

From Structure to Results: Improving the Effectiveness of Ratepayer Advocacy in Vermont

(a citizen response to the Department of Public Service's Act 56, Section 21(b) Report)

Testimony of Melanie C. Peyser

before the

Senate Finance Committee

February 25, 2016

I. Introduction

The Department of Public Service Public Advocacy Structure in Context

The Public Advocate Office: Not Just a Structure

- Structure doesn't operate in a vacuum –the PAO doesn't operate in isolation
- Old notions of Separation of Powers are not adequate tools to untangle independence, accountability, effectiveness, or the capacity to deliver positive outcomes for ratepayers
- Money in politics, opaque regulatory process and decision-making, delayed impact of significant decisions on ratepayers, and mismatch of election cycles to PSB decisions means that elections provide NO meaningful accountability
- Internal structure and organizational culture are equally or more important drivers of independence, accountability, and effectiveness
- Every institution thinks it's unique and thus exceptionally good. There is no proved correlation between an organization's uniqueness and its effectiveness.
- Human capacity and organizational effectiveness can be strengthened or weakened by myriad influencing factors

Environmental Factors Affecting Effectiveness of DPS Structure

- Campaign Finance Rules
- Financial Disclosure Rules
- Limitations on Lobbying
- Whistleblower Protections
- Availability of State-funded Legal Assistance for Civil and Administrative Matters
- Ethics and Conduct Rules
- State Audit and Inspection
- Community of Nonprofit Consumer/Advocacy Groups

Business, Political, and Organizational Culture and the DPS PAO Structure

- **Forceful Executive**
- **Party Makeup in Legislature**
- **Energy Monopoly – across power sources and generation, transmission, and distribution**
- **Culture of Paternalism v. Culture of Public Service**
- **Impunity v. Accountability**
- **Lack of Performance Management/ Culture of Excellence**
- **Hear No Evil, See No Evil, Speak No Evil**

The Impact of DPS' Own Choices on Effectiveness

- **Diminishing stakeholder input**
- **Veneer of Consultation**
- **Backroom Settlements and MOUs**
- **No Effective Separation of Functions/Waiting Periods**
- **Inadequate Public Access to Useful Information**
- **Deficient Follow up on Own Commitments**
- **Weak Enforcement of Board Orders and Oversight**

Disproportionate Impact of PAO Structure in the Context of Public Service Board Procedures

- **Board appointment of Independent Counsel is discretionary**
- **Public Advocate has no affirmative duty to disclose evidence that contradicts a utility's or the Department's position**
- **Intervention rules are onerous**
- **Effective public notice and information on navigating the system are non-existent**
- **Public comments are not**
- **Adversarial process impedes reasonable consideration of already available evidence from other dockets (which often is hidden because of minimal posting of documents on PSB website)**
- **Utilities have no affirmative duty to post documents on their websites or to provide notice to customers of proceedings that affect them**

II. The proof is in the pudding:

**The PAO's results speak for
themselves!**

PAO SAMPLE RESULT #1:

VGS System Expansion & Reliability Fund

Background

- In 2011, VGS requested permission to hold back an owed refund and rate reduction and escrow the funds into a “System Expansion and Reliability Fund.” The stated purpose of the SERF was to collect money from customers in advance of a yet-to-be-approved pipeline expansion project and then apply collected funds to future recovery of the project costs. The goal was ostensibly to mitigate rate increases “to zero or nearly zero.”
- In Docket 7712, relying on an MOU between VGS and DPS laid out the establishment of the fund and a promise to enter further discussions and a subsequent MOU addressing DPS oversight of the fund and criteria for use of the moneys in the Fund, the Board authorized VGS to establish the fund by holding back an owed refund and moving an owed 5.4% rate reduction into the “gas distribution charge” on a semi-permanent basis.
- VGS justified the establishment of the SERF as a mechanism to share financial risk with ratepayers. The then CEO claimed that the \$60-70 million expansion project would otherwise be too financially risky for a company of its size and assets. Further, VGS claimed that without the rate smoothing effect of the funds, rates could swing by as much as 15%. VGS’ CEO, Don Gilbert, testified that such an upward swing could reduce the then 46% price advantage of natural gas by 10% and thus make it difficult to attract new customers in Addison County.

