

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7466

Investigation into Petition Filed by Vermont Department )  
of Public Service Re: Energy Efficiency Utility Structure )

Order entered: 12/20/2010

**ORDER RE: ORDER OF APPOINTMENT FOR VERMONT ENERGY INVESTMENT CORPORATION  
AND PROCESS AND ADMINISTRATION DOCUMENT**

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## **I. INTRODUCTION**

The Public Service Board ("Board") concluded in its August 20, 2010, Order in this proceeding that it would grant an Order of Appointment to Vermont Energy Investment Corporation ("VEIC")<sup>1</sup> to serve as the statewide Energy Efficiency Utility ("EEU") known as Efficiency Vermont.<sup>2</sup> The Board directed me to conduct further proceedings related to the development of a recommended Order of Appointment and related documents.

In this Proposal for Decision, I recommend that the Board issue the attached Order of Appointment to VEIC and approve the attached document entitled "Process and Administration of an Energy Efficiency Utility Order of Appointment." These documents are similar, although not identical, to those filed by the Vermont Department of Public Service ("DPS") on September 3, 2010. In this Proposal for Decision, I also specifically ask parties to comment on one area in which the two documents appear to be inconsistent — should VEIC's Order of Appointment establish certain items related to types of costs, cost allocation, and jurisdictional separations?

## **II. PROCEDURAL HISTORY**

At the January 5, 2010, status conference at the beginning of Phase 2 of this proceeding, the parties agreed that the Phase 2 issues could be grouped into three separate, but related, "tracks" — Phase 2 Issue Resolution, Initial Overall Performance Assessments, and the DPS Benchmarking Study. The schedules of the three tracks were closely coordinated.

The Phase 2 Issue Resolution track includes: (1) specific substantive issues that the Board determined needed further discussion before they could be resolved; (2) the development of a model Order of Appointment; and (3) the development of a "Process and Administration"

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1. VEIC is currently serving as the statewide EEU under a contract with the Board.

2. Order of 8/20/10 at 71 (Order paragraph 3). In that same Order, the Board determined that it would also grant an Order of Appointment to the City of Burlington Electric Department ("BED") to deliver EEU services in its service territory. This Proposal for Decision does not address a proposed Order of Appointment for BED; that document will be addressed in a subsequent Proposal for Decision.

document that describes the overall EEU program structure under the Order of Appointment model.<sup>3</sup>

On June 25, 2010, the Board issued an Order ("June 25 Order") resolving many of the specific substantive issues included in the Phase 2 Issue Resolution track with the intention that the Board's decisions regarding these issues would be incorporated into the draft Order of Appointment and Process and Administration documents then under development by the parties. On October 6, 2010, the Board issued an Order modifying one aspect of its June 25 Order. Specifically, the October 6 Order changed the reassignment of certain responsibilities that previously were performed by the Contract Administrator.

Between April and August 2010, the parties filed six versions of the draft Process and Administration document, and four versions of the draft Order of Appointment. These were discussed at six workshops which I conducted, and at various negotiating sessions among only the parties.

On September 3, 2010, the DPS filed the final proposed Order of Appointment for VEIC and the final proposed Process and Administration document (collectively referred to herein as the "September 3 Documents"). I am admitting the final proposed Order of Appointment for VEIC as exh. DPS-5, and the final proposed Process and Administration document as exh. DPS-6. Any party wishing to object to the admission of exhs. DPS-5 or DPS-6 into evidence should do so in its comments on this Proposal for Decision so that the Board may rule on any objections.

On September 7, 2010, VEIC filed comments on the draft documents (referred to herein as "VEIC Comments").

On September 17, 2010, BED, Central Vermont Public Service Corporation ("CVPS"), the Group of Municipal Electric Utilities ("GMEU")<sup>4</sup> and International Business Machines

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3. The Process and Administration document has been referred to in earlier Board orders in this proceeding as the Comprehensive Document.

4. The Group of Municipal Utilities include: Barton Village Inc. Electric Department; Village of Enosburg Falls Water & Light Department; Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Company; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; and Swanton Village Inc. Electric Department.

Corporation ("IBM") separately filed comments on the September 3 Documents (referred to herein as "BED Comments," "CVPS Comments," "GMEU Comments," and "IBM Comments", respectively).

On September 24, 2010, the DPS and VEIC separately filed reply comments (referred to herein as "DPS Reply Comments," and "VEIC Reply Comments," respectively).

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

### **III. FINDINGS**

#### **A. Proposed VEIC Order of Appointment**

1. The proposed VEIC Order of Appointment sets forth the terms of VEIC's appointment as an EEU, including the effective date, the length of the appointment, VEIC's responsibilities as an EEU, and the terms governing VEIC's compensation. Exh. DPS-5 at 3-11.

2. Under the terms of the proposed VEIC Order of Appointment, the Appointment would be effective on the date of the Order's issuance, and the period between the date of the Appointment and January 1, 2012, would constitute the Transition Period. Exh. DPS-5 at 3.

3. The proposed VEIC Order of Appointment includes a plan governing the Transition Period. Exh. DPS-5 at 15-40.

4. The Transition Period plan provides that, during the Transition Period, VEIC's budgets, minimum performance requirements, Quantifiable Performance Indicators ("QPI"), potential performance award, and operations fees will reflect those in effect under the contract between the Board and VEIC at the time of Appointment. The Transition Period plan provides that VEIC's budgets, goals and QPIs for the Transition Period will be stated as if the Transition Period included the entire January 1, 2009, through December 31, 2011, performance period, and VEIC's results from this entire performance period will count towards meeting the Transition Period QPIs. Exh. DPS-5 at 15.

5. The proposed VEIC Order of Appointment includes guidelines for customer-sited generation and combined-heat-and-power projects that VEIC must follow when responding to

lost-opportunity, customer-initiated or vendor-initiated projects where customer-sited generation is being considered. Exh. DPS-5 at 41-43.

6. The proposed VEIC Order of Appointment includes guidelines for VEIC's responsibilities regarding demand response. Exh. DPS-5 at 44-45.

### **B. Process and Administration Document**

7. The proposed Process and Administration document is a comprehensive document that describes the entire EEU program structure. It sets forth the procedural and administrative framework for all EEU Orders of Appointment. Exh. DPS-6 at 3.

8. The proposed Process and Administration document is intended to be a "living document" that would be revised in the future if the Board made further changes to the EEU program. The document provides that it could be amended by the Board as appropriate after due notice. Exh. DPS-6 at 3.

9. The proposed Process and Administration document describes:

- the Order of Appointment legal mechanism, the Energy Efficiency Charge ("EEC") and other funding sources, and the role of the EEU Fiscal Agent;
- the content of the Demand Resources Plan ("DRP") and the process to be used to develop the DRP;
- ongoing EEU monitoring, savings verification, and evaluation activities, including the statutorily required independent third-party audit;
- the processes for evaluating an EEU's performance, conducting a competitive solicitation for a new EEU, and re-issuing, modifying, revoking or terminating an EEU's appointment;
- compensation and payment terms and processes;
- various administrative matters with which an EEU must comply; and
- an EEU's reporting requirements.

Exh. DPS-6, *generally*.

### **IV. PARTIES' COMMENTS**

Both CVPS and GMEU support the adoption of the September 3 Documents by the Board; neither party recommended any changes to either of the documents. They noted that the September 3 Documents are designed to promote transparency in the delivery of energy

efficiency services, safeguard the interests of affected entities, and promote greater accountability by energy efficiency providers.<sup>5</sup>

No party recommends any specific changes to the proposed VEIC Order of Appointment. However, in the cover letter that accompanied the September 3 Documents, the DPS states that there are a number of provisions in the proposed VEIC Order of Appointment that are dependent upon either Board decisions or the resolution of the pending amendment of the Board's contract with VEIC. VEIC agrees with the DPS that there are a few outstanding issues related to budgetary matters during the transition period that could be affected by pending Board decisions.<sup>6</sup>

Both BED and IBM recommend changes to the Process and Administration document. BED recommends a change to the process for modifying an EEU's QPI. IBM recommends three changes related to: (1) the assignment of EEU contracts in the event an EEU is terminated; (2) the use of uncommitted EEC funds at the end of a three-year performance period; and (3) the schedule for filing monthly and quarterly reports by EEUs.

Finally, in its cover letter accompanying the September 3 Documents, the DPS states that the documents propose three changes to decisions previously made by the Board in its June 25 Order. These changes relate to: (1) the re-evaluation of performance goals if an EEU secured unanticipated additional funding; (2) the continuation during the Transition Period of the formulaic adjustments to performance goals contained in the Board's contract with VEIC; and (3) the attachment of the guidelines for Combined Heat and Power and Demand Response to individual Orders of Appointment rather than the Process and Administration document.

## **V. DISCUSSION**

I commend the parties to this proceeding on their collaboration regarding the September 3 Documents. They participated in extensive discussions over several months, and the depth of their engagement is reflected in the fact that there is broad consensus regarding the content of both documents. I also appreciate the leadership role taken by the DPS in drafting and

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5. CVPS Comments at 1-2; GMEU Comments at 1.

6. VEIC Comments at 1.

incorporating other parties comments' on both documents; this was a lengthy and complex process that required a significant time commitment and attention to detail.

Overall, the September 3 Documents set forth a thoughtful and comprehensive administrative framework for the EEU Order of Appointment model, as well as appropriate specific terms of VEIC's appointment. Both documents address a wide range of issues; most aspects of the documents have not been commented on by any party. This Proposal for Decision does not specifically discuss the uncontested portions of the September 3 Documents, except to the extent necessary to address additional substantive issues I have identified with the documents. I have carefully reviewed the portions of the September 3 Documents not specifically addressed herein, I find them reasonable, and I recommend that they be approved by the Board.

The remainder of this discussion focuses on the issues raised in the parties' comments regarding the September 3 Documents, and the additional substantive issues I have identified.

For the parties' convenience, I have attached a redline/strikeout version of the Order of Appointment for VEIC, the Process and Administration document, and most of their attachments to this Proposal for Decision showing the changes from the September 3 proposal.<sup>7</sup>

#### **A. Effect of Board Decisions on Proposed Order of Appointment**

The DPS and VEIC both note that some aspects of the proposed Order of Appointment are dependent on either Board decisions or the resolution of the pending amendment of the contract between the Board and VEIC.<sup>8</sup> The DPS states that the parties have made best efforts to identify the provisions in the September 3 Documents that may be subject to change.

