VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: CVPS Corporation / Roxbury
[redacted]

MEMORANDUM OF DECISION

This proceeding concerns whether the installation of an electric utility line and the elimination of related service lines by Central Vermont Public Service Corporation ("CVPS") along Route 12A in Roxbury, Vermont in 1994 and 1995 ("Project") was and is subject to the jurisdiction of 10 V.S.A. §§ 6001-6092 ("Act 250"). As explained in more detail below, the Vermont Environmental Board ("Board") will grant the motion to dismissand will dismiss this action upon notification that CVPS has filed an administratively complete Act 250 application for the Project on or before August 2, 1999.

I. PROCEDURAL SUMMARY

On January 6, 1998, the District #3 Environmental Commission ("District #3") issued a Memorandum of Decision ("MOD") in connection with land use permit application #3R0786, a Master Plan filed by CVPS proposing to construct 12.5 miles of utility lines through portions of Randolph, Braintree, Granville, and Roxbury. The MOD directed the district coordinator for the District #5 Environmental Commission ("District #5") to issue a jurisdictional opinion addressing whether the Project was and is subject to Act 250 review.

On October 1, 1998, the assistant coordinator of District #5 issued Jurisdictional Opinion #5-98-20 ("5.0.") concluding that the Project does not require an Act 250 Permit.

On November 2, 1998, the Selectboard and Planning Commission for the Town of Roxbury ("Roxbury") filed a Petition for Declaratory Ruling with the Board, alleging that the J.O. is in error and that Act 250 has jurisdiction over the Project.

On November 16, 1998, the Vermont Department of Public Service ("DPS") filed a Notice of Appearance in this proceeding.

On December 14, 1998, Board Chair Marcy Harding convened a prehearing conference with the following entities participating:

CVPS by Kimberly K. Hayden, Esq., Tim Clapp, and John Teriele
DPS by Aaron Adler, Special Counsel and Randall Lloyd
Roxbury by Gerald Tarrant, Esq. and Susan M. D'Amico
Central Vermont Regional Planning Commission ("Planning Commission") by Chris Walsh

Northfield Telephone Company ("NTC") by Peter Monte, Esq., George Doney, Michael Reed, and Gregory Sanders

On December 17, 1998, Chair Harding issued a Preheating Conference Report and Order which, among other things, sets forth the dates by which specific filings are due to the Board.

On February 2, 1999, CVPS filed a letter requesting that the Board grant an extension of certain deadlines established in the Prehearing Order.

On February 3, 1999, Chair Harding issued a Preliminary Ruling regarding scheduling.

On February 181999, John C. Bannon, Esq. filed a notice of appearance on behalf of NTC.

On February 23, 1999, Roxbury filed a letter requesting that the matter proceed to hearing.

On February 23, 1999, the Planning Commission filed a letter in support of Roxbury's request.

On February 23, 1999, CVPS filed a Statement-of Material Facts Not in Dispute and a Motion to Dismiss.

On February 25, 1999, CVPS filed a letter requesting a hearing on its Motion to Dismiss.

On March 5, 1999, DPS filed a Motion for an Enlargement of Time and a Continuance ("DPS Motion").

On March 5, 1999, Chair Harding issued a Chair's Preliminary Ruling granting the DPS Motion.

On March 8, 1999, Roxbury filed a letter in support of the DPS Motion.

On March 10, 1999, Young, Monte, and Lyford and Peter J. Monte tiled a motion to withdraw as counsel of record for NTC.

On March 25, 1999, DPS filed a response to the Motion to Dismiss ("DPS's

Memorandum").

On March 25, 1999, Roxbury filed the Affidavit of Susan M. D'Amico and a memorandum in opposition to the Motion to Dismiss ("Roxbury's Memorandum").

On April 8, 1999, the Vermont Agency of Natural Resources ("ANR") filed its notice of appearance. Also on April 8, 1999, ANR and CVPS filed their responses to Roxbury's Memorandum and DPS's Memorandum (respectively, "ANR's Response" and "CVPS's Response").

On April 15, 1999, Roxbury submitted a letter to the Board responding to CVPS's Response. Roxbury's letter was not authorized and will not be considered by the Board.

On April 15, 1999, Chair Harding issued a memorandum to the service list regarding the opportunity for oral argument.

On April 20 and 21, 1999, several parties submitted responses to the Chair's April 15, 1999 memorandum. Chair Harding also issued an order granting the motion of Young, Monte, and Lyford and Peter J. Monte to withdraw as counsel of record for NTC.

