism allowed the utility to earn more in excess earnings, if it could show that it was already earning more than most of its peer utilities. Again, the deal negotiated by the Department provided significant benefits to GMP, inexplicably at ratepayers' expense.

[16] Here, capital-related costs are those associated with longer-lived utility investments such as transformers, poles, substations, and power generation facilities. These investments are usually growth-related so the revenues from new sales requiring these investments are also a source of funding, in addition to the price increases allowed by the ARP.

[17] Petition of Green Mountain Power Corporation for approval of an alternative regulation plan (Plan II), Vermont Public Service Board Docket No. 7585, Order dated April 16, 2010, p. 15.

Interestingly, while the Department had no issues with allowing the utility to maintain this generous level of excess returns, the Board did raise questions with this component of the settlement. In the final order for the proceeding, the Board actually eliminated the first year of its implementation since it would have been too generous and would have financially rewarded the utility for effectively doing nothing.[18] Again, the Department had no issue entering into an agreement that financially rewarded the utility for doing nothing, it was the Board that imposed these limited constraints, contrary to the original terms of the settlement agreement.

The Department's 2009 settlement agreement with GMP expired in 2013 when the ARP was scheduled for an additional periodic regulatory review. Like the 2009 review, this 2013 periodic review was the time in which the Department could have sought additional ratepayer protections and modifications to the ARP. It also represented the first opportunity that the Department would have to potentially unwind some of its poor decisions arising from the 2009 settlement agreement discussed earlier: provided, of course, that the Department recognized that these prior agreements were not in ratepayers' best interest. The Department, unfortunately, did not make such recommendations.

The Department failed to file any expert testimony or present any independent opinion to the Board regarding the merits of the proposed ARP in the 2013 periodic review, despite the obvious shortcomings of the 2009 settlement agreement.[19] Fortunately for ratepayers, AARP-VT did intervene and actively participated in the proceeding. Unlike the Department, AARP-VT did sponsor the testimony of an expert

[18] *Ibid.*, p. 17.

[19] Petition of Green Mountain Power Corporation for approval of an Alternative Regulation Plan, pursuant to 30 V.S.A. § 218d, Vermont Public Service Board Docket No. 8191.

witness in this proceeding that highlighted many of the design deficiencies associated with GMP's ARP.[20] Interestingly, even GMP recognized that its ROE Performance Adjustment mechanisms was probably a little too rich, and agreed to remove this provision in the 2013 ARP review with little argument.[21]

AARP-VT conducted an analysis that examined the ratepayer benefits of GMP's ARP, something the Department did not conduct at that time. The Department was apparently satisfied with the structure of the ARP and preserving the terms and conditions of its 2009 settlement with the utility. Part of AARP-VT's analysis, replicated in

Table 1 below, showed that over the course of the ARP's existence, GMP ratepayers had received $852,442 in benefits. GMP shareholders, however, had received over $6.5 million in excess earnings under the earnings sharing mechanisms repeatedly agreed to by the Department. When questioned by the Senate Finance Committee about these issues in a 2014 committee hearing, the Department maintained that it was still "learning" the intricacies of the ARPs nearly a decade after the first alternative regulation plan was implemented in Vermont.

[20] See, Petition of Green Mountain Power Corporation for approval of an Alternative Regulation Plan, pursuant to 30 V.S.A. § 218d, Vermont Public Service Board Docket No. 8191, Direct Testimony of David E. Dismukes.

[21] Petition of Green Mountain Power Corporation for approval of an Alternative Regulation Plan, pursuant to 30 V.S.A. § 218d, Vermont Public Service Board Docket No. 8191, Order dated August 25, 2014, p. 7.

**Table 1 Green Mountain Power's Earnings Sharing Trends**

| Earnings Sharing Experience Green Mountain Power | | | | | | |
|---|---|---|---|---|---|---|
| Year | Ratepayer ESM Shares | Contribution to Customer Energy Efficiency Programs (Power Partners) | Ratepayer - Total Share | Deadband Share | Utility ESM Shares | Utility - Total Share |
| 2007 | $0 | $2,849 | $2,849 | $25,637 | $0 | $25,637 |
| 2008 | $0 | $31,718 | $31,718 | $285,458 | $0 | $285,458 |
| 2009 | $0 | $120,125 | $120,125 | $1,081,129 | $0 | $1,081,129 |
| 2010 | $0 | $178,792 | $178,792 | $1,609,124 | $0 | $1,609,124 |
| 2011 | $0 | $182,388 | $182,388 | $1,641,489 | $0 | $1,641,489 |
| 2012 | $0 | $0 | $0 | -$1,024,350 | $0 | -$1,024,350 |
| 2013 | $0 | $336,572 | $336,572 | $3,029,144 | $0 | $3,029,144 |
| | **$0** | $852,442 | **$852,442** | $6,647,631 | | **$6,647,631** |

The Department appears to have been just as careless in its other reviews of GMP's ARP. In a later compliance filing examining the prudence of GMP's base rates, the Department's own consultant noted multiple imprudent expenditures and practices of GMP. First, the consultant noted that GMP had paid $770,410 to exempt employees for overtime during storm events.[22] Exempt employees are salaried employees typically not eligible for overtime benefits, but GMP apparently has a policy compensating such employees for additional time worked if the employee works more than five hours during a storm event. As the consultant concluded, restoration activities during outage events are already a significant burden on ratepayers without the inclusion of additional overtime benefits for employees who are expected as part of a salaried position to work extra hours as appropriate.[23] Furthermore, since the overtime benefits being provided

[22] Larkin & Associates, PLLC: Report on Analysis of Rate Year Ending September 30, 2016 Green Mountain Power Corporation Cost of Service Request and Cost of Capital Request Under Alternative Regulation (August 14, 2015), Tariff No. 8580, p. 51.

[23] *Ibid.*, p. 52.

represented a discretionary management bonus, the consultant recommended that GMP shareholders should at least share some responsibility for these costs.[24]

Furthermore, the Department's consultant also found in an earlier proceeding that GMP's vegetative management activities to control tree growth near power lines were deficient. This deficiency led to higher than necessary restoration costs during a major storm event as 95 percent of outages and damages to the utility's system were due to tree-related damage. The consultant thus recommended that GMP adopt a shorter trim cycle and an aggressive enhanced maintenance program that focused on dangerous and hazardous trees. The Department's consultant also noted an absence of a proactive program, and recommended that GMP perform a tree growth study to be used in improving vegetative management efforts.[25] While GMP did produce a study in response to this earlier recommendation, the Department's consultant felt it was deficient. The Department's consultant also noted that GMP failed to recognize and acknowledge its own role in the high cost of restoration activities during a 2014-2015 major storm event.[26] In the consultant's opinion, GMP's exogenous cost request associated with storm restoration should have been decreased to reflect a sort of shared pain due to the company's own negligence.

Ultimately, the Department did not heed the recommendations of its own consultant on these issues. The Department negotiated a "global agreement" resolving all issues between itself and GMP regarding the company's costs of operations. This agreement did not address excess storm-restoration costs associated with bad vegetative management policies or employee bonuses policies, leaving the issue to be

[24] *Ibid.*, p. 52.
[25] *Ibid.*, p. 55.
[26] *Ibid.*, p. 56.

resolved in future regulatory proceedings. The Department's consultant had recommended $770,410 in employee compensation be removed from rates due to over-time bonuses.[27] Likewise, the Department's consultant noted GMP and the Department "did discuss a plan to address the (vegetative management) cycle issue and to aggressively address the hazard/danger tree issue that is causing the damage during storms."[28] This concern however was not resolved during the proceeding, with discussions between the Department and GMP remaining only "ongoing" when the Department entered into its settlement with GMP.[29]

The Department's acquiescence to utility ARP plans, and their relatively generous terms, was not limited to proceedings involving GMP alone. On October 4, 2011, VGS filed an ARP pursuant to 30 V.S.A. § 218d, to replace an expiring plan under which the company had been operating.[30] Here again, the Department entered into a settlement, or MOU, with VGS on June 26, 2012, to settle all issues in the Board's proceeding.[31]

One provision in VGS' ARP allows the utility to index its allowed rates of return to changes in market rates.[32] This provision allows the utility to increase its allowed rates of return as market rates begin to increase, without filing a rate case.[33] Under most ARPs, the allowed rate of return under the program is fixed, not variable, until the time of the utility's next rate case. This rate of return provision effectively shifts financial

[27] *Ibid.*, p. 52.
[28] *Ibid.*, p. 56.
[29] *Ibid.*, p. 56.
[30] Petition of Vermont Gas Systems, Inc., for approval of a Successor Alternative Regulation Plan, Vermont Public Service Board Docket No. 7803, Order dated August 21, 2012, p. 3.
[31] *Ibid.,* p. 4.
[32] *Ibid.*, p. 7.
[33] The inverse is also true, but given recent interest rate trends, it is hard to imagine further large interest rate decreases that would result in substantially lower rates.

market risk away from utility shareholders and onto ratepayers and is a provision that went unchallenged by the Department in its settlement agreement with the utility. Likewise, the terms of VGS's ARP allow for immediate recovery of all capital investment costs associated with transmission and distribution integrity-management programs,[34] without any performance benchmarking requirements, thereby shifting the regulatory risk of reviewing the costs associated with these plans, as well as the performance risk of the integrity management plans themselves, away from the utility and its shareholders and onto ratepayers.