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7. A redline/strikeout version of the spreadsheet attachments to the proposed Order of Appointment for VEIC are not attached to this Proposal for Decision.

8. The contract between the Board and VEIC is being amended to reflect statutory modifications to the EEU budget and framework, to add behind-the-customer-meter smart-grid activities to the EEU's scope of work, to update certain performance goals to reflect updated avoided costs, and to define performance goals for heating-and-process-fuel efficiency services.

According to the DPS, the pending issues relate to: (1) adjustments needed due to the implementation of the Self-Managed Energy Efficiency Program ("SMEEP")<sup>9</sup> and its effect on EEU budgets; (2) the final recalculation of the goal for the Total Resource Benefits performance indicator (as a result of the implementation of new avoided costs in 2010 and other factors); and (3) issues related to spending on Forecast 20.<sup>10</sup> In my role in assisting the Board with oversight of its contract with VEIC, I am aware that the pending contract amendment also addresses: (a) issues associated with the expansion of VEIC's heating-and-process-fuels services due to statutory changes which increased the amount of funding for these services; and (b) issues associated with VEIC's role (as Efficiency Vermont) in smart-grid activities.

VEIC and the Board have agreed on the language of the pending contract amendment, and I have modified the Order of Appointment attached to this Proposal for Decision to be consistent with this pending amendment.<sup>11</sup> However, under State contracting requirements, the amendment must be approved by the Office of Attorney General and the Secretary of Administration before it can be finalized. The amendment has been submitted to both entities, and it is possible that their review will result in substantive modifications to the amendment that could affect either the VEIC Order of Appointment or the Process and Administration document. I recommend that, if any such modifications to the contract amendment are made, the Board should inform the parties to this Docket and provide them an opportunity to comment on incorporating the proposed changes into the Order of Appointment and the Process and Administration document.<sup>12</sup>

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9. *See*, 30 V.S.A. § 209(h).

10. Letter from Walter (TJ) Poor, Energy Program Specialist, DPS, to Susan M. Hudson, Clerk, Board, dated September 3, 2010, at 3.

11. Changes were made to the following sections of the September 3 proposed Order of Appointment: proposed Appendix A at Sections 10, 12, and 15; throughout proposed Attachment A to Appendix A; proposed Tables A-1, A-2, A-3, A-5, A-9, and A-10; and proposed Attachments B, C, D, E, and F.

12. To be clear, I do not recommend that the parties have an opportunity to comment on the contract amendment itself as that is negotiated between the Board and VEIC, in consultation with the DPS. Rather, I recommend that the parties have an opportunity to comment on the effect of any contract amendment changes on the VEIC Order of Appointment and Process and Administration documents.



**B. Process for Modifying an EEU's QPIs**

Section II.1.D.(c) of the proposed Process and Administration document provides: "The Board may amend an EEU's QPIs at any time during the term of an Order of Appointment after such process as the Board may require."

BED recommends that this section be modified to specify that the Board must, at a minimum, provide the affected EEU with notice and an opportunity to be heard on any proposed amendment.<sup>13</sup>

The DPS states that it has no objection to BED's recommendation.<sup>14</sup> No other party commented on this issue.

QPIs will be used to measure an EEU's performance. A portion of some EEUs' compensation may be based upon whether they meet their QPIs. For this reason, it is appropriate that an affected EEU be provided with notice and an opportunity to comment on any proposed amendment to its QPIs. However, BED's recommended change "notice and an opportunity to be heard" could be construed to require contested-case procedures to be followed. Since QPIs are established in the Demand Resources Plan workshop process, which is not a contested-case proceeding, there is no need to require contested-case procedures when modifying the QPIs. Therefore, I recommend that the Board adopt a modified version of BED's recommendation to provide the affected EEU with notice and an opportunity to comment. Thus, I recommend that the Board modify Section II.1.D.(c) so that it reads:

The Board may amend an EEU's QPIs at any time during the term of an Order of Appointment after such process as the Board may require provided, however, that the Board must provide the affected EEU with notice and an opportunity to comment on any proposed amendment.

In making this recommendation, I note that the language of Section II.1.D.(c) allows the Board to determine the process to be used to amend an EEU's QPIs. Such process could include a hearing, but under my recommended language, a hearing would not be required.

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13. BED Comments at 1.

14. DPS Reply Comments at 1.

### **C. Assignment of EEU Contracts**

Section III.5 of the Process and Administration document describes the responsibility of parties upon the expiration or revocation of an EEU's appointment.

IBM recommends adding a new paragraph (k) to this section, providing that, if an EEU's Appointment is terminated, that EEU's existing contracts will be reassigned to one of the following, as determined by the Board: the new EEU as appointed by the Board, the DPS or the Board.<sup>15</sup>

The DPS asserts that this concern is addressed by existing Section III.5.C.(h) which states that:<sup>16</sup>

Upon termination of Appointment, an EEU will likely have outstanding commitments, including, but not limited to loans, loan guarantees, partnership agreements and committed capacity in the [regional Forward Capacity Market ("FCM")]. An EEU shall be relieved of those obligations from the date of termination forward, but shall remain responsible for (a) all payments due up to the time of termination, and (b) all liabilities arising from any disputes arising from such contracts up to the time of termination. The responsibility for these obligations from the date of termination forward will be assigned by the Board after such process as the Board may require.

The DPS contends that it is not necessary or prudent to determine at this time who should be assigned an EEU's outstanding obligations if an Appointment is terminated. According to the DPS, responsibility for these obligations could be assigned to one or more of the entities identified by IBM, to the electric utilities, or to another unknown entity. The DPS asserts that the current language in Section III.5.C.(h) provides the Board with flexibility to determine at the appropriate time which entity or entities should be assigned an EEU's outstanding commitments. Nevertheless, while the DPS believes that the current language of Section III.5.C.(h) includes existing contracts within the scope of an EEU's outstanding commitments, it would support adding "existing contracts" to the language to ensure clarity.<sup>17</sup>

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15. IBM Comments at 1.

16. The DPS refers to "Section III.5. (h)" in its reply comments on this issue even though it quotes the text of Section III.5.C.(h). For clarity, I have used the correct section reference throughout my description of the DPS's comments.

17. DPS Reply Comments at 1-2.

VEIC asserts that the issue raised by IBM appears to already be addressed in existing paragraphs Sections III.5.C.(g) and (h). Section III.5.C.(g) states:

Upon termination of Appointment, an EEU will likely have outstanding contracts for customer incentive payments. An EEU shall be relieved of those obligations from the date of termination forward, but shall remain responsible for (a) all payments due up to the time of termination, and (b) all liabilities arising from any disputes arising from such contracts up to the time of termination. The responsibility for customer incentive payments from the date of termination forward will be assigned by the Board after such process as the Board may require.

Nevertheless, VEIC states that it did not oppose a modification to address this issue, if the Board believes additional clarification is needed. However, VEIC recommends that the Board consider amending IBM's proposed language to provide that "responsibility for existing contracts will be assigned by the Board after such process as the Board may require" in order to be consistent with the existing language in Sections III.5.(g) and (h).<sup>18</sup>

It is unclear from IBM's comments whether it is concerned that the existing language of Sections III.5.(g) and (h) is insufficient to address all of an EEU's existing commitments, or whether it disagrees with the broad discretion provided to the Board in those sections and would prefer that the Board only be able to assign responsibility for an EEU's existing commitments to those entities identified by IBM. I, therefore, address both possibilities.

While the existing language may be sufficient to address all of an EEU's existing commitments, there is value to clarifying this issue. However, this can be done without adding a new section, as IBM recommended. Instead, I recommend that the Board modify the first sentence of Section III.5.C.(h) to read: "Upon termination of Appointment, an EEU will likely have outstanding commitments including, but not limited to, loans, loan guarantees, partnership agreements, committed capacity in the FCM, and other existing contracts."

I do not, however, recommend that the Board determine now that it will assign responsibility for an EEU's existing contracts to one of the three entities identified by IBM. As the DPS noted, it may be appropriate to assign responsibility for an EEU's existing contracts to another entity, or to multiple entities. It is important for the Board to have broad discretion to

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18. VEIC Reply Comments at 1.

make such assignments based on the particular circumstances if and when a termination of an EEU's appointment occurs.

#### **D. Use of Uncommitted EEC Funds**

Section IV.D of the proposed Process and Administration document provides:

At the end of a 3-year performance period, if uncommitted EEC funds exceed 5% of the prior year annual total EEC funded budget, then those funds shall be used as a budget credit to ratepayers for efficiency services in the following year. At the end of a performance period, if uncommitted funds are less than 5% of the prior year annual total EEC funded budget, then the Board shall determine allocation of funds after, at a minimum, opportunity for written comment.

IBM recommends that this section be modified to read as follows: "At the end of a 3-year performance period any uncommitted EEC funds shall be used as a budget credit to ratepayers for efficiency services in the following year."<sup>19</sup>

The DPS opposes this proposed change. The DPS asserts that the current language is consistent with PSB Rule 5.300, which sets forth the methodology for calculating EEC rates.<sup>20</sup> In addition, the DPS contends that the flexibility accorded to the Board if the uncommitted funds at the end of a performance period are less than five percent of the prior year's budget is valuable to ratepayers, as evidenced by the use of 2008 uncommitted carryover funds to leverage matching funds to implement smart-grid activities.<sup>21</sup>

VEIC also opposes this proposed change, citing past practice as established in PSB Rule 5.300, as well as the Board's determination regarding the 2008 uncommitted carryover funds; in that determination the Board stated that the benefit to customers of slightly lower EEC rates was more than offset by the benefits associated with leveraging matching federal funds to implement

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19. IBM Comments at 1.

