STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6867

Investigation into Memorandum of Understanding between Green Mountain Power Corporation and Vermont Department of Public Service	)))	Hearings at Montpelier, Vermont November 10, 12-13, 2003

Special Contract # 691

2004-2006 Economic Development Agreement Between Green Mountain Power Corporation and International Business Machines Corporation	)))

Order entered: 12/22/2003

PRESENT: Michael H. Dworkin, Chairman
David C. Coen, Board Member
John D. Burke, Board member

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I. INTRODUCTION

In these proceedings, the Vermont Public Service Board ("Board") reviews two related agreements involving Green Mountain Power Corporation ("Green Mountain" or the "Company"):

- a Memorandum of Understanding between Green Mountain and the Department of Public Service ("Department") which, in general terms, sets limits on rates for the period 2003–2006; and

- an Economic Development Agreement ("EDA") between Green Mountain and International Business Machines Corporation ("IBM"), and supported by the Department, under which Green Mountain offers reduced rates for the period 2004–2006 for a portion of IBM's load.

The Board, in this Order, approves the Memorandum of Understanding, subject to certain interpretations, finding that it will result in just and reasonable rates during 2003 and 2004 and will likely result in reasonable rates in 2005–2006. In addition, the Board approves the EDA, also subject to conditions enumerated in this Order. The most important of these interpretations and conditions are as follows:

- Affected ratepayers may file a petition pursuant to 30 V.S.A § 226(c) for suspension and/or investigation of Green Mountain's proposed 2005 and 2006 rate increases and the Board may suspend the rate increases in response to such a petition.
- The mechanism for implementing future rate increases proposed, orally and in briefs, by Green Mountain and the Department, is inconsistent with Vermont law and not accepted.[1] Instead, if Green Mountain seeks to increase rates pursuant to the Memorandum of Understanding, Green Mountain shall file tariffs, supported by a cost of service and other information required by Board Rule 2.402. The effective date of such proposed tariff revisions shall be no earlier than January 1, 2005, and January 1, 2006.
- The EDA is approved subject to the condition that IBM shall file annual reports on the number of full-time equivalent employees at all sites receiving power under the EDA, and, if IBM reduces its employee levels by more than 5% below the number employed as of the date of this Order, IBM shall notify the Board and the discounted rate shall terminate as of the month of such employment decrease.
- The EDA may be modified as part of the overall rate design of Green Mountain's rates scheduled to be filed within 60 days of this Order.

Overall, with these conditions and interpretations, we find that the arrangements governed by the Memorandum of Understanding and the EDA are in the public interest. First, the record shows that Green Mountain's ratepayers should benefit from the Memorandum of Understanding, which freezes rates in the near-term, and caps possible rate increases through 2006, without

1. We note that the mechanism for implementing the rate increases was proposed orally and in legal briefs, but was not contained in the Memorandum of Understanding; thus, our rejection of that mechanism does not result in a disapproval of the settlement incorporated in the Memorandum of Understanding.

foregoing their long-standing rights to question these rates at any time. Additionally, ratepayers receive the benefits of having a lower return on Green Mountain's common equity included in rates; possible bill credits, refunds, or early payment of future obligations if Green Mountain exceeds its allowed earnings caps; avoidance of costs of a fully-litigated rate case; and the resolution and proper accounting treatment of certain expenses.

Second, Green Mountain will benefit from the certainty the Memorandum of Understanding provides to its standing in the financial community, the security of predictable rate recovery, and the resolution and rate recovery of certain deferred accounting items. Green Mountain is also protected from substantial harm if extraordinary or unforeseen events occur.

Lastly, IBM, and the broader community that it affects, will benefit from the EDA, which provides a discounted rate for a portion of its electric load. The EDA will help ensure the retention of manufacturing jobs at IBM. At the same time, Green Mountain's other ratepayers are shielded from any possible negative cost effects of the Memorandum of Understanding, in that we find no cross-subsidy of IBM is presented by the EDA. Moreover, if employment at IBM declines, the benefits to IBM provided by the EDA will terminate.

II. Procedural History

The Memorandum of Understanding arises from the Board's 2002 Order in Docket 6545 in which the Board approved the sale of the Vermont Yankee Nuclear Power Station ("Vermont Yankee") to Entergy Nuclear Vermont Yankee, LLC ("Entergy"). The evidence in that case demonstrated that the sale and the simultaneous entry into the Power Purchase Agreement under which the prior owners of Vermont Yankee would purchase power from the plant would provide benefits to the state of Vermont and was, therefore, in the best interest of the state. One of these benefits was a reduction in expected costs for Green Mountain and Central Vermont Public Service Corporation ("Central Vermont"). The Board found, however, that these cost reductions might not benefit ratepayers directly, absent an adjustment of rates. To ensure such benefits for customers, the Board ordered:

> Central Vermont and Green Mountain to each file, on or before April 15, 2003, a cost-of-service study based upon actual 2002 data. The cost of service study will

enable the Board and Department to determine whether an adjustment to rates is justified in 2003 or 2004.[2]

Green Mountain filed its analyses on a timely basis on April 15, 2003. After the Department reviewed Green Mountain's filings, the Department and Green Mountain entered into settlement discussions, which, after several requests by the Department for extensions, resulted in the Memorandum of Understanding that we consider in this Order. Green Mountain and the Department filed the Memorandum of Understanding on July 11, 2003, in Docket 6545, requesting that the Board approve the arrangement. The primary components of the Memorandum of Understanding are as follows:

- During 2003–2006, if Green Mountain's Return on Equity ("ROE") for core utility services exceeds 10.5%, Green Mountain will use the excess earnings to write down regulatory assets or reduce rates.
- Green Mountain will be permitted to increase rates by up to 1.9% in 2005 and up to 0.9% in 2006. Other than those potential rate increases (which will be reduced or eliminated if not substantiated by Green Mountain in future cost of service filings) Green Mountain may not request a rate increase throughout 2003–2006, except in very limited circumstances.
- Effective January, 2005, Green Mountain will begin amortizing ACE (Accounts Correcting for Efficiency) over five years (at a carrying cost equal to Green Mountain's Allowance for Funds Used During Construction rate, which is currently 8.6%) and will amortize costs associated with the Pine Street Barge Canal Superfund site over twenty years (the Pine Street amortization will be without a return).
- Green Mountain will offer to extend the current EDA with IBM for an additional three years.
- Green Mountain will file a proposed rate design within 60 days and a proposed alternative regulation plan within 120 days.

As specified in the Memorandum of Understanding, Green Mountain entered into negotiations with IBM on a special contract to succeed the existing special contract that was due to expire at the end of 2003. Green Mountain filed the resulting agreement on September 29, 2003, requesting Board approval under 30 V.S.A. § 229.

2. Docket 6545, Order of 6/13/02 at 136.

The Board opened an investigation in Docket 6867 to consider the Memorandum of Understanding, convening a Prehearing Conference on September 30, 2003. At that time, based upon statements from the Public Advocate and Green Mountain's counsel and upon the terms and conditions of the EDA, the Board concluded that consideration of the Memorandum of Understanding was inextricably linked to the EDA.[3] Accordingly, the Board directed IBM to be joined as a party to Docket 6867.[4] The Board also granted motions to intervene filed by AARP, Inc., and the Vermont Low Income Advocacy Council ("VLIAC").

The Board held an Oral Argument to consider legal issues raised by the Memorandum of Understanding on November 10, 2003. Evidentiary hearings on the Memorandum of Understanding took place on November 12–13, 2003.[5]

This Order also addresses the EDA between IBM and Green Mountain, because of the close relationship between the EDA and the Memorandum of Understanding. We note, however, that we have not merged the two cases, even though we are issuing an order jointly in both proceedings.

III. Positions of the Parties

A. Parties' Positions

Green Mountain argues that the Board should approve both the Memorandum of Understanding and the IBM EDA. According to Green Mountain, the Memorandum of Understanding will produce just and reasonable rates during the period from 2004-2006. Green Mountain asserts that the rate increases in 2005 and 2006 are supported by the evidence.[6] Implementation of the scheduled rate increases in 2005 and 2006 without suspension will

3. "The MOU is with the Department and the company, Green Mountain, and the provision about IBM is in there because the Department wanted it in there." Tr. 9/30/03 at 11 (Counsel for the Department, James Volz). "The contract [EDA] . . . is linked to the approval of this MOU explicitly." *Id.* at 16 (Green Mountain General Counsel, Donald Rendall). Moreover, ¶ 7(a) of the EDA states: "This Agreement shall be effective only upon approval by the [Board] of this Agreement and the DPS/Green Mountain Memorandum of Understanding dated July 11, 2003, in Board Docket No. 6867 . . ."

4. Prehearing Conference Memorandum, Request for Filing on Legal Issues and Order Joining IBM as a Party, 10/10/03.

5. These hearings also considered issues related to the EDA.

6. We note that neither Green Mountain nor the Department has filed a cost of service analysis for 2005 or 2006.

provide predictable (and capped) rates to customers, while still permitting the Board to investigate and modify Green Mountain's rates. Moreover, Green Mountain states that preapproval of the future rate increases (through approval of a compliance filing to be submitted early in 2004) is consistent the statutory requirements set out in 30 V.S.A. § 225–227. In particular, Green Mountain argues that the implementation of these rate increases through a compliance tariff filing is consistent with past Board precedent.

As to the EDA, Green Mountain maintains that approval of the special contract is in the best interest of Vermont, because it will help mitigate the risk of future loss of IBM load that could adversely affect all other Green Mountain customers. Green Mountain also asserts that the EDA is consistent with the policy considerations that underlie the existing economic development agreements approved by the Board; the EDA encourages IBM to consume more energy than it otherwise would, thus providing increased economic activity and, thereby, a larger contribution to Green Mountain's fixed costs. Green Mountain states that the EDA does not result in a subsidy of IBM by others. Finally, Green Mountain points out that IBM's unique economic status in Vermont presents a compelling reason to approve the EDA.

IBM argues that the evidence justifies approval of the EDA. According to IBM, its Vermont facility faces a significant cost disadvantage compared to other competing plants. IBM states in its brief that it desires to reduce costs in order to maintain production and employment and that the EDA is a necessary component of this cost cutting. IBM also claims that the EDA is consistent with the rationale supporting Board approval of both economic development and interruptible special contracts. IBM maintains that the EDA ensures that there will be no harm to other ratepayers by providing a contribution to fixed costs, while it simultaneously benefits other Green Mountain customers through enhanced economic activity in the Green Mountain service area and Vermont as a whole through new business at the IBM Essex site. Finally, IBM states that the Board should not condition approval of the special contract upon retention of jobs in Vermont.