On April 28, 1999, the Board heard oral argument and deliberated concerning the Motion to Dismiss and all supporting, opposing, and responsive memoranda of the parties.

On May 19, 1999, the Board conducted further deliberations concerning the Motion to Dismiss.

II. FINDINGS OF FACT

Based upon review of the parties' various submissions in connection with the Motion to Dismiss, the Board concludes that the following facts are uncontested and finds as follows:

1. During 1994 and 1995, CVPS constructed a section of electric utility line along Route 12A in the Town of Roxbury, Vermont, from CVPS pole #394 south of the Teela Wooket Camp, through Roxbury Village to CVPS pole #332 in the area south of the State of Vermont Fish Hatchery (previously defined as the "Project").

2. The Project includes a new corridor section of line that exceeds 2,200 feet

in length ("New Corridor"). The Project also utilizes an existing utility corridor previously used for telephone line ("Existing Corridor").

3. CVPS concedes that the New Corridor exceeds the jurisdictional threshold of Environmental Board Rule ("EBR") A-3(a) and that there is Act 250 jurisdiction over the entire Project, including the Existing Corridor. CVPS concedes that the entire Project requires a land use permit. CVPS does not concede that the Project resulted in the widening of or a change in the character of the Existing Corridor.

4. CVPS states that the New Corridor, as originally planned, did not exceed 2,200 feet but that the line was modified over time to a length that exceeded 2,200 feet.

5. Roxbury and ANR do not concede that work on 2,200 feet of the New Corridor was conducted within the time-frame outlined in Environmental Board Rule A-3(a).

6. No evidence has been presented that CVPS notified District #3 or District #5 that it was undertaking the development of a transmission facility considered exempt under EBR A-3(c).

III. DISCUSSION AND CONCLUSIONS OF LAW

The Prehearing Order defined the issue before the Board as "[w]hether the Project is subject to jurisdiction pursuant to 10 V.S.A. §§ 6001-6092 and Appendix A to the Environmental Board Rules, such that a land use permit was and is required." No party filed a timely objection to the issue as framed.

Appendix A to the Environmental Board Rules addresses Act 250 permit requirements for power and communication distribution lines and facilities. Rule A-3 provides in part:

(a) Permits required:

Unless specifically exempted under Rule A-3(c) no person shall, without having obtained a permit under 10 V.S.A. chapter 151, construct, relocate, reconstruct, or extend any transmission facility for any purpose whether above, below, or on ground if the construction of improvements for the right-of-way involves more than one acre (for example, 2,200' long based on minimum width

> of 20' right-of-way) if within a municipality not having permanent zoning and subdivision ordinances .... Reconstruction does not mean repair or replacement of component parts. For the purposes of this subsection if a transmission facility is constructed, relocated, reconstructed, or extended in segments and if at any time the total acreage of the improvements for the right-of-way of all segments completed within the preceding three (3) months together with any additional segment or segments to be constructed will equal or exceed the minimum acreage specified in this subsection, then a permit shall be required for the segment or segments of the facility which result in the acreage of the right-of-way to exceed such minimums.
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> ***
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> (c) Exemptions:
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> Subject to the provisions of Rule A-4 below the following transmission facilities shall be exempt from the permit requirements of the Rules and Regulations of the [E]nvironmental [B]oard and this Appendix A:
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> ***
>
> (iv) an above-ground transmission facility in a right-of-way existing, cleared, and in use, as of the effective date of these rules, excepting rights-of-way for public highways, where such installation does not require widening or changing of the character of the right-of-way ....

CVPS now concedes that there is jurisdiction over the entire Project, including the Existing Corridor, based upon its concession that the New Corridor exceeds 2,200 feet in length. CVPS "believes that ... by exceeding the one acre rule of the new section of line, the Project has triggered Act 250 jurisdiction as to both the new and existing sections of corridor. They are related parts of the Project and [were] built within three months of each other." CVPS's Response at 2. As a result, CVPS filed the Motion to Dismiss on the grounds that the proceeding is moot because there no longer is an "actual case or controversy" before the Board. E.g., Town of Cavendish v. Vermont Pub. Power Supply Auth., 141 Vt. 144, 147 (1982). "As a general rule, a case is moot if 'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome."' In re Barlow, 160 Vt. 513,518 (1993). Cf. In re Orzel, 145 Vt. 355,360 (1985) ("The issuing of guidelines is beyond the scope of a declaratory ruling" and should be addressed in the context of formal rulemaking).