PAO SAMPLE RESULT #1:

VGS System Expansion & Reliability Fund

- The SERF cannot serve its purpose of reducing the rate impact of the ANGP to “zero or near zero.” Even with the SERF, cost recovery for the pipeline will require rate increases (excluding the effect of any decreases in natural gas prices) of at least 10%. VGS and DPS are now trying to ignore their prior statements that: the underlying premise for the SERF was that there was a need to ward of rate swings to protect demand.
- The SERF has not created and likely will not create any financial benefit to the residential and small business customers, who have and will pay into it and who will pay for the lion’s share of VGS expansion plans! To the contrary: so far, the SERF has cost, on average, each of VGS’ 43,000 plus residential customers upwards of \$350 in owed refunds and a 5.4% rate reduction. Payments into the SERF will continue until at least 2030 and will be accompanied by additional rate increases. Over the next 30 years, the average residential customer will contribute an additional \$8,000 in charges for the SERF and rate increases to allow VGS to recover the cost of the pipeline!
- Many senior VGS customers will not live to see any rate benefit from the project.

PAO SAMPLE RESULT #1:

VGS System Expansion & Reliability Fund

What went wrong?

- **DPS never followed up to hammer out oversight or a common understanding of reasonable development expenditures.** DPS and VGS never signed the second MOU to govern operation of the SERF or lay out oversight mechanisms or a common understanding of criteria for recovery of expenditures against the Fund.
- **VGS reporting and DPS due diligence and oversight fell apart.** Since early 2014, VGS hasn't submitted reports that detail project development expenditures, required by the first MOU and referenced in the Board's Order authorizing establishment the SERF. Instead, VGS started submitting total amounts for each segment of the project. In 2015, VGS stopped reporting development expenses. Instead, VGS began reporting one item only: total capital expenditures for the project. There is no evidence that DPS or VGS sought Board permission to change the reporting conditions set forth in Docket 7712. DPS isn't providing the oversight or due diligence that VGS agreed to in return for special rate treatment.

PAO SAMPLE RESULT #1:

VGS System Expansion & Reliability Fund

Is DPS protecting ratepayers' funds in the SERF now?

- **DPS has agreed to a settlement in Docket 7970 that further undermines protection of ratepayers' funds in the SERF.** In October 2015, DPS signed a new MOU with VGS in Docket 7970. That MOU requires DPS to take the position that the entire project is “used and useful.” DPS has thus agreed that development expenditures that have not even been accurately quantified and that may well exceed the entire projected cost of the project as presented in Docket 7712 are at least eligible for recovery.
- **The MOU also requires VGS to absorb, subject to several exceptions, a purported \$20 million in project costs. VGS has already taken a \$10 million allowance for potentially disallowed costs and is in two lawsuits with its first mainline contractor.** Despite VGS' claims that even a \$60-70 million project would be too risky without escrowing funds AND declining profitability of pipeline construction projects in general, VGS is now not blinking at a \$20 million loss on the project PLUS nearly double the original financial risk. DPS doesn't appear to be concerned either.

PAO SAMPLE RESULT #2: VGS Addison Natural Gas Project

Background

- Addison County Pipeline Expansion costs have ballooned to \$154 million since VGS proposed establishment of the SERF to reduce otherwise untenable financial risk associated with a \$60-70 million project and since the original petition was filed at \$83.8 million.
- At the same time, both oil and natural gas prices started dropping, but home heating oil prices have dropped by a much larger proportion than natural gas prices have. **By November 2015 – just before additional technical hearings on the project, natural gas had less than a 10% price advantage over oil.**
- DPS didn't introduce evidence of the disappearing price advantage in November or December while proceedings in the case were ongoing. DPS didn't update the evidence in January. DPS took no steps whatsoever to protect VGS' customers from paying for a project, the claimed benefits of which were disappearing.

PAO SAMPLE RESULT #2: VGS Addison Natural Gas Project

The Result:

- Home heating oil is now cheaper than natural gas without accounting for conversion costs or recovery of pipeline costs. Based on today's prices, the average family, who switches to natural gas will lose upwards of \$50 annually. **Once conversion costs of \$600-\$15,000 and rate increases to pay for the pipeline are factored in, families, who convert to natural gas from oil stand to lose hundreds of dollars per year.**
- Even before considering VGS' expansion, the 2011 46% price advantage of natural gas over oil has not only dropped by 10%. It has dropped by more than 46%! If VGS thought residential demand would be lacking if the price advantage was only 36%, it's obvious that no rational person would switch to a more costly fuel!
- **VGS' recently filed a new rate case and proposal for a new Alternative Regulation Plan along with a request to begin drawing down SERF funds. VGS is already backing off December 2015 projections used to justify continued public benefit.**

PAO SAMPLE RESULT #2:

VGS Addison Natural Gas Project

Is DPS protecting consumers now?

- VGS continues to advertise savings for residential customers over home heating oil and to issue press statements claiming that natural gas is cheaper and cleaner. **DPS has been silent except to praise VGS' recent proposal to reduce rates by 3.3% in November. The reduction represents all customer categories.** The reduction for residential and small business customers is much smaller.
- **DPS does not appear to be concerned that consumers considering switching to natural gas in VGS' current territory and in Addison County are receiving inaccurate price signals.** Currently, the average family (according to VGS' definition) will lose money by switching to natural gas. VGS removed misleading language from its website saying that measuring from February 2015, residential customers could save between \$700 and \$1500 by switching to natural gas, but the introductory web page for residential customers still says that new customers stand to save by switching from oil or propane.

PAO SAMPLE RESULT #2: VGS Addison Natural Gas Project

Is DPS protecting consumers now?

- Without misleading advertising, it's hard to imagine that there will be any residential demand for natural gas in Addison County. **If VGS is unable to attract residential and commercial customers, and if VGS' own projections for industrial customer demand continue to decline, VGS customers will be faced with enormous stranded costs.**
- DPS' fuel market predictions in Docket 7970 have proved wrong every time, and evidence is mounting that there will be little or no public benefit from the project.
- The DPS PAO continues to claim that critics simply don't like the pipeline and are therefore dissatisfied with the Public Advocate Office.

PAO SAMPLE RESULT #3: Addressing VGS' Excess Operating Costs

October 1, 2014 VGS Assessment of Alternative Regulation Plan Effectiveness

	For Rate Year 2011	For Rate Year 2012	For Rate Year 2013	For Rate Year 2014	For Rate Year 2015 as filed on 8.28.2014
Total Operating Cost Cap at Projected # of Customers	12,570,265	13,233,985	13,737,996	15,345,463	15,861,924
Total Operating Costs	13,186,397	14,198,425	14,543,167	15,716,866	18,128,417
Expenses Over the Cap	(616,132)	(964,440)	(805,171)	(371,403)	(2,266,493)
50% of Difference	(308,066)	(482,220)	(402,586)	(185,702)	(1,133,247)

September 30, 2015 VGS Assessment of Alternative Regulation Plan Effectiveness

	For Rate Year 2012	For Rate Year 2013	For Rate Year 2014	For Rate Year 2015 as filed on 10.6.2014	For Rate Year 2016 as filed on 8.28.2015
Total Operating Cost Cap at Projected # of Customers	13,233,985	13,737,996	15,345,463	15,861,924	16,218,594
Total Operating Costs	14,198,425	14,543,167	15,716,866	17,244,137	18,320,153
Expenses Over the Cap	(964,440)	(805,171)	(371,403)	(1,382,213)	(2,101,559)
50% of Difference	(482,220)	(402,586)	(185,702)	(691,107)	(1,050,780)

PAO SAMPLE RESULT #3: Addressing VGS' Excess Operating Costs

[DPS PAO Response to October 1, 2014 VGS Assessment re: Ops Cap Overruns \(as published October 31, 2014 DPS Assessment of Effectiveness of VGS' ARP](#)

PSD RESPONSE:

VGS has not managed its costs within the cost cap, which has resulted in rate payers paying a higher level of costs over an extended period of time without improvement or progress in bringing costs within the cap. The Department would like to have further discussions with VGS to explore options and possibilities to begin to bring costs within the cost cap.

PAO SAMPLE RESULT #3: Addressing VGS' Excess Operating Costs

DPS PAO January 25, 2016 Response to September 30, 2015 VGS Assessment re: Ops Cap Overruns

January 25, 2016

Mrs. Judith C. Whitney, Acting Clerk
Vermont Public Service Board
112 State Street
Montpelier, Vermont 05620

Re: Docket 8472-VGS Alt. Reg. Plan Renewal

Dear Mrs. Whitney:

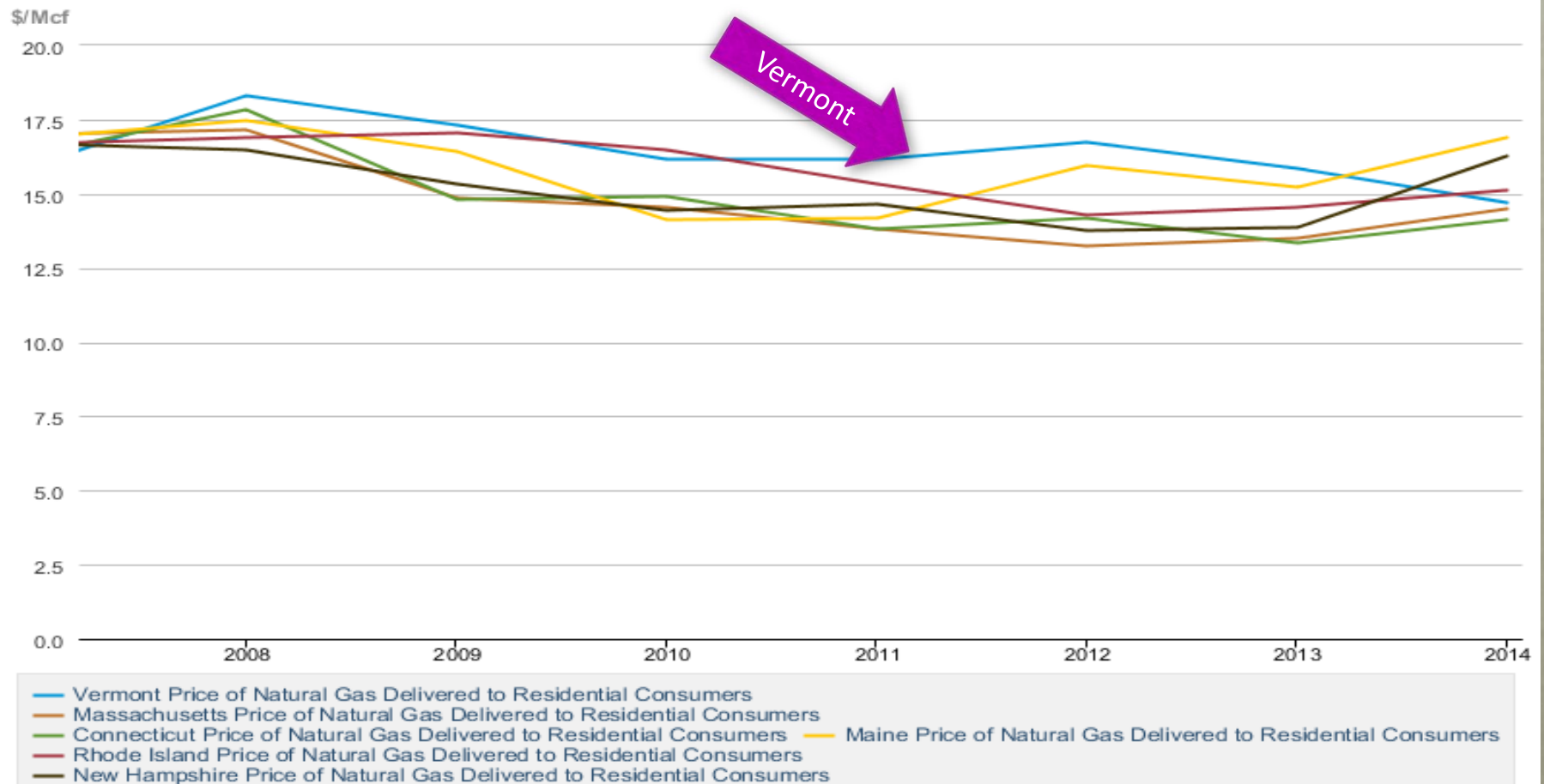
The Department recently became aware of an error we made in the above-referenced docket. Pursuant to the Section 1.b. iii. of the Extended Plan, the Department was due to submit to the Board and to Vermont Gas Systems, Inc. ("VGS") its assessment of the Extended Plan's effectiveness. This assessment was due eleven months before the expiration of the renewal term, or October 31, 2015. This provision is in the Extended Plan, but it is not specifically referenced in the Board's Order of August 26, 2015, approving the Extended Plan.