The Department maintains that the Memorandum of Understanding is in the best interest of Green Mountain's ratepayers and the state, by providing an "aggressive" four-year rate stability plan covering 2003–2006. The resulting rate stability, says the Department, is important to stimulate job growth. At the same time, the Department points to benefits to ratepayers arising from the fact that rates are capped during the period, while the Board retains its ability to investigate Green Mountain's rates at any time. The Department also supports approval of the IBM EDA, which, according to the Department (but not according to Green Mountain or IBM), was "designed to help retain jobs in Vermont by reducing IBM's electric costs." The Department argues that the EDA is generally consistent with the intent and goals of prior Board decisions approving special contracts. In addition, the Department asserts that the EDA should be approved even if it does not meet previously-applied criteria because the incremental load that is granted a special rate might otherwise be lost, which would eliminate the contribution it now provides to fixed costs.

AARP does not oppose approval of the Memorandum of Understanding, itself. Rather, AARP asks the Board to limit its approval to the plain language of the Memorandum of Understanding by which Green Mountain and the Department agree to rate increases in 2005 and 2006. According to AARP, this language binds only Green Mountain and the Department, so that AARP (or other affected ratepayers), would retain the right to request that the Board suspend and investigate the proposed rate increases when Green Mountain files the cost of service required to justify rate increases in these years.[7] In the event the Board concludes that the rate increases for 2005 and 2006 are binding on itself, AARP argues that the Board cannot abrogate AARP's right to seek suspension and investigation under 30 V.S.A. § 226(c). AARP points out that this right is essential, particularly since Green Mountain has filed no information supporting the reasonableness of the rate increases for 2005 and 2006. As to the EDA, AARP argues that Vermont law does not permit approval of such agreements if they do not create new jobs or contain means of verification. Finally, AARP points out that no testimony supports the conclusion that the special contract supports economic development.

VLIAC joins AARP's position on the Memorandum of Understanding. VLIAC argues that the EDA does not meet the criteria that the Board has previously enunciated for economic development agreements. According to VLIAC, the EDA does not limit the rate discount to new

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7. By inference, AARP's argument would mean that approval of the Memorandum of Understanding does not bind the Board to accept the rate increases.

load and does not guarantee the creation of new jobs. Moreover, VLIAC asserts that Green Mountain has not demonstrated that the EDA will cover its marginal costs. As a results, says VLIAC, the EDA is unduly discriminatory. Finally, VLIAC urges the Board not to adopt a new standard for economic development agreements that would permit such arrangements for the purpose of job retention. Such a standard, asserts VLIAC, would be impossible to verify and virtually limitless. VLIAC also stresses that neither of the signatories to the Memorandum of Understanding asks the Board to rely upon job retention as a basis for approval or argues that the contract will preserve jobs, so the Board cannot rely upon job retention as a basis for approving the EDA. VLIAC also suggests that if retention of load at IBM is important as a state policy, that it would be preferable to obtain relief from the general fund rather than from Green Mountain's ratepayers.

B. Public Comments

Several members of the public sent the Board letters expressing opinions on the matters at issue here. All such comments are available in the "public comments" file for this matter at the Public Service Board.

The Commissioner of the State Department of Economic Development, Michael W. Quinn, requested that the Board approve the EDA. Mr. Quinn stated that the EDA reflects current economic conditions facing IBM and will improve IBM's "competitive posture regarding electric rates."

The State Auditor of Accounts, Elizabeth M. Ready, submitted an analysis of Economic Development Agreements approved by the Board in the past. The Auditor observed that the Board's policies for such agreements provided special rates that avoided cross-subsidization and adhered to long-standing principles of cost-based ratemaking. The Auditor also noted that the Board had not required verification of job creation or economic benefits of the EDAs. Finally, the Auditor suggested that greater guidance from the General Assembly could serve to clarify many of the emerging EDA issues, and in so doing, ensure that broad economic development goals are met.

A number of commenters objected to the EDA. In general, these commenters argued that:

- Basic ratepayers should not have to pay more money in order to allow IBM to have lower rates.
- IBM should not be granted a discount, particularly since other ratepayers were paying higher rates than justified in order to avoid bankruptcy by Green Mountain.
- If IBM is going to receive a discount, it should not be provided solely by Green Mountain customers, but by other Vermont consumers as well.

One member of the public raised concerns that Green Mountain's existing rates may be too high. The commenter suggested that recent changes in federal tax law that affected taxation of dividends would tend to indicate that a Return on Equity about 100 basis points lower than otherwise justifiable was reasonable. In addition, the commenter argued that the Board should ensure that the benefits from tax law changes allowing Green Mountain to increase depreciation expense should accrue to ratepayers. Finally, the commenter also suggested that preapproval of future rate increases without cost of service filings was "unusual" and that it would be difficult for the Board to approve them under traditional ratemaking.

IV. Green Mountain/DPS Memorandum of Understanding

A. Findings

1. Cost of Service

1. Under the Memorandum of Understanding, the Department and Green Mountain agree that a change in rates in 2003 and 2004 is not warranted. Exh. GMP-2, ¶ 9.

2. The Memorandum of Understanding provides that if Green Mountain earns a return on common equity in excess of 10.5% from its Vermont electricity utility operations in 2003, 2004, 2005, or 2006, Green Mountain will apply the excess to reduce regulatory assets as agreed to by Green Mountain and the Department and approved by the Board. Green Mountain will file a report on March 1 of each year detailing the core return on equity from the previous calendar year. The Memorandum of Understanding states that the core return on equity shall be calculated

excluding the operations of Green Mountain's unregulated subsidiaries and rental water heater program. Exh GMP-2, ¶ 17.

3. In the past two years, regulatory commissions in other states have allowed returns on equity ranging from 10% to 12.45% for utilities that are vertically integrated (i.e., which own significant generating plants) and from 9.5% to 11.72% for companies that do not own significant generation. Exh. GMP-NRB-1; tr. 11/12/03 at 18–19 (Brock).

4. Based upon analyses of returns on equity using the Discounted Cash Flow, Capital Asset Pricing Model, and Risk Premium methodologies, the Department estimates that the zone of reasonable returns ranges from 9.42%–11.33%. Lesser pf. at 49.

5. The Memorandum of Understanding provides that if Green Mountain exceeds the 10.5% return on common equity in 2005 or 2006, Green Mountain will refund the full amount of the overearnings to customers or reduce regulatory assets. Exh. GMP-2, ¶ 11; Griffin pf. at 4.

6. A high percentage of Green Mountain's load is concentrated in a single customer: IBM. This factor increases investors' perceptions of Green Mountain's risks relative to other electric utilities. Brock pf. at 3.

7. In Docket 6107, Green Mountain agreed to eliminate its seasonal rates and to defer any additional revenues received by Green Mountain in 2001 as a result of this rate design change to be used as income in 2001, 2002, or 2003 for the purpose of assuring that Green Mountain's regulated operations earn the allowed rate of return in each of those years. Green Mountain and the Department agree under the Memorandum of Understanding to further defer this revenue through 2004. Docket 6107, Order of 1/23/01 at 94; exh. GMP-2, ¶ 13; Griffin pf. at 5.

8. The deferred revenues for 2004 are $4.091 million. Exh. GMP-12.

9. Deferral of the Docket 6107 revenues until 2004 will permit Green Mountain to earn its allowed return on equity in 2004. Griffin pf. at 5; Behrns pf. at 7.

10. Green Mountain also expects to earn its allowed rate of return for 2003. Exh. GMP-11.

11. Under the Memorandum of Understanding, the Department agrees to a rate increase for Green Mountain of 1.9% effective 1/1/05 and an additional rate increase of 0.9% effective 1/1/06. Green Mountain will make a cost of service filing with the Board and the Department that supports these rates at least 60 days prior to these dates. Exh. GMP-2, ¶ 11; Griffin pf. at 2, 3.

12. Green Mountain has not yet prepared a cost of service for 2005 or 2006. Tr. 11/12/03 at 41 (Griffin).

13. Under the terms of the Memorandum of Understanding, Green Mountain may not seek any rate increase to take effect prior to January 1, 2007 (except for those specified in the previous finding), except that Green Mountain may seek emergency rate relief or an accounting order in the event of a major storm, interruption of power supply in excess of forecasted outage rates relating to Vermont Yankee, Hydro-Quebec deliveries, Wyman, Stonybrook, or McNeil generating facilities, forced de-rating of the Hydro-Quebec interconnection facilities, or major non-weather-related loss of customer load resulting in revenue loss materially in excess of supply cost savings. Exh. GMP-2, ¶ 10.

2. Deferred Amortizations

14. Under the Memorandum of Understanding, beginning January 1, 2005, Green Mountain will amortize expenses in the account labeled Accounts Correcting for Efficiency over a period of five years, accruing a carrying charge at Green Mountain's Allowance for Funds Used During Construction rate, which is presently 8.6%. At the same time, Green Mountain will amortize expenses in the account labeled "Pine Street" over twenty years, without a return. Exh. GMP-2, ¶ 12; Behrns pf. at 10.

15. As of June 30, 2003, Green Mountain had a regulatory asset of $13 million for Pine Street costs, consisting of $5.7 million in costs incurred to date (net of recoveries from all sources) and approximately $7.3 million in estimated future costs (net of estimated future recoveries). Griffin supp. pf. at 4.

16. As Green Mountain incurs future Pine Street costs, Green Mountain will begin amortization of those costs over twenty years beginning January 1 of the year following their expenditure. Griffin supp. pf. at 7.

17. For the as yet *unrecovered* Pine Street costs, the long amortization period, coupled with the absence of a return, results in approximately a 54%-46% sharing of the costs between shareholders and customers. Griffin pf. at 5; Griffin supp. pf. at 7.

18. On a *total recovery* basis (i.e., considering past costs associated with Pine Street that have already been recovered from ratepayers or incurred by shareholders), ratepayers will ultimately pay 59% of the total costs, while Green Mountain's shareholders will pay 41% of the costs. Exh. GMP-14.

19. Loss of carrying costs for Pine Street does not result in an under-recovery of those costs under Generally Accepted Accounting Procedures ("GAAP"). Griffin supp. pf. at 6–7.

3. Other Terms and Conditions

20. The Memorandum of Understanding provides that any transmission cost savings associated with Pooled Transmission Facility treatment of Highgate and Phase I/II facilities will be applied to reduce regulatory assets to the benefit of Green Mountain's ratepayers as agreed by the Department and approved by the Board. Exh. GMP-2, ¶ 16.

21. Green Mountain agrees under the Memorandum of Understanding to continue accrual-basis accounting of its defined benefit plans through the stay-out period defined in this Memorandum of Understanding. Exh. GMP-2, ¶ 15.