Furthermore, VGS' ARP included an earnings sharing approach designed to share over-earnings in a fashion similar to the ESM discussed earlier for GMP.[35] However, unlike GMP, the VGS ESM included a weather normalization factor, wherein the utility's earnings sharing would be determined on a weather-normalized basis.[36] VGS argued that weather normalization is a ratemaking principle used in other jurisdictions and the Department appears to have unquestionably accepted this assertion in its settlement agreement with the utility.[37] While weather normalization adjustments do exist for natural gas utilities, the adjustments are made with respect to utility throughput levels, which in turn normalizes utility sales-related revenues: these adjustments are not tied to earnings (or profits). Once again, even the Board recognized a provision included in a Department-supported settlement agreement that had risk-shifting implications to ratepayers. While the Board approved the mechanism,

[34] Petition of Vermont Gas Systems, Inc., for approval of a Successor Alternative Regulation Plan, Vermont Public Service Board Docket No. 7803, Order dated August 21, 2012, p. 23.
[35] *Ibid.*, p. 7.
[36] *Ibid.*, pp. 7-8.
[37] *Ibid.*, p. 13.

it noted that it "realize(d) that (weather normalization) **substantially** reduces VGS's earnings risk, and may be viewed as a shift of risk to ratepayers."[38]

Admittedly, the settlement agreement executed by the Department included a provision setting VGS' base allowed rate on equity at 9.75 percent.[39] Notably, this level represents a 50 basis point reduction from the ROE originally-proposed by VGS (i.e., 10.25 percent). This reduction was purportedly a concession for the risk-shifting nature of the weather-normalization of the Company's profits.[40] The problem with this agreement is that this 50 basis point reduction did not discount VGS' rate of return from an industry average level, which would have been appropriate, but instead, reduced its rate of return from an abnormally high level (10.25 percent). Thus, the final rate of return agreed to by the Department simply lowered VGS' rate of return to an average rate, not one representing any fair compensation for risk shifting nature of the various components of its ARP. In fact, the same can be said of GMP's allowed rate of return as well.

Table 2 below compares both GMP's and VGS' allowed rates of return (specifically, ROEs) to industry averages and shows that these returns, are only slightly lower (not 50 basis points lower) than the US average, and are actually **higher** than recent industry averages utilized in other New England states. This means that the Department has entered into a series of differing settlement agreements with both utilities over the past several years that have shifted a tremendous amount of financial and performance risk away from the utility and onto ratepayers, in return for virtually no

[38] *Ibid.*, p. 13. The Board approved the mechanism since, as will be discussed in the later part of this section, the agreement included a rate of return adjustment, in addition to an ESM adjustment. The Board also believed it would be in the public interest to decouple the utility's earnings from its throughput.

[39] *Ibid.*, p. 27.

[40] *Ibid.*

financial compensation for ratepayers. Importantly, VGS' allowed rate of return is not meaningfully lower than industry averages, even after including the 50 basis point reduction included in the Department's MOU.

**Table 2 Comparison of Allowed Returns on Equity**

| | Allowed ROE (Percentage) |
|---|---|
| US Average, All Retail Electric Utilities (2010 - current) | 10.00 |
| New England Average, All Retail Electric Utilities (2010 - current) | 9.49 |
| Green Mountain Power (MOU from Docket 8190) | 9.6 |
| **Differences:** | |
| **GMP to US Average** | **-0.40** |
| **GMP to NE Average** | **0.11** |
| US Average, All Retail Natural Gas Utilities (2010 - current) | 9.88 |
| New England Average, All Retail Natural Gas Utilities (2010 - current) | 9.47 |
| Vermont Gas Systems (MOU from Docket 7803) | 9.75 |
| **Differences:** | |
| **VGS to US Average** | **-0.13** |
| **VGS to NE Average** | **0.28** |

### 2.3 Examples of Deficiencies in the Department's Prior Ratemaking Actions

The Department has also entered into settlement agreements on various other ratemaking adjustments and financial mechanisms, outside the context of an ARP, that have also been equally adverse to residential and small commercial ratepayers. On February 7, 2011, VGS filed a petition with the Board requesting an accounting order that would establish a System Expansion and Reliability Fund ("SERF") to be used to fund future, yet undefined, natural gas system expansions.[41] VGS proposed to fund this

[41] Request of Vermont Gas Systems, Inc. to establish a System Expansion and Reliability Fund with funds provided by reductions in the quarterly Purchase Gas Adjustment rate under the Alternative Regulation Plan, Vermont Public Service Board Docket No. 7712, Re: Request of Vermont Gas Systems, Inc. for an Accounting Order Establishing a Vermont System Expansion and Reliability Fund (February 7, 2011).

new regulatory mechanism out of the excess revenues it had been recovering in its fuel charges to customers arising from the regularly-occurring natural gas commodity price decreases.

For instance, VGS noted that in the 10 quarters prior to its filing, it had implemented nine rate reductions due to considerable reductions in commodity natural gas prices.[42] Rather than file for a tenth rate reduction estimated to be approximately 4.5 percent of a customer's overall rates (or $3.7 million annually), VGS proposed to "escrow" the rate decrease into the SERF to offset future rate increases that "might otherwise be required for an eventual system expansion project."[43] On May 16, 2011, the Department entered into a MOU with VGS supporting the establishment of the proposed SERF.[44] Indeed, the May MOU contained no major revisions to the general proposal made by VGS in its initial petition.

It is difficult to understate the extent to which the Department's actions regarding the SERF deviate from residential and small commercial ratepayer interests. At the time of this settlement agreement, no formally-proposed pipeline project had been submitted to, or approved by the Board. This fund was proposed, and agreed to by the Department, based upon a concept, or idea alone, not a specific investment supported by the necessary and appropriate due diligence. It is virtually impossible to imagine any other ratepayer advocate in the U.S. agreeing to a settlement of this nature for a variety of reasons.

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[42] *Ibid.*, p. 2.
[43] *Ibid.*, p. 3.
[44] Request of Vermont Gas Systems, Inc. to establish a System Expansion and Reliability Fund with funds provided by reductions in the quarterly Purchase Gas Adjustment rate under the Alternative Regulation Plan, Vermont Public Service Board Docket No. 7712, Memorandum of Understanding (May 16, 2011).

First, by supporting the proposed SERF, the Department supported denying ratepayers a deserved decrease in rates and any increase in disposable income that those ratepayers were entitled to as a result of a decrease in wholesale natural gas prices. This agreement effectively allowed rates to be unnecessarily inflated in order to be placed in a fund for a project (or projects) that had not been approved by the Board. Thus, the Department, by agreeing to a proposal to fund expansion projects that did not exist, also agreed to inflate rates to levels that were not truly cost-based since the costs for natural gas had unquestionably decreased. The Department, in effect, volunteered and committed the valuable funds and resources of its client (ratepayers) to an entity that it was (or should be) designed to protect. Thus, it should come as no surprise to the Department that some public stakeholders have expressed the belief that it has a too "cozy" relationship with utilities.[45]

Second, the Department's SERF settlement agreement violates not one, but several seminal ratemaking principles. The Department's settlement agreement committed residential and small commercial customers to fund speculative, unknown, and non-measurable projects and costs. While it is true that ratepayers could be called upon in the future to fund prudently-incurred natural gas expansion investments, that possibility is not justification enough for the establishment of the SERF. Consider that ratepayers are typically not required to fund utility investments until: (1) an investment proposal has been made and approved by a utility's regulators; (2) the utility successful develops the project and brings it to commercial operation; and (3) the utility attains cost-recovery for its investments after a regulatory showing that these investments were

[45] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 25.

prudently-incurred and used and useful. Yet the Department's settlement agreement did the exact opposite, putting the proverbial cart before the horse, allowing the utility to collect money before any investments are identified, approved, and proven reasonable. This is entirely inconsistent with the regulatory principle of setting overall rates in a fashion that are fair, just, and reasonable since, in this instance, rates were inflated to fund what, at best, were speculative investments, not known and measureable costs.

Third, by entering into a settlement agreement for speculative, unknown, and non-measurable projects and costs, the Department effectively committed its clients (residential and small commercial ratepayers) into financing a natural gas pipeline hedge fund. Indeed, one Board member, John D. Burke, dissented from the Board's ultimate decision to approve the Department's SERF settlement agreement.[46] Mr. Burke stated that the Department's SERF settlement agreement "allowed for existing customers to provide venture capital to study expansion feasibility."[47] Underscoring his concern, Mr. Burke noted provisions in the Department's SERF settlement that would allow the utility to use the fund to recover business development costs. Mr. Burke also criticized the lack of a professional feasibility study investigating the viability of VGS's promulgated expansion of natural gas service into Vergennes and Middlebury,[48] a project that would eventually be referred to as the Addison Natural Gas Pipeline. Mr. Burke stated that the information provided by VGS amounted to little more than a

[46] Request of Vermont Gas Systems, Inc. to establish a System Expansion and Reliability Fund with funds provided by reductions in the quarterly Purchase Gas Adjustment rate under the Alternative Regulation Plan, Vermont Public Service Board Docket No. 7712, Order dated September 28, 2011, pp. 20-23.

[47] *Ibid.*, p. 20.

[48] *Ibid.*, p. 21.

"quasi-educated guess,"[49] that essentially reduced to the company believing, "if we build it, they will come."[50]

Fourth, by agreeing to this proposal, the Department agreed to the adoption of a ratemaking mechanism that represented a "substantial exception to normal ratemaking principles."[51] The funding mechanism shifted a considerable level of financial and ratemaking risk away from VGS and onto residential and small commercial ratepayers. The SERF had no grandfathering provisions, nor any parameters outlining when it would or should be return to ratepayers, or even how it would be returned to ratepayers. To this day, it represents an open-ended, and more importantly, free regulatory "call option" for VGS provided at great expense by residential and small commercial ratepayers.