20. PSB Rule 5.305(E)1.a provides:

For the year 2007, and any subsequent year following the expiration of a contract between the Board and an entity serving as the EEU:

If *Uncommitted Funds* < 0.05 \* *Prior Year Total Budget*, then Budget Credit shall be determined by the Board in a separate process

If *Uncommitted Funds* > 0.05 \* *Prior Year Total Budget*, then Budget Credit = *Uncommitted Funds*

21. DPS Reply Comments at 2, citing "Board Determination Re 2008 Unspent EEU Funds" dated July 28, 2009.

smart-grid activities behind the meter to allow electric utilities to evaluate the future potential for further such activities in Vermont.<sup>22</sup>

I recommend that the Board not adopt IBM's proposed change regarding this issue. The Process and Administration document is intended to describe the EEU program structure. In this instance, the document is simply incorporating the five-percent threshold established in PSB Rule 5.300. If that threshold were to be modified, the appropriate vehicle would be a rulemaking proceeding regarding PSB Rule 5.300, which the Board has stated it will be opening shortly.<sup>23</sup> Therefore, I recommend that the Board not rule on the merits of IBM's proposed change (or the DPS's and VEIC's arguments opposing the change) in this Docket, but rather allow IBM to raise the proposed change in this upcoming rulemaking proceeding, if it desires; should IBM do so, the DPS and VEIC would be free to present their arguments opposing the change in that proceeding.

In addition, I recommend that the Board add the phrase "As provided in Board Rule 5.300" at the beginning of each sentence in Section IV.1.D to clarify that this Section reflects the terms of PSB Rule 5.300.

#### **E. Schedule for Filing Monthly, Quarterly and Annual Reports**

Appendix B of the Process and Administration document describes the reporting requirements of an EEU. These reports include monthly, quarterly, and annual reports.

IBM observes that this Appendix includes a filing date for annual reports, but not monthly and quarterly reports. IBM recommends that this Appendix be modified to provide that monthly and quarterly reports will be filed within 30 and 45 days, respectively.<sup>24</sup>

VEIC notes that the annual report deadline cited by IBM applies only when an EEU's appointment has been terminated. VEIC states that, in normal circumstances, an annual report is

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22. VEIC Reply Comments at 1-2, citing "Board Determination Re 2008 Unspent EEU Funds" dated July 28, 2009, at 7.

23. The Board has stated it will open a rulemaking proceeding to modify Rule 5.300 to remove the Rule's references to the Contract Administrator, since that position will no longer exist in the new Order of Appointment structure. The Board has also stated that it will consider other changes to the Rule that could improve administrative efficiency and transparency. Memorandum from Susan M. Hudson, Clerk, Board, to Vermont Electric Distribution Utilities, Parties to PSB Docket No. 7466, and EEU E-mail Service List, dated September 14, 2010, re: Calculation of 2011 EEC Rates; Revision of Board Rule 5.300 (EEU-2010-07).

24. IBM Comments at 1.

submitted as soon as reasonably possible, with specific delivery dates sometimes varying based upon factors such as the progress of the savings-verification process. VEIC adds that monthly and quarterly reports are typically submitted on the first business day of the second month following the reporting period (for example, the January monthly report is typically submitted on the first business day of March).<sup>25</sup>

The DPS states that it has no objections to including specific due dates for monthly and quarterly reports, and suggested that those dates be based on current practice. The DPS contends that including a strict reporting deadline for the annual report is problematic because the annual report depends on a number of other factors, including the DPS's annual verification of savings claims and a Board determination based upon that process. Therefore, the DPS recommends that if language regarding an annual report deadline is added, it should be flexible enough to accommodate some timing uncertainty.<sup>26</sup>

I recommend that the Board modify Appendix B to include specific due dates for monthly and quarterly reports, and a general description of the timeframe for filing annual reports. The Process and Administration document is intended to describe the entire EEU program structure. Reporting requirements are an important component of that structure; clarity regarding report due dates will be valuable. I concur with the DPS that the due dates should be based on current practice; the schedule currently used by both EEUs to file reports has worked well and no party has suggested that it should be modified.<sup>27</sup> Therefore, I recommend that the Board add a second sentence to Appendix B, Section 1 that reads:

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25. VEIC Reply Comments at 2.

26. DPS Reply Comments at 3.

27. I do note, however, that BED's traditional "Annual Report" is analogous to VEIC's annual savings claim in that it is prepared prior to the savings verification process, and includes unverified savings numbers. Historically, VEIC has filed its final annual report after the conclusion of the savings verification process for that year. In the past, the savings verification process was not conducted for BED each year (it was last conducted for BED's 2006 savings). However, the DPS's current Board-approved EEU evaluation plan states that the DPS plans to conduct annual savings verification activities for BED's energy efficiency services. (DPS Electric Energy Efficiency Evaluation Plan 2009-2011 at 6). Therefore, in the future, BED will be able to file an Annual Report that includes verified savings. This is, however, an additional report that BED has not traditionally filed. Accordingly, I specifically invite BED and other parties to address this issue in their comments on this Proposal for Decision.

Monthly Reports shall be submitted on the first business day of the second month following the reporting period (for example, the January Monthly Report is due on the first business day of March).

I further recommend that the Board add a second sentence to Appendix B, Section 2 that reads:

Quarterly Reports shall be submitted on the first business day of the second month following the reporting period (for example, the January 1 through March 31 Quarterly Report is due on the first business day of May).

In addition, I recommend that the Board add a second sentence to Appendix B, Section 3 that reads:

Annual Reports shall be submitted as soon as reasonably possible after the Board issues its determination regarding an EEU's achieved savings at the conclusion of the DPS's savings verification process, unless an EEU's appointment is terminated by the Board, in which case the deadline set forth in Paragraph C, below, shall apply.

#### **F. Changes to Previous Board Decisions**

As noted by the DPS, the September 3 Documents include three changes to decisions previously made by the Board in its June 25 Order. In addition, they include one change to a finding previously made by the Board in its November 24, 2009, Order.

##### **(1) Additional Funding Threshold**

In the June 25 Order, the Board approved the parties' proposal regarding the threshold amount of additional funding that, if obtained by an EEU, would trigger the review of EEC collections, or of that EEU's goals, performance indicators, and service offerings. Specifically, the Board determined that, if an individual source provided an EEU with additional funding (for activities already supported by the EEC) above five percent of that EEU's annual EEC-funded budget, then the Board would examine whether EEC collections should be adjusted. Similarly, the Board determined that if an individual source of additional funding was greater than five percent of an EEU's resource-acquisition or non-resource-acquisition budget (depending on the scope of activities to be funded), the Board would examine whether that EEU's performance goals, performance indicators and service offerings should be adjusted. If an individual source of additional funding was below these five-percent thresholds, then the Board would not be required

to consider whether EEC funds, goals, indicators and service offerings should be adjusted. However, if any individual source of additional funds for resource-acquisition activities that were substantially similar to an EEU's current operations was less than or equal to five percent of that EEU's resource-acquisition budget, performance goals would be adjusted on a formulaic basis, as would be determined when future performance indicators were developed.<sup>28</sup>

In its letter accompanying the September 3 Documents, the DPS states that, during the development of the language and mechanisms governing unanticipated additional funding, it became clear to the parties that the five-percent threshold was too high. Instead, according to the DPS, the parties now propose that the threshold for adjusting EEC collections and performance goals should be \$100,000 (rather than five percent of the relevant budget). In addition, under this new proposal, if this threshold is met, an EEU would propose how any performance indicators and EEC collections should be affected, and the Board would make a determination after such process as it may require. The DPS asserts that this new proposal still allows for small fluctuations in budgets (in both directions) without significant process, and gives the Board flexibility to determine the appropriate review process depending on the funding amount.<sup>29</sup>

No other party commented on this issue.

I recommend that the Board accept this proposal, and modify its June 25 Order accordingly. As noted by the DPS, if the annual EEU budget were \$30 million, the five-percent threshold would mean that there would be no automatic review of goals or EEC collections unless the additional funding were above \$1.5 million. The parties' proposed new \$100,000 threshold is a more appropriate trigger for automatic review by the Board.

However, I note that in two areas the proposed Process and Administration document is not entirely consistent with the DPS's description of the parties' proposed change. First, Section I.2.C addresses the receipt of unanticipated additional funding by an EEU. Subparagraphs (a) and (b) of that section, which address the effect of unanticipated additional funding on an EEU's performance indicators, fees and services, are consistent with the DPS's description of the parties'

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28. Order of 6/25/10 at 46-47 (Order paragraph 8).

29. Letter from Walter (TJ) Poor, Energy Program Specialist, DPS, to Susan M. Hudson, Clerk, Board, dated September 3, 2010.



proposed change. However, subparagraph (e) of that section, which addresses the effect on EEC collections, still contains the five-percent threshold.<sup>30</sup> Therefore, I recommend that the Board modify Section I.2.C.(e) to read:

(e) If any individual source provides funds for activities already supported by the EEC, an EEU shall identify whether these funds are greater than \$100,000.

- i. If the additional funds are greater than \$100,000, the Board shall determine whether EEC collections should be adjusted.
- ii. If the additional funds are less than \$100,000, the Board may, but is not required to, determine whether EEC collections should be adjusted.

Second, as proposed, Section II.1.D.(a) provides: "The DRP process shall include . . . any formulas to adjust performance target values formulaically for small changes in three year budgets." To be consistent with Section I.2.C, I recommend that the reference to formulas to adjust performance targets for small changes in budgets be deleted. Therefore, I recommend that the Board modify Section II.1.D.(a) to read:

(a) The DRP process shall include a determination of what indicators shall be measured, the identification of minimum or target values for each indicator, the assignment of weight to each indicator, and a payment scale for target values.

I have made these modifications in the attached version of the VEIC Order of Appointment. Any party wishing to object to these modifications should do so in its comments on this Proposal for Decision so that the Board may resolve any disputes.

## **(2) Formulaic Adjustments to Performance Goals**

In the June 25 Order, the Board approved the parties' recommendation that the performance mechanism currently in place for EEUs should be maintained throughout the Transition Period, except that any changes to performance goals and indicators that are pending

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30. Subparagraphs (c) and (d) of this section address reductions to the EEU budget, or requests that an EEU perform duties in addition to those described in its Order of Appointment. Both these subparagraphs include a \$100,000 trigger, below which no changes to an EEU's performance indicators or fees will occur, and above which the affected EEU will propose a method, if any, by which the change should affect performance indicators, fees and/or services to be provided by the EEU.

at the time an Order of Appointment is issued should be allowed to be completed during the Transition Period.<sup>31</sup>

In the DPS's letter accompanying the September 3 Documents, the DPS states that, after further reflection, the parties believe that one aspect of the performance mechanism currently in place should be changed now. Specifically, the current contract provides for formulaic adjustments to performance goals to address budget fluctuations. According to the DPS, the parties now recommend that these formulaic adjustments be replaced with the mechanism in Section I.2.C of the Process and Administration document (the \$100,000 threshold described in the previous section of this Order) immediately upon issuance of an Order of Appointment. The DPS states that it has incorporated this change into Attachment A to Appendix A of the proposed VEIC Order of Appointment (that is, all references to formulaic adjustments have been removed and replaced with a reference to Section I.2.C of the Process and Administration document).<sup>32</sup>

No other party commented on this issue.