Roxbury opposes the Motion to Dismiss, arguing that there are two live issues for this Board to consider: (i) whether that portion of the Project which occurred in the Existing Corridor widened or changed the character of the right-of-way pursuant to EBR A-3(c)(iv) and therefore subjected the Existing Corridor to Act 250 jurisdiction and (ii) whether, pursuant to EBR A-3(d), CVPS was required to inform the District Commission in writing when it determined that the Existing Corridor portion of the Project was exempt from Act 250 jurisdiction under EBR A-3(c)(iv) ("Notice Issue").

The Board will address the Notice Issue first. The Board issues a declaratory ruling based upon a de novo consideration of the applicability of any statutory provision or any rule or order of the Board over the project. 10 V.S.A. § 6007(c) and EBR 3(D). Whether CVPS provided notice required by EBR A-3(d) is not an issue for the Board to consider in the context of this declaratory ruling proceeding because, regardless of how Roxbury frames the issue, it does not involve the *applicability* of EBR A-3(d) to the Project. Rather, the Notice Issue concerns whether CVPS has *complied with* a requirement of EBR A-3(d) and, therefore, may be an appropriate consideration in the context of an enforcement action. Accordingly, the Board concludes that the Notice Issue is not a live issue for purposes of this declaratory ruling proceeding.

The second issue which Roxbury claims is live in this proceeding is whether the Existing Corridor is subject to Act 250 jurisdiction because CVPS widened and/or changed the character of a utility right-of-way pursuant to EBR A-3(c)(iv). Roxbury contends that Act 250 jurisdiction does not automatically extend to the Existing Corridor simply because CVPS concedes that the New Corridor exceeds the jurisdictional threshold. Roxbury argues that the Board must determine whether the Existing Corridor falls within the EBR A-3(c)(iv) exception to jurisdiction or whether, as Roxbury contends, CVPS was and is required to apply for an Act 250 permit for the Existing Corridor because it changed the character of the right-of-way. Furthermore, Roxbury and ANR do not concede that the incremental construction that resulted in 2,200 feet of the New Corridor occurred within the time limitations set forth in Rule A-3(a).

CVPS has conceded that there is Act 250 jurisdiction over the entire Project including the Existing Corridor and it has indicated its intention to file an application for the entire Project. It is immaterial whether CVPS concedes that there is jurisdiction over the Existing Corridor on a theory which Roxbury and ANR believe to be erroneous or whether there is jurisdiction over the Existing Corridor on the basis of the legal and factual arguments advanced by Roxbury and ANR. The fact remains that CVPS has conceded jurisdiction and the Board's findings support a conclusion that jurisdiction exists and existed at the time construction commenced. CVPS was and is required to obtain a permit for the entire Project. No live issue remains for the Board to consider in

the context of this declaratory ruling.' The Board concludes that the issues in this proceeding are moot.

During oral argument, Roxbury urged the Board to rely upon the common law exception to the mootness doctrine. That exception permits review of an otherwise moot issue for cases that are "capable of repetition, yet evading review." Doria v. University of Vermont, 156 Vt. 114, 118 (1991)(quoting State v. Tallman, 148 Vt. 465,469 (1987)). The two part test to determine the applicability of this exception is whether (i) the challenged action is too short in duration to be fully litigated prior to its cessation and (ii) there is a reasonable expectation that the same complaining party will be subjected to the same action again. Id. The Board concludes that the exception is not applicable in this matter because the challenged action must be of such short duration that it will almost always evade review. Comnare State v. Tallman, 146 at 469 (1987) ("an order closing a pretrial hearing 'is *by its nature* short-lived"') (emphasis added; citation omitted). The construction of new electric lines does not ***inherently*** evade review - that is, CVPS or another utility may file a permit application or it may notify the district commission that the construction is exempted from review.

The Board also concludes that Roxbury's attempt to draw an analogy between CVPS's concession to jurisdiction and the doctrine that subject matter jurisdiction cannot be conceded is unfounded. Underlying the doctrine that one cannot concede subject matter jurisdiction is the fact that a traffic court has no jurisdiction to issue a divorce decree, even if the parties seeking a divorce "concede" to the jurisdiction of the traffic court. In contrast, the Board and the district commissions are precisely the administrative bodies empowered with the jurisdiction to review a project for compliance with Act 250.