It had never been the Department's intention to conduct an assessment of the Extended Plan at that time as the renewal was for a one-year term only and we were already in discussions with VGS with respect to the upcoming rate case and a successor alternative regulation plan. We had intended to and incorrectly thought we had sought Board approval to delete this requirement from the Extended Plan.

We did not perform an updated assessment to share with the Board. The Department believes that the revisions made to the Extended Plan were improvements and we look forward to our continued work with VGS in the drafting of a successor plan.

PAO SAMPLE RESULT #4: Comparison of Residential Natural Gas Rates in New England

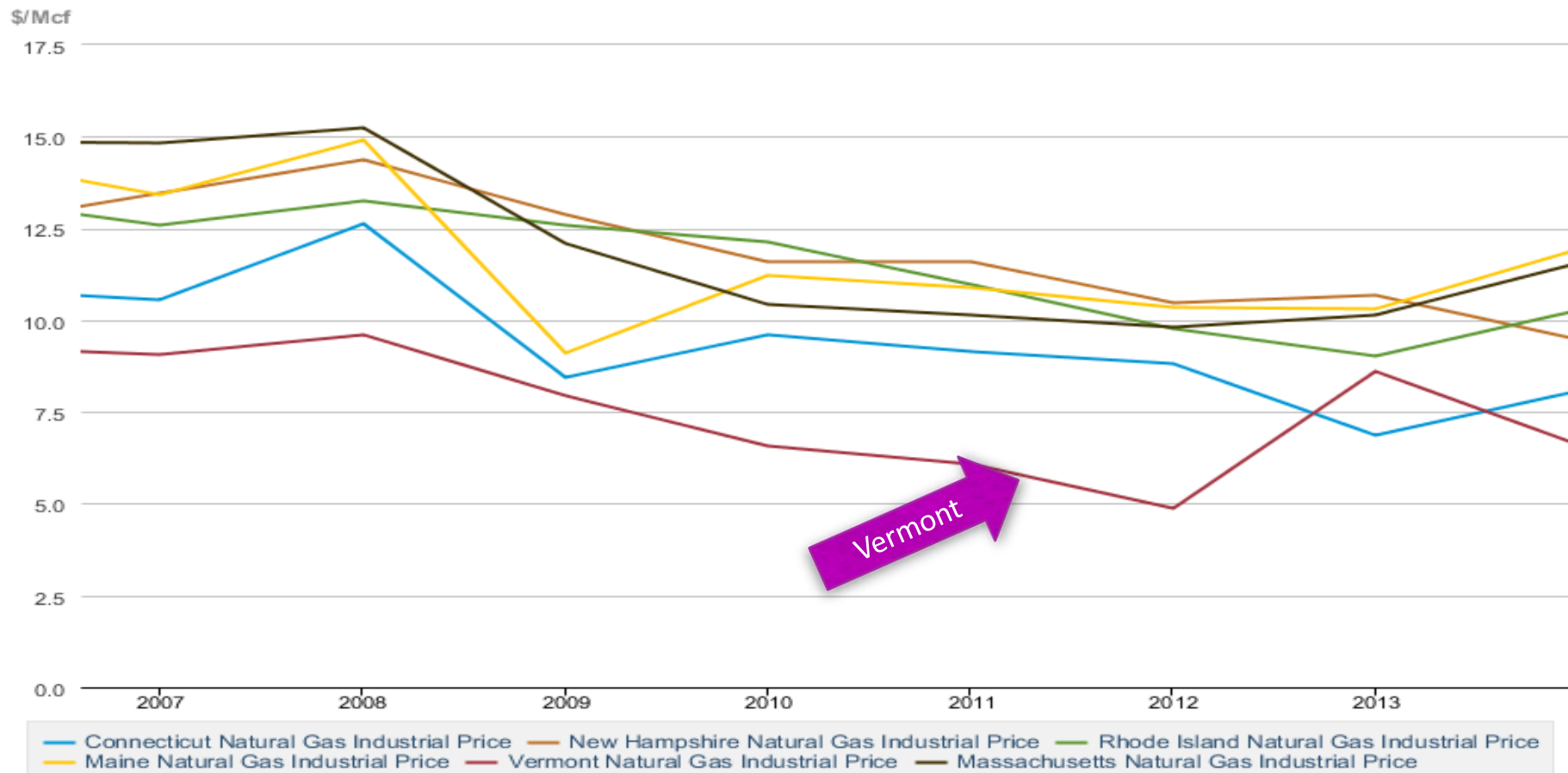
Natural Gas Prices



Source: U.S. Energy Information Administration

PAO SAMPLE RESULT #4: Comparison of Industrial Natural Gas Rates in New England

Natural Gas Prices



Source: U.S. Energy Information Administration

III. The Department's Report:

Separating Myths from Facts

Report Myth #1: The PAO can't always protect ratepayers because it must secure benefits for other stakeholders and the public at large

- **Myth:** The Department claims that the PAO can't always protect ratepayer interests in the context of promoting the interests of the broader public.
- **Fact:** In service of the broader public, the DPS PAO also ignores:
 - landowners, forced to host or adjoin utility transmission projects and industrial wind and solar projects
 - Small-business fuel dealers and installers of residential renewables and their employees, affected by Section 248 decisions, including job losses
 - Organic farms and natural products producers
 - Job seekers in shrinking employment markets/ loss of permanent job units
 - Vermonters concerned about the climate change, wildlife, aesthetics, clean water, and the Vermont way of life
- **Fact:** The DPS PAO can always accommodate the interests of large utilities and preferred industrial solar and wind developers.

Report Myth #2: The PAO's activities and positions produce tangible public benefit

- **Myth:** The DPS PAO's promotion of Governors' energy policies before the PSB produces benefits to the State and residents of Vermont and contributes to the public good.
- **Fact:** There is no empirical evidence that the DPS PAO's positions in cases before the PSB, in which Gaz Metro companies have been involved over the past 10 years (e.g. GMP/CVPS merger, Northwest Reliability Project, VGS Phase V and VI Looping Projects, ANGP Phase I, ANGP Phase II) have resulted in any public benefit. DPS and the relevant companies have shown:
 - no demonstrated economic benefit to the State or its residents
 - no demonstrable increase in tax revenue,
 - no demonstrated permanent job growth
 - no net financial benefit to ratepayers
 - No retention of large employers or of pre-existing skilled or unskilled permanent jobs in the state

Report Myth #3: An independent structure would be too expensive

- The real costs of investor-owned utility and developer projects and rate regulation have to date been externalized. The public is currently expected to pay the costs of:
 - Consultation and stakeholder input
 - Intervention
 - Other legal costs
 - Financial and environmental detriment
 - Opportunity costs
 - Inadequate public information and consumer representation
- Externalization of project costs borne by the public contributes to the repeated overestimation of projects' net economic benefits.
- These costs should be borne by utilities and built into project costs and costs of service so that the real impacts on Vermont's economy are recognized, and unrealistic ideas remain "pipe dreams."

Report Myth #4: The public just doesn't get it

- The public is clearly experiencing the symptoms of a flawed organizational structure and the many other factors contributing to poor institutional performance.
- It's the institution's job to identify and fix the causes of those symptoms – not to dispute whether the public is experiencing symptoms at all.
- DPS wants to dispute whether ratepayers are feeling pain instead of examining whether there is actually a problem and finding solutions.

IV. Recommendations

**Combining Structural Overhaul
with Rapid Response Measures to
Improve Ratepayer Outcomes and
Build Public Trust**

Recommendation #1: Reject DPS' Report

- At a minimum, determine that the Report, as written, fails to answer the questions posed or to meet a minimum standard of rigor or quality
 - Findings and conclusions lack justification in the presented data or analysis
 - The report ignores questions posed by the legislature
 - Bare opinions and conjecture are presented as fact
 - Strong bias toward VT utilities and their lawyers (10 of 29 interviewees - 4 from VELCO); few non-Vermont experts in ratepayer advocacy (4 current or former consumer advocates from other states)
- Consider investigating whether the submitted Report is consistent with the data, analysis, findings, and conclusions of the principal investigator
 - The summary of public comments during public hearings is at best incomplete and at worst deceptive
 - Based on statements made by the principal investigator and author of the original draft report, some interviews may have been excluded from the report content and interviewees dropped from the list

Recommendation #2: Gather the necessary data to move forward with the establishment of an independent PAO

- If DPS is unwilling to take a critical look at its own strengths and weaknesses, the only solution is an independent evaluation of the organizational efficacy of the Public Advocate Office, including public perceptions. However, this would only be a stop-gap measure. There is a growing consensus that an Independent Ratepayer Advocate is the only way to rebuild public trust in utility regulation in Vermont.
- Instead, the Legislature should commission an independent study that moves the ball forward on establishing a new entity to serve ratepayers. The study should isolate resources currently devoted to the Public Advocacy function within DPS; determine whether other consumer-oriented functions should also be moved to the new entity (e.g. consumer affairs, public information), survey residential and small business ratepayers, (disaggregated to by consumers with differing needs), identify the consuming public's priorities (e.g. price, reliability, energy efficiency, clean energy, accessible information, complaint handling, etc.), and provide baselines for future performance measurement, ratepayer satisfaction, and resource allocation, and cost-effectiveness.

Recommendation #3: Engage stakeholders to establish an effective Ratepayer Advocate Office

- **Begin the process of establishing an independent Ratepayer Advocate Office outside of DPS by creating a Citizen Commission to oversee the process**
- **Identify additional needs for independent resources to protect the interests of other segments of the public that are currently poorly served by DPS. For example:**
 - **Landowner ombudsman or utility-supported fund for legal assistance to landowners**
 - **Intervener Fund (Canadian NEB model) with flat, modest stipends for landowners, interested parties, community groups, towns, and nonprofit advocacy groups to intervene in Section 248 proceedings**
 - **Utility-funded grants to organizations serving groups at risk for discrimination**

Recommendation #4: Identify and implement quick legislative fixes for nagging problems

Accelerate improvements through modest legislative amendments with the potential for immediate positive impact:

- **Mandatory disclosure by DPS PAO attorneys of conflicts between State policy/Department positions and ratepayer interests**
- **Mandatory (v. discretionary) appointment of Independent Counsel to represent ratepayers in rate matters and Section 248 proceedings whenever an above conflict of interest is identified**
- **Mandatory appointment of Independent Counsel to represent ratepayers in any rate matter or Section 248 proceedings that have the potential to influence rates at the signed request of 25 or more ratepayers.**

Recommendation #5: Address issues that undermine the public's trust in DPS and the regulatory process

- **Mandatory appointment of Independent Counsel in any case, related to an alleged violation of a Board Rule by a utility, of which DPS knew or should have had knowledge**
- **Mandatory Board investigation (and appointment of Independent Counsel to represent the public) into allegations of DPS failure to carry out oversight or enforcement functions with respect to any utility; or failure to fulfill any commitment made in an MOU, presented as evidence in support of a Board determination, approved by the Board, or incorporated into a CPG or Board Order**
- **Mandatory investigation into any allegation of DPS participation in regulatory delay for the purpose of influencing the availability of or access by the Board and other parties to evidence relevant to Section 248 or rate proceeding.**

Recommendation #5: Address issues that undermine the public's trust in DPS and the regulatory process

- **Mandatory disclosure by DPS PAO of evidence or information submitted by utility to DPS or Board, or submitted by DPS to Board in any docket or report if that evidence directly contradicts or updates evidence, relevant to a Board decision, that was previously provided by either the utility or DPS in a Section 248 proceeding or a rate proceeding**
- **Regular and ad hoc performance audits of ratepayer advocacy activities, DPS oversight of utilities and enforcement of Board orders, and DPS fulfillment of terms and conditions of MOUs/ settlements (e.g. by State Auditor)**

Recommendation #6: Create mechanisms to support the independence of ratepayer advocates

- **Establishment of a Code of Conduct and accompanying disciplinary process and sanctions for PAO staff and attorneys engaged in proceedings before the Public Service Board.**
- **Whistleblower protections for PAO staff at all levels**
- **Mandatory waiting period of at least one year following termination for any PAO staff person to seek employment with any utility, in connection with which the staff member carried out responsibilities while employed by PAO.**
- **Mandatory waiting period of at least one year following termination before any exempt employee of a utility can be considered for a position at PAO.**

Conclusion: Action Is Required Now!

- **It's not just the Public Advocate!**
 - The Department is ineffective as a whole
 - Board Rules and Procedures are barriers to access to justice for the average citizen and for ratepayers in particular
 - Other protections and levers to protect ratepayers and ensure effective representation of their interests by the state are lacking (e.g. whistleblower protections, campaign finance, disclosure, etc.)
- **Consumers cannot be expected to depend on political will for a complete institutional and regulatory overhaul! The DPS PAO's location within government, governance, and performance are logical places to start.**
- **In the meantime, easy fixes should be instituted to protect ratepayers and the public.**

consultant, who resides in Monkton, Vermont. Ms. Peyser has over 20 years of experience working in the former Soviet Union, Eastern Europe, Asia, Africa, and Latin America with justice sector institutions, civil society, philanthropic organizations, and the media to improve the fairness, transparency, and effectiveness of the administration of justice in developing countries and transitional democracies. As part of her work, Ms. Peyser has designed and led applied empirical research, pilot projects and reform initiatives to improve the organization and delivery of state-funded legal aid, establish citizen and victim assistance centers in police stations, introduce collaborative citizen court monitoring, and programs and resources for pro se litigants. Ms. Peyser has also worked extensively with judiciaries to establish robust resources and infrastructure for judicial ethics, conduct and disciplinary systems, judge and court staff training, and evidenced-based court operations and programs. Ms. Peyser served as a U.S. Supreme Court Fellow from 2005-2006. She is a graduate of Colgate University and has an M.A. in Russian from Middlebury College and a J.D. from Albany Law School of Union University.

Ms. Peyser returned home in 2014 to help her mother address issues associated with her family's property and home, which are located along the route of the Addison Natural Gas Project. Melanie is a member of Just Power VT.

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