I recommend that the Board accept this proposal and modify its June 25 Order accordingly. Changing the EEU structure to an Order of Appointment model is a complex undertaking. The Board expected that, as parties' discussions became increasingly detailed, they might identify areas in which their original recommendations, or the Board's original decisions, could be improved. Replacing formulaic adjustments to performance goals with the \$100,000 threshold mechanism described above is one example of an area in which parties altered their original recommendation as a result of further discussions. I find this change to be appropriate, and recommend that the Board adopt it.

However, I note that the new language in Section 1.B.(b) under the heading Description of Performance Indicators in Attachment A to Appendix A of the VEIC Order of Appointment (which is repeated in Sections 2.C.(b), 3.C.(b), 4.C.(b), 5.C.(b), 6.C.(b), and 7.C.(b) of that document) refers to a "limitation set forth in Paragraph 9 of the Transition Period Plan (Appendix

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31. Order of 6/25/10 at 45 (Order paragraph 4).

32. Attachment A to Appendix A of the proposed VEIC Order of Appointment is the current contract performance mechanism with changes to reflect how the mechanism will operate pursuant to an Appointment instead of a contract.

A)."<sup>33</sup> I believe this language was intended to refer to Paragraph 10 of the Transition Period Plan, since Paragraph 9 discusses definitions of terms used in the Transition Period Plan, while Paragraph 10 includes a limit on the total compensation to be provided to VEIC for the 2009-2011 time period. I have changed the paragraph reference in the attached version of the VEIC Order of Appointment. If any party disagrees with this modification, it should indicate this in its comments on this Proposal for Decision.

### **(3) Guidelines for Combined-Heat-and-Power and Demand Response**

The June 25 Order approved guidelines for an EEU that may provide combined-heat-and-power services, as well as guidelines for an EEU that may provide demand-response services. Both these guidelines were written to apply generically to "an EEU."<sup>34</sup>

In its letter accompanying the September 3 Documents, the DPS states that both these guidelines were originally intended to be attached to the Process and Administration document, but that the parties now believe it would be more appropriate to include the guidelines with each individual Order of Appointment. The reason for this is that the guidelines may not be relevant to all EEUs (for example, the demand-response guidelines are not relevant to BED's appointment). Therefore, the DPS has revised the guidelines approved in the June 25 Order to refer to VEIC specifically, and attached them to the proposed VEIC Order of Appointment.

No other party commented on this issue.

This is another area in which the parties' more detailed discussions led them to identify an area in which the Board's original decision could be improved. The June 25 Order specifically stated that the demand-response guidelines would not apply when an EEU and the distribution utility are the same entity.<sup>35</sup> Since the Board has now determined that BED should be granted an Order of Appointment, it is appropriate to attach both sets of guidelines to individual Orders of Appointment when appropriate. Therefore, I recommend that the Board accept the parties'

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33. Exh. DPS-5 at 20.

34. Order of 6/25/10 at Appendices B and C.

35. Order of 6/25/10 at 28 (finding 26).

recommendation and the modifications to the guidelines for combined-heat-and-power and demand response.

**(4) Payments to an EEU in the Event of Revocation or Termination**

Finding 63 of the Board's November 24, 2009, Order in this proceeding provides that an Order of Appointment should address what amounts should be paid to an EEU in the event of revocation or termination.<sup>36</sup> However, as proposed in the September 3 Documents, these amounts are addressed in the Process and Administration document, rather than in VEIC's Order of Appointment. After reviewing both documents, I find that it is appropriate to address this issue in the Process and Administration document as the parties proposed. Therefore, I recommend that the Board accept the parties' proposal and modify its November 24, 2009, Order accordingly.

**G. Apparent Conflict Within September 3 Documents**

There is one area in which there appears to be a conflict within the September 3 Documents. Specifically, as proposed, Section IV.3.C of the Process and Administration document requires certain items related to types of costs, cost-allocation, and jurisdictional separations to be established in an EEU's Order of Appointment.<sup>37</sup> However, with the exception of the definition of the types of costs that constitute VEIC's organization-wide indirect costs, these items are not included in the proposed VEIC Order of Appointment.

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36. Order of 11/24/09 at 48 (finding 63).

37. As proposed, Section IV.3.C. states:

The Appointment for an EEU shall establish:

(a) The types of costs that constitute an EEU's fringe-benefit and payroll-related costs and an EEU's organization-wide indirect costs, unless otherwise modified by the Board.

(b) The method for allocating an equitable share of an EEU's fringe-benefit and payroll-related costs and an EEU's organization-wide indirect costs unless otherwise modified by the Board.

(c) Any appropriate EEU revenue and cost separations, assignments and allocation policies and procedures to govern an EEU's eligible share of any organization-wide revenues or costs.

(d) Any appropriate EEU jurisdictional separations for implementing entities that provide services subject to other regulatory jurisdictions, as described in Sections V.18 and V.19.

I recognize that the September 3 Documents were developed over many months, and the parties made best efforts to keep the two documents consistent with each other. However, in this instance, it is unclear to me whether the parties intended to delete Section IV.3.C of the Process and Administration document, or to add the items listed therein to the VEIC Order of Appointment. To address this situation, I recommend that the Board replace the word "shall" with the word "may" in the introduction to Section IV.3.C so that the sentence reads: "The Appointment for an EEU may establish: . . . ." In addition, I expressly request that the parties address this issue in their comments on this Proposal for Decision. Specifically, are the items identified in Section IV.3.C at a level of detail such that it is not appropriate for the Board to approve them, or should the Board approve these items, either as part of an Order of Appointment or subsequent to such appointment, because the DPS will be approving VEIC's invoices (with any disputes resolved by the Board)? If the Board should approve these items as part of an Order of Appointment, what should be included in VEIC's Order of Appointment regarding these items?

#### **H. Other Substantive Changes**

In reviewing the September 3 Documents, I identified additional areas where I believe substantive changes are necessary to accurately reflect the parties' intent or previous Board decisions in this Docket. For example, in both the proposed VEIC Order of Appointment and the proposed Process and Administration document, the word "should" is used in several places where "shall" should be used because I believe the parties intended for the Board to require an entity to perform an action. In addition, there are several places where "shall" is used when referring to the DPS, when "will" should have been used because the Board does not have the authority to require the DPS to take these actions.<sup>38</sup> I have changed these terms when appropriate in the documents.

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38. This is reflected in the June 25 Order, where the Board stated that the DPS shall perform certain actions, if it so elects, and if the DPS elects not to perform the actions, the Board shall perform the actions. *See, e.g.*, Order of 6/25/10 at 87 (Order paragraph 14) and 88 (Order paragraph 18).

More specific changes to each document are described below. I have incorporated all the changes into the attached VEIC Order of Appointment and Process and Administration document, and recommend that the Board adopt them. Parties should review these changes and identify any areas of concern in their comments on this Proposal for Decision. To facilitate parties' review, I have attached redline/strikeout versions that compare the September 3 versions of these documents with the versions attached to this Proposal for Decision.

### **(1) Order of Appointment**

I recommend twenty additional substantive changes to the proposed VEIC Order of Appointment.

First, as proposed, the first sentence of the Introduction states that the term of the Appointment will be from the date the Order of Appointment is issued until December 31, 2021. However, I believe the parties' intent was that the Appointment term should extend through calendar year 2021, not only until December 31 of that year. Therefore, I recommend that the Board replace the word "until" with the word "through" in the first sentence of the Introduction.

Second, Section II.3.B of the proposed Order of Appointment provides that the magnitude of heating-and-process-fuel efficiency services provided by VEIC "is acknowledged to be a function of the magnitude of financial resources made available by the Board for this purpose." However, currently the funds for such services are determined by statute, not by the Board. Therefore, I recommend that Section II.3.B be modified to read: "The magnitude of such services is acknowledged to be a function of the amount of financial resources made available by statute or by the Board for this purpose."

Third, Section II.8 of the proposed Order of Appointment discusses VEIC's participation in the FCM as well as in proceedings that could modify the market itself. However, this section does not include any requirements or expectations regarding VEIC's participation in the New England Power Pool ("NEPOOL") or Independent System Operator of New England, Inc. ("ISO-NE") proceedings that are not directly related to the FCM. VEIC's current contract with the Board requires it to also "support the State of Vermont's efforts to secure resource parity for

demand resources in regional electricity markets."<sup>39</sup> To the best of my knowledge, the parties to this proceeding did not explicitly discuss removing this requirement as part of the change to the Order of Appointment model.<sup>40</sup> Therefore, I recommend modifying the second sentence of Section II.8 to read:

VEIC shall also participate in any proceedings for the modification or further development of the market itself, and shall support the State of Vermont's efforts to secure resource parity for demand resources in regional electricity markets.

This change is consistent with the goal of the State law that requires Vermont electric distribution and transmission utilities to:

advocate for regional cost support for the least cost solution with equal consideration and treatment of all available resources, including transmission, strategic distributed generation, targeted energy efficiency and demand response resources on a total cost basis.<sup>41</sup>

VEIC's ability to participate in these regional discussions will be constrained by available resources. As such, I recommend that this issue be discussed in the DRP process as part of the non-resource-acquisition budget determination.

In addition, the last sentence of Section II.8 of the proposed Order of Appointment (before subparagraph II.8.A) reads: "VEIC shall provide to the Board and or Department upon request the following information on the claimed capacity submitted in the FCM: . . . ." This is followed by subparagraphs A through D, which address how the financial risks of participating in the FCM will be shared, not information on the claimed capacity submitted in the FCM. Therefore, I recommend modifying the last sentence of Section II.8 to read: "The financial risks of participating in the FCM shall be shared as follows: . . . ."

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39. Section II.X of Attachment L to the Board's current contract with VEIC. This contract is available on the Board's website at: [www.psb.vermont.gov/docketsandprojects/eeu/rfpsandcontracts/2009-2011/eeucontract](http://www.psb.vermont.gov/docketsandprojects/eeu/rfpsandcontracts/2009-2011/eeucontract).