Roxbury correctly states that if the petition is dismissed, then the J.O. will be a final order. Roxbury alleges that the J.O., which concluded that there is no jurisdiction over the Project, is based on erroneous facts and an unsound analysis. Roxbury states that it "is concerned that [the J.O.] will remain the law between [Roxbury] and CVPS. [It is also concerned that the J.O.] may indicate as *dictum* to all the world that construction similar to what occurred in the Town of Roxbury is non-reviewable and that notification by utilities that they are exempt is not required under Rule A-3(d)." Roxbury's

[1] By this decision, the Board does not address whether the Project widened or changed the character of the Existing Corridor. Thus, the Board does not reach a conclusion regarding whether there is an independent basis for finding jurisdiction over the existing Corridor (pursuant to EBR A-3(c)(iv)) that arises in addition to the attachment of jurisdiction under CVPS's theory.

Memorandum at 6. DPS and ANR join in this concern.

The Board agrees that a jurisdictional opinion which concludes that there is no jurisdiction should not become a final order where a project proponent concedes jurisdiction. Nevertheless, it would be an inefficient use of resources to proceed to a Board hearing -- as Roxbury urges -- on the issue of whether CVPS widened or changed the character of the Existing Corridor. As CVPS states, "even if [Roxbury] were to convince the Board that CVPS changed the character of the [Existing Corridor], the result would be an order determining that jurisdiction applies to the entire Project and requiring [CVPS] to apply for an Act 250 permit, which is exactly what [CVPS] proposes to do already." CVPS's Response at 3. Accordingly, as set forth more fully below, the Board's dismissal of the petition for declaratory ruling is inextricably tied to the requirement that CVPS apply for a permit and to the Board's declaration that the J.O. is vacated.

Roxbury concludes its Memorandum with the following public policy concerns:

> It would be dangerous precedent if this Board allowed companies to circumvent its rules by constructing major facilities in sensitive areas that are subject to its jurisdiction with the only consequence -- if it were caught -- that the company would have to do what it should have done in the first instance. Why ever apply? . . . If the underlying J.O. is not corrected these types of actions will undoubtedly happen again and again. This case presents a major opportunity to issue a declaration on why the [J.O.] was wrong, the harm CVPS caused the Town, how Appendix A should have worked under the circumstances in terms of notification and how the rules should apply in the future. To do so would be to take a giant step forward in ensuring that this type of activity does not occur in the future.

Roxbury's Memorandum at 8-9.

The Board concurs that it would be intolerable if the "only consequence" available when a developer disregarded Act 250 permitting requirements was an order compelling the violator to apply for a permit. The Board does not agree, however, that those additional consequences are appropriate or authorized in the context of a declaratory ruling proceeding. Rather, the Board relies upon its enforcement authority to correct existing violations and to deter those that may be contemplated in the future. It is through an enforcement action that "the harm CVPS caused to the Town" and "how Appendix A

should have worked ... in terms of notification" could properly be addressed.[2] In addition, Roxbury and any other interested party will have the opportunity during the District Commission application process to explore whether CVPS widened or changed the character of the existing right-of-way when it constructed improvements in the Existing Corridor. Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 5, 1990) and Memorandum of Decision at 1 (Dec. 17, 1990)[EB#435] (application is reviewed based upon site as it existed before construction commenced). Finally, the Board notes that Roxbury may wish to file a petition for rulemaking pursuant to EBR 3(B) in order to clarify or amend the rules in Appendix A.

Accordingly, as set forth in the Order below, the Board will dismiss this petition for declaratory ruling pursuant to EBR 18(D) because there are no live issues remaining for Board review.

IV. ORDER

Roxbury's

§§risdiction pursuant to 10 V.S.A.

#373issing Declaratory Ruling
M o n d a y , 2, 1999g u s t

Upon receipt of the proof

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[2]The

footnote supra.

issue an Order vacating Jurisdictional Opinion #5-98-20 issued October 1, 1998 and stating that it is of no force and effect in this or in any other proceeding involving these or any other parties.

Dated at Montpelier, Vermont this 21st day of May, 1999.

ENVIRONMENTAL BOARD*

Marcy Harding

Marcy Harding, Chair
John Drake**
John T. Ewing**
George Holland
Rebecca M. Nawrath
Alice Olenick
Robert H. Opel

* Board Members Samuel Lloyd and W. William Martinez did not participate in this proceeding.

**Board Members John Drake and John T. Ewing were not present at the May 19, 1999 deliberations but they reviewed and concur with the decision as issued.

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