22. Under the Memorandum of Understanding, Green Mountain will file a revised rate design, supported by a fully allocated cost of service study within 60 days of approval of the Memorandum of Understanding. Exh. GMP-2, ¶ 18; Behrns pf. at 7.

23. The Memorandum of Understanding provides that the Department and Green Mountain will jointly develop an alternative regulation plan to be filed within 120 days of approval of the Memorandum of Understanding. Exh. GMP-2, ¶ 20; Behrns pf. at 7.

B. Discussion

1. 2003 and 2004 Rates

The Memorandum of Understanding, according to the Department, represents a "four-year rate stability plan" that is "fair to consumers and Green Mountain's shareholders."[8] Except in limited circumstances, this rate stability plan maintains existing rates for 2003 and 2004, while permitting Green Mountain to raise rates up to a designated rate cap in 2005 and 2006 (although

8. Behrns pf. at 3.

Green Mountain must still justify those rate increases at the time it seeks to implement them). In this section, we consider whether it is reasonable to maintain existing rates through the end of 2004, as proposed by the parties, or whether the Board should open into an investigation into the potential for reducing Green Mountain's existing rates.[9]

As we discussed above, the Memorandum of Understanding arose out of the Board's approval of the sale of Vermont Yankee from Vermont Yankee Nuclear Power Corporation ("VYNPC") (Green Mountain owned 20% of VYNPC) to Entergy. In that case, the Department and Green Mountain maintained that the sale would reduce costs and lower risks. To ensure that the benefits of the sale inured to Green Mountain's ratepayers, the Board directed Green Mountain (and Central Vermont) to file cost of service analyses by April 15, 2003.

Green Mountain submitted the cost of service filings as required. For 2003, Green Mountain's cost of service showed a revenue deficiency of 0.73%; for 2004, Green Mountain filed a cost of service suggesting a 4.46% revenue deficiency.[10] Notwithstanding the asserted revenue deficiency, Green Mountain and the Department agreed to freeze rates throughout these two years. No party opposes the rate freeze in this period and none recommends that the Board lower Green Mountain's rates.

We conclude that the rate freeze for the period 2003 and 2004 is reasonable. Based upon the evidence presented in the record and the terms and conditions in the Memorandum of Understanding (most significantly, the adjustment to the return on equity), Green Mountain's rates over this period are not likely to be in excess of just and reasonable levels.

In the last Green Mountain rate case, the Board established a Return on Equity of 11.25% for Green Mountain.[11] That return on equity also included a provision stating that if Green Mountain's earnings on core utility operations exceed this level in 2001 or 2002, the excess will be returned to ratepayers through reductions to regulatory asset accounts or through other means

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9. In the following section, we address the reasonableness of the rate caps proposed by Green Mountain and the Department, as well as the mechanisms those parties propose for implementing rate increases in 2005 and 2006.

10. Griffin pf. at 2. In fact, however, Green Mountain's actual results through the 3rd quarter of 2003 show that, not only was there no actual revenue deficiency in 2003, but that carry-forward accounts from 2003 could be used to preclude the likelihood of deficiencies in 2004. Exh. GMP-11.

11. Docket 6107, Order of 1/23/01 at 88.

as approved by this Board.[12] Since the time we established the 11.25% Return on Equity years ago, changes in economic conditions, investor expectations, and the returns on risk-free investments have occurred that suggest that a lower Return on Equity is reasonable.

The changes in market conditions and reasonable investor expectations are reflected in returns on equity for other similarly situated electric utilities. The Department's testimony produced estimates for the cost of equity ranging from 9.42% to 11.33% for Green Mountain, although the Department's witness recommended a Return on Equity nearer the high end of this range.[13] Green Mountain presented evidence showing that in the last two years, allowed Return on Equity's for electric utilities have ranged from 10% to 12.45% for utilities that are vertically integrated (i.e., with significant ownership of power generating plants), and from 9.5% to 11.72% for companies that do not own significant amounts of generating plants.[14] Green Mountain has sold off most of its generating assets; however, it has long-term contracts for much of its power. However, decisions by this Board and actions by Green Mountain have reduced the level of risk the Company faces so that Green Mountain's risk exposure is likely to be less than other integrated electric utilities. In particular, Green Mountain faces little, if any, regulatory risk in regard to power supply costs (which represent by far the largest portion of Green Mountain's total expenses). For the vast majority of these costs (purchases from Vermont Yankee, Hydro-Quebec, and small power producers), Green Mountain bears little risk of recovery, due to previous Board rulings.[15] For much of the remaining load, Green Mountain has entered into a contract with

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12. *Id*. at 88–89.

13. Lesser pf. at 49. Mr. Lesser testified that the estimates at the lower end of this range should be given less weight because some of the data upon which they are based may reflect short-term uncertainties rather than long-term trends. *Id*. at 49–50.

14. Exh. GMP-NRB-1. In testimony, Ms. Brock clarified the distinction between deregulated and non-regulated utilities in response to questions:

> CHAIRMAN: In that case doesn't it make this company's risk profile look more like a T&D utility and less like a vertically integrated monopoly utility in terms of its chance of disallowance?
> MS. BROCK: In terms of its chance of disallowance I think that's a fair statement, although the distinction that I draw in my testimony relates to general exposure and the corporate requirements of the T&D company as opposed to an integrated company.

Tr. 11/12/03 at 19 (Brock).

15. Tr 11/12/03 at 17–18 (Brock).

Morgan Stanley to manage power supply that effectively shields the Company.[16] We recognize that Green Mountain still faces substantial risk due to the significant concentration of load in a single customer: IBM.[17] On balance, however, the assurances of rate recovery for the bulk of Green Mountain's costs persuades us that we should not ignore the returns to utilities that have sold off their generating assets when determining a reasonable range for the Return on Equity.[18]

In addition, one measure typically employed by the Board as a "reality check" on other ways of determining a reasonable return on equity is the cost of risk-free investments (typically based upon long-term U.S. Treasury Bonds), plus a risk premium. In the last several years, long-term risk-free rates have declined to almost historic lows.[19] This change in interest rates suggests that a decline in regulated Return on Equity on core utility operations is appropriate.

The Memorandum of Understanding reflects these changes (at least partially) by effectively reducing Green Mountain's targeted Return on Equity to 10.5%.[20] Under the Memorandum of Understanding, if Green Mountain earns a return on common equity on Vermont operations in excess of 10.5% during any of the years from 2003 through 2006, the Company will apply the dollar amount of the excess to reduce "regulatory assets" (i.e., carrying accounts that would otherwise be charged to future ratepayers), or provide a credit to customers.

We find that the Return on Equity appears to be within the range of reasonable returns on equity, albeit at the high end of that range. The changes in market conditions, investor expectations, and low regulatory risks faced by the Company might suggest a lower level. However, within the context of the overall settlement, we find it acceptable.

We also conclude that, even after incorporating the 10.5% Return on Equity set out in the Memorandum of Understanding, the evidence supports the conclusion that Green Mountain's rates during 2003 and 2004 are just and reasonable and that an investigation into existing rate levels is

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16. Tr. 11/12/03 at 18 (Brock).

17. Brock pf. at 3.

18. This conclusion is reinforced by the fact that the low end of the range is consistent with the Department's analysis of the appropriate Return on Equity.

19. Tr. 11/12/03 at 25–26 (Brock).

20. To be precise, the Memorandum of Understanding does not establish a Return on Equity for Green Mountain as have past settlement agreements between Green Mountain and the Department. Rather, it specifies that returns on equity in excess of 10.5% during 2003–2006 shall be used to reduce regulatory assets and/or credited to customers. Exh. GMP-2, ¶ 17. This agreement effectively sets the Return on Equity at 10.5%.

not warranted. First, we note that Green Mountain's initial cost of service filings suggested that Green Mountain expected to under-earn during 2003 and 2004, by as much as 4.64% in the latter period. These filings appear to suggest the need for a rate increase in 2004; however, adjustments in the Memorandum of Understanding, coupled with more recent earnings information, indicate that Green Mountain has a reasonable expectation of meeting its Return on Equity in both years.[21] Specifically, under the Memorandum of Understanding, Green Mountain has agreed to carry over deferred revenues arising from the elimination of seasonal rates until 2004 rather than booking them as revenues in 2003, even though the cost of service filings assumed use of the revenues in 2003. Incorporating the effect of these Docket 6107 revenues (approximately $4 million)[22] and of the 10.5% Return on Equity, Green Mountain's cost of service filing shows that Green Mountain projects a revenue deficiency in 2004 of approximately 1.5%. Nonetheless, Green Mountain maintains that these rate levels will permit Green Mountain to earn its allowed return in 2004. For 2003, Green Mountain has stated that it will earn its allowed return even without the need to recognize deferred revenues.[23] To some degree, this is a result of beneficial weather,[24] but it nonetheless demonstrates that maintaining existing rates will not force Green Mountain to under-earn. At the same time, the evidence presented in the record does not suggest that Green Mountain is likely to collect revenues materially in excess of those needed to achieve its targeted Return on Equity.

Second, the Memorandum of Understanding also provides ratepayers some protection against over-earnings. Under the Memorandum of Understanding, the reduction in the Return on Equity applies not only on a going-forward basis (to 2004–2006), but it also will apply to Green Mountain's earnings for 2003. Moreover, Green Mountain has agreed that, if its Return on Equity exceeds the 10.5% rate, it will use the excess earnings to reduce regulatory assets or provide customer refunds. This condition provides some measure of protection to ratepayers if Green Mountain's actual earnings exceed the levels suggested by the cost of service filings.

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21. Exh. GMP-11.
22. Exh. GMP-12; tr. 11/12/03 (Griffin).
23. Exh. GMP-11; tr. 11/12/03 at 67–68 (Griffin).
24. Tr. 11/12/03 at 66-67 (Griffin).

Third, the Memorandum of Understanding and the rate freeze in 2003–2004 is not predicated upon an excessive deferral of costs. Green Mountain presently has approximately $28.8 million in deferred costs that it will recover by amortizing the costs in rates. Except for costs associated with the Pine Street Barge Canal Superfund site and with ACE, these deferrals are now being amortized and that amortization is reflected in rates. Amortization for these two remaining accounts will begin January 1, 2005.[25]

In general, the Board seeks to minimize the degree to which recovery of expenses is deferred as this tends to have the affect of shifting present costs to future ratepayers so that neither present nor future rates reflect their true costs. However, we find the limited size of the deferrals incorporated into the cost of service as permitted by the Memorandum of Understanding to be reasonable. In particular, the bulk of the deferral is associated with expenses used to address long-standing environmental problems and remedies at the Pine Street site. Green Mountain has agreed not to seek a return on this deferral, so ratepayers are largely unharmed by the deferral.[26]

We thus find that the rate freeze for the period 2003–2004 is reasonable.