### 2.4 Examples of Deficiencies in the Department's Prior CPG Actions

The most recent and perhaps most controversial of the Department's adverse ratepayer positions is reflected by actions in VGS' CPG proceeding for the Addison Natural Gas Pipeline ("ANGP") project.[52] The Department has consistently supported the development of this project stating that the ANGP "constitute(d) an important addition to the service territory of Vermont Gas."[53] The Department's positions during

[49] *Ibid.*, p. 21.
[50] *Ibid.*, p. 21.
[51] *Ibid.*, p. 14.
[52] AARP-VT, the sponsor of this Report, intervened in this proceeding and recommended that the Board re-open the CPG since the terms and conditions under which the original certificate were based had changed. AARP-VT was unsuccessful in its challenge. Further, the author of this report served as the expert witness for AARP-VT in this proceeding.
[53] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Order dated December 23, 2013; p. 18.

the ANGP CPG proceeding, however, appear to have been influenced heavily by the Department's conflicting political functions.

Under 30 V.S.A. § 202b, the Department is required to complete a Comprehensive Energy Plan ("CEP") for the State.[54] The 2011 CEP prepared by the Department, prior to VGS's petition, stated explicitly that "Vermont should encourage the increased use of natural gas by supporting economically viable expansion of the natural gas service territory promoting attachments to the current distribution system … and promoting the use of natural gas vehicles."[55] Because of this requirement, and the Department's finding, a sizeable portion of the Department's filed testimony with the Board in the ANGP CPG proceeding was devoted towards advocating the perceived benefits of increased natural gas availability in the State, consistent with its 2011 CEP findings.[56] This undoubtedly impacted the ability of the Department to provide a critical review of VGS' proposal.

In the months subsequent the Board's initial granting of the certificate, VGS disclosed that the gas pipeline's estimated costs had increased by more than 40 percent, or $35 million.[57] In the months following this problematic disclosure, VGS once again disclosed that the estimated costs of the project had increased by another $33

[54] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Direct Testimony of Walter Poor; 2:24-25.

[55] *Ibid.*, 5:6-9; citing 2011 Comprehensive Energy Plan, Volume 2, p. 220.

[56] See, generally, *Ibid.*

[57] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Supplemental Prefiled Testimony of Eileen Simollardes, Exhibit Petitioner Supp. EMS-1.

million, such that in the course of a year, estimated project costs increased by nearly 78 percent.[58] Each of these disclosures prompted parties to request that the Board issue Orders announcing a decision to seek remands of its earlier CPG, requests the Board agreed with on both occasions. In the subsequent remand proceedings, however, the Department once again demonstrated its inability to adequately represent the interests of Vermont residential and small commercial ratepayers.

First, the Department inexplicitly joined VGS in objecting to petition for intervention status from two parties, Vermont Public Interest Research Group ("VPIRG"), a consumer and environmental non-profit organization and AARP-VT.[59] While there were arguably some concerns regarding the direct relevance of the practice of hydraulic fracturing in the proceeding (an issue raised by VPIRG), it is unconscionable that the Department would advocate against the representation of two entities that also represent ratepayers, particularly AARP-VT's advocacy for senior and elderly ratepayers.

Second, the Department modified its later economic impact analysis of the ANGP to produce results that supported its position that the development of the ANGP would produce net economic benefits to Vermont and Vermont ratepayers.[60] The nature of

[58] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Prefiled Testimony of Ralph Roam, Exhibit Petitioner RR-2.

[59] See, Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Order RE: Rule 60(B) Reconsideration, pp. 5-6.

[60] See, Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of

these estimates were highly questioned by other stakeholders (including AARP-VT), many of who believed that the Department's experts had placed an analytic "thumb on the scale" of evaluating project benefits and costs. However, even if the Department's analysis is taken at face value, its results underscore its significant bias in favor of broad state interests, and against those of residential and small commercial ratepayers.

Overall, the Department's analysis concluded that the ANGP would create net benefits for Vermont of some $80 million on net present value ("NPV") terms, with $29.5 million resulting from direct benefits.[61] The Department's analysis, however, was presented from the perspective of **all Vermont stakeholders**: ratepayers, construction companies, municipal governments, competitive fuel oil dealers, and most importantly, utilities. The Department's analysis **did not focus on its clients** (i.e., residential and small commercial ratepayers), but looked at the net benefits to the state, thereby underscoring its focus on the entire state, not residential ratepayers.

Figure 1 summarizes the information found in the Department's net economic benefit analysis. The information has been re-ordered to show the impacts on residential ratepayers versus other Vermont stakeholder groups. The Department's own analysis estimated total direct residential ratepayer net benefits of a negative $64.4 million over 35 years.[62] What this means is that the direct economic costs of the ANGP are higher than the direct economic benefits that arise to residential ratepayers, even

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approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Second Remand Testimony of Asa S. Hopkins.

[61] *Ibid.*, p. 6; and Workpaper "REMI results.xlsx".

[62] *Ibid.*

considering the energy savings that arise to new natural gas residential ratepayers that can take service from the new pipeline.

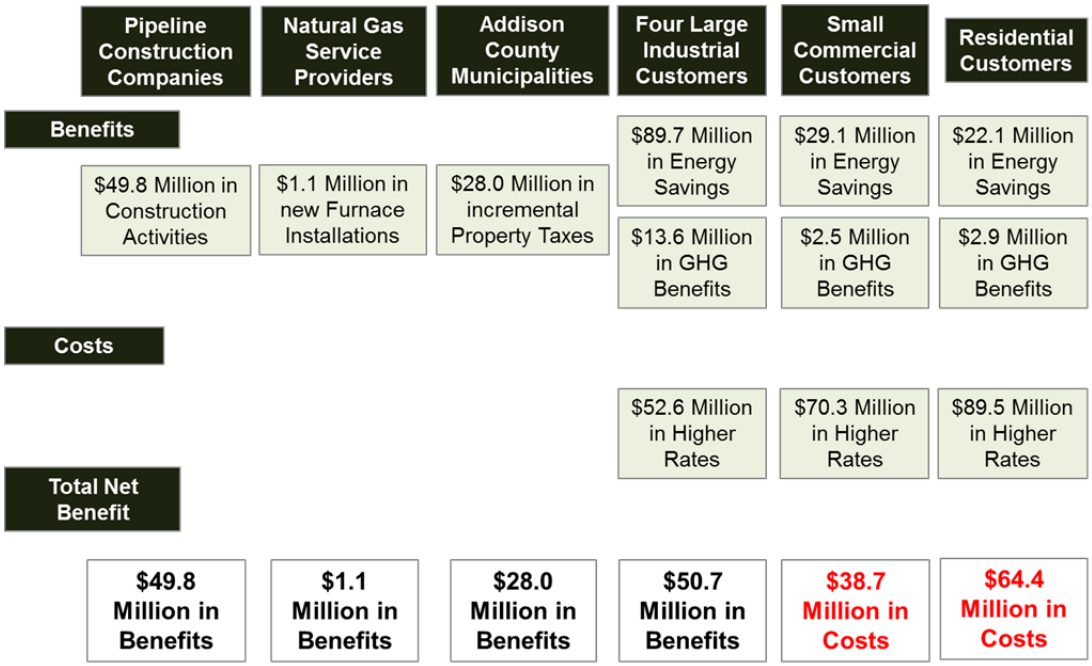


**Figure 1. Estimate of Net Economic Benefits, Ratepayers vs. the Public Good[63]**

The Department's own analysis regarding the impacts to residential customers begs the question: who benefits from the AGNP, based upon the Department's analysis, if residential customers, overall, are net losers? The answer is a handful of stakeholders benefit including: (1) four large industrial customers; (2) the construction industry; (3) a few municipal governments (due to increased tax revenues); and VGS and its shareholders. Thus, even if one accepts the Department's net economic benefits numbers, the scale of those net benefits are highly tilted in favor of a handful of stakeholders, not the broader interests of residential ratepayers. The revised orientation of the Department's net benefits analysis highlights the bias in its advocacy efforts as those in favor of the state's energy planning goals, not ratepayer interests.

[63] Estimates are provided in present value, or "PV" terms.

This is the fundamental problem that the Department and the DPS Report fails to understand.

Perhaps the best example of the Department's anti-ratepayer bias in the ANGP remand proceedings is associated with the settlement, or MOU, it entered into with VGS after all parties had submitted their evidence regarding whether or not the CPG proceeding for the ANGP should be re-opened.[64] This settlement, between the Department and VGS only, purportedly caps rate recovery associated with the ANGP at $134 million, a level that is $20 million less than VGS's current cost estimate.[65] The Department represented this $20 million reduction as a "meaningful" reduction to the expected costs of the project, thus limiting ratepayer exposure.[66]

The Department's views on its own MOU, however, are deeply problematic. For starters, the Board had already ruled that the ANGP was in the economic best interests of the State at a price tag of $121.6 million in its first remand proceeding.[67] Likewise, the Department fully agreed that VGS's management missteps caused cost overruns in

[64] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Memorandum of Understanding Between the Vermont Department of Public Service and Vermont Gas Systems, Inc.

[65] *Ibid.,* p. 2.

[66] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Supplemental Hearing Testimony of Commissioner Christopher Recchia; 3:17-19.

[67] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Order RE: Rule 60(B) Reconsideration.

the ANGP that were "both significant and a cause for concern."[68] Arguably, if VGS had pledged to not seek rate recovery of any expenses in excess of this previous Board-approved amount, the entire question of the continued CPG designation before the Board would be moot. In other words, with the Department's MOU, the Department argued that VGS should be allowed rate recovery of an additional $12.4 million over that already approved by the Board to recover cost overruns caused in part because of VGS' likely mismanagement.

Likewise, the Department also argued before the Board that it was increasingly concerned that regulatory uncertainty was exacerbating the project's timeline and increasing cost, noting that VGS decided to send crews home after completing 11 miles of the proposed project due to the possibility of the Board withdrawing its support of the project.[69] This "concern" is telling since it shows that the Department is, once again, more interested in reducing the financial risk and exposure of regulated utilities rather than the longer run rate impacts imposed on ratepayers.

[68] Petition of Vermont Gas Systems, Inc., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont; Vermont Public Service Board Docket No. 7970; Supplemental Hearing Testimony of Commissioner Christopher Recchia; 4:10-11.

[69] *Ibid.,* 2:20 to 3:4.

## 3 The DPS Report Fails to Understand the Problem

### 3.1 The "Public Interest" and "Ratepayer Interest" are not Synonymous

The DPS Report repeatedly uses the terms "public interest" and "ratepayer interests" as synonymous and interchangeable.[70] This is not an error of semantics, but one that underscores an important misunderstanding the Department appears to have about its role in litigation matters before the Board. The Department cannot, on the one hand, promote the interests of the state as a whole ("the public") and, on the other, defend the interests of a specific group within the public, such as residential and small commercial ratepayers.

Further, in attempting to represent the public interest, broadly, the Department wastes Vermont ratepayer resources by duplicating the activities of the Board. Ratepayers should not have to pay twice for the defense of the public interest. For instance, the Department has a statutory charge to "represent the interests of the consuming public."[71] Yet, the Department represents its mission to the public as:

> The mission of the Department of Public Service (DPS) **is to serve all citizens** of Vermont through public advocacy, planning, programs, and other actions that meet the public's need for least cost, environmentally sound, efficient, reliable, secure, sustainable, and safe energy, telecommunications, and regulated utility systems in the state for the short and long term. The Department does this by:
>
> - **Promoting the interest of the general public** in the provision of the state's regulated public services--electricity, natural gas, telephone, cable television, and to a limited degree water and wastewater. [emphasis added][72]

[70] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, pp. 19-20.

[71] 30 V.S.A. § 2 (2016)

[72] http://publicservice.vermont.gov/about_us

The Department does not recognize that advocating for ratepayer interests requires it to pursue policies that are partisan in nature and result in the least-cost and most reliable utility service possible. Advocacy does not involve pursuing policies that balance the interests of regulated utilities and their shareholders against those of captive ratepayers. A ratepayer advocate is not a neutral arbiter of fact, nor the defender of the "public good" in litigation matters before the Board. Suggesting that the public interest and ratepayer interests are synonymous is the same as suggesting that anything in a utility's best interest is in ratepayers' best interest. Just because a large, in-state capital project may result in a benefit to a utility and its shareholders, and may increase local employment and taxes to a few municipalities and counties, does not make that project one that is in ratepayers' best interests. Likewise, supporting a utility's proposal to offer highly discounted, or special contract utility service rates to a large industrial customer usually does not mean that it is in residential ratepayers' best interest since, more often than not, captive residential ratepayers are the ones left holding the bag for these types of "public good" initiatives.

The DPS Report, while making a few passing references to the "consuming public,"[73] appears frightened to even mention the term "ratepayer interests" much less "residential ratepayer interests," despite the fact that Act 51, Section 21(b) requires the Department to conduct a survey of other state agencies and their organizational structures and approaches to protecting "residential ratepayer" interests, not the "public interest" or the "public good."[74] The DPS Report surveys these structures, in terms of a

[73] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 19.

[74] *Ibid.*, p. 13.

simple tally of the agency in which these advocates are located.[75] However, the DPS Report does not include a critical comparison of the advocacy mission of these agencies and how they differ from that of the Department.

For instance, the DPS Report includes the Utah Office of Consumer Services ("UOCS") in its ratepayer advocacy survey.[76] The UOCS was first established by the Utah Legislature in 1977 and is governed by a nine-person committee of laypersons that represent certain segments of the population and have relevant professional and technical expertise.[77] While the Director of the UOCS is appointed by the Governor, that appointment has to be approved by the layperson committee and the Utah Senate.[78]

The express goal of the UOCS is to represent residential, small commercial, and agricultural customers in utility matters, not to represent the public interest or the public good. The goal is not to maximize state employment opportunities resulting from utility capital investments, nor to underwrite speculative utility investments to provide new service in the state. For instance, the UCOS' responsibilities include, among others, advocating:

- positions and actions that will result in public utilities providing reliable service to Utah customers at the lowest reasonable cost, while appropriately considering risk factors. Contrary to the actions taken by the Department over the past several years, the goals of the UOCS are not to promote policies that shift risk away from utilities and their shareholders and onto ratepayers.
- processes for determining new resources that considers all appropriate costs, benefits and risks to consumers that does not preference for a type of fuel or generating resource, but rather a decision that minimizes costs (appropriately considering risks) and maximizes the benefits to consumers in the long run.

[75] *Ibid.*, Appendix A.
[76] *Ibid.*, Appendix A.
[77] Utah Code Ann. § 54-10a-202.
[78] Utah Code Ann. § 54-10a-201.

- policy changes that impact ratepayers in a manner that minimizes ratepayer costs and maximizes ratepayer benefits – not the benefits of the public at large.
- policies that support a reasonable level of funding for low income programs recognizing that they do have benefits despite the difficulty in their quantification.[79]

The DPS Report purportedly surveys the Illinois Citizens Utility Board ("CUB") in its analysis[80] but, once again, fails to analyze how CUB's advocacy emphasis and activities differ considerably from the Department's. For instance, the Illinois CUB was created by the Illinois General Assembly in 1983 as an independent, non-profit, non-partisan organization to explicitly represent the interest of residential utility customers in the state: their goal is not to represent or balance the public interest, but to advocate for residential ratepayers only.[81] Like the UOCS, the Illinois CUB also has an independent, volunteer-based board of directors that provides input into the CUB's policy positions and advocacy efforts.

The DPS Report purportedly included the New Hampshire Office of Consumer Advocacy ("OCA") in its survey of ratepayer advocates,[82] but outside of looking at its organizational structure, the Department appears to have paid little attention to the OCA's mission, its advocacy activities, and how those differ from the Department. The New Hampshire OCA represents another state agency-based ratepayer advocate that has the express mission to represent residential ratepayer interests: not the public good

[79] http://ocs.utah.gov/objectives.html

[80] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 16.

[81] 220 ILCS 10/4 and 220 ILCS 10/5.

[82] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, Appendix A.

or public interest.[83] The OCA also has an independent board of directors, selected by a variety of elected officials, which govern its activities.

In Ohio, the Office of the Ohio Consumers' Counsel ("OCC") "advocates for Ohio's residential utility consumers through representation and education in a variety of forums."[84] The OCC Governing Board is made up of nine members, three each representing residential consumers, organized labor and family farmers. In addition, no more than five members of the board may be from the same political party.[85] After the legislature created the OCC in 1976, one of the first items accomplished was the adoption of the "Residential Utility Consumers' Bill of Rights." The bill identifies 10 basic rights that "each residential utility consumer is entitled to" and serves as the "foundation of the OCC's commitment to represent residential utility customers."[86]

In Delaware, the 2013 General Assembly amended its statutes to clarify its intent that the Department of Public Advocate ("DPA") is to "principally advocate on behalf of residential and small commercial consumers."[87] The DPA's fundamental mission is to advocate "the lowest reasonable rates for consumers, consistent with the maintenance of adequate utility service and consistent with an equitable distribution of rates among all classes of consumers." The DPA may also provide guidance to the Governor, the General Assembly or the Secretary of State on matters of energy policy and utility consumers,[88] but it is not the primary agency formulating energy policy on the behalf of the state.

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[83] RSA 363:28
[84] http://www.occ.ohio.gov/message.shtml
[85] ORC Ann. 4911.17
[86] http://www.occ.ohio.gov/about/history/historical_1978.shtml
[87] *29 Del. C. § 8716.*
[88] http://publicadvocate.delaware.gov/aboutagency.shtml

The previously-discussed examples show that most ratepayer advocates have explicit missions dedicated to defending residential and small commercial ratepayer interests. These advocates' missions are not dedicated to promoting the resource planning or economic development goals of a particular governor: they do not serve as state energy offices or planning agencies, and they have express missions entirely different than their respective state regulators. Unfortunately, the DPS Report, which purportedly surveys the activities of other state ratepayer advocates, is entirely deficient in recognizing the considerable differences between the Department's mission and those of other state ratepayer advocates. The DPS Report is also deficient in identifying a set of best practices from the mission statements of other state ratepayer advocates to improve ratepayer advocacy in Vermont.

### 3.2 Fails to Understand its Role as Ratepayer Advocate

The DPS Report also highlights the Department's confusion about who within the agency is primarily responsible for ratepayer advocacy. The DPS Report initially notes that ratepayer advocacy is spearheaded from within the Department in its Division of Public Advocacy, which itself, is headed by the Director of Public Advocacy.[89] The Director of Public Advocacy (the Public Advocate or "PA") is appointed by the Department of Public Service Commissioner and serves at the Commissioner's pleasure. However, the DPS Report also notes that according to state statutes, (1) the Division of Public Advocacy is comprised primarily of attorneys that represent its client: the Commissioner; and (2) these attorneys, including the Public Advocate, are not authorized to formulate policy nor independent advocacy strategy. This means that

[89] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 10.

ratepayer advocacy does not originate from a division or office exclusively focused on ratepayer issues, but from the Commissioner's office itself. The structure of public advocacy within the Department, therefore, is highly flawed for a number of reasons.

First, the Division of Public Advocacy has no independent authority to pursue activities that are in residential and small commercial ratepayers' best interests.[90] As a division of attorneys, they are compelled by statute and ethical codes to represent the wishes of their client, the Commissioner, not ratepayers. The Commissioner, in his or her mission in promoting the broad public interest, has an inherent and unresolvable conflict of interest between his or her planning mission, on the one hand, and his or her advocacy mission, on the other; a conflict that will be discussed in greater detail in the following sub-section of this report.