40. Section II.X of Attachment L to the Board's current contract with VEIC also requires VEIC to coordinate its activities in NEPOOL with designated Board and DPS staff, and to ensure that the positions it takes as a NEPOOL member are consistent with those advocated by the Board. I do not recommend modifying the proposed Order of Appointment to require VEIC to continue to do these tasks because such a requirement would not be consistent with the Board's goal of making the framework it uses to regulate the EEU more similar to the framework the Board uses to regulate electric utilities. However, I am aware that Vermont electric utilities sometimes coordinate with Board and DPS staff regarding regional activities and positions when such coordination would advance Vermont's interests at the regional level. I recommend that the Board encourage VEIC to do the same.

41. Public Act No. 61, § 8 (2005 Vt. Bien. Sess.).

Fourth, Sections II.14.A and B of the proposed Order of Appointment refer to VEIC's long-term goals. I believe the parties intended to refer to the long-term goals of VEIC as an EEU, not to VEIC's own long-term goals as a company. To clarify this, I recommend that the first sentence of Section II.14.A be modified to read:

A reasonable level of applied research, development and demonstration if it finds that such actions are likely to lead to cost-effective solutions to meeting EEU long-term resource-acquisition goals and are necessary to advance the goals of sound product and program design over time.

I further recommend that Section II.14.B be modified to read:

The development and implementation of training and workforce development initiatives as appropriate, consistent with long-term EEU goals and objectives, including cooperative activities with Vermont educational institutions, vocational training, and continuing education; and/or

Fifth, finding 148 in the Board's November 24, 2009, Order in this proceeding provides that, under an Order of Appointment structure, expenses incurred by an EEU for efforts to seek alternative funding should be funded through a non-resource-acquisition compensation methodology. This concept is not incorporated into the proposed Order of Appointment. To address this issue, I recommend modifying the first sentence of Section III.2 so that it reads:

VEIC costs that are to be treated as NRA costs (including expenses incurred by VEIC for efforts to seek alternative funding) shall be identified, with specific corresponding budgets for each activity, as part of the DRP process.

Sixth, the reference to Provision 7 in the last sentence of Section III.4 is unclear. This sentence describes three-year spending limits that VEIC shall be subject to. I recommend the Board clarify the language in this sentence, consistent with what I believe to be the parties' intent, so that it reads:

VEIC shall not exceed three-year spending limits as defined in the DRP for RA or NRA activities, or for any other categories that may be designated by the Board (such as individual eligible NRA budget categories) without approval from the Board, unless funds are transferred that do not require Board approval as provided in Section III.7.

Seventh, Section III.7 describes the process to be followed if VEIC would like to transfer funds among eligible non-resource-acquisition budget categories. The second sentence in this section, which describes a threshold below which VEIC does not need Board approval to transfer



funds, includes a reference to "that category" that is unclear. As a result, I recommend that the Board clarify this sentence, consistent with what I believe to be the parties' intent, so that it reads:

VEIC must request approval from the Board to transfer funds among eligible NRA budget categories, unless (1) the amount of the transfer is less than \$10,000, or (2) the amount transferred is less than 50% of the amount allocated to the category from which it is transferred and less than \$50,000.

Eighth, Section III.10.A provides that VEIC will submit a report to the DPS that establishes its claim regarding its QPIs for the previous year. It is possible that some QPIs may not be measurable each year (for example, in the 2003-2005 contract period, one of VEIC's performance indicators measured an increase in market share of Energy Star housing from the baseline to the third year of the contract period), and the Order of Appointment language should allow for this possibility. In addition, consistent with current practice, VEIC should submit its report that establishes its claim regarding its QPIs for the previous year to the Board as well as the DPS. Therefore, I recommend that the first sentence of this Section be modified to read as follows:

By April 1 of each year, VEIC shall submit a report to the Board and the DPS that establishes its claim regarding its QPIs (e.g., MWh, Total Resource Benefits ("TRB"), MMBtu, and other Board- approved QPIs) for the previous year for those QPIs which can be measured for that year (some market transformation QPIs may only be able to be measured over a multi-year period).

Ninth, as proposed by the parties, the last sentence of Section III.10.B provides an opportunity for VEIC and other parties to comment on the DPS's recommendation to the Board regarding VEIC's claim for its QPIs for the previous year. However, this section does not include a deadline for such comments to be filed. Since there is only one month between the date that the DPS will file its recommendation and the date by which the Board must issue its determination regarding VEIC's achieved savings, I recommend that the Board insert a filing deadline for comments on the DPS's recommendation. While to the best of my knowledge, the parties have not discussed such a deadline, I believe establishing such a deadline is consistent with their intent as evidenced by the fact that the proposed Order of Appointment specifies deadlines for all other steps in the documentation and verification process. Therefore, I recommend that the Board convert the last sentence of Section III.10.B into a new Section III.10.C (renumbering the following sections accordingly) that reads: "By July 15 of each year,

VEIC or other interested parties may offer comments on the Department's recommendation to the Board."

Tenth, as proposed by the parties, Section III.11 of the proposed Order of Appointment refers to ". . . VEIC's financial standing or status as an Order of Appointment . . ." Based on the context of Section III.11, I believe the parties intended this to read ". . . VEIC's financial standing or status with respect to its Order of Appointment . . ." I recommend that the Board modify this sentence accordingly.

Eleventh, as proposed by the parties, Section III.11.E of the proposed Order of Appointment reads, "Loans to VEIC shall be shown as a credit on VEIC's monthly service; and . . ." Based on the context of Section III.11, I believe the parties intended this to read "Loans to VEIC shall be shown as a credit on VEIC's monthly invoice; and . . ." I recommend that the sentence be modified accordingly.

Twelfth, as proposed, Section IV.2 includes a definition of the term "Allowable VEIC EEU Funds." Based on how this term is used in the proposed VEIC Order of Appointment, I believe the parties intended it to describe how the funds available to VEIC for the purposes set forth in the Order of Appointment will be calculated. However, as written, the definition mixes funds that are allocated to a particular EEU with the total EEU program funds.<sup>42</sup> To address this situation, I recommend that the Board modify Section IV.2 to read as follows:

**Allowable VEIC EEU Funds** means the total amount of EEU EEC Funds and any other funds under the jurisdiction of the Board that have been allocated for the purposes specified in VEIC's Order of Appointment. Allowable VEIC EEU Funds for a calendar year are comprised of the total EEC Funds approved for collection (not including any true-up from over/under collections of the EEC from prior years and any payments to electric distribution utilities for EEC uncollectibles) by the Fiscal Agent for that calendar year, plus any approved carryover of VEIC's unspent EEC Funds from prior calendar years, plus any other funds available under the Board's jurisdiction for EEU implementation such as funds for the acquisition of Heating-and-Process-Fuels resources, less the following deductions:

A. DPS EEU monitoring and evaluation costs;

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42. Specifically, if only EEC funds allocated to a particular EEU are included in Allowable VEIC EEU Funds (as the first part of the second sentence of the definition states), then there is no reason to deduct items A through H.

- B. Fiscal Agent fees;
- C. Fiscal Agent audit fees;
- D. Customer Credit Available Incentive Funds;
- E. Independent Triennial Audit of the EEU;
- F. EEC Rate Charge Advertising;
- G. EEU Funds allocated for the purpose of EEU Order of Appointments other than VEIC; and
- H. Any other costs the Board determines are required in order to effectively administer, monitor or evaluate an EEU.

Thirteenth, as proposed by the parties, Section 1 of Appendix A provides, in relevant part, that VEIC's operations fees shall reflect the operations fees in effect under the contract between the Board and VEIC at the time of Appointment. This Section also states that Appendix A and its attachments describe these terms in detail. However, it appears that the only operations fee stated in Appendix A and its attachments is that which will apply to customer-side smart-grid activities carried out by VEIC using funds approved by the Board for this specific purpose in its May 27, 2010, memorandum.<sup>43</sup> I believe it is consistent with the parties' intent to specify all operations fees that will apply during the Transition Period. To accomplish this, I recommend that the Board add a new Section 4 to Appendix A (and renumber following sections accordingly) which would state:

During the Transition Period, an Operations Fee of 2.0% will apply to total eligible monthly costs and expenses incurred and funded by VEIC Heating and Process Fuel Funds.

I further recommend that the Board add a new Section 5 to Appendix A (and renumber following sections accordingly) which would state:

During the Transition Period, an Operations Fee of 0.75% will apply to all total eligible monthly costs and expenses incurred and funded by VEIC Electric EEU Funds, except for expenses on customer-side smart-grid activities carried out by VEIC using funds approved by the Board for this specific purpose in its May 27, 2010, memorandum.

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43. See, Section 4 of Appendix A to the proposed VEIC Order of Appointment.

Fourteenth, as proposed by the parties, Section 3 of Appendix A to the proposed Order of Appointment currently reads: "During the Transition Period, VEIC may extend the scope of EEU services as specified in the Orders of Appointment, but only to the extent they are able to do so with currently available resources." To a reader unfamiliar with the parties' discussions during this proceeding, this sentence could be confusing because it does not indicate what the starting point is for any extension of the scope of EEU services. To clarify what I believe to be the parties' intent, I recommend modifying Section 3 to read:

During the Transition Period, VEIC may extend the scope of EEU services beyond the scope included in the Board's contract with VEIC for the 2009-2011 period, but only to the extent they are able to do so with currently available resources.

Fifteenth, as proposed by the parties, Section 10 of Appendix A to the proposed Order of Appointment currently reads:

The total compensation amount for all eligible costs, expenses and performance incentives paid to VEIC by the EEU Fund Fiscal Agent under this Appointment may not exceed the amount that would cause total payments to VEIC from January 1, 2009 through December 31, 2011, including all payments made under VEIC's Efficiency Vermont contract with the Board during this period, to exceed \$105,120,306, unless otherwise approved by the Board.

However, I believe the parties' intent was that the dollar amount specified in this Section would include any performance incentive payment earned for the work VEIC performed from January 1, 2009, through December 31, 2011, even though such payment would not be made until 2012. Therefore, I recommend that the Board add the phrase "for work performed" to Section 10 of Appendix A to the proposed Order of Appointment in two places so that this Section reads:<sup>44</sup>

The total compensation amount for all eligible costs, expenses and performance incentives paid to VEIC by the EEU Fund Fiscal Agent under this Appointment may not exceed the amount that would cause total payments to VEIC for work performed from January 1, 2009, through December 31, 2011, including all payments made under VEIC's Efficiency Vermont contract with the Board for work performed during this period, to exceed \$105,140,904, unless otherwise approved by the Board.

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44. I also recommend changing the dollar amount in this Section to be consistent with the pending amendment to the contract between VEIC and the Board.

Sixteenth, Section 12.D of Appendix A to the proposed Order of Appointment currently requires VEIC to maintain accounting that segregates VEIC's General Administration costs, and Section 12.F requires VEIC to segregate its costs associated with participating in the Vermont System Planning Committee ("VSPC"). However, Section 13 of Appendix A to the proposed Order of Appointment provides that General Administrative Costs shall include, among other items, costs associated with VSPC participation. Therefore, I recommend that the Board use the term General Administrative costs in Section 12.D, delete Section 12.F, and renumber the following sections accordingly.

Seventeenth, Attachment G to Appendix A of the proposed Order of Appointment includes three definitions that include the word "Contractor" and that are intended to apply during the Transition Period (Contractor Electric EEU Funds, Contractor FCM Funds, and Contractor Heating and Process Fuel Funds). However, Appendix A and its other attachments either do not use the word "Contractor" in the defined term, or replace it with "VEIC." To be consistent throughout Appendix A, I have revised those three defined terms in Attachment G to replace "Contractor" with "VEIC," and have used those terms throughout Appendix A and its attachments.<sup>45</sup>

Eighteenth, the definition of Contractor Heating and Process Fuel Funds (which I have renamed VEIC Heating and Process Fuel Funds) in Attachment G to Appendix A of the proposed Order of Appointment does not mention proceeds from the sale of Vermont's share of Regional Greenhouse Gas Initiative allowances that are available to VEIC. In order to make this definition consistent with Attachment E to Appendix A of the proposed Order of Appointment, I recommend that the last sentence of the definition be modified to read:

The *VEIC Heating and Process Fuel Funds* for a calendar year are comprised of: (1) revenues from regional wholesale market capacity payments for energy efficiency resources, excluding *ISO-NE* payments received by *BED* and less (a) *DPS* and *Contract Administrator* costs associated with *ISO-NE FCM* activities, and (b) *VEIC FCM Funds*; plus (2) proceeds available to VEIC from the sale of Vermont's share of Regional Greenhouse Gas Initiative allowances.

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45. I have not modified the defined term Contractor EEU Funds because that term applied only to monies available during the 2006-2008 contract period.

Nineteenth, the last two sentences of the definition of FCM in Attachment G to Appendix A of the proposed Order of Appointment refers to the Transition Period in the present tense, and the first commitment period for FCM resources in the future tense. However, the Transition Period has now ended, and the first commitment period has begun. Therefore, I recommend modifying the last two sentences of the definition of FCM to read:

Since the commitment period for *FCM* resources did not begin until June, 2010, *ISO-NE* developed rules for a Transition Period, starting in December, 2006, and extending through May 31, 2010. During this Transition Period, available capacity in New England, including demand resources such as energy efficiency was eligible to receive capacity payments at a fixed price per kW established by the Transition Period rules.

Finally, the last sentence of the definition of Self-Administered Energy Efficiency Program in Attachment G to Appendix A of the proposed Order of Appointment refers to the fact that the details of this program were not yet finalized at the time of the fourth amendment to the Board's contract with VEIC. The details of this program are now defined, and I recommend that this sentence be deleted from the definition in Attachment G to Appendix A.

## **(2) Process and Administration Document**

I recommend nineteen additional substantive changes to the Process and Administration document.

First, the Board determined in its November 24, 2009, Order that an EEU shall not be able to abandon or curtail any responsibilities associated with its appointment without first obtaining the Board's approval.<sup>46</sup> However, this concept is not included in the proposed Process and Administration document. To address this issue, I recommend that the Board insert a new Section 1.B. (and renumber subsequent sections) that reads: "Upon appointment, an EEU shall not abandon or curtail any responsibilities associated with the appointment without first obtaining the Board's approval."

Second, as proposed, the second sentence of Section I.1.C. of the Process and Administration document provides that the Appointment of an EEU "shall be deemed by the

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46. Order of 11/24/09 at 86 (Order paragraph 4).

Board to satisfy the corresponding obligations of Distribution Utilities, in whole and in part, under section 218c and under any prior Orders of the Board." However, when read in isolation, this sentence appears to be broader than what I believe the parties intended. I believe the parties intended to refer only to the distribution utilities' obligations under Sections 218c(a) and (b), since the appointment of an EEU will not change distribution utilities' obligations under Section 218c(d) related to a transmission system plan. In addition, in the Board's June 25 Order, it largely adopted the parties' recommendation regarding an EEU's role with respect to geographically targeted programs. This recommendation, as approved by the Board, provided that a Distribution Utility remains responsible for certain activities related to distributed utility planning.<sup>47</sup> In order to reflect the parties' intent and the Board's decision, I recommend that the second sentence of Section I.1.C be modified to read:

The Appointment(s) shall be deemed by the Board to satisfy the corresponding obligations of Distribution Utilities, in whole and part, under sections 218c(a) and (b) and under any prior Orders of the Board, except that electric utilities shall retain responsibility for: (1) selecting the mix of resources, of which energy efficiency may be one, to be deployed to serve load and address Supply Problems and Reliability Deficiencies; (2) participating in the DRP process to identify potential areas to be geographically targeted; (3) coordinating with an EEU regarding the anticipated energy efficiency savings in those areas; (4) making appropriate funding decisions (including the possibility of petitioning the Board for a service-territory-specific Energy Efficiency Charge adder), if the statewide budget established by the Board in the DRP process will not be sufficient to acquire the necessary energy efficiency savings in the geographically targeted areas; and (5) planning for and delivering energy efficiency services as part of distributed utility planning, if the constrained area is not included in an EEU's DRP or if the Board were to determine that an EEU were no longer to provide geographic targeting services.

Third, as proposed, the second sentence of Section I.1.D provides the source for the Board's jurisdiction over an EEU that is not an organization affiliated with a gas or electric utility, or a "company" as defined in 30 V.S.A. § 201. However, I believe this sentence should be clarified to reflect that the statute cited therein not only provides the Board with jurisdiction over such an EEU, but also sets limits on that jurisdiction. To clarify this, I recommend that the Board modify the second sentence of Section I.1.D to read:

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47. See, Order of 6/25/10 at 21-23.

If an EEU is not such an organization, or is not a "company" as defined under 30 V.S.A. § 201, an EEU will be subject to the jurisdiction of the Board to the same extent as a "company" so defined under § 201 as authorized by § 209(d)(6), except as otherwise provided by 30 V.S.A. § 209(d)(6).

Fourth, as proposed, the second paragraph of Section I.2.E refers to "EEC collections for such period." However, it is unclear what period this phrase refers to. I believe the parties intended this clause to refer to a performance period. Therefore, I recommend the Board modify the second paragraph of Section I.2.E to read: "EEC collections for a performance period shall include amounts designed to recover the cost for the geographically targeted planning and resource acquisition services reasonably anticipated to be performed during that period." I also recommend that the two paragraphs of Section I.2.E be combined.

Fifth, as proposed, Section I.2.E.(a) could be read to be inconsistent with the Board's June 25, 2010, Order. This section addresses how the cost of geographically targeted activities will be funded, if the costs are expected to exceed the amount of the statewide EEU budget allocated for such activities. Specifically, this section states that ". . . the unfunded costs for such services may be allocated to the affected DUs . . . ." However, the June 25 Order provides that distribution utilities will remain responsible for funding additional energy efficiency investments in geographically targeted areas, if the statewide budgets are insufficient to acquire the desired energy efficiency savings. In addition, the June 25 Order focuses on acquiring the necessary energy efficiency savings in geographically targeted areas while Section I.2.E.(a) does not explicitly include this concept. Therefore, to make Section I.2.E.(a) consistent with the June 25 Order, I recommend it be modified to read:

If the statewide budget established by the Board will not be sufficient to acquire the necessary energy efficiency savings in the geographically targeted areas during a regular performance period, the costs for additional energy efficiency investments in geographically targeted areas necessary to acquire the desired energy efficiency savings shall be allocated to the affected DUs by the Board in accordance with the principles established in Docket No. 7081 and may be recovered by DUs utilizing traditional DSM Cost Recovery Mechanisms.

Sixth, as proposed, the first part of Section II.1.A.(b)i refers to geographically targeted programs in a DRP generally, while the second part of that same section refers to "the same



supply problem or reliability deficiency." To clarify the reference to the "same" supply program or reliability deficiency, I recommend that Section II.1.A.(b)i be modified to read:

To the extent that the Board authorizes an EEU to plan for and implement geographically targeted programs in a DRP to address a particular supply problem or reliability deficiency, such activities should satisfy the obligations of an electric utility to plan for and deliver such programs to meet the same supply problem or reliability deficiency under 30 V.S.A. § 218c.

Seventh, as proposed, Section II.1.C.(b) allows the Board to resolve disputes regarding parties' proposals for a DRP after any such process as the Board may require. However, Section II.1.C.(c) states that the Board will provide entities with an opportunity to submit comments and participate in a technical workshop prior to adopting an EEU DRP. Thus, it appears that Section II.1.C.(c) sets forth a minimum process that the Board must follow. To resolve any conflict between these two sections, I recommend that the Board modify the second sentence of Section II.1.C.(b) to read: "If parties present markedly different proposals or recommendations, the Board may seek to resolve disputes after any such process as the Board may require, provided that such process includes at least the steps set forth in Section II.1.C.(c), below;"

Eighth, as proposed, the Process and Administration document does not refer to the "Benchmarking Review" which the Board's November 24, 2009, Order in this proceeding concluded should be conducted every three years by the DPS.<sup>48</sup> This Benchmarking Review will compare an EEU's performance to that of energy efficiency providers in other jurisdictions, normalizing for program maturity, funding, demographics, and other important variables. To incorporate this into the Process and Administration document, I recommend that the Board insert a new Section II.2.F (and renumber subsequent sections) that reads:

Every three years (in time to inform the establishment of performance goals) the DPS will assess an EEU's performance relative to the performance of other entities conducting similar efficiency resource acquisition efforts in other jurisdictions. Such comparisons shall normalize for program maturity, funding, demographics and other important variables. An EEU and other interested parties may offer comments on the results of the DPS's Benchmarking Review to the Board.

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48. Order of 11/24/09 at 35-36 (finding number 38), 41-42.

Ninth, as proposed, Section III.4 provides that the DPS or any other entity could ask the Board to initiate a review of an EEU appointment for cause, but does not mention that the Board could also initiate such a review on its own motion. I believe such a provision should be included in the Process and Administration document so that it is consistent with the Board's November 24, 2009, Order in this proceeding, in which the Board stated that the Board should be able to terminate an EEU's appointment at any time for good cause.<sup>49</sup> Therefore, I recommend that a new second sentence be added to Section III.4 which reads: "The Board may also, on its own motion, initiate such a review for cause."

Tenth, as proposed, the last sentence of Section IV.1.A reads: "Details of an EEU's compensation structure should be outlined in its Order of Appointment." However, as described in Section II.1.(c) of the Process and Administration document, an EEU's compensation structure will be considered in the DRP process. Therefore, I recommend that the last sentence of Section IV.1.A be modified to read: "An EEU's compensation structure shall be outlined in its Order of Appointment and developed in detail in the DRP Process."

Eleventh, as proposed, Section V.3.B requires an EEU to provide the Board and the DPS with timely access to its financial, administrative and accounting records upon request. However, Section I.1.F of the proposed Process and Administration document provides that the DPS or the Board may initiate a management audit of activities related to an EEU's performance under an appointment at any time. In such case, it would be appropriate for the entity performing the management audit to also be provided access to those financial, administrative and accounting records relevant to the scope of the management audit. Therefore, I recommend that the last sentence of Section V.3.B be modified to read: "The DPS, the Board and any other entity that the Board so designates shall be provided timely access to this data upon request."

Twelfth, as proposed, Section V.5.C requires that an EEU collect and store various types of data from Vermont Utilities. As provided in V.5.C.(a) and V.5.C.(c), this data includes circuit data, among other items. However, my understanding is that, historically, Vermont Utilities have not provided circuit data for all their customers; rather, this data is collected by an EEU only for customers in the geographically targeted areas. As proposed, Section V.5.C could be read to

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49. Order of 11/24/09 at 27, 49.

require an EEU to collect circuit data for all customers from all Vermont Utilities, which I do not believe was the parties' intent. To clarify this language, I recommend adding the phrase "to the extent provided by Vermont Utilities" to the end of both V.5.C.(a) and V.5.C.(c).

Thirteenth, as proposed, Section V.6.D reads:

An EEU is solely responsible for the intentional or accidental release of any confidential information in its possession. An EEU agrees to indemnify the Board for any claims resulting from the release of any confidential information.

I believe it is consistent with the parties' intent for an EEU to also agree to indemnify the State for any such claims. Therefore, I recommend that the Board modify the second sentence of Section V.6.D so that it reads: "An EEU agrees to indemnify the Board and the State for any claims resulting from the release of any confidential information."

Fourteenth, as proposed, Section V.10.A of the Process and Administration document requires an EEU to coordinate with the service delivery efforts of any other Appointed EEUs, Vermont Utilities (which is defined to refer to electric utilities only), or other energy efficiency service providers in Vermont. While Vermont Gas Systems Inc. ("Vermont Gas") could be considered one of the "other energy efficiency service providers" referred to in this sentence, because the Board expressly concluded in its November 24, 2009, Order that it would require an EEU to coordinate with Vermont Gas when that EEU provides electric efficiency services to Vermont Gas customers, I recommend that the first sentence of Section V.10.A. be modified to read:

An EEU shall make every reasonable effort to coordinate with the service delivery efforts of any other Appointed EEUs, Vermont Utilities, Vermont Gas Systems, Inc., and other energy efficiency service providers in Vermont to ensure administrative efficiency, and consistent planning and reporting.

Fifteenth, as proposed, Section V.10.C of the Process and Administration document is written as if there were two EEUs. While the Board has decided that it will award Orders of Appointment to both VEIC and BED at the present time, it is possible that there could be more than two EEUs in the future. This section also refers to cost-sharing agreements with Vermont utilities. Thus, there could be multiple entities involved in such agreements. Therefore, I recommend that Section V.10.C be modified to read:

An EEU shall attempt to negotiate cost-sharing agreements with other EEUs or Vermont utilities when it becomes apparent that parallel or overlapping efforts may be more efficiently and economically performed by one of them on behalf of two or more entities. Any cost-sharing agreement shall provide a mechanism for fair exchange of compensation for EEU services among the entities.

Sixteenth, as proposed, Section V.15 of the Process and Administration document refers to performance contracting. This is a term of art in the energy efficiency industry; the performance contracting is used to obtain energy savings. To clarify this, I recommend adding the phrase "to obtain energy savings" to the first sentence of that section so that it reads: "If an EEU or any of its contractors advises a customer to use performance contracting to obtain energy savings . . ."

Seventeenth, as proposed, Section VI.1 of the Process and Administration document states:

**Allowable EEU Funds** means the total amount of EEU EEC Funds and any other funds under the jurisdiction of the Board that have been allocated for the purposes specified in the Order of Appointment. Allowable EEU Funds for a calendar year are comprised of the total EEC Funds approved for collection (not including any true-up from over/under collections of the EEC from prior years and any payments to DU's for EEC uncollectibles) by the Fiscal Agent for that calendar year and allocated to an EEU by the Board, plus any approved carryover of an EEU's unspent EEC Funds from prior calendar years, plus any other funds available under the Board's jurisdiction for EEU implementation such as funds for the acquisition of heating and process fuels resources, less the following deductions:

- A. DPS EEU monitoring and evaluation costs;
- B. Fiscal Agent fees;
- C. Fiscal Agent audit fees;
- D. Customer Credit Available Incentive Funds;
- E. Independent Triennial Audit of the EEU;
- F. EEC Rate Charge Advertising; and
- G. Any other costs the PSB determines are required in order to effectively administer, monitor or evaluate an EEU.

Based on how the term Allowable EEU Funds is used in the Process and Administration document, I believe the parties intended the term to describe the total amount of funds allocated

by the Board to a particular EEU for the purposes specified in that EEU's Order of Appointment. However, as written, the definition mixes funds that are allocated to a particular EEU with the total EEU program funds. If only EEC funds allocated to a particular EEU are included in Allowable EEU Funds (as the first part of the second sentence quoted above states), then there is no reason to deduct items A through G. In addition, it should be clarified that Allowable EEU Funds includes only those heating-and-process-fuels funds that have been allocated to that same EEU. Therefore, I recommend that the Board modify Section VI.1 to read as follows:

1. **Allowable EEU Funds** means the total amount of EEU EEC Funds and any other funds under the jurisdiction of the Board that have been allocated for the purposes specified in an Order of Appointment. Allowable EEU Funds for a calendar year are comprised of: (1) the total EEC Funds approved for collection (not including any true-up from over/under collections of the EEC from prior years and any payments to Distribution Utilities for EEC uncollectibles) by the Fiscal Agent for that calendar year and allocated to an EEU by the Board; plus (2) any approved carryover of that EEU's unspent EEC Funds from prior calendar years; plus (3) any other funds available under the Board's jurisdiction for EEU implementation, such as funds for the acquisition of heating-and-process-fuels resources, that have been allocated to that EEU.

Eighteenth, as proposed Section VI.19 includes a general reference to Docket No. 7081. I believe the parties' intent was to refer to the Board's June 20, 2007, Order in that Docket, along with the Memorandum of Understanding approved by that Order. Therefore, I recommend that the reference be modified to read: "*See* Docket No. 7081, Order of 6/20/07 and the Memorandum of Understanding approved by that Order."

Finally, as proposed, the first sentence of each paragraph in Appendix A to the Process and Administration document states that a particular type of evaluation activity is "described" in a Section of the main body of the Process and Administration document. However, the descriptions of these activities are actually contained in Appendix A; they are simply referred to in the main body of the Process and Administration document. Therefore, I recommend that the word "described" in the first sentence of each paragraph of Appendix A to the Process and Administration document be replaced with the phrase "referred to."

**I. Non-Substantive Changes**

The attached versions of the September 3 Documents also include several non-substantive typographical and punctuation changes, including corrections to section references. I encourage the parties to read the attached documents closely, and include any additional recommended typographical, punctuation, or section-reference changes in their comments on this Proposal for Decision.

**VI. CONCLUSION**

In this Proposal for Decision, I recommend that the Board issue the attached Order of Appointment to VEIC. I also recommend that the Board approve the attached document entitled "Process and Administration of an Energy Efficiency Utility Order of Appointment." As discussed in Section V.G., above, I also specifically ask parties to comment on one area in which the two documents appear to be inconsistent — should VEIC's Order of Appointment establish certain items related to types of costs, cost-allocation, and jurisdictional separations?

Dated at Montpelier, Vermont, this 15th day of December, 2010.

s/Ann Bishop

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Ann Bishop  
Hearing Officer

## VII. BOARD DISCUSSION

On December 9, 2010, BED, the DPS, and VEIC separately filed comments on the Hearing Officer's Proposal for Decision. On the same date, CVPS and GMP filed joint comments on the Proposal for Decision; CVPS's and GMP's comments state that GMEU joins in their submission.

In general, the parties support the Proposal for Decision, including the changes proposed by the Hearing Officer to the September 3 Documents.<sup>50</sup> The parties' comments address two areas in which the Hearing Officer explicitly solicited comments: (1) the process related to the filing of an Annual Report by BED; and (2) an apparent conflict within the September 3 Documents concerning the types of costs, cost allocations, and jurisdictional separations that are to be included in an EEU's Order of Appointment. In addition, VEIC proposes several minor modifications to the Transition Period Performance Mechanism (Attachment A to the Transition Period Plan, which is Appendix A to VEIC's Order of Appointment) and the Definitions Relating Solely to Appendix A Transition Period Plan and Associated Attachments (Attachment G to the Transition Period Plan).

The September 3 Documents were the product of extensive negotiations among the parties to this proceeding; we commend the parties for their thoughtful engagement on the myriad issues addressed therein. We also appreciate the parties' thorough review of the Proposal for Decision and its attachments, particularly since the Hearing Officer recommended numerous changes to the proposed VEIC Order of Appointment and Process and Administration document. After reviewing these documents and the parties' comments, we conclude that, except as noted below, the Proposal for Decision, including the Hearing Officer's recommended changes to the September 3 Documents, is reasonable and should be approved.

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50. BED also specifically notes that it supports the Hearing Officer's proposal on page 9 of the Proposal for Decision to modify Section II.1.D.(c) of the Process and Administration document to provide an affected EEU with notice and the opportunity to be heard on any proposed amendment to an EEU's QPIs. BED states that the Hearing Officer's proposal addresses the concerns BED raised in its earlier comments regarding this issue.

*Filing of Annual Report by BED*

In the Proposal for Decision, the Hearing Officer noted that BED's traditional "Annual Report" is analogous to VEIC's annual savings claim in that it is prepared prior to the savings verification process and includes unverified savings numbers. The Hearing Officer stated that, since the DPS is planning to conduct annual savings verification activities for BED's energy efficiency services, in the future BED would be able to file an Annual Report that includes verified savings. However, because this is an additional report that BED has not traditionally filed, the Hearing Officer specifically invited comments on this issue.

BED asserts that it is unnecessary for it to file an additional Annual Report each year. Instead, BED proposes to continue its current practice of reflecting verified savings for previous years in each subsequent Annual Report.

The DPS states that its schedule for verifying BED's savings claims in the future is undefined and depends somewhat on the efforts to coordinate verification activities related to the EEU's Forward Capacity Market claims with traditional annual savings verification activities. According to the DPS, the coordination of verification efforts will become clearer in the DPS's evaluation plan scheduled to be filed in the Demand Resources Plan proceeding (EEU-2010-06) in late January; if approved, some modification of the verification procedure outlined in the Process and Administration document may be necessary. The DPS suggests that the specific issue of BED's Annual Report could be addressed at that time. In the meantime, the DPS recommends that BED and the DPS work together to determine the appropriate timeframe for filing a savings claim and an annual report that includes verified numbers.

We conclude that it is premature to require BED to file an additional Annual Report at this time. The Hearing Officer predicated this requirement on the DPS conducting annual savings verification activities for BED's energy efficiency services. However, based on the DPS's comments, the DPS is still developing the process by which it will conduct its verification of BED's savings claims. Given that the schedule currently used by BED to file its Annual Reports has worked well to date, we will allow BED to continue its current practice of filing an Annual Report that is based on unverified savings and reflecting verified savings for previous years in each subsequent Annual Report. However, we expect BED and the DPS to discuss this



issue further in the context of the DPS's evaluation plan in the Demand Resources Plan proceeding; we will consider whether BED should file an additional Annual Report that is based on verified savings once the DPS's process for conducting its verification of BED's savings claims has been finalized.

We also determine that there is no need to modify Paragraph 3 of Appendix B to the Process and Administration document at this time to reflect this decision. That paragraph states, in relevant part, "Annual Reports shall be submitted as soon as reasonably possible after the Board issues its determination regarding an EEU's achieved savings at the conclusion of the DPS's savings verification process . . . ." This language is broad enough to encompass BED's current practice, given that the timing of the DPS's review of BED's annual savings claim has not yet been finalized.

#### *Apparent Conflict in September 3 Documents*

The Proposal for Decision notes that there is one area in which there appears to be a conflict within the September 3 Documents. Specifically, as proposed, Section IV.3.C of the Process and Administration document requires certain items related to types of costs, cost-allocation, and jurisdictional separations to be established in an EEU's Order of Appointment. However, with the exception of the definition of the types of costs that constitute VEIC's organization-wide indirect costs, these items are not included in the proposed VEIC Order of Appointment. The Hearing Officer specifically requested comments on this issue.

BED supports the Hearing Officer's modification to the introduction to Section IV.3.C of the Process and Administration document so that it reads "The Appointment for an EEU may establish . . ." because this provides the Board with the flexibility to address these issues either through an Order of Appointment or other method.

CVPS, GMP, and GMEU assert that it is not necessary for the items listed in Section IV.3.C to be included in the VEIC Order of Appointment at this time. These utilities note that Section V.19 of the Process and Administration document requires an EEU that is not also a fully integrated electric distribution utility to develop and implement appropriate affiliate transaction and intra-company cost-allocation procedures that shall be filed with the Board and the DPS.

These utilities understood that, pursuant to this requirement, VEIC would make a filing for Board review that would address items such as those called for under Section IV.C.3 of the Process and Administration document.

The DPS contends that the level of detail provided in Section IV.3.C is not necessary in any Board-approved Orders of Appointment. According to the DPS, items such as an EEU's fringe-benefit and payroll-related costs (Section IV.3.C.(a)), allocation methods (IV.3.C.(b)), appropriate revenue and cost separations (Section IV.3.C.(c)) and jurisdictional separations (IV.3.C.(d)) should be reviewed as a part of the DPS's responsibilities associated with reviewing an EEU's invoices. The DPS recommends that any changes to these items should be negotiated by the DPS and the EEUs, with any disputes resolved by the Board through the dispute resolution process outlined in the September 3 Documents. In addition, the DPS recommends deleting Section IV.3.C.(d) because the intent of Section V.19 encompasses the appropriate jurisdictional separations described in IV.3.C.(d).

VEIC supports the Hearing Officer's modification to the introduction to Section IV.3.C of the Process and Administration document, asserting that this is consistent with the broader objective of shifting the EEUs from a contract structure to a regulatory structure more similar to that of a distribution utility. Related to this issue, VEIC recommends modifying the defined term "Eligible Indirect Costs" in the VEIC Order of Appointment to read "Eligible Indirect and Fringe Costs." Section IV.8 of the proposed VEIC Order of Appointment provides that Eligible Indirect Costs are to be determined consistent with the provisions of the federal Office of Management and Budget Circular A-122. VEIC recommends modifying the definition term because this Circular addresses both indirect and fringe costs.

All parties agree that it is not necessary for an EEU's Order of Appointment to specify the items listed in Section IV.3.C; the Hearing Officer's proposed modification to the introduction to this Section removes this as a requirement, and we hereby adopt it. In addition, we accept the DPS's recommendation that Section IV.3.C.(d) of the Process and Administration document be deleted because the intent is already addressed in Sections V.18 and V.19.

Finally, we accept VEIC's proposed modification to the defined term "Eligible Indirect Costs." In general, we agree with the DPS that the items specified in Section IV.3.C should be

reviewed as a part of the DPS's responsibilities associated with invoice review. However, we are persuaded that it is appropriate to use the federal guidelines contained in the Office of Management and Budget Circular A-122 for fringe benefits as well as indirect costs. Using such guidelines should be more administratively efficient since VEIC already follows the federal guidelines for any federal grants it receives; such administrative efficiency should reduce the administrative costs assigned to ratepayers.

To reflect this determination in the VEIC Order of Appointment, it is necessary to modify the defined term when it is used in Sections III.1.A and IV.8. It is also necessary to modify the second sentence of Section IV.8 to read "These guidelines shall serve as the basis for determining whether or not a particular direct, indirect, or fringe cost item incurred under this Appointment is reasonable and appropriate."

#### *Modifications to the Transition Period Performance Mechanism*

VEIC proposes the following modifications to the Transition Period Performance Mechanism (which is Attachment A to the Transition Period Plan):

- Cumulative Annual Electricity Savings, Section 1.D.(b) – Replace "\$4.996" with "\$5.000";
- Total Resource Benefits, Sections 2.D.(a), 2.E.(a), and 2.E.(b) – Replace "\$235,100,000" with "\$235,100,250";
- Business End Uses, Sections 7.C.(a)ii and 7.C.(a)iii – Delete the word "Non-" because the preceding language includes the term "except";
- Million BTU (MMBtu) Heating and Process Fuel Savings, Section 8.E.(b) – Replace "\$4.666" with "\$4.577"; and
- Minimum Performance Requirements, Section 11.A.(a) – Add "DPS monitoring and evaluation costs" to the list of items in this subsection.

VEIC also proposes modifications to three definitions in the Definitions Relating Solely to Appendix A Transition Period Plan and Associated Attachments (which is Attachment G to the Transition Period Plan). According to VEIC, these three definitions appear to include references to various documents in VEIC's contract with the Board. To correct these definitions, VEIC recommends:

- Replacing definition J, "Business Sector" with: "***Business Sector*** means Business New Construction and Existing Business. Existing Business includes the following markets: Commercial and Industrial Retrofit, and Commercial and Industrial Equipment Replacement."
- Deleting the first portion of definition KK, "One Hundred Percent (100%) Target Level" which defines the target for each performance indicator for the period January 1, 2006, through December 31, 2008.
- Replacing definition LL, "Residential Sector" with: "***Residential Sector*** means Retail Efficient Products, Residential New Construction, and Existing Homes. Existing Homes includes the following markets: Residential Retrofit and Multifamily Retrofit. Residential New Construction includes the following markets: Single Family New Construction and Multifamily New Construction."

We adopt all of VEIC's proposed changes except for that to Minimum Performance Requirements (Section 11.A.(a)). We adopt the other changes to the Transition Period Performance Mechanism because they either make the language of the Attachment consistent with the Attachment's Tables or with the final version of the Board's contract with VEIC.<sup>51</sup> We adopt the changes to Attachment G because they remove references to contract documents which are no longer in effect as of the date of this Order.

We do not adopt VEIC's proposed change to Minimum Performance Requirements (Section 11.A.(a)) because the second sentence of Section 11.A states that "[t]his requirement is intended to ensure that VEIC produces a minimum benefit-cost ratio of electricity resource savings relative to the costs incurred to implement and evaluate the *EEU* and the *EEC*." This same language is in the Board's current contract with VEIC, and was not modified in the most recent amendment to that contract. Therefore, we conclude that parties to the contract intended to include the DPS's costs to evaluate VEIC's performance as an EEU when calculating the minimum benefit-cost ratio. Since Section 1 of Appendix A (Transition Period Plan) provides that during the Transition Period, VEIC's minimum performance requirements (among other items) shall reflect the minimum performance requirements in effect under the contract between

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51. The pending amendment referred to by the Hearing Officer in the Proposal for Decision has been signed, after approval by the Office of Attorney General and the Secretary of Administration. These reviews did not result in any substantive changes to the amendment.

the Board and VEIC at the time of Appointment, we see no basis for modifying the minimum performance standard included in the current contract at this time.

*Use of Uncommitted EEC Funds*

Finally, on pages 12-13 of the Proposal for Decision, