

VMPD will discuss, in a fairly general and limited way, how the parties and the board might consider proceeding, but the specific process and procedures to be applied will be governed to some extent by the priorities set by the Board. That having been said, VMPD emphasizes and joins the many comments made during the technical conference to the effect that, in the vernacular, “we have a need for speed”. Virtually daily, the media contains comments or discussions regarding regulatory uncertainty, the potential for utility insolvency or bankruptcy, and the reluctance of the financial markets to be available to deal aggressively with the unsettled conditions in Vermont’s regulated energy marketplace. The failure to take action, promptly, in order that the Board and the parties will be afforded an opportunity to evaluate the situation in some depth may result in the inability to take any action. That is, the circumstances of some of the players appears to be so extreme that the failure to provide them with immediate relief may trigger an avalanche engulfing all stakeholders. Vermont, its ratepayers, and its economy deserve better.¹

DISCUSSION

I. PRIORITIES TO BE ESTABLISHED BY THE BOARD.

A. First, the Board Should Address and Allow for Immediate Utility Survival.

Based on the candid acknowledgment by Green Mountain Power Corporation (“GMP”) and by Central Vermont Public Service Corporation (“CVPS”) of their evidently precarious financial conditions as well as certain of the parties’ filings, VMPD agrees with other commentators that the first priority of the Board should be to address the issue of utility survival. As the chair of the Board made

1. By so stating, VMPD does not mean to imply that the Board should construct an impenetrable or perpetual safety net. VMPD, as others have stated, seeks only to quiet the fears of the marketplace so there is an opportunity to achieve resolution. Once that opportunity is realized, market forces will dictate the long term results.

clear during the technical conference, the Board is aware of the financial markets' hatred of uncertainty. Uncertainty affects risk and risk affects the extent to which financing is available and, if it is available, at what rate or cost it can be obtained. The cost of capital, of course, affects both decision making (for example, whether a given remediation effort makes sense) and the cost of that remediation effort. As others stated at the technical conference, uncertainty drives costs up and forecloses the opportunity to pursue savings that otherwise might be available. Even more immediately, if the financial markets will not continue to deal with the utilities that require interim financing for ongoing operations, those utilities may cease their present operations and may not be in position even to consider or discuss financing for ongoing remediation efforts.

In addition to the strictly monetary implications of uncertainty and utility survival, it is obvious that a utility's management and resources, not to mention the comparable resources of the Board, the Department of Public Service ("DPS" or "Department"), and others, will be distracted from consideration of intermediate and long term matters if the immediate question is whether the doors can remain open and the lights on.

A third benefit from focusing on assuring utility survival is the time that will be gained during which remediation of one sort or another may be considered, evaluated, proven, and proposed for Board or Legislative consideration.

B. Second, the Board Should Understand Fully the Ramifications of Insolvency or Bankruptcy, and Particularly the Consequences for All of Vermont, Not Just for Individual Utilities That Might Be Involved Directly.

Closely connected with the first issue (utility survival) is the issue of utility insolvency or bankruptcy. Some have proclaimed that the insolvency or bankruptcy of one or more of the utilities in Vermont may not be a bad thing and may result in opportunities for remediation. Some of those who view insolvency and bankruptcy more positively than the financial markets do may not have readily

available all of the information that is known to the financial markets. For instance, local or regional examples of bankruptcy proceedings may not paint a complete picture of what insolvency or bankruptcy may hold in store for Vermont, particularly if one or both of the largest investor owned utilities should find itself insolvent or in need of bankruptcy protection. It is VMPD's position that not enough is known of the ramifications of insolvency and bankruptcy to predetermine a positive outcome. Perhaps it is a contrarian viewpoint, but VMPD does not perceive much benefit from GMP or CVPS, or any other particular Vermont utility, becoming insolvent or bankrupt.

It further is VMPD's belief that, to the extent insolvency or bankruptcy were to result in a default by GMP and/or CVPS under the Hydro-Quebec Vermont Joint Owners Agreement and the corollary Participation Agreement, to which VMPD is a party,² or other contracts in which either or both of those utilities are parties,³ further defaults could be triggered under step-up or cross-default provisions in other agreements or loan obligations. On that basis, a majority, if not all, of Vermont's distribution utilities could be affected significantly and adversely and could be forced to seek bankruptcy protection in turn.⁴ Accordingly, as with the issue of temporary survival, utility solvency is a high priority necessary to be evaluated in due course and with proper and serious consideration if a "death spiral" is to be avoided in Vermont. Other significant and unintended consequences could flow from insolvency or bankruptcy of one or more of the utilities in Vermont. For example, as noted by the Fourteen Municipal Utilities, the failure of one or more of Vermont's investor owned utilities could

2. Of the roughly 300 mW under contract, VMPD takes approximately 2 mW of Schedule C-1 power.

3. See, e.g., Position Paper of Fourteen Vermont Municipal Electric Utilities, dated October 5, 1998, at 4-5 ("Municipal Position Paper").