Second, the PA itself has no independence of action. The PA is appointed by the Commissioner, serves at the Commissioner's pleasure, and serves for a term coincident with that of the Commissioner.[91] Further, as a lawyer, the PA cannot formulate policy independent from his or her client, the Commissioner. Conflicts or differences of opinion on ratemaking or other utility regulatory issues, will be resolved according to the wishes of the Commissioner, not the PA.

Third, the PA is beholden to the Commissioner for all of the resources needed to undertake his or her advocacy functions.[92] The PA's budget and financial support is approved by the Commissioner. In addition, the PA must seek approval, or at minimum must ensure no disapproval, for the use of technical resources within the Department such as economic, engineering, and other technically-trained experts.

[90] See, 30 V.S.A. §1(b).
[91] *Ibid.*
[92] 30 V.S.A. §1(c)

The DPS Report, however, appears to acknowledge, or at least understand, many of these conflicts and barriers to true advocacy independence.[93] Despite this ambiguity in function, the inherent conflicts of interests, and lack of independence, the DPS Report suggests that Vermont has a unique system of ratepayer advocacy that is somehow preferable to the structure used in the rest of the country.[94] Particularly troubling is that despite its recognition of potential conflict of interests and barriers to true advocacy independence, the Department has:

- Never attempted to develop any internal rules or protocols to remedy these conflicts.
- Appears to have never sought any legislative remedy to these challenges.
- Continues not to seek any legislative remedy to these challenges in the DPS Report recommendations.

### 3.3 The Conflict of Interest between Planning and Advocacy functions

The DPS Report notes that the Department's structure, which purportedly blends energy planning and ratepayer advocacy, is "one of the more unusual"[95] in the U.S. However, the DPS Report is deficient in explaining how the coupling of energy planning and advocacy activities lead to ratepayer synergies. This failure likely stems from the fact that it is impossible to show these synergies since both serve mutually-exclusive purposes and are not complimentary, contrary to what is suggested in the DPS Report.[96] These two functions are often in conflict with one another, both in theory and in practice. This is why most states have opted to keep the two functions separate. If there were considerable synergies and benefits between energy planning and ratepayer

[93] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, pp. 19-20.
[94] *Ibid.*, p. 6.
[95] *Ibid.*, p. 6.
[96] *Ibid.*, pp. 8-9.

advocacy, more states would likely house these entities within one agency, and not keep them separated from one another. Vermont is simply the exception to the rule in this matter, and not in a good way.

Consider that the energy policy and planning functions associated with most states are housed either directly in the executive office of the Governor, within a separate state executive agency, or part of another comparable state executive agency (like a state planning agency or natural resources department). These entities usually serve as the official state energy office ("SEO") and, in fact, the National Association of State Energy Officials ("NASEO") identifies the Department as being the prime SEO for Vermont. NASEO identifies 56 SEOs associated with each state and U.S. protectorate.[97]

The organization and specific emphasis of each SEO can differ, but, according to NASEO, SEOs, like the Department, are committed to becoming "… important agents of change – advancing practical energy policies and supporting energy technology research, demonstration, and deployment" and to accelerating "…energy-related economic development and enhance environmental quality through energy solutions that address their citizens' needs and enhance national energy security."[98] The mission of most SEOs is to promote energy development, with a particular emphasis on energy efficiency and emerging technologies.

SEOs tend to provide subsidies, loan programs, and other support programs to remove market barriers with more risky technologies, or efficiency measures that face a number of market barriers that can lead to cost and development uncertainty. While

[97] National Association of State Energy Officials, About State Energy Offices. http://www.naseo.org/state-energy-offices.

[98] *Ibid.*

these may be important state-level activities, they have nothing to do with ratepayer advocacy and, in fact, can often run afoul of ratepayer interests.

This conflict is likely why most states have opted to keep their planning and energy development activities separate from often conflicting ratepayer advocacy activities. SEOs often tend to exhibit considerable resource and technology preferences, particularly those associated with "advanced" or "emerging" technologies. Ratepayer advocates, on the other hand, tend to be exceptionally fuel and technology neutral since often, emerging energy resources are characterized by a number of challenges that raise ratepayer costs (i.e., limited manufacturing/suppliers, untested functionalities, limited commercial experience and information, questionable operating performance over extended time periods, to name a few). These differences in mission are often the reason why SEOs and ratepayer advocates are kept separate.

As an example, in Massachusetts, the Department of Energy Resources ("DOER") within the Executive Office of Energy and Environmental Affairs, serves as the state's SEO. Ratepayer advocacy however, is handled by the Office of Ratepayer Advocacy within the Office of the Attorney General ("AG").[99] This separation is not restricted to just large states. Several smaller states keep the functions of the SEO and the functions of the ratepayer advocate separate. New Hampshire, for example, maintains the Office of Energy and Planning ("OEP") within the state's executive branch yet, as noted earlier, New Hampshire also maintains an OCA that has a mission

[99] See, Members, National Association of State Utility Consumer Advocates, available online at: http://nasuca.org/members/.

dedicated to advocating for residential customers proceedings before the New Hampshire Public Utilities Commission ("NH PUC").[100]

There are several examples of recent conflicts between SEOs and ratepayer advocates in regulatory proceedings. A recent example arose in Massachusetts' push to upgrade ageing gas distribution systems and replace leak-prone systems comprising of non-catholically protected steel pipe.[101] In recent years this movement has extended to replacing small diameter cast iron assets that can tend to break and create methane leaks.[102] Massachusetts utilities petitioned regulators (the Department of Public Utilities or "DPU") for a set of exceptionally generous cost recovery mechanisms for these replacement activities that shifted a considerable degree of cost and performance risk away from utilities and onto ratepayers. These program proposals would pass along, on a dollar-for-dollar basis, an exceptional level of capital expenditures through rates without a rate case and with no performance standards guaranteeing that leaks and/or safety-related accidents would be reduced as pipeline replacement activities accelerated.

The state energy office in Massachusetts strongly supported these ratemaking provisions. The state ratepayer advocate, however, opposed these cost recovery mechanisms (at least as they were proposed), despite her strong support for pipeline replacement and improved safety performance. The state energy office also opposed

[100] The Office of the Consumer Advocate, New Hampshire Office of Consumer Advocate, available online at: http://www.oca.nh.gov/.

[101] See, Petition of Bay State Gas Company, pursuant to G.L. c. 164, § 94 and 220 C.M.R. § 5.00 et seq., for Approval of a General Increase in Gas Distribution Rates Proposed in Tariffs M.D.P.U. Nos. 70 through 105, and for Approval of a Revenue Decoupling Mechanism, Massachusetts Department of Public Utilities Docket D.P.U. 09-30, Order dated October 30, 2009, p. 118.

[102] See, Petition of Bay State Gas Company, d/b/a Columbia Gas of Massachusetts, pursuant to G.L. c. 164, § 94 and 220 C.M.R. § 5.00 et seq., for Approval of a General Increase in Gas Distribution Rates Proposed in Tariffs M.D.P.U. Nos. 105 through 139, Massachusetts Department of Public Utilities Docket D.P.U. 12-25, Order dated November 1, 2012, p. 26.

every proposal offered by the state ratepayer advocate to develop a cost recovery mechanism that facilitated pipeline replacement, yet balanced cost and performance risk more equitably between utilities and ratepayers. The SEO in this proceeding did not collaborate, nor enter into a joint participation agreement in this proceeding but were active litigants taking opposing positions.

A similar example of conflicts between a state SEO and a ratepayer advocate can be highlighted in a 2012 electric utility proceeding in Maryland. On July 25, 2012, in the wake of prolonged power outages brought by hurricanes, blizzards, and a derecho, Governor Martin O'Malley of Maryland signed an executive order directing the state energy advisor, in collaboration with other state agencies to create a "Grid Resiliency Task Force."[103] The Grid Resiliency Task Force was charged with evaluating options for infrastructure investments to improve resiliency of the electric grid, as well as financing and cost recovery options for utility capital investments. After publishing a final report entitled *Weathering the Storm* on September 24, 2012,[104] the Potomac Electric Power Company ("Pepco") filed a proposal with the Maryland Public Service Commission ("MPSC") for a special ratemaking mechanism that would have allowed them to recover the costs associated with accelerating the replacement of its infrastructure, as well as developing new technologies, on a dollar-for-dollar basis.[105]

The Maryland SEO, represented by the Maryland Energy Administration ("MEA"), fully supported the utility proposal in that proceeding. The Maryland Office of People's

[103] Grid Resiliency Task Force: Weathering the Storm, Maryland Energy Administration, available online at: http://energy.maryland.gov/Pages/gridresiliencytf.aspx.

[104] Weathering the Storm: Report of the Grid Resiliency Task Force (September 24, 2012), Office of Governor Martin O'Malley.

[105] In the Matter of the Application of Potomac Electric Power Company for an Increase in its Retail Rates for the Distribution of Electric Energy, Public Service Commission of Maryland Case No. 9311, Direct Testimony of Frederick J. Boyle, pp. 13-14.

Counsel ("OPC"), which is the ratepayer advocate in Maryland, directly opposed the cost-recovery proposals associated with the utility's proposed resiliency and modernization investments.[106] The Maryland OPC argued that Pepco's proposal was premature since regulators had not determined the appropriate level of resiliency needed in Maryland, or the cost effectiveness of establishing more aggressive resiliency standards. Furthermore, the Maryland OPC noted that the cost recovery mechanism associated with Pepco's proposed accelerated infrastructure investment was inconsistent with the Governor's report, choosing only those parts that were favorable to its shareholders, and not those that would have imposed cost and performance discipline on the utility's actions.[107]

The above examples of conflicts between agencies focused on energy planning, and those associated with ratepayer advocacy, are not uncommon. Yet, the DPS Report fails to recognize the inherent conflict of interest in the energy development and planning functions of an SEO versus the least cost, fuel-neutral emphases usually pursued by ratepayer advocates. The examples provided above highlight SEO and ratepayer advocate conflicts. Each example dealt with regulatory proceedings where a significant amount of utility capital investment was on the line. These proceedings also involved instances where relatively risky technologies were also being proposed, in some instances before a definitive state goal had been defined. In other instances, the conflict arose out of promoting the replacement of aged assets versus ensuring that

[106] In the Matter of the Application of Potomac Electric Power Company for an Increase in its Retail Rates for the Distribution of Electric Energy, Public Service Commission of Maryland Case No. 9311, Order No. 85724, p. 144.

[107] *Ibid.*, p. 145.

those replacements were tied to performance benchmarking to ensure that the investments delivered upon their promises.

These examples, however, are not instances in which the ratepayer advocate, in the spirit of minimizing costs, just said “no” and the SEO, in the spirit of advancing technology, said “yes.” The differences of opinion were related to issues on (1) cost recovery matters; and (2) utility performance risk. Ratepayer advocates and SEOs view these issues in an entirely different light.

SEOs, for instance, have incentives to promote technologies and capital investment since it is usually consistent with gubernatorial energy and economic development policies. Ratepayer advocates are not opposed to such investments, per se, but often argue that these large capital investment proposals need to (1) meet the muster of cost-effectiveness and (2) most importantly, ensure that the risk associated with the development and operation of such technologies are not unnecessarily shifted away from utility shareholders and onto ratepayers. SEOs tend to be less sensitive to these issues (cost recovery, risk shifting), and as noted in Section 2 of this Report, it is exactly this degree of insensitivity to risk shifting that has made the Department’s actions entirely inconsistent with effective ratepayer advocacy in Vermont.

Likewise, it should be recognized that in the earlier-provided examples the SEOs were on the same side of the argument as the regulated utility. This result should come as no surprise since both parties (utilities and SEOs) often have very similar interests in seeking additional utility capital investment. SEOs want to see additional capital investment in order to create jobs, promote innovative technologies, and support the energy policy goals of their respective governors. Utilities want to see additional capital

investment in order to enhance shareholder value: and if these utilities can reduce the risk of cost recovery or can enhance their ability to earn, or exceed their allowed rates of return, all the better.

Such an alignment of interests (i.e., utility and energy planning) was clearly apparent in VGS CPG proceeding for the ANGP project, where the Department was strongly supportive of VGS' proposal to increase the availability of natural gas to underserved regions, despite the exceptional riskiness and costliness of the proposition.[108] Whether real or imagined, it cannot be denied that this alignment of interests between utilities and the Department creates the appearance of a conflict of interest, if not an outright conflict. Even the DPS Report noted that members of the public expressed concern at public hearings that the Department was "cozy" with utilities in the state or out-and-out "advocates for utilities."[109] It may very well be the case that the Department is not "cozy" with utilities, but it does appear to be the case that the Department has an inherent incentive to promote policies consistently aligned with those of Vermont's electric and natural gas utilities and not those associated with residential and small commercial ratepayers.

[108] See, Petition of Vermont Gas Systems, Inc., requesting a Certificate of Public Good pursuant to 30 V.S.A. § 248, authorizing the construction of the "Addison Natural Gas Project" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont, Vermont Public Service Board Docket No. 7970.

[109] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, pp. 25-26.

# 4 Deficiencies in the DPS Report Recommendations

## 4.1 Overview of DPS Report Recommendations

The DPS Report repeatedly challenges whether a move from the current structure of ratepayer advocacy in Vermont would be cost effective, and the degree to which any reform would impact accountability and independence.[110] The DPS Report conducts a cursory review of other state ratepayer advocates, focusing only on whether or not the advocate in any particular state was part of an independent agency, part of an office of the Attorney General, or some other reporting structure.[111] From there, the DPS Report jumps to a series of rather anecdotal summaries of why each structure would be inappropriate or would not work in Vermont, and concludes that Vermont's unique structure is superior.[112] In summary, the DPS Report concludes:

- It would not be cost-effective to reform the current structure in Vermont since the Department, on the behalf of the Governor's office, will continue to intervene and represent the public interest before the Board. Creating a new entity independent of the Department would result in a duplication of effort. Further, any newly-created independent ratepayer advocacy entity would have to secure additional technical staff that would also duplicate the Department's efforts.
- There is no alternative ratepayer advocacy structure that could create better accountability to the citizens of Vermont since the Department is required to answer directly to the Governor, who in turn, must answer to the electorate every two years.
- The greater the degree of independence, the less the degree of accountability. In other words, more independence for a ratepayer advocate is bad since it reduces accountability, and accountability is preferable to independence.

The DPS Report's conclusions, however, are based upon a set of false choices that include:

[110] *Ibid.*, p. 23.
[111] *Ibid.*, Appendix A.
[112] *Ibid.*, p. 6.

- The recommendations, on their face, suggest that every other state in the U.S. has an inefficient structure for ratepayer advocacy, is structured in a fashion that has little to no accountability, and presumably an unhealthy degree of independence. This is clearly an unreasonable as well as unsupported conclusion.
- Section 2 of this Report underscores how the Department's current activities already have little to no accountability to residential and small commercial ratepayers. The Department has entered into settlement after settlement with utilities on terms that are highly advantageous to the utility, not ratepayers. To date, no accountability has been imposed on the Department for having taken these decisions. This accountability needs to be improved substantially.
- Independence of action and accountability are not mutually exclusive and the structure of most ratepayer advocates around the U.S. provide numerous examples of how accountability can be reconciled with independence. Section 2 of this Report highlights that the Department does not formulate ratepayer advocacy and litigation strategies that are independent and in the best interest of residential and small commercial ratepayers. Further, once these actions have been taken by the Department, there is little to no accountability.

### 4.2 Cost-Effectiveness of Reformed Ratepayer Advocacy

The DPS Report reaches a number of bold and unsupported conclusions about the efficiency of reforming Vermont ratepayer advocacy suggesting that any change in the current structure would result in waste and duplication of effort.[113] Nowhere does the DPS Report attempt to quantify the financial requirements that would be wasted, nor does the Report attempt to detail the efficiency of the Department's own past regulatory activities, and how those regulatory activities would change if the Department's planning and advocacy activities were separated from those associated with ratepayer advocacy. Instead, the DPS Report conclusions rest upon a herculean assumption (not an analysis) that any new ratepayer advocacy entity would purse the same activities, address the same issues, and utilize the same resources as the Department.

[113] *Ibid.*, p. 23.

However, assume that the DPS Report's assumptions are reasonable and that a successor ratepayer advocacy entity did purse the same activities, address the same issues, and utilize the same resources as the Department. The fact that this new ratepayer advocate utilizes a level of financial resources comparable to the Department is simply immaterial since the Department's report is focusing, once again on the wrong issue. Financial resources are an "input" to the regulatory litigation process; advocacy and the effectiveness of that advocacy is the "output." As Section 2 displayed, Vermont ratepayers are getting very little "output" (advocacy) for their financial "inputs" to support the Department's current activities. Clearly, the Department is not a cost-effective ratepayer advocate: Vermont ratepayers are simply not getting any advocacy "bang for their buck" since the Department fails repeatedly to take positions that are consistent with ratepayer interests and instead, takes positions (by entering into settlements) that reduce utility financial and regulatory risks, and imposes those risks, without adequate compensation, onto residential and small commercial ratepayers. Thus, the creation of a new entity to pursue these activities will actually represent a cost-effective improvement to the status quo.

The DPS Report's cost efficiency conclusions also run counter to the experience in every state in the U.S. that has a statutorily-defined ratepayer advocate. As discussed earlier in this Report, there are 42 states that have both a statutorily-defined ratepayer advocate separate from its state energy office. None of these states would argue that their separation of state energy policy and planning from ratepayer advocacy is inefficient nor have there been any proposals to merge such activities in order to attain efficiencies or economies of scale.

Consider that most SEOs originated during the energy crises of the 1970s. The original (and continued) goal of these SEOs has been to foster the development of energy efficiency, energy resource diversity, and new advanced energy technologies during a period of considerable energy uncertainty.[114] Similarly, ratepayer advocacy positions came about during the same time period. These ratepayer advocates however, were created with an entirely different mission: namely, to represent ratepayers before regulatory commissions during a time period seeing considerable rate increases arising from volatile energy prices and rampant inflation.[115]

There have been no major initiatives to merge SEO-type functions (energy policy and planning) with ratepayer advocacy activities despite the fact that both types of agencies arose during the same time period and under similar circumstances. No studies showing the efficiencies or synergies associated with merging these two activities have been conducted. Since that time, neither NASEO nor the National Association of State Utility Consumer Advocates ("NASUCA") has issued any individual or joint resolutions suggesting mergers or the opportunities for mergers between their individual memberships. In fact the two organizations tend to interact on a relatively infrequent basis, and when there are interactions, particularly in regulatory proceedings, it is not uncommon for the two types of entities to take opposing positions on the same issue (as highlighted in Section 3 of this Report). Thus, the DPS Report's claim there

[114] See, for example, Alabama Energy Division (http://adeca.alabama.gov/Divisions/energy/Pages/default.aspx); Massachusetts Department of Energy Resources (http://www.mass.gov/eea/grants-and-tech-assistance/guidance-technical-assistance/agencies-and-divisions/doer/doer-overview.html); and Rhode Island Office of Energy Resources (http://www.energy.ri.gov/about/).