2. 2005 and 2006 Rates

In addition to providing for a rate freeze for 2003 and 2004, the Memorandum of Understanding limits rate increases in 2005 and 2006, as follows:

> To enable GMP to meet the requirements of this MOU, in particular the extended stay-out provision in paragraph 10 and the cap on earnings in paragraph 19, the DPS agrees to a rate increase of 1.9% effective 1/1/05 and an additional rate increase of 0.9% effective 1/1/06. Before each of these increases may go into effect, GMP must make cost of service filings with the DPS and Public Service Board 60 days prior to each rate increase that support the rate increase.[27]

The Memorandum of Understanding further provides that, except for the 1.9% and 0.9% rate increases in 2005 and 2006, respectively, and except for the "safety-valve" provisions of

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25. Exh. GMP-2, ¶ 12.

26. *Id*. There are some negative elements to shifting costs to future years even without accruals upon those costs; however, in this context and for the amounts of the Pine Street deferrals, those negative elements are small and acceptable as part of an overall resolution of the Pine Street issue. In fact, the multi-year nature of the agreement offers some protection against unduly shifting earnings and deferrals from year-to-year.

27. Exh. GMP-2 ¶ 11.

Paragraph 10 (see finding 13), "Green Mountain Power agrees not to seek any other rate increase effective prior to January 1, 2007 (i.e., no filing prior to 4/15/06)."[28]

These provisions of the Memorandum of Understanding constitute *caps* on possible Green Mountain rate increases through the end of 2006. Green Mountain and the Department have committed that if the supporting costs of service indicate rate increases smaller than the 1.9% and 0.9%, then the increases would be limited to the smaller amounts.[29]

Our consideration of the 2005 and 2006 rate provisions in the Memorandum of Understanding begins with a review of the statutory requirements for utility rate increases. The Vermont legislature has provided that, except for temporary rate increases, a utility may not increase its rates "without strictly complying with the notice and filing requirements set forth in [30 V.S.A. § 225]," which include the requirement that all proposed rate changes be filed forty-five days in advance of their effective date.[30] When a utility files a proposed rate increase, it must provide specific information set out in Board Rule 2.402,[31] which is designed to implement the Legislature's command. *After* that information is filed, the Department is charged with investigating the justness and reasonableness of the increase. The Department then reports to the Board, at least fifteen days prior to the effective date of the proposed change in rate schedule, its recommendation as to whether the rate increase should be accepted. If the Department opposes the rate change, the Board is required to hear evidence and decide the matter. If the Department recommends approval of the increase, the Board may nonetheless suspend and investigate the

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28. Exh. GMP-2 ¶ 10.

29. Green Mountain and Department Joint Response to Board Questions, filed October 30, 2003 ("Joint Response") at 2; Griffin pf. at 3.

30. 30 V.S.A. § 225(a). Note, however, that for good cause the Board can shorten the forty-five day period if the Department so consents; also, proposed rate *decreases* can be filed on only five days' notice.

31. Rule 2.402 reads, in relevant part:

> (A) . . . In order to enable the Board to determine whether new rates proposed by any utility should be further investigated or suspended, all rate filings shall contain complete and substantial justification for the proposed change, including the following: (1) detailed calculation of cost of service; (2) detailed calculation of cost of capital; (3) rate base calculation; (4) the effect of the filing on annual operating revenues; (5) projected construction expenditures by category for each of the following two years; (6) for electric utilities, a detailed statement of purchased power and production costs . . .
>
> (B) . . . Where a request for a change in rates proposes or utilizes any change in the ratemaking methodology or principles approved or utilized by the Board in the most recent rate order affecting the same utility, such change shall be clearly identified, and a statement of the reasons for such change shall be given.

matter. In addition, and importantly for today's case, when the Department does not oppose a rate increase, five persons adversely affected by the increase (or any one such person if fewer than five are adversely affected) may petition the Board to investigate the increase. The ratepayers' "petition shall be filed at least seven days before the date the rates become effective," and the statute explicitly says that "[t]he board may suspend the rates as a result of the petition."[32] If the Board suspends the rate increase, it must provide six days' notice to the utility.[33]

In *In re Allied Power and Light Company*, 132 Vt. 354 (1974), the Vermont Supreme Court has addressed the issue of whether the Board can, in essence, waive in advance its ability to suspend a proposed rate increase, or similarly waive the ability of affected ratepayers to petition for an investigation. In *Allied*, the Board had authorized electric utilities to include a power and fuel adjustment clause in their rate schedules. Such a clause would have allowed a utility to adjust customer bills automatically (i.e., without further Board approval) in accordance with increases or decreases in the utility's costs of purchased power or fuel. On appeal, the Vermont Supreme Court determined that such automatic adjustments to utility rates violate the statutory requirements of Title 30 for advance notice of rate changes. 132 Vt. at 363.

The Supreme Court's discussion of the extent to which utilities, and the Board, are constrained by those statutory requirements is vital to our review of the Memorandum of Understanding in the current proceeding:

> Under Section 226, the filing of this notice [of a rate change] gives both the Board and certain persons adversely affected by the change the option of initiating procedures leading to an investigation. *Although the Board may forego, in its own behalf, beginning an investigation, it cannot cut off the statutory right of affected persons to apply to the Board by petition for an investigation.*

132 Vt. at 362 (emphasis added).

Given the Court's statement in *Allied* that the Board might forego its ability to suspend rate changes but could not preclude the statutory right of affected ratepayers to petition the Board for investigation, we conclude that we could approve the Memorandum of Understanding only on an

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32. 30 V.S.A. § 226(c).

33. 30 V.S.A. § 226(a). Note that this statutory provision allows suspension of rate changes only for investor-owned utilities (such as Green Mountain), and not for municipal or cooperative utilities.

understanding consistent with the Supreme Court's express language: we could, if warranted, waive our ability to suspend the 2005 and 2006 rate increases, but we could *not* limit the statutory right of Green Mountain ratepayers to petition us, pursuant to 30 V.S.A. § 226(c), for suspension and investigation of the rate increases. Nor could we preclude our ability to suspend and investigate the rate increases in response to a ratepayer petition, for otherwise the ratepayers' statutory rights to petition for suspension would effectively be "cut off," which is exactly what our Supreme Court has prohibited.

Having determined the limits of our authority to preapprove rate increases for 2005 and 2006, we now turn to a consideration of whether we can, and should, issue the rate approvals that are contemplated by the Memorandum of Understanding.

Green Mountain and the Department acknowledge that the Memorandum of Understanding itself does not represent a tariff filing under 30 V.S.A. § 225, and that consequently Green Mountain must file tariff revisions, in accordance with the requirements of that statute, to implement the 2005 and 2006 rate increases.[34] Green Mountain and the Department further acknowledge that Board approval of the Memorandum of Understanding would not preclude the Board from suspending those tariff revisions pursuant to 30 V.S.A. § 226(a), nor would it preclude Board suspension in response to a request filed by ratepayers pursuant to 30 V.S.A. § 226(c).[35] Notwithstanding their acceptance of the Board's ability to suspend the tariff revisions, Green Mountain and the Department both express the strong expectation that the Board would not suspend the tariffs if it had approved the Memorandum of Understanding, because they "contemplate . . . that the Board would resolve any substantive issues regarding the compliance tariff filing as part of the Board's consideration of the Memorandum of

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34. Joint Response at 2.

35. Joint Response at 4–5. Similarly, at oral argument, counsel for Green Mountain agreed that Board approval of the Memorandum of Understanding would not preclude the Board from suspending the rate increases:

> THE CHAIRMAN: But I think we began earlier with your saying although you hoped it wouldn't, you see no barrier to it being suspended.
>
> MR. ZAMORE: That's absolutely correct. That in order to assure compliance that the implementation of the MOU complies with sections 225 to 227 as interpreted by the Allied case, that compliance tariff must be subject to suspension.

Tr. 11/10/03 at 29 (emphasis added).

Understanding."[36] It is unclear to us how such a resolution of substantive issues regarding rates for 2005 and 2006 is feasible in the absence of any cost-of-service analysis for those years.

Indeed, our own rules mandate that any utility rate filing include "complete and substantial justification for the proposed [rate] change," which must include a "detailed calculation of cost of service."[37] Before we can approve the 2005 and 2006 rate provisions of the Memorandum of Understanding, we must ensure their consistency with these requirements of the Board's Rules.

The commitment by Green Mountain to file a cost of service that supports the 2005 and 2006 rate increases is an essential component of the Memorandum of Understanding's future rate provisions, for without it we could not approve those provisions. As noted in the findings above, there is no evidence in the record before us on which we can determine the justness and reasonableness of a 1.9% rate increase in 2005 or a 0.9% increase in 2006. Green Mountain's argument [38] that those increases somehow represent deferrals of increases otherwise due in 2003 or 2004 is simply inconsistent with either statutory procedures or substantive analysis of the earnings data in the record overall. Notwithstanding this insufficiency of the current record, we conclude that we can approve the Memorandum of Understanding, including its provisions for rate increases in 2005 and 2006, based on Green Mountain's commitment to file the necessary supporting information, combined with Green Mountain's and the Department's acknowledgment that ratepayers could petition us to suspend, and that we ourselves *could* suspend, the rate increases when filed. Taken as a whole, the provisions of the Memorandum of Understanding, read in light of the representations of Green Mountain and the Department, provide assurances that the statutory procedural requirements will be met and that there will be an adequate future opportunity to determine whether the actual rate increases will be cost-justified, both before they are approved *and* after a relevant cost-of-service analysis is filed.

Based on the foregoing considerations, and in light of the overall benefits of the Memorandum of Understanding for ratepayers, we conclude that we can approve the future rate provisions set forth in Paragraph 11 of the Memorandum of Understanding. So that there is no

36. Joint Response at 4.

37. Board Rule 2.402(A).

38. GMP Reply Brief at 3.

misunderstanding, our approval of the future rate provisions encompasses the following, and no more:

1. Green Mountain may file a proposed rate increase of no more than 1.9% to take effect on a service-rendered basis January 1, 2005;

2. Green Mountain's proposed rate increase for January 1, 2005, must be supported by a cost of service that Green Mountain must file at least 60 days prior to January 1, 2005;

3. The Board will not suspend Green Mountain's proposed January 1, 2005, rate increase if the increase is supported by the cost of service, but the Board will remain free to open an investigation into the rate increase;

4. Pursuant to 30 V.S.A. § 226(c), affected Green Mountain ratepayers may file a petition with the Board requesting an investigation into Green Mountain's proposed January 1, 2005, rate increase, and in response to the ratepayer petition the Board may suspend the rate increase;

5. Green Mountain may file a proposed rate increase of no more than 0.9% to take effect on a service-rendered basis January 1, 2006;

6. Green Mountain's proposed rate increase for January 1, 2006, must be supported by a cost of service that Green Mountain must file at least 60 days prior to January 1, 2006;

7. The Board will not suspend Green Mountain's proposed January 1, 2006, rate increase if the increase is supported by the cost of service, but the Board will remain free to open an investigation into the rate increase;

8. Pursuant to 30 V.S.A. § 226(c), affected Green Mountain ratepayers may file a petition with the Board requesting an investigation into Green Mountain's proposed January 1, 2006, rate increase, and in response to the ratepayer petition the Board may suspend the rate increase; and

9. Finally, although the parties have been silent as to the possibility of a rate *decrease* if warranted by Green Mountain's cost-of-service filings, we assume that Green Mountain would file to reduce its rates if the cost of service indicated a material reduction to be warranted.[39]

We must next address one final and significant aspect of Green Mountain's implementation of the 2005 and 2006 rate increases: the deadline for a ratepayer petition seeking investigation of the increases, and the related deadline for Board suspension of the increases.

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39. The Board reserves its authority to open an investigation into a possible rate reduction based on our own review of the cost of service, or if we are so persuaded by the request of affected persons to open an investigation.

Green Mountain and the Department have proposed a specific process for Green Mountain to follow for filing the tariff revisions to implement the 2005 and 2006 rate increases. (This process is not part of the Memorandum of Understanding, but instead was described in response to Board questions about the Memorandum of Understanding.) According to Green Mountain and the Department, immediately upon Board approval of the Memorandum of Understanding, Green Mountain would file a "compliance tariff filing" that would "be subject to the requirements of 30 V.S.A. §§ 225 – 227 and Board Rule 2.401."[40] This compliance tariff filing would indicate that it takes effect on a service-rendered basis in February, 2004 (presumably, the specific date would be forty-five days after the filing date), but would also provide that the maximum 1.9% rate increase would only apply starting with the first billing cycle in January, 2005, with the maximum 0.9% increase applying with the first billing cycle in January, 2006. The compliance tariff further provides that the actual levels of the 2005 and 2006 rate increases would be determined by the cost of service filings that would be filed on or before the November 2 preceding the increased rates.[41]

Green Mountain and the Department contend that the statutory deadlines for Board suspension and ratepayer petitions would be calculated based on whatever effective date Green Mountain might choose to specify in its proposed compliance tariff.[42] As a result, a ratepayer petition or Board suspension would need to occur seven and six days' prior to that nominal effective date (in February, 2004), respectively, even though customers' rates would not change until January 1, 2005, and January 1, 2006.

Green Mountain and the Department assert that their proposed compliance tariff procedure, with a nominal effective date that is earlier than the dates the increased rates would actually be implemented, is consistent with past Board practice. The two parties point, in particular, to the Board's Order in Docket No. 5396, in which as part of the approval of the acquisition (and merger) of Allied Power & Light Company by Central Vermont Public Service Corporation, the Board approved a five-year phase-out of the differential between Allied's (lower)

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40. Joint Response at 3.

41. Joint Response at Attachment A.

42. Joint Response at 3–5; Green Mountain Brief at 6–9; Green Mountain Reply Brief at 4–6; DPS Brief at 4; tr. 12/10/03 at 7–8, 15–26 (Zamore, counsel for GMP), 36–37, 44–46 (Volz, counsel for the Department).

rates and CVPS's rates. The Board's Order in that Docket required CVPS to file compliance tariffs to implement the multiple, phased increases for the former Allied customers.

We conclude that Green Mountain and the Department's proposal is neither supported by our precedent from the *Allied-CVPS* case nor, more importantly, consistent with statutory requirements. In CVPS's acquisition of Allied, the Board concluded, based on the evidentiary record, that absent the acquisition, over the ensuing five-year period Allied's rates would "likely rise to a level near to or in excess of Central Vermont's."[43] In contrast, the record in the current proceeding does not support a conclusion at this time that Green Mountain's 2005 and 2006 rate increases are just and reasonable.

More fundamentally, we conclude that Green Mountain and the Department's proposed use of a compliance tariff filing with a nominal effective date, whose sole apparent purpose is to prevent a suspension of the rate increases at times closer to their actual proposed implementation dates, cannot in fact accomplish that purpose. The Vermont Supreme Court has previously addressed the issue of what the "effective date" is for rate changes for purposes of the deadlines set forth in 30 V.S.A. § 227(a). In *In re Tariff Filing of Quechee Water Company*, 159 Vt. 122 (1992), the Court considered the claim by Quechee Water Company ("Quechee") that its rate request had gone into effect because, the water company claimed, the Board failed to rule on the request within the seven-month deadline established in 30 V.S.A. § 227(a).[44] Quechee had filed a proposed rate increase on July 25, 1990, which the Board suspended. The Board issued its final order on the rate request on May 1, 1991. Quechee argued that the "effective date" of its rate filing was forty-five days after the July 25 filing date, that the Board had failed to issue its order

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43. Docket No. 5396, Order of 7/18/90 at 23.

44. Section 227(a), as in effect at the time of the Court's decision in *Allied*, provided:

> If the board orders that a change shall not go into effect until final determination of the proceedings, it shall proceed to hear the matter as promptly as possible and *shall make its determination within seven months from the date that the change otherwise would have gone into effect*. If the board fails to make its determination within such time, the changed rate schedules filed by the company shall become effective and final.

(Emphasis added.) This section has since been amended to address the applicable deadline for a Board order *if* a company files for a rate design change while it has a rate case pending (a circumstance that is not present here). When no rate design has been filed, the operative provisions of Section 227(a) are the same as those that the Court addressed in *Allied*.

within seven months of that effective date, and that consequently its rate increase automatically became effective as a matter of law.

The Supreme Court rejected Quechee's claim. The Court noted that, due to Quechee's quarterly billing, its customers would not have been subjected to the proposed rate increase until October 1, 1990, and as such the seven-month period ended on May 1, 1991. In so holding, the Court stated:

> If a utility chooses to file a rate request more than forty-five days before the change would actually go into effect, *that is, before the rates would be priced at the new, higher rate, the seven-month period does not begin to run until the later date*.[45]

As the Court's holding in *Quechee* makes clear, the statutory deadlines for action on a utility's proposed rate increase are set by the date that ratepayers would actually pay the proposed rates. In the current case, those dates are January 1, 2005, and January 1, 2006. Accordingly, we conclude that the deadlines for ratepayer petitions seeking a Board investigation into Green Mountain's 2005 and 2006 rate increases are seven days prior to the dates on which "the rates would be priced at the new, higher rate"[46] and the deadlines for Board suspension are six days prior to those dates.

3. Other Terms and Conditions

a. Future Filings

The Memorandum of Understanding provides that Green Mountain will make two additional filings with the Board. Specifically, Green Mountain agrees to file, within 60 days of approval of the Memorandum of Understanding, to petition the Board for approval of a rate redesign. That filing will be accompanied by a fully allocated cost of service study.[47] In addition, Green Mountain and the Department agree to work cooperatively to develop an alternative regulation plan for which Green Mountain will seek approval under 30 V.S.A. § 218d. These parties have set a target date for filing the plan as 120 days after Board approval of the

45. 159 Vt. at 124 (emphasis added).
46. *Quechee*, 159 Vt. at 124.
47. Exh. GMP-2, ¶ 18.

Memorandum of Understanding. In addition, if the Board approves the alternative regulation plan, the Memorandum of Understanding provides that its provisions will terminate.

We find both of these provisions reasonable and accept them as part of the Memorandum of Understanding.

b. Resolution of Pine Street Expenses

The recovery of costs associated with the Pine Street Barge Canal Superfund site has been an issue for a number of years. To date, the Board has allowed Green Mountain to recover over $6 million from ratepayers for payment of such costs.[48] As we described in our Order of Docket 5983, we allowed these cost recoveries for litigation and remediation efforts "considering the large potential costs faced by Green Mountain."[49] However, we also observed at that time that "[i]n no proceeding has a party litigated the fundamental issue of who should ultimately pay for the costs arising from the Pine Street site."[50] We also pointed out that:

> We cannot finally dispose of the question of the sharing of the costs of the remediation between Green Mountain shareholders and customers. Because of the relative sizes of the total expense and the total recoveries, it is not necessary to now reach the question; in addition, we would prefer to judge the relative equities when the final net costs, and their bases, are known. However, we agree with the arguments put forward by the DPS and IBM to support the sharing of the final net cost.[51]

In this proceeding, the Department and Green Mountain have proposed, in essence, a final resolution of Pine Street. As discussed above, the Memorandum of Understanding requires Green Mountain to begin amortizing the remaining Pine Street costs effective January 1, 2005.[52] These parties propose to amortize the costs over 20 years, without a carrying cost. According to Green Mountain, the effect of the 20-year amortization without return is to share the recovery of these as-yet-unrecovered costs between shareholders and ratepayers, with ratepayers paying 46% of the

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48. Exh. GMP-14.

49. Docket 5983, Order of 2/27/98 at 68.

50. *Id*.

51. *Id*.

52. Future Pine Street costs would also be amortized over 20 years, without a return, commencing January 1 of the year following their expenditure. Griffin supp. pf. at 7.

unamortized amounts.[53] In fact, if we consider the total cost recovery associated with Pine Street (including past costs that have already been recovered from ratepayers or incurred by shareholders), ratepayers will ultimately pay 59% of the total costs, while Green Mountain's shareholders will pay 41% of the costs.[54]

We find that this resolution of Pine Street is, as part of the overall settlement of issues, reasonable. For the reasons that we discussed in Docket 5983, Pine Street litigation and remediation costs should not be paid for exclusively by either Green Mountain's ratepayers or its shareholders. The Memorandum of Understanding achieves that result in a manner that falls within the zone of reason for fairly allocating the cost recovery between ratepayers and shareholders.

c. Cost of Service Issues

Under the Memorandum of Understanding, Green Mountain and the Department also agree to two accounting adjustments that have rate impacts. First, the Memorandum of Understanding provides that any transmission cost savings associated with Pooled Transmission Facility treatment of Highgate and Phase I/II facilities will be applied to reduce regulatory assets to the benefit of Green Mountain's ratepayers as agreed by the Department and approved by the Board.[55] Second, Green Mountain agrees to continue accrual-basis accounting of its defined benefit plans through the end of 2006.[56]

We accept both of these agreements between the Department and Green Mountain.

V. Green Mountain/IBM Economic Development Agreement

A. Findings

24. On September 30, 2003, Green Mountain filed a petition seeking approval, pursuant to 30 V.S.A. § 229, of an economic development agreement ("EDA") with IBM. The proposed

53. Griffin pf. at 5; Griffin supp. pf. at 7. Green Mountain states that it presently has approximately $5.5 million in unrecovered costs (as of September 30, 2003) and estimates future costs as $7.3 million. Exh. GMP-14.

54. Exh. GMP-14.

55. Exh. GMP-2, ¶ 16.

56. Exh. GMP-2, ¶ 15.

EDA, or special contract, is for a term of three years, beginning on January 1, 2004.[57] Exh. GMP-6.

25. Approval of the EDA is expressly conditioned on approval of the Memorandum of Understanding. The inverse is not true, however, as the Memorandum of Understanding only requires that Green Mountain offer to extend the existing EDA for an additional three years. Exh. GMP-2, ¶ 14; exh. GMP-6, Section 7(a).

26. Under the EDA, IBM is eligible to receive a discounted rate for what are called "incremental sales" of electric energy in excess of a scheduled "Baseload Amount" in each year of the agreement.[58] Brown pf. at 2.

27. The Baseload Amount is 404,331,688 kWh, and was derived from IBM's total electric usage for 1996. It is calculated, for EDA purposes, through comparisons to the monthly amount of power drawn by IBM through each of two metering points in 1996. Exh. GMP-6 at 2; Brown pf. at 3.

28. Under the EDA, for electric energy usage greater than that used in corresponding months in 1996 (the Baseload Amount), IBM will pay an "Incremental Sales Price" equal to Green Mountain's marginal cost of providing such energy to IBM, plus a margin of $10/MWh (1¢/kWh) in contribution to Green Mountain's fixed costs. Brown pf. at 2-3, 7.

29. The electric load eligible for the Incremental Sales Price under the EDA could be at risk, if IBM were to reduce its production or other commitments to its Essex Junction facilities. *Id.* at 5-6; Aldrich 11/10/03 pf. at 3.

30. The EDA does not require other customer classes to subsidize IBM's electricity costs, because the Incremental Sales Price reflects current market prices and are therefore sufficient to cover Green Mountain's marginal cost of energy and capacity to serve IBM's load. Brown pf. at 7.

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57. The EDA can be renewed for 2005 and 2006, provided IBM provides notice to Green Mountain by November 30th of the preceding year. We condition our approval upon such notice being given to the Department and the Board as well. Further, we note that any subsequent agreement (after 2006) is, by the terms of the EDA, subject to Board approval, and if requested, it will be considered independently and on its own merits.

58. The EDA uses the word "incremental" as a term-of-art, referring to demand greater than that used by IBM in each corresponding month in 1996. Unlike in past EDAs, the term is *not* used to describe an increment beyond current or recent usage.

31. The Incremental Sales Price includes $10/MWh (1¢/kWh), above Green Mountain's estimated marginal cost,[59] which provides a contribution to Green Mountain's fixed costs. *Id.* at 3; exh. GMP-6, Section 2(a).

B. Discussion

In addition to its rate and accounting provisions, the Memorandum of Understanding also required Green Mountain to offer to extend the existing EDA with IBM for three years, on the same terms and conditions. After discussions, Green Mountain and IBM agreed to a new three-year EDA with somewhat similar and somewhat changed terms and conditions, which they now ask the Board to approve.[60] One significant difference exists between the proposed EDA and the past arrangements: whereas previous special contracts have applied only to incremental (i.e., increased) sales, the proposed EDA applies to a portion of IBM's existing load (IBM, Green Mountain, and the Department all refer to this power as "incremental", even though it is in no sense additional in the way a standard dictionary definition of "incremental" would suggest). The Department supports approval of the EDA.

The proposed EDA provides a discount, as determined by Green Mountain's projected marginal cost of energy,[61] for the power IBM uses in excess of what the EDA defines as the "Baseload Amount." Green Mountain, IBM, and the Department estimate that the total amount of incremental energy should not exceed 15% of IBM's total usage in 2004. They further estimate that the dollar value of the discount is unlikely to exceed $450,000, or 2% of IBM's total electric bill.[62]

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59. The EDA defines the components of Green Mountain's Marginal Costs in detail on p. 3, Section 1(h).

60. IBM has received a special contract rate for some portion of its power since 1998, under two EDAs previously approved by this Board. Each of the contracts (although not necessarily the amendments) was justified by reference to increases in then-current demand and expectations of job growth. Special Contract #294, approved October 7, 1997, as amended on May 21, 1998; and Special Contract #433, approved December 8, 2000, and amended on December 18, 2002.

61. Under the Memorandum of Understanding, IBM can, and (for 2004) has elected to, lock-in the Incremental Sales Price for each year of the EDA. There exists, therefore, the possibility that if Green Mountain's projections are too low, the Incremental Sales Price could exceed Green Mountain's marginal cost. In other words, the EDA provides IBM with a financial "hedge" of some value.

62. Tr. 11/12/03 at 127 (Brown). Recent energy usage at IBM strongly suggests that the discount could apply to significantly more than 15% of IBM's load, with a corresponding increase in the dollar value of the savings to IBM.

As a general principle, utilities are required to charge all customers the rates set out in their tariffs, unless they receive approval by the Board for a special contract. Specifically, 30 V.S.A. § 229 prohibits utilities from "furnishing or rendering of any special product or special service not provided for or covered" in tariffs without approval of the Board.

Special contracts, including economic development agreements such as that before us here, must also meet the strictures of § 229, as the Board has previously articulated. While the Board has broad discretion in review of special contracts, our review must consider three statutory factors. First, rates must be set out in tariffs unless a company demonstrates the basis for deviation from those rates under § 229. Second, non-tariffed rates must be contributory, i.e., greater than short-term incremental costs associated with servicing that load. This factor derives from the requirement of Section 218(a) that rates be just and reasonable (which the Board has routinely interpreted to mean cost-based). Third, consistent with 30 V.S.A. § 218(a), the rates must not be unjustly discriminatory. This ensures that other electric ratepayers are not treated unfairly. These statutory requirements are discussed in turn below.

1. Standards for Special Rates under Section 229

The Board has previously approved three primary types of electric service special contracts in Vermont: (1) interruptible; (2) generation displacement; and (3) economic development. Interruptible contracts and generation displacement contracts both allow price breaks for customers in exchange for commitments to shift power demands either (1) to off-peak times (where the utility also saves money in its cost of supplying power), in the case of interruptible contracts, or (2) to operating customer-owned generating assets at times favorable to the utility (for generation displacement agreements).[63] The present proposal is for neither an interruptible special contract nor a generation displacement one. Rather, it is presented as an economic development agreement.

63. Interruptible contracts enable the utility to manage its load at times of probable system (or transmission or distribution system) peak demand. In return for shutting down or reducing its load when certain system load conditions occur (which reduces the costs of power for the utility), and when requested by the utility (or in certain contracts, the Independent System Operator - New England), an interruptible special contract customer is paid for its interruptions through various means, such as discounted prices, bill credits, or reimbursements. Both the utility and the customer benefit from these arrangements.

Economic development agreements differ from other special contracts in that the justification for receiving a certain amount of its electricity at a discounted rate is not the fact that it reflects direct or immediate reductions in *costs* borne by the utility. Indeed, economic development agreements have encouraged the expansion — or in one case, the retention[64] — of the customer's electrical load, with attendant increased purchase and delivery cost. However, EDA's focus on other overall economic benefits derived for the utility, its customers, and the broader affected economic interests as a whole. The theory is that the utility and its ratepayers benefit directly from the increased load, not because of reduced costs, but rather because of otherwise unexpected *income* which, if properly priced, outweighs the extra cost of providing the power and provides an additional contribution to the utility's fixed costs, thereby reducing (in theory) what *other* customers must contribute.

In 1992, both of Vermont's largest electric utilities established economic development programs that set out the criteria under which the utilities would make available discounted rates. The EDA approved by the Board that year established the criteria under which Central Vermont could provide discounts to businesses participating in its Economic Development Incentive Program.[65] Also in 1992, the Board approved the first EDA for a customer enrolled in Green Mountain's Jobs Incentive Rate Program, and established the standards that would apply to future agreements.[66] The Board has used the criteria set out in these Dockets to determine customer eligibility for all subsequently approved EDAs. We also have applied these criteria flexibly over time to take into account changing economic circumstances, although we have required that contracts be consistent with the principles underlying the economic development programs. For Green Mountain's program, we approved the following criteria:

- The customer must be a primary (manufacturing or equivalent) employer.
- Only new load (at new or existing customers) qualifies.
- The new load must produce a certified number of jobs.

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64. Special Contract #243, Order of 1/31/97. The Order stated: "The retention of the Vermont Composites facility will result in the retention of 80 jobs, and in the absence of the contract, Vermont Composites would not have retained its Bennington facilities."

65. Docket 5569, Order of 7/31/92 at 17.

66. Docket 5604, Order of 10/28/92 at 6.

- Each customer must participate in Green Mountain's energy efficiency programs.
- The customer must be located in an area with adequate transmission and distribution services.[67]

The instant EDA, for which IBM and Green Mountain are seeking approval, does not meet the specific historical criteria (and we cannot accept the Department's assertion that it does[68]). Unlike previous special contracts, IBM makes no assertions that the EDA will foster job growth.[69] Rather, IBM and the Department base their support of the EDA on long-term economic importance of IBM to the overall health of the region (including, in large measure, most of Green Mountain's ratepayers) and the state as a whole.[70] Those parties also point to the fact that the same factors that make job growth beneficial would also apply to job retention.

As reflected in our existing criteria for EDAs, the Board considers promoting employment in Vermont to be an important value. In that context, and as a first step, we are now willing to consider job growth and job retention equivalent as a goal: both provide employment that would not otherwise exist. Therefore, it is appropriate to modify the Board's policy here to recognize the benefits of job retention in the manufacturing sector, but within the bounds of the condition set out below. In particular, the consideration of job retention as a goal requires the development of a means to assure that Vermont receives the promised benefits (i.e., retained employment). This is necessary because, in job retention arrangements, the customer receives an immediate benefit, while verification of the benefits to the state from the contract become difficult; by contrast, in load growth special contracts, the customer derives no benefit unless the load growth appears.

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67. Docket 5604, Order of 10/28/92 at 4.

68. The Department recommended that the Board approve the IBM EDA without hearing or investigation. The Department explicitly asserted that the EDA appeared to satisfy the requirements of Green Mountain's *Jobs* Incentive Rate Program as approved by the Board in Docket 5604, Order of 10/28/92. Letter dated October 21, 2003, from the Department to Susan M. Hudson (emphasis added).

69. The two predecessor contracts (#294 and #433) between Green Mountain and IBM made clear that : "WHEREAS, the foregoing expansion *is expected to result in additional manufacturing jobs being created in Vermont*: (Economic Development Agreement between Green Mountain and IBM (Special Contract #294), dated as of October 7, 1997); and "The Department's letter points out that this contract will facilitate the continuation of the expansion program IBM began in 1995, *making future job growth more likely* . . ." (Special Contract Approval Re: S.C. #433, December 8, 2000) (emphasis added).

70. The State of Vermont Agency of Commerce & Community Development requested that the Board approve the IBM EDA, stating that it reflects current economic conditions facing IBM and will improve IBM's "competitive posture regarding electric rates." Letter from Michael W. Quinn to Susan M. Hudson, dated October 29, 2003. *See* also footnotes 7, 68.

In this proceeding, the parties have persuaded us that retaining employment at IBM — the largest private employer in the state — is a valid goal that justifies a non-tariffed rate for the load described in the EDA. We emphasize that this determination is based upon the specific circumstances presented here, including IBM's unique standing in the Vermont economy. The expansion of the economic development special contracts to job retention, however, points to the need to have clearer standards defining the eligibility for such discounts that are known to customers generally. As we describe below, our strong preference is that these standards be incorporated in the utilities' tariffs, rather than in case-by-case special contracts.

For the above reasons, we conclude that Section 229's purposes have been met. Special contracts also must meet core requirements of Vermont law, which we have described previously:

> A fixed and central tenet of the pricing of utility services is that prices be non-discriminatory. All eligible consumers are entitled to the same prices for the same services, provided under similar cost conditions. A second objective . . . is that they be sufficient to cover the reasonable and prudent costs incurred to provide service. Satisfaction of these fundamental pricing rules is prerequisite to a Board finding, pursuant to 30 V.S.A. § 218, that a utility's rates are just and reasonable. Vermont regulatory case law has long recognized this.[71]

2. Contribution to Fixed Costs

The second major requirement affecting special contracts is Section 218(a) of Title 30, which requires that rates be just and reasonable. Consistent with traditional ratemaking principles, the Board has concluded that rates, including special contract rates, must be cost-based. To implement this statutory mandate for special contracts, we have required that they cover their costs and provide a measure of "system benefits" in addition to providing discounted rates to the special contract customer alone.[72] Such "system benefits" result from the special contract customer's contribution to the fixed costs of the utility: $10/MWh (1¢/kWh) in the instant EDA. As the Board explained in Docket 6077:

71. Docket 6077, Order of 2/8/00, citing Docket 5308, Order of 3/9/93 at 72; Docket 5426, Order of 7/22/92 at 11, 23-29; Docket 5713, Order of 5/29/96 at 28-29 (in particular, fn. 104).

72. *See*, for example, Docket 6077, Order of 4/21/98.

> Ideally, all customers should benefit in some way by a special contract arrangement. At the very least, customers who are not parties to the contract should be made no worse off by the existence of the contract.[73]

The proposed EDA meets this test. The price for the load covered by the discounted rate starts at Green Mountain's marginal cost of serving that load. The EDA broadly defines marginal costs, so that it encompasses not only the incremental, market-based energy price, but also related costs of serving IBM including capacity, ancillary services, line losses, and transmission. The final price for power adds the 1¢/kWh margin as IBM's contribution to the fixed costs of Green Mountain. We find this margin above the costs of serving IBM to be reasonable; thus, the EDA meets the requirement that special contracts be contributory.[74]

3. Unjust Discrimination

We turn now to the most difficult question: how to ensure compliance with the third requirement of 229 and Vermont law, namely verifying that there is no unjust discrimination. There is no question that the proposal before us constitutes price discrimination, since it offers a price to one customer that is not offered to others. The real question is whether this discrimination is *unjust*. For discrimination to be "just," this standard mandates that a special contract that provides a discount from otherwise applicable rates *also* provide benefits that "justify" the discount. A contract can meet this criteria in one of two ways. First, special contracts may qualify for discounted rates by providing load enhancement. The customer agreement provides benefits to the utility that would not otherwise exist and, in exchange, the customer receives some discount. Because the discount is dependent upon the provision of these benefits to the utility, there is no unjust discrimination. Second, the contract may provide employment (either by adding employees or retaining jobs that would be lost absent the special contract rate) that would not otherwise exist.

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73. Docket 6077, Order of 2/8/00, fn. 198.

74. The definition of "marginal" costs is, of course, critical for this purpose. That definition is set out in Section 1(h) of the proposed EDA.

a. Load-based special contracts

The vast majority of special contracts that the Board has approved have been based on load enhancement. When a special contract shifts its energy usage from peak periods to off-peak time periods (through an interruptible contract), the utility achieves a direct savings by avoiding the purchase of capacity to serve the company's peak or by avoiding the purchase of additional energy at the most expensive time periods. As a result, the utility's overall costs decrease. Similarly, generation displacement special contracts provide direct benefits to the utility by making available generation from the customer during peak periods, allowing the utility to avoid seeking the capacity or energy from other sources. As a result, all of the utilities customers benefit from the special contract and there is no unjust discrimination.

Most EDA special contracts have been based upon expansion of usage by the customer and job growth and also produce benefits for the utility and its other customers. The special contract customer receives a discounted rate only for the additional load. Because we require that special contracts provide a contribution to fixed costs, the additional load that is caused when the customer adds equipment or facilities generates a contribution to fixed costs that would not otherwise exist. This additional contribution, that would not exist but-for the special contract rate, ensures that there is no unjust discrimination.

As AARP and VLIAC argue, the IBM EDA can not be found to meet the prohibition against unjust discrimination as a load-based special contract. The reason for this is very simple: neither IBM nor Green Mountain demonstrated that the level of IBM's electric demand is causally-related to the availability of the proposed discount.[75]

b. Job retention-based special contracts

The benefits to the utility's other customers that inure from job retention-based special contracts are much less obvious, but no less real. We assign a significant value to maintaining a strong manufacturing workforce in Vermont, which carries with it measurable beneficial economic effects for Green Mountain's ratepayers, the region, and the state. As a result, the

75. The Department did suggest a causal relationship, although they presented no evidence to support the assertion. Their claim is also in direct contrast to the positions of the two signatories to the EDA.

discounted special contract rate is not unjustly discriminatory when it is provided in order to obtain (or retain) measurable employment. However, in order to meet the prohibition against unjust discrimination, it is essential that the provision of jobs and the customer discount are directly linked.

Where new load supports new jobs, evaluation of results is relatively straightforward. Unless the customer increases loads, the customer receives no benefit under the special contract. For job retention, even if one assumes that it is desirable to retain jobs and that a retained job is worth as much as an added job, two problems exist. The first is verification of the "but-for" relationship inherent in the grant of a discount. Is it correct that the customer really will reduce employment and economic activity in the absence of a discounted electric rate? Unlike the load-growth scenario, the customer may be able to obtain a discount merely by asserting the relationship; testing the validity of the customer assertions, however, is almost impossible. Also, as IBM's experience shows, the linkage between load and jobs may not be direct; major job cuts may not be reflected in a change of customer load. The second problem in the job retention context is the question of what to do if the customer does not, in fact, retain jobs? If the special contract is found to be non-discriminatory because of job retention, the basis for that finding and for providing that customer discount is diminished, if not eliminated, if the customer nonetheless reduces employment.

Thus, we accept the proposition that retained jobs are essentially equivalent to new jobs. This is consistent with prior approvals, in which the Board has recognized that securing jobs in Vermont may, in certain circumstances, support special contract rates.[76] However, we also conclude that we must condition EDAs based on job or load maintenance on adequate verification that employment is, in fact, retained.

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76. See Special Contract #142, approved on 9/3/95 (". . . a certification that the new business activity will secure 40 to 60 jobs in Vermont).

4. Conclusion

We approve the EDA, subject to the provision that IBM provide a degree of assurance that job retention will be achieved, in part, as a result of the discounted rate allowed by the EDA. Toward that end, we condition our approval of the EDA upon the following:[77]

(1) IBM shall report, to the Board and the Department, the number of full-time equivalent employees working at the site or sites for which electric power is provided pursuant to the EDA:

at the time of approval of this EDA;[78]

and on an annual basis thereafter.

(2) If, at any time during the pendency of the EDA, IBM's total, full-time equivalent employment is reduced by 5% or more from its baseline workforce as reported in condition 1, IBM shall notify Green Mountain, the Board, and the Department, within 30 days; and, effective as of the month following the date of such employment decrease, the discounted rate provided for in the EDA shall immediately terminate.

(3) Should IBM exercise its option to renew the EDA for 2005 or 2006, IBM and Green Mountain shall provide the Department and the Board, by December 15th of the prior year (2004 and 2005, respectively), a report of the following information:

- The Incremental Sales Price for the ensuing year;
- The projected Baseload Amount for the ensuing year;
- The actual Incremental Sales Price for the current year (estimated for the month of December if necessary);
- The actual energy consumed for the current year (estimated for the month of December if necessary);
- The number of full-time equivalent employees working at IBM sites for which electric power is provided pursuant to this agreement;
- A description of individual demand-side management ("DSM") projects completed during the year;
- An estimate of energy and demand savings for each DSM project;
- The dollar amount invested in each DSM project; and

77. In large part, these provisions are consistent with conditions set out in our orders approving previous special contracts between Green Mountain and IBM.

78. Pursuant to the Board's approval of December 8, 2000, of Special Contract #433 (the predecessor IBM EDA), Green Mountain filed this information, as of December 4, 2003 (at IBM's request, this was filed under seal). We will accept the December 4, 2003, filing as meeting the requirement herein, absent IBM's request to update this information to reflect its employment numbers at the time of approval of the Memorandum of Understanding.

- A description of DSM activities planned for the ensuing contract year.

We note that the "Redesign of Green Mountain Retail Rates" provisions of the Memorandum of Understanding require that:

> Within sixty days of the approval of this MOU by the Board, Green Mountain shall file with the Public Service Board a fully allocated cost of service study and rate redesign as well as a petition pursuant to 30 V.S.A. §§ 218 et. seq.

and that:

> The review of the proposed new Green Mountain rate design shall be conducted by the Board in a new docket opened for such purposes pursuant to 30 V.S.A. § 218 et. seq.[79]

Therefore, in addition to the job retention condition outlined above, we further condition our approval of the EDA on the expectation that Green Mountain's rate redesign will specifically address what we believe to be a more appropriate rate treatment of the power provided under the EDA: that is, in Green Mountain's tariffs. Moreover, upon review and approval of such a proposal, we reserve the right to modify or terminate the EDA accordingly.

5. Special Contract vs. Tariffs

In this Order, we approve the EDA for IBM because we find it in the best interest of the state of Vermont. We are, however, concerned with the continued offering of such discounts through special contracts rather than tariffs; this concern is heightened in the context of load retention special contracts which lack the verification inherent in the load growth scenarios.

As we discuss above, unless granted approval of a special rate under § 229, utilities must charge the rates set out in their tariffs. For most services, tariffs have distinct advantages over special contracts. The tariffs specify the eligibility for particular rates, terms and conditions of service. By doing so, they create a clear test that ensures that there is not unjust discrimination between similarly situated customers. The delineation of the eligibility standards also assures that the guidelines are known by all customers. By contrast, special contracts are negotiated between the utility and individual customers. This heightens the possibility that discounts will be offered

79. Exh. GMP-2, ¶¶ 18, 19.

to one customer, but not others with similar characteristics or justification. Because of these differences, the Board favors the use of tariffs wherever possible.

We have previously raised concerns over the use of special contracts. For example, in Docket 6077, we prohibited Verizon from offering special contracts for toll services, finding that "the demand characteristics of these customers are such that they warrant a non-tariffed service and that the price discounts given to individual customers are justified by other, offsetting, ratepayer benefits."[80] In that case, we found that the offering of individual pricing arrangements was unjustly discriminatory. Instead, we required Verizon to make these discounts available through tariffs.

Similarly, in Dockets 6101/6223, we imposed penalties upon Adelphia Cable Communications ("Adelphia") for a rebate program that Adelphia operated in conjunction with the City of Burlington. We observed that the discount was:

> not available to all customers within Adelphia's service territory meeting the income and other criteria, nor even all such customers within the City of Burlington. Instead, Adelphia only offers the discount to eligible customers as certified by the Mayor's office. This practice clearly discriminates against other similarly situated customers, contrary to the provisions of 30 V.S.A. §§ 218(a) and 219. Moreover, we question whether the mechanism used to determine the customers eligible to receive the discount is reasonable. In particular, the use of the Mayor's office raises the risk that many eligible customers will not apply for the discount, in part because of an appearance that the process is politicized.[81]

Likewise, we find it important that all potential employers, including new businesses seeking to locate in Vermont, be able to readily and transparently identify EDA opportunities, rather than relying on varying levels of "access" to EDA negotiators.[82] As with the cable services discussed above, a tariffed form of discounts will be better able to encourage new economic interest than a case-by-case negotiated one. It appears that the EDA program is one that would benefit from being included in Green Mountain's tariffs rather than being offered through

80. Docket 6077, Order of 2/8/00 at 51.

81. Dockets 6101/6223, Order of 4/28/00 at 52.

82. This does not mean that all customers must be offered the same discounts. Green Mountain may make distinctions between such things as the amount of load available for discounted rates and the size of the discounts in its tariffs, so long as it can justify these differences. The critical aspect discussed here is that the discounts should be available to all customers meeting the criteria.

individual special contracts. This would allow Green Mountain to clearly delineate the criteria for discounts so that all similarly situated customers are treated fairly and there is no unjust discrimination.

We expect to take up this issue in the context of Green Mountain's rate design filing expected within 60 days.

Finally, we note that rather than creating economic development incentives through special electric rates, it may be more appropriate for the legislature to create such a program funded from general tax revenue. Economic development special contracts provide benefits to the state as a whole, not only to the electric utility in whose service territory the customer is located. As such, it may be more reasonable to have *all* Vermonters provide the subsidization for the new business. A state-funded program would also ensure that the subsidization is transparent, rather than having other electric ratepayers pay a hidden contribution to such businesses. Moreover, using the electric rate system to provide the benefits is extraordinarily inefficient because it sends incorrect cost signals to ratepayers. Customers that receive underpriced power will use more electricity than they would if the rates were not discounted. Conversely, customers who pay more because of such a reduction for others will tend to use less electricity than they would if rates were properly cost-based, making it more costly for them to go about doing their business.

VI. Conclusion

We conclude that the Memorandum of Understanding is reasonable and, therefore, approve it subject to clarifications set out herein. This will have the effect of reducing Green Mountain's Return on Equity to more appropriate levels, freezing rates through the end of 2004, and capping rate increases in the following two years. As a result, ratepayers will benefit from stable rates that are just and reasonable.

We also find that the proposed Economic Development Agreement between Green Mountain and IBM is consistent with Vermont's statutory requirements and approve it with one significant condition. The evidence shows that, with that condition, the special contract will promote the retention of manufacturing jobs at IBM's Vermont facility, which, because of IBM's unique characteristics, is of high value to the state.

VII. Order

It Is Hereby Ordered, Adjudged and Decreed by the Public Service Board of the State of Vermont that:

1. The Memorandum of Understanding dated July 11, 2003, between Green Mountain Power Corporation and the Vermont Department of Public Service is approved, subject to the clarifications set out in this Order.

2. Except as provided in Paragraphs 3 and 5, below, Green Mountain shall not file for any rate increase effective prior to January 1, 2007.

3. Green Mountain shall file cost-of-service studies for 2005 and 2006 with the Board and the Department, at least 60 days prior to January 1, 2005, and January 1, 2006, respectively. If substantiated by the cost-of-service filings, Green Mountain may file tariffs, with supporting information as required by Board Rule 2.402, to raise its rates by a maximum of 1.9% as of January 1, 2005, and a maximum of 0.9% as of January 1, 2006. The effective dates for such tariff filings shall be no earlier than January 1, 2005, and January 1, 2006, respectively.

4. In response to the tariff filings allowed in Paragraph 3, above, affected ratepayers may petition the Board to investigate the filings, pursuant to 30 V.S.A. § 226(c). In response to such a ratepayer petition, the Board may suspend the tariff filings.

5. In the event of a major storm, power supply interruption or outage significantly in excess of forecasted outage rates relating to Vermont Yankee, Hydro-Quebec deliveries, Wyman, Stonybrook or McNeil generating facilities, or forced de-rating of the Hydro-Quebec interconnection facilities, or major non-weather-related loss of customer load resulting in revenue loss materially exceeding supply cost savings, Green Mountain may seek emergency rate relief pursuant to 30 V.S.A. § 226(a) or seek an accounting order from the Board permitting deferral of costs associated therewith. The Department retains its right to contest the ultimate recovery of such booked and deferred costs.

6. During the period January 1, 2003, through December 31, 2006, Green Mountain's allowed rate of return on common equity shall be 10.5%. Core return on equity shall be calculated excluding the operations of Green Mountain's unregulated subsidiaries and rental water heater program.

7. Green Mountain shall file a report detailing its core return on equity for calendar year 2003 and each year thereafter through calendar year 2006 by March 1 of the following year.

8. If Green Mountain's earnings exceed the allowed return of 10.5 percent during the period January 1, 2003, through December 31, 2006, the excess shall be returned to ratepayers as a credit on customer bills or through reductions to regulatory asset accounts or through other means as agreed to by the Department and approved by this Board.

9. Within sixty days of the date of this Order, Green Mountain shall file with the Board a fully allocated cost-of-service study and rate redesign as well as a petition, pursuant to 30 V.S.A. §§ 218 and 225 and Board Rule 2.402, to redesign its rates. This rate redesign shall address the extent to which special contracts in general, and the IBM EDA in particular, can be provided in Green Mountain's tariffs, instead of through special contracts.

10. Green Mountain shall work with the Department to develop an alternative-regulation plan, which Green Mountain shall propose for Board approval pursuant to 30 V.S.A. § 218(d). Green Mountain shall seek to complete and file this plan with the Board within 120 days of the date of this Order. If the Board approves the alternative-regulation plan, the provisions of the Memorandum of Understanding shall terminate.

11. Beginning January 1, 2005, Green Mountain shall amortize all expenses in the account labeled Accounts Correcting for Efficiency over a period of five years, accruing a carrying charge at Green Mountain's Allowance for Funds Used During Construction rate (which is presently 8.6%). Also Beginning January 1, 2005, Green Mountain shall amortize all current and future expenses in the account labeled "Pine Street" over twenty years, without accruing any carrying charges. Each of these amortizations shall be allowed in rates without further disallowance or adjustment, according to these amortization schedules, until fully amortized.

12. Green Mountain shall continue accrual-based accounting of its defined benefits plans through December 31, 2006.

13. Any transmission cost savings associated with Pooled Transmission Facility treatment of Highgate and Phase I/II facilities shall be applied to reduce regulatory assets to the benefit of Green Mountain's ratepayers, as agreed to by the Department and approved by the Board.

14. The Economic Development Agreement between Green Mountain and IBM, filed on September 30, 2003, subject to the conditions herein, is approved. The term of the EDA shall be one year, beginning on January 1, 2004. IBM shall have the option to renew this EDA to apply to all Incremental Sales during 2005 and 2006, upon proper notice as defined in paragraph 7(a) of the EDA, and including such notification to the Department and the Board.

15. IBM's total monthly energy consumption in excess of the Monthly Baseload Amount as set forth in Appendix A to the EDA shall be provided by Green Mountain at the Incremental Sales Price as defined and calculated in paragraph 2(a) of the EDA.

16. Except as specifically conditioned, our approval of the EDA should not be construed as approval or disapproval of any of the specific negotiated terms, or as a determination that those terms are, or are not, cost-effective for IBM or otherwise in IBM's best interest.

17. IBM shall report, to the Board and the Department, the number of full-time equivalent employees working at the site or sites for which electric power is provided pursuant to the EDA:

- at the time of approval of this EDA;
- and on an annual basis thereafter.

18. If, at any time during the pendency of the EDA, IBM's total, full-time equivalent employment is reduced by 5% or more from its baseline workforce as reported in Paragraph 17, IBM shall notify Green Mountain, the Board, and the Department, within 30 days; and, effective as of the month following the date of such employment decrease, the discounted rate provided for in the EDA shall immediately terminate.

19. Should IBM exercise its option to renew the EDA for 2005 or 2006, IBM and Green Mountain shall provide the Department and the Board, by December 15th of the prior year (2004 and 2005, respectively), a report of the following information:

- The Incremental Sales Price for the ensuing year;
- The projected Baseload Amount for the ensuing year;
- The actual Incremental Sales Price for the current year (estimated for the month of December if necessary);
- The actual energy consumed for the current year (estimated for the month of December if necessary);

- The number of full-time equivalent employees working at IBM sites for which electric power is provided pursuant to this agreement;
- A description of individual demand-side management ("DSM") projects completed during the year;
- An estimate of energy and demand savings for each DSM project;
- The dollar amount invested in each DSM project; and
- A description of DSM activities planned for the ensuing contract year.

20. All findings and conclusions requested by the parties and not specifically adopted above are rejected.

Dated at Montpelier, Vermont, this 22nd day of December, 2003.

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

OFFICE OF THE CLERK

FILED: December 22, 2003

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.