4. As Thomas Weis, General Counsel to Vermont Electric Power Company (VELCO) noted during the technical conference, VELCO is owned by many of the distribution utilities in Vermont. While the bankruptcy of VELCO's owners might not force VELCO into bankruptcy, the ownership of VELCO could be a significant asset to the creditors of the defaulting utility owners.

result in significant adversity to Vermont's bond bank and the residents and property owners of municipalities conducting public service operations. Municipal Position Paper at 5; *see, e.g.*, 12 V.S.A. § 2743 ("When judgment is rendered against a county, town, village, school or fire district, execution shall issue against the goods or chattels of the inhabitants . . . and may be levied and collected of the same.")

A rush to insolvency or to bankruptcy may have many unforeseen and unintended consequences that may reach far beyond the participants to this proceeding.

C. The Board Should State Clearly What Is to Be or What May Be Subject to Remediation, Which Will Require an Understanding of the Impacts of Including or Excluding Certain Aspects of the Regulated Energy Industry.

The third priority from VMPD's vantage point, is to consider what is to be remediated. In its Order Opening Investigation, entered September 15, 1998, the Board stated:

Historically, Vermont's electric rates have been the lowest in New England, and among the lowest in the Northeast. Today, however, this competitive advantage is eroding; electric rates for most Vermont businesses and residences are increasing, while neighboring states are pursuing a variety of techniques to lower power costs

Thus, the Board's initial focus was on electric rates and the impact on Vermont's competitive position electric rates may impose. VMPD applauds the Board's clearly articulated recognition of the connection between those two concepts. However, it is not just power supply that has an effect on electric rates, although it obviously may be the single most significant factor. Other costs of operation, management, financing, and participation in the electric power market play a direct role in determining the rates consumers pay for electric power. VMPD believes all of those factors must be considered.⁵

5. Others have recognized the opportunities for cost savings from other than power supply. For example, CVPS and GMP are reported to have pursued significant cost reduction strategies, including reductions in force, elimination of duplicative assets, and streamlining of operations to achieve savings that translate into reduced rates to consumers. The Department has suggested that mergers between certain of the utilities could achieve further savings by the elimination of redundancies. Department Position Paper, dated October 5, 1998, at 7-8.

Even if other cost factors and potential savings are not pursued, they must be recognized for their impact on rates. At least a knowing determination must be made whether to consider those costs for reduction or to recognize that all cost savings may not be achievable, electric rates may not be able to be reduced to the fullest extent possible, and Vermont's competitive position may not be restored.

For example, conspicuously absent from the Department's filing and from a listing of assets that may be sold, auctioned, remarketed, or otherwise subject to cost reduction, is the portfolio of so-called regulatory assets carried on the books of most, if not all, utilities in Vermont. Investment in those assets has required the expenditure of funds and the incidence of costs. The Board should consider the extent to which regulatory assets, and the remediation of their costs, should be on the list for evaluation and reduction. Similarly, the costs imposed by the regulatory process itself may need consideration and evaluation by the Board.⁶ At the very least, those costs must be recognized and, if not remediated, factored into the extent to which Vermont will be able to reduce electric energy costs overall.

D. The Board Next Should Determine How Remediation May Be Accomplished.

Once a determination has been made as to what costs may be remediated, the next priority is to determine how remediation may be conducted. As noted during the technical conference, each of the utilities in Vermont is different from the other in a variety of ways; their very legal existence and structure may be so different as to result in different outcomes, even if common steps are taken.⁷ The

6. A current example is a single item at issue in Docket No. 5980, Investigation into the Department of Public Service's proposed Energy Efficiency Plan, in which the Department's bill-back to the utilities of some \$660,000 of costs incurred or to be incurred by the Department is under review. While that individual item may be a small percentage of total power costs, it is but one example of not insignificant dollar amounts that may be involved in regulatory proceedings.

7. Vermont's utilities are municipal, cooperative, and investor owned in form. Each of the differences in legal foundation may require attention lest, again, unintended consequences result from actions taken.

utilities have different supply sources; some have hard assets, others have only paper supply. The service territories of the utilities may be uniquely different in the context of the loads they serve, the shape and configuration of those loads, and the opportunities those loads may present to the marketplace. The utilities each may have different resources and strengths as well as different weaknesses. VMPD was gratified to hear the Chair of the Board indicate that, while there may be common questions and problems, there may not be common solutions. VMPD does not believe that “one size fits all” and it firmly believes that each utility should be enabled an opportunity to conduct its negotiations and remediation efforts in private and individually in order to optimize individual, and thereby presumptively collective, opportunities.

In connection with optimizing opportunities, VMPD is troubled by a particular comment in the Department’s filing. At page 4 of the Department’s Position Paper, it states

While the above market cost reductions would arguably benefit ratepayers and the increased certainty would help utilities and power suppliers, opposing commentators are concerned that consumers will be found today to be obligated to pay for costs out into the future, and then those costs will not actually materialize as planned. This could happen, for example, if market prices turn out to be higher than forecast. . . . Some proponents suggest securitizing only 50-75% of eligible above market costs to hedge against the risk of market prices going up.

It appears that the Department desires to have it both ways; that is, to require the remediation of above market costs yet reserve to ratepayers the potential for gain if the market price for power should rise in the future. To VMPD, the approach appears to be a negative ratchet and one that will have the effect of reducing the opportunity for benefit that may be achieved in remediation. In other words, if a remediation partner is precluded from the opportunity to receive the benefits of a potential upswing in market rates, that partner necessarily will pay less for its initial participation, if it will participate at all. The proposal also smacks of “second guessing” or after-the-fact revisionism, something all vocal participants at the technical conference noted must be avoided. Such regulatory interference imposing

artificial constraints on the remediation effort and market place are inappropriate and will prevent Vermont from achieving some of the benefits it might hope to obtain from remediation. The market will not participate unless it can be assured that its participation will be respected and the result final.⁸

II. THE BOARD SHOULD ESTABLISH A FRAMEWORK TO PERMIT INDIVIDUAL, PRIVATE EFFORTS TO REDUCE COSTS WHILE FACILITATING AN EXPEDITIOUS REVIEW AND CONSIDERATION OF COMMON ISSUES AND POTENTIAL REMEDIATION.

Finally, with regard to the nature of the proceedings, and bearing in mind VMPD's firm belief that remediation efforts, including possible contract revisions and negotiations, must be allowed to be conducted in private, VMPD encourages the Board to establish a framework for proceeding in this docket in a manner that will encourage, not hinder, the free expression and exchange of ideas, points of view, and approaches. If participants believe they cannot speak freely or that they will be punished or repudiated for having said something that might offend the position of some other stakeholder, a significant potential benefit of the present docket will be lost. The dialogue during the initial technical conference appeared to be relatively open and free and VMPD is hopeful that the same atmosphere will prevail during the remainder of the proceedings in Docket 6140.

Those proceedings should be conducted in the most expeditious and least rigid manner possible, while at the same time allowing the Board to develop the record it believes may be necessary to support the actions it may determine to take. VMPD believes that the use of prefiled testimony, exchanges of discovery, and other like efforts common to a contested case will serve only to delay or even stall the process. As with the first technical conference, people should be permitted to present live statements or testimony, for the record, with a free and open exchange of ideas.

8. See, e.g., Consolidated Position Paper of Associated Industries of Vermont, *et al*, dated October 5, 1998, at 15.

CONCLUSION

Because of the serious implications to the entire state of Vermont of the failure of any, but particularly of the largest, of Vermont's utilities, the Board should proceed quickly to afford relief to those utilities presently seeking rate relief, thereby assuring their immediate survival. The Board should establish an expeditious schedule in Docket No. 6140 whereby the issues of utility insolvency and bankruptcy may be considered and evaluated and, most important, whereby the parties may have an opportunity to achieve some solutions to the high rate problems the Board has noted. To the greatest extent practicable, the parties should be given the opportunity to achieve remediation individually, and in private, in order to enable the greatest mix and optimum solution to the situation facing Vermont. As the Board has noted, failure to achieve rate reduction may have severe and lasting consequences for Vermont and its competitive position in what universally has been recognized to be a global economy.

Dated at Rutland, Vermont and respectfully submitted this 15th day of October, 1998.

REIBER, KENLAN, SCHWIEBERT, HALL & FACEY, P.C.

By _____
Edward V. Schwiebert, Esq.
Attorneys for Vermont Marble
Power Division of OMYA, Inc.