[115] See, About Us, National Association of State Utility Consumer Advocates, available online at: (http://nasuca.org/about-us/).

will be inefficiencies or lost synergies by separating Vermont's SEO-type activities from its ratepayer advocacy activities is without merit in both theory and practice.

### 4.3 Accountability and Independence of Reformed Ratepayer Advocacy

The DPS Report also concludes that the Department has a higher degree of accountability compared to any other state ratepayer advocates in the U.S. since it answers to a governor that is required to face an electorate every two years.[116] The DPS Report goes further by also concluding that greater degrees of ratepayer advocacy independence are synonymous with less public accountability.[117] Both conclusions are complete falsehoods.

All ratepayer advocates across the U.S. are ultimately accountable to the electorate whether that be through the election of a governor, an attorney general, or a group of legislators that many be responsible for these advocates' appointment and removal. The fact that Vermont's governor is elected on a two-year basis is relatively immaterial, particularly as it relates to utility regulatory issues. The DPS Report provides no empirical evidence to support the assertion that ratepayer advocates appointed by more frequently-elected governors (or other elected officials) are more responsive to ratepayer interests and are more accountable. This is simply one of the numerous unsupported assertions in the DPS Report that is a function of misguided opinion, not fact.

Further, the DPS Report reaches its independence and accountability conclusions by simply tallying the organizational structure of each ratepayer advocate,

[116] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 20.

[117] *Ibid.*

and then overlaying a number of unsupported opinions and absurd assumptions (like the appointment of a climate change denier) to suggest that accountability and independence are mutually exclusive.[118] The DPS Report does not undertake a thorough investigation of each state ratepayer advocacy organization: and how each advocate is appointed; how oversight is maintained; the financial resources utilized; the number and type of reporting requirements; and any professional qualifications required to hold office.

Even more egregious is the fact that the DPS Report does not attempt to survey the best practices of each state and compile, on a composite basis, a model for ratepayer advocacy that would improve the current structure's effectiveness. There appears to be a very simple answer to this deficiency: the DPS Report is a results-driven product designed to maintain the status quo. The Department clearly has no desire to change since it believes no change is necessary. The underlying theme in the DPS Report's "research" is that no change is needed since Vermont already has the most unique, and best model for ratepayer advocacy. Such a conclusion is misplaced.

Currently, there are 43 state ratepayer advocacy entities from 42 states across around the U.S. (see below): 20 states have independent agencies (47 percent); three are located within a regulatory commission (9 percent); 16 are located within an Attorney General's office (37 percent), and three are located within other state administrative agencies. In other words, nearly three-quarters of the ratepayer advocacy agencies in the U.S are either in independent agencies or are part of an AG's office. No state, as even the DPS Report recognizes, has an organizational structure comparable to Vermont.

[118] *Ibid.*, p. 21.

**Table 3. Summary of State Ratepayer Advocates Organizational Structure.**

| Independent Agency | Within Public Utility Commission | Within other Government Agency | | |
|---|---|---|---|---|
| | | Attorney General | Department of Commerce | Department of State |
| Arizona | California | Alabama | Hawaii | Delaware |
| Colorado | North Carolina | Alaska | Utah | |
| Connecticut | West Virginia | Arkansas | | |
| D.C. | Wyoming | Illinois | | |
| Florida | | Iowa | | |
| Illinois | | Kentucky | | |
| Indiana | | Massachusetts | | |
| Kansas | | Michigan | | |
| Maine | | Minnesota | | |
| Maryland | | Nevada | | |
| Missouri | | New Mexico | | |
| Montana | | North Carolina | | |
| Nebraska | | Ohio | | |
| New Hampshire | | Rhode Island | | |
| New Jersey | | Tennessee | | |
| Ohio | | Washington | | |
| Oregon | | | | |
| Pennsylvania | | | | |
| Texas | | | | |
| Wisconsin | | | | |

Note: North Carolina is included twice as it has a Consumer Services Division within the Public Utility Commission, and a Utilities Section within the Office of Attorney General.

Contrary to the DPS Report's incorrect conclusions, many of these ratepayer advocates have very high degrees of independence and accountability. Also, in contradiction to the conclusions of the DPS Report, there are a number of attractive organizational and oversight requirements that have been utilized by these states that could be combined to create an exceptionally effective, independent, and accountable ratepayer advocate in Vermont.

Consider, as an example, the current structure of the New Hampshire Office of the Consumer Advocate ("OCA") who is appointed by the governor of that state for a four year term that is not necessarily coincident with that of the governor. In addition,

there is a residential ratepayer advisory board that advises the ratepayer advocate on matters concerning residential ratepayers. The advisory board has nine members that serve three-year terms.

- Three members are appointed by the speaker of the house. One represents the interests of residential ratepayers; one represents the elderly; and one is a member of the public.
- Three members are appointed by the senate president. One represents the interests of residential ratepayers; one represents the disabled; and one represents environmental concerns.
- Three members are appointed by the governor and council. One represents the interests of persons of low income; one represents the interests of small business owners; and one represents the interests of residents of low-income housing.

The OCA meets with its advisory board at least quarterly or at the call of the chairperson or three board members. The Consumer Advocate must be present for all board meetings to inform the board of the actions of the office of the consumer advocate and to respond to the board's inquiries. In addition, the Board recommends to the governor and council whether to reappoint the consumer advocate. If the Board does not recommend reappointment, or the governor and council do not accept the Board's recommendation to reappoint, the Board shall then recommend three persons to the governor and council to fill the position.

A structure similar to New Hampshire's would represent a significant improvement to the current structure of consumer advocacy in Vermont. The New Hampshire Consumer Advocate is appointed by the Governor, thereby undermining one of the arguments offered by the Department in its Final Report. The Governor however, gets important direction from the constituency group primarily impacted by the OCA's activities, which is ratepayers. An advisory board of this nature would represent a considerable improvement to the current Vermont structure. Further, the OCA's

advisory board is appointed by both the Governor and the Legislature, thereby expanding the degree of independence and accountability, not reducing it. Independence is improved since advice, counsel, and oversight are provided by a governing board that represents ratepayer constituencies and accountability is maintained is the Board is selected by both the Governor and the Legislature. In other words, a structure of this nature has enhanced accountability since it is required to answer to: (1) the Governor; (2) the Legislature; and (3) ratepayers.

The organizational structure of the Ohio Consumer Counsel ("OCC") provides another important example of ratepayer advocacy. The OCC's mission is to explicitly represent residential ratepayers: there is no ambiguity of the mission. Here, the Attorney General appoints a nine-member governing board that serve three-year terms representing represent farmers, residential customers, and organized labor. No more than five members of the board can be from the same political party and each board member is required to be confirmed by the state senate. The governing board appoints the OCC and deputy OCC and provides guidance to the OCC on regulatory matters and policy.

Again, the Ohio example represents a differing approach that enhances both accountability and independence that could provide a number of alternatives to ratepayer advocacy in Vermont. The ratepayer advocate in Ohio is appointed by the Attorney General rather than the Governor. The results of the DPS Report suggests that having an AG appoint a ratepayer advocate is less accountable than one appointed by a Governor. However, this is a misplaced conclusion. First, AGs in most states are elected officials, just like a governor. Second, AGs are elected to be a state's lead legal

representative and advocate. An equally strong argument could be made that since the regulatory process is one primarily associated with litigation, it is more appropriate to have the state's lead legal officer selecting appointed advocates rather than an individual governor. The broader public interest considerations of the "public interest" are not diminished by a structure of this nature. Consider that a Governor can still ensure that his energy policy and planning goals are communicated through the use of his SEO. More importantly, in most states, the regulatory commission itself is appointed by the Governor and will likely have some deference to his or her policy positions and/or preferences and is typically required to review evidence, and make decisions, that are in the public interest.

Kansas also utilizes a ratepayer advocacy organizational and governance structure that includes some type of oversight committee. Residential and small commercial ratepayers in Kansas are represented by the Citizens Utility Ratepayer Board ("CURB"), which was legislatively authorized in 1989, and re-approved in 1991. CURB is an independent agency in Kansas. The consumer advocate in Kansas is appointed by CURB's Board of Directors, which itself is comprised of five members each of whom are appointed by the Governor. Each board member represents one of Kansas' congressional districts, with one at-large member. CURB is a relatively cost-efficient agency, comprised of a relatively small internal staff that includes the consumer counsel, two supporting attorneys, one technical staff member (accountant/economist), and two administrative staff.

The Kansas model reflects another example of a collective appointment and governance model for consumer advocacy. The mission for CURB is clearly focused on

residential and small commercial customers. CURB has a Board of Directors that represents the broad, geographic diversity of the state. The governor has influence over the appointment of individual board members. Further, CURB's internal staff is limited, reducing direct employee costs. Instead, the office relies on the expertise of outside consultants in litigated matters. This allows CURB to hire experts with a particular set of expertise rather than holding a large staff that could be idle during periods in which the number of active litigation matters is limited.

Arizona offers another potential model for alternative ratepayer advocacy organization and governance. In Arizona, residential ratepayer interests are represented by the Residential Utility Consumer Office ("RUCO"), formed by legislation in 1983. The RUCO director is appointed by the governor and is required to have some experience in utility regulatory issues. Like the Kansas CURB (as well as the CUB in Illinois), RUCO has a relatively small staff and relies on outside consultants for technical expertise on an as-needed basis. This creates litigation flexibility since it allows RUCO to select the best technical experts based upon the issues at hand rather than (1) holding a large staff of technical experts that cover a wide range technical issues arising in regulation or (2) having a smaller staff that may have mismatched technical skills relative to the regulatory issues at hand.

### 4.4 The DPS Report Recommendations are Meaningless

The DPS Report makes three rather meaningless recommendations which, by themselves, will do nothing for residential and small commercial ratepayer advocacy in Vermont.[119] All three recommendations are offered to address what the DPS Report believes is a public perception problem with many of the Department's past actions

[119] *Ibid.*, p. 35.

before the Board.[120] The DPS Report finds that any concerns regarding the Department's actions are not attributable to the Department itself, but instead are due to the presumption that residential ratepayers are incapable of understanding their own best interests and how those interests should be advocated before the Board.

The DPS Report's first recommendation is that the Department submit an annual report that communicates the Department's prior-year's activities before the Board.[121] The submission of an annual report will likely do nothing to improve ratepayer advocacy in Vermont. First, it is not uncommon for ratepayer advocates in other parts of the country to prepare annual reports to their respective governing bodies. The fact that the Department has not already been preparing such reports speaks volumes about its ongoing accountability to ratepayers. The Department should be doing this as a normal course of business, not as some type of "reform" initiative designed to increase ratepayer advocacy effectiveness in Vermont.

Second, the DPS Report's recommendation to prepare an annual report is offered in a somewhat cavalier, offhanded manner: it does not identify any specific type of report format, the type of specific information that will be provided, and it fails to identify any review and input process for the report.[122] For instance, the DPS Report does not recommend a reporting requirement and input process similar to the best practices associated with other ratepayer advocates (nor does it even define any best

[120] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (Draft dated January 15, 2016), Vermont Public Service Department, p. 19; see also, An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 35.

[121] An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21(b): A Report to the Vermont Hose Committee on Commerce and Economic Development and the Senate Committee on Finance (February 22, 2016), Vermont Public Service Department, p. 36.

[122] *Ibid.*, p. 37.

reporting practices). Ratepayers will be disserved if the current DPS Report is any indication of quality and type of critical self-examination that is expected to result from the Department's proposed annual reporting process.

Lastly, the preparation of an after-the-fact report will provide little consolation to ratepayers after the proverbial "cow is out of the barn." There will be no performance consequences associated with any of the Department's prior year activities. Developing a report that simply lists the Department's "cooperative" activities with utilities, without any accountability, is simply meaningless.

The DPS Report's second recommendation is that the Department hold a public hearing prior to the Board's public hearing in order to improve its "public outreach."[123] However, the proposed recommendation will in reality provide very little public involvement, likely coming too late in the evidentiary process for the Department to act in any meaningful fashion. By the point in the evidentiary process when public hearings are typically held, the majority of the discovery in the case will have already been served, litigation strategy will have already been formulated, experts will have been secured, and a good portion of the first round of pre-filed expert testimony will have been prepared.

Second, it is doubtful that a "second" public hearing will do much to change or modify the Department's actions in litigated matters before the Board. The DPS Report fails to identify what goals will be set for these public hearings, what information will be solicited, how the Department will act upon this information or public testimony, and whether or not, and how, the Department will be bound by the information and concerns submitted to them in these newly-proposed public hearings. The Department's

[123] *Ibid.*, p. 37.

recommendation is nothing more than providing an "open mic" for the public to speak directly to the Department, it will have little to no impact particularly given the Department's reception of the public input provided in the development of the instance DPS Report. Thus, the DPS Report's recommendation to hold a second public hearing is relatively meaningless.

The DPS Report's third recommendation is for the Department to submit evidence showing why any settlement, or MOU, that it enters into with utilities is in the public interest.[124] This recommendation is simply redundant to standard evidentiary practice before the Board. Under Board practices, all parties are required to provide evidence in any contested or uncontested settlement to support why a particular settlement is in the public interest.[125] Unfortunately, this filing requirement did not prevent the Department from entering into a settlement agreement with VGS and creating a SERF thereby denying ratepayers a natural gas cost refund in which they were entitled.[126] Instead those refunds were diverted to a special ratemaking fund that effectively serves as a utility investment hedge fund. Again, this recommendation is relatively meaningless since, like the other two recommendations, it is one that should be (or is) the normal course of business in Vermont regulatory proceedings.

[124] *Ibid.*, p. 38.
[125] See, 30 V.S.A. § 218d(a)(2).
[126] See, Request of Vermont Gas Systems, Inc. to establish a System Expansion and Reliability Fund with funds provided by reductions in the quarterly Purchase Gas Adjustment rate under the Alternative Regulation Plan, Vermont Public Service Board Docket No. 7712, Order Amending Alternative Regulation Plan, p. 5.

## 5 Conclusions and Recommendations

Ratepayer advocacy in Vermont would be best served by a number of reforms that enhance the independence and vigor in which residential and small commercial ratepayer interests are protected before the Vermont Public Service Board. This Report recommends that the Legislature eliminate the Division of Public Advocacy and the position of the Public Advocate in the Department of Public Service. In its place, the Legislature should create an independent Ratepayer Advocate ("RA") that supervises an Office of Ratepayer Advocacy ("ORA").[127]

For administrative purposes, the RA and ORA can be housed in any relevant state agency, including the Department or the Office of the Attorney General, provided that a high degree of independence included in the recommendations below, or some version of the recommendations listed below, are adopted. If the RA/ORA functions are removed, the Department should continue to conduct its statewide energy planning and policy activities like any other state energy office. Further, the dollars associated with the RA's activities should be eliminated from the Department's future budget. The Department should be allowed to intervene, as a separate state agency intervenor, in matters before the Board, provided the Department has the internal budget to support such activities and it makes clear that its intervention is predicated on representing the Governor's energy policy positions and goals and not ratepayer interests.

Three areas of recommendation for the RA/ORA are provided below: one addresses the mission and emphasis of the new entity, one addresses the

[127] This new office can remain in the Department if certain organizational, independence, and accountability reforms are undertaken. If the Legislature were to choose to keep this new ratepayer advocate in the Department, the "elimination" of the current PA would effectively consist of a name, mission, and organizational change, rather than a true "elimination." Likewise, a movement to another agency could also be seen as effectively "transferring" rather than eliminating.

organizational structure of the new entity and one area addresses other relevant administrative and reporting issues.

### 5.1 Mission Recommendations

One of the most important policy recommendations that can be made to the Legislature in this matter is to clearly and unambiguously identify the RA's mission as being one dedicated to:

- Representing and forcefully advocating for residential and small commercial ratepayer interests.
- Supporting low-income and disadvantaged utility customers.
- Being fuel and technology neutral, focusing on securing the lowest cost, most reliable utility service possible.
- Defending residential and small commercial ratepayers from assuming utility business, financial, and regulatory risk without appropriate and reasonable compensation.

### 5.2 Organizational Recommendations

The RA and the ORA need an independent organizational and oversight structure. This can be accomplished through the following recommendations:

- A volunteer stakeholder committee (Committee for Ratepayer Advocacy or "Committee") should be established that provides guidance on ratepayer advocacy and governance issues.
    - The committee should be comprised of six members: two appointed by the Governor; one appointed by the Senate President Pro Tempore; one appointed by the Speaker of the House; and two appointed by the Committee itself.
    - Members will serve staggered four-year terms and should represent a balanced, cross-section of stakeholder groups, including small business groups, consumer groups, low-income groups, and environmental groups.
    - Committee members can be removed by a majority vote of other committee members.
- The Committee shall solicit qualified RA candidates that have prior consumer advocacy experience. The RA does not have to be an attorney.

- The Committee will submit three RA candidates to the Governor for selection. The Governor will appoint the RA who will also be confirmed by the Senate Finance Committee.
- The RA will serve a four year term and can be re-nominated and re-confirmed for additional terms.
- The RA can be removed for cause by a recommendation of the Governor provided that recommendation is approved by both the majority of the Committee and the Senate Finance Committee.
- The RA and ORA may operate within any state agency. However, the RA and ORA shall be completely independent of any agency Secretary, Commissioner, or other type of administrative director. The RA and ORA will have a separate line item budget from the agency in which it is housed that will be funded through regulatory assessment fees.
- The ORA shall be comprised of a moderate-sized staff that is composed primary of attorneys with one attorney serving as a Director of Litigation.
    - The RA can serve as the Director of Litigation if she/he is a Vermont Bar-certified attorney in good standing.
    - The ORA should be comprised of a small number of professional staff members such as economists, engineers, accountants, and other policy/utility analysts to assist in case management and non-docketed regulatory matters.
    - The RA/ORA will primarily rely on outside consultants for litigated matters. The RA will be limited to a total consulting budget not to exceed $125,000 per docket. The RA can increase this expenditure to $175,000 per docket upon a showing of special circumstances provided this amount is approved by the Committee. Consulting fees will be recovered through the regulatory assessment fee, or a direct utility reimbursement, and will not be part of the ORA's normal operating budget.

### 5.3 Other Recommendations

- All settlement agreements, memoranda of understanding, or other agreements entered into by the RA with other parties (including utilities) in litigated proceedings before the Board must be approved by the Committee.
- The RA will brief the Committee on a quarterly basis. At least two of these briefings will be on an in-person basis.
- The RA shall prepare an annual report that will be submitted to the Committee that will also be submitted to the Governor and the Senate Finance Committee. The report will explicitly discuss: the RA's actions during the prior year; the specific positions taken by the RA on each major proceeding during the prior year and how those positions compare to the Board's final decision in each matter; an explicit discussion regarding the

rationale and basis for any settlements or memoranda of understanding entered into by the RA during the prior year (prepared in a fashion that does not compromise the statutorily-required confidentiality of such agreements); the RA's position and status associated with any pending proceedings; and a discussion and analysis of the value delivered to ratepayers during the course of the prior year. Assumptions, caveats, and other conditions associated with the analysis of ratepayer value and any quantification of this value shall be clearly provided in the report.