IN THE SUPREME COURT
OF THE
STATE OF VERMONT

No. 23-AP-084

Petition of Vermont Gas Systems, Inc.,
pursuant to 30 V.S.A. §248(i), for approval of
an out-of-state renewable gas purchase contract
with a term exceeding five years

(Appeal of Catherine Bock)

Appeal from the Vermont Public Utility Commission
Case No. 22-2230-PET

# REPLY BRIEF OF APPELLANT CATHERINE BOCK

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## Reply Brief Statement of the Issues

1. Did Bock's expert, Dr. Grubert, testify that the contract will reduce greenhouse gas emissions?

2. Did the Department or VGS identify record evidence supporting the Commission's key finding that the primary environmental benefit of the contract is that it will reduce emissions by displacing geologic gas?

3. At a minimum, is a remand is necessary for the Commission to determine whether it would approve the contract solely on the basis of a secondary benefit?

4. Is a remand also necessary for the Commission to determine whether it would approve the contract without the finding that the social cost of carbon condition suffices to satisfy least-cost principles?

5. Does deference to the Commission's expertise conflict with traditional judicial review of agency findings of fact and conclusions of law?

6. Did the Commission hold that this contract implements the GWSA because it complies with the Comprehensive Energy Plan's generic encouragement of RNG?

7. Does the Commission's authority to approve of a contract without a hearing limit the Court's review when the Commission holds a hearing?

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## ARGUMENT

### 1. Bock's expert, Dr. Grubert, did not testify that the contract will reduce greenhouse gas emissions.

Ms. Bock's Brief (pp.22, 25-26) argued that the Commission found that the primary benefit of the RNG contract was that it would reduce greenhouse gas emissions by displacing geologic gas, and that this finding is not supported by any evidence in the record.

Vermont Gas Systems' Brief asserts that Bock's expert, Dr. Grubert, testified that the contract will reduce emissions. VGS' Brief at page 11 states: "Her own expert testified that the Contract will reduce greenhouse gas emissions." VGS's Brief at page 18 states: "… there is no dispute that the Contract will reduce greenhouse gas emissions—Ms. Bock's own expert testified as much." In this respect, VGS's Brief reiterates the position it submitted to the Commission, that the record proved that the contract will reduce emissions by displacing geologic gas. PC 170, 197.

The VGS Brief does not cite to any record evidence in support of these assertions. VGS confuses reduced carbon-intensity with reduced emissions. Dr. Grubert testified that the Archaea RNG is 26% less carbon intense than geologic gas. Because gas sales are increasing, and because there was no evidence that RNG sales will displace existing geologic gas sales, the contract will result in additional emissions. PC 406-408, 410-411. The VGS Brief (p.11) cites to PC 35, which is the summary in the Hearing Officer's Proposal for Decision of Dr. Grubert's testimony about carbon intensity. On that page the Hearing Officer stated that Dr. Grubert had testified that there would be a 26% percent reduction in emissions "per unit of fossil gas displaced." (Emphasis added.) The VGS Brief (p. 18) also cites to Bock's Brief, where Bock summarizes Dr. Grubert's testimony that RNG is 26% less carbon-intensive than geologic gas, not that the contract will reduce emissions by displacing geologic gas.

Dr. Grubert did not testify that the contract will displace geologic gas and thereby reduce greenhouse gas emissions. She testified that the contract is likely to increase rather than decrease emissions, and that it does not provide a credible path towards compliance with the Global Warming Solutions Act but instead will

make it more difficult to attain compliance. PC 403-408, 413-416. Dr. Grubert testified, as noted above, that there is no evidence that displacement will occur. Dr. Grubert's testimony does not support the Commission's finding that the primary benefit of the RNG contract was that it would reduce emissions by displacing geologic gas.

2. **The Department and VGS have identified no record evidence supporting the Commission's key finding that the primary environmental benefit of the contract is that it will reduce emissions by displacing geologic gas.**

Bock's Brief (p. 18) argued there is no evidentiary support for the Commission's key finding that, because the Archaea RNG is less carbon-intense than geologic gas, "the primary environmental benefit" of the contract "will be to displace natural gas with RNG". (PC 21; PC 47, PC 139.) VGS responds merely by asserting "there is no clear error where the evidence indicates that the Contract will displace some portion of the geologic natural gas currently in VGS's supply portfolio." VGS Brief p.19. The Department adopts the same position. (Brief p.11, citing to PC 47, where the Commission explicitly adopted the Hearing Officer's Finding 26)

Neither VGS nor the Department cite to a witness or document in support of the finding that the Contract will displace geologic gas currently in VGS's supply portfolio. That finding, as Bock's Brief explained (pp 22, 25-26), lacks any footing in the record and is clearly erroneous.

3. **At a minimum, a remand is necessary for the Commission to determine whether it would approve the contract solely on the basis of a secondary benefit.**

Bock argued that the ruling must be reversed because the primary basis for approval was the erroneous finding that the contract RNG will displace geologic gas and thereby reduce emissions. As noted in the Department's Brief (p.11), at PC 47-48 the Commission explicitly adopted the Hearing Officer's Finding 26, which stated that the primary environmental benefit of the contract is that

contract RNG will displace geologic gas and thereby reduce emissions. Bock Brief pp/22, 25-26.

Bock's Brief (p.26) also argued that if the Commission's intent was not to approve the contract on the basis that contract gas would displace geologic gas, a remand is necessary so that the Commission can explain its intent.

The Department and VGS argue that, notwithstanding the absence of evidence of displacement and emissions reduction, the Commission was justified in approving of the contract because it will provide a benefit to customers who cannot switch to other fuels. (Department Brief pp.11-12; VGS Brief pp. 19-20).

Neither the Department nor VGS argue, however, that the Commission's ruling would have been the same without the Commission's reliance on "the primary environmental benefit of the Contract," displacement. This is Finding 26, which was adopted by the Commission. Where a trial ruling includes reliance on a clearly erroneous finding, and the ruling does not make clear that the same result would have been reached without that finding, a remand is necessary. *Theberge v. Theberge*, 2020 VT 13 ¶ 21, 211 Vt. 535, 228 A.3d 998 (remanding because Court cannot speculate whether trial court would have reached the same result in the absence of the erroneous finding); *Parker v. Parker*, 2012 VT 20 ¶ 15, 191 Vt. 222, 45 A.3d 48 (holding that remand is necessary where Supreme Court cannot fully discern the basis for the trial court's decision from its findings); *In re McCort,* 162 Vt. 481, 514, 650 A.2d 504 (1994) (holding that where Labor Relations Board relied on a clearly erroneous finding, remand is necessary); *Grievance of Merrill*, 157 Vt. 150, 156. 596 A.2d 45 (1991) (remanding because Court cannot speculate whether Labor Relations Board would have reached the same result absent an erroneous finding).

Remand would not be a mere formality. The Commission may conclude that the secondary benefit, that the RNG will provide a benefit to ratepayers who cannot switch fuels for financial or other reasons, may not justify rate increases for those same ratepayers. Both of the least-cost alternatives to this contract that were found by the Hearing Officer—efficiency and weatherization—would provide emission-reduction benefits to customers who are unable to switch fuels. PC 156. Unlike investing in RNG from New York, investing in least-cost efficiency and in least-cost weatherization does reduce emissions. And, unlike investing in RNG from New York, investing in least-cost efficiency and least-cost weatherization

reduces what ratepayers pay in their monthly bills. They are still using natural gas, but they are using less than they were before. Reducing the monthly bills of ratepayers who cannot switch fuel for financial or other reasons—as compared to increasing their monthly bills—may not be beneficial to VGS, but it is beneficial to ratepayers.

On remand, therefore, the Commission may reasonably conclude that providing a reduced carbon intensity profile benefit to ratepayers, standing alone, does not justify raising rates where other investments of ratepayer dollars by VGS would reduce both emissions and monthly bills.

### 4. A remand also is necessary for the Commission to determine whether it would approve the contract without the finding that the social cost of carbon condition suffices to satisfy least-cost principles.

Bock's Brief (pp.10-12, 18-20, 22, 28-29) explained that the Commission found that the contract is a least-cost alternative because of the social cost of carbon condition. The Commission made this finding at PC 41, 46-47.

VGS and the Department have not responded to Bock's brief by identifying any record evidence supporting the Commission's finding that the social cost of carbon condition renders the contract a least-cost alternative.

VGS dismisses this issue by mischaracterizing Bock's objection as a mistaken belief that under least-cost planning principles the company must choose "the cheapest option." (VGS Brief p. 23, 24.) That is not Bock's objection. Least-cost analysis is more complex than that, as explained in Bock's Brief at 26-27, and Mr. Jacobs' analysis resulted in a range of least-cost alternatives. Any alternative within that range would have been a least-cost alternative. The Archaea RNG contract was not included within that range. It is a high-cost alternative. PC 510.

The Commission could have stated that the contract is not a low-cost alternative but should be approved for other reasons, which it could have articulated if it found them to be true. The Commission did not do that. It found that the contract <u>is</u> a least-cost alternative. Bock's objection is that the

Commission erroneously relied on the social cost of carbon condition to find that this contract will be a least cost alternative.

VGS and the Department, again, have not argued that the Commission's ruling would have been the same without the reliance on this erroneous finding. As noted above, where a trial ruling includes reliance on an unsupported finding, and the ruling does not make clear that the same result would have been reached without that finding, a remand is necessary. *Theberge v. Theberge*, supra; *Parker v. Parker*, supra; *In re McCort,* supra; *Grievance of Merrill*, supra.

## 5. Deference to the Commission's expertise does not conflict with traditional judicial review of agency findings of fact and conclusions of law.

Bock argued that the Commission relied on findings that were clearly erroneous, failed adequately to give reasons for its conclusions and misapplied the Global Warming Solutions Act. The two briefs of the Appellees respond by urging the Court to provide the highest level of deference to the Commission because the Commission is exercising discretion delegated by the Legislature under § 248 and possesses special expertise.

This Court has never found there to be a conflict between its deference to the Commission's expertise and traditional judicial review of agency action. Even in § 248 cases the Court has insisted that the Commission base its findings on evidence in the record and explain the basis for its findings. *In re Petition of Apple Hill Solar, LLC*, 2019 VT 64, ¶¶ 27, 32-36, 211 Vt. 54, 219 A.3d 1295 (reversing § 248 certificate because of reliance on clearly erroneous findings); *Petition of Vermont Gas Systems, Inc.*, 2018 VT 44, ¶¶ 24-25, 207 Vt. 324, 187 A.3d 1138 (reversing rate decision where Commission's findings failed to explain how it determined the amount of costs disallowed as imprudent); *In re MVP Health Ins. Co.,* 2016 VT 111, ¶ 20, 203 Vt. 274, 155 A.3d 1207 (stating that adequate findings are necessary to determine whether administrative agency exercised sound discretion implicitly mandated by statute); *New England Power Co. v. Town of Barnet*, 134 Vt. 498, 503, 367 A.2d 1363, 1366 (1976) ("The purpose of findings is to make a clear statement to the parties, and to this Court if

appeal is taken, of what was decided and how the decision was reached." (quotation omitted)).

This Court also has not exempted the Commission and similar boards from the arbitrary and capricious standard. The Court summarized the arbitrary and capricious standard as applied to the Water Resources Board, which, like the Commission, had been delegated legislative authority and possessed expertise.

> To determine whether the Board acted "arbitrarily," we must decide whether the decision makes sense to a reasonable person. . .[T]the Board must also explain its reasons for finding as it does; if it does not give reasons, its decision may appear arbitrary.

*In re Town of Sherburne*, 154 Vt. 596, 605, 581 A.2d. 274 (1990). The Court does not owe any deference to a Commission decision based on erroneous findings or unexplained conclusions.

With regard to interpreting the Global Warming Solutions Act, the Department's and VGS's Briefs paint with overly broad brush strokes. This Court has adopted "Chevron" deference to an agency's interpretation of a statute in a rule when the agency administers that statute and the agency has been tasked by the legislature with the job of fleshing out the statute through rulemaking. *Levine v. Wyeth,* 2006 VT 107 ¶30, 183 Vt. 76, 944 A.2d. 949, *aff'd* 555 U.S. 555 (2009). Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), a court determines whether the statutory language pertaining to an issue is plain or is silent or ambiguous. If plain, the court's inquiry ends. If the statute is silent or ambiguous, the court defers to the agency's interpretation, as set forth in its rule, unless the interpretation is arbitrary, capricious, manifestly contrary to the statute, or unreasonable. Id. at 843-844.

*Chevron* deference is inappropriate here with regard to the Global Warming Solutions Act and § 248(i), because the Commission has not fleshed out a statute through rulemaking. *Levine*, supra at ¶ 31, citing *United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). When not engaged in rulemaking, the Court held in *Levine*, an agency's interpretation of a statute deserves only "a respect proportional to its 'power to persuade.' " *Mead,* 533 U.S. at 235, 121 S.Ct. 2164 (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))."

## 6. The Commission held that this contract implements the GWSA because it complies with the Comprehensive Energy Plan's generic encouragement of RNG.

Bock's Brief argued that an RNG contract that increases emissions over present levels while reducing each customer's carbon intensity profile does not implement the GWSA. VGS' Brief (pp.11, 15, 17), like the Commission (PC 45-46), resort to the Comprehensive Energy Plan (CEP) as proof that the GWSA is implemented by this contract. Their argument is that if the contract conforms to the CEP, it satisfies the GWSA.

This argument has little power to persuade under *Levine*. Mr. Jacobs was asked whether the contract is consistent with the State's 2022 Comprehensive Energy Plan, and he answered that the CEP "considers" this as an option. The Plan, he testified, "considers renewable natural gas as one solution to reduce emissions accordance with the Comprehensive Energy Plan and the Climate Action Plan." 9/20/22 Tr. 94-95. The Court may take judicial notice of the 2022 CEP, https://publicservice.vermont.gov/document/2022-comprehensive-energy-plan, which Mr. Jacobs summarized. Its recommendation is not that RNG be utilized in Vermont generally or in this instance. It has two "Recommendations" about RNG. The first is to "Complete the study of Vermont potential" for RNG. "Based on the results of that study, consider ways to support cost-effective RNG development." Id. at 211. The second relates to the potential use of RNG if a Clean Heat Standard is adopted by the legislature. The CEP's recommendations call for further study and consideration of RNG, because it warns that RNG use could "lock[] customers into existing combustion-based thermal energy infrastructure," which would be detrimental "particularly if it delays or dissuades electrification." *Id*. at 210.

The GWSA clearly commands the State of Vermont to address climate change by reducing emissions. The Legislative Findings in § 2 of the Global Warming Solutions Act, Act 153 of the Laws of 2020, state that climate change is a crisis. The Legislative Findings also require emissions reductions to respond to the crisis for Vermont. The Findings state that the Intergovernmental Panel on Climate Change has determined that "… industrialized countries must cut their

emissions to net zero by 2050…" and "a failure to substantially reduce emissions over the next ten years will require even more substantial reductions later…" 2020 Vermont Laws No. 153. The codified section of the Act states that Vermont "shall reduce" its greenhouse gas emissions from within the boundaries of the State "and those emissions outside the boundaries of the State that are caused by the use of energy in Vermont…" 10 V.S.A. § 578(a). Vermont "shall reduce" emissions by "not less than 26 percent from 2005 greenhouse gas emissions by January 1, 2025" and "not less than 80 percent from 1990 greenhouse gas emissions by January 1, 2050." 10 V.S.A. § 578(a).

The Act states that every agency must incorporate implementation of this goal into their decision-making procedures with respect to the agency's programs and services. 10 V.S.A. § 578(c). The programs and services that the Commission provides include approval of proposed contracts to purchase natural gas.

In this § 248 case, the permit applicant stated that the purpose of the contract, and the justification for its rate impact, is implementation of the GWSA. That the contract aligns with the CEP's general encouragement to consider use of RNG does not suffice as proof that the GWSA is implemented by this contract.

### 7. The Commission's authority to approve of a contract without a hearing does not limit the Court's review when the Commission holds a hearing.

VGS argues generally that the Commission was free to disregard its prior regulatory decisions and Vermont's broader energy policy regime. (Brief p. 10) It asserts the Commission' s decision about what is relevant is unreviewable. VGS asserts that because the Commission has the discretion to dispense with a hearing, it can base its decision on any factor it wants when it does hold a hearing. (Brief pp. 1, 13-14)

VGS's reasoning is flawed. The legislature's decision to grant the Commission discretion to decide whether to approve of purchase contracts without a hearing does not suggest that the legislature also intended to limit judicial review of the Commission's rulings when hearings have been held.

In rate cases, as with § 248(i) cases, the Commission has discretion to approve of a proposed rate change without a hearing. 30 V.S.A. §§ 225(b), 226.

This Court has applied the traditional standards of judicial review of agency action, such as the clearly erroneous test, in too many rate cases to cite. In no reported rate decision has a party argued, or the Court concluded, that when the legislature empowered the Commission to approve of rates without a hearing the legislature also intended to limit judicial review of the Commission's rulings when hearings have been held.

When the Commission holds a hearing, traditional judicial review of agency action applies. Applying traditional judicial review is not "second guess [ing] the Commission's judgment about what is relevant." VGS Brief pp. 13-14. The Court has authority to consider whether Commission's departure from its ruling in Docket No. 21-0167-PET was arbitrary and capricious.

## CONCLUSION

In light of the crisis facing this State, this nation and the planet, Ms. Bock and every ratepayer were owed a decision that was grounded in the record, explained adequately the basis for its decision, and implemented the Commission's own prior ruling requiring use of §218c principles when investing ratepayer funds. The Court should reverse and remand the Commission's order approving of the Archaea landfill gas contract.

Date: August 18, 2023

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation imposed by V.R.A.P. 32(a)(7). As counted by Microsoft Word, it contains 3071 words.

Date: August 18, 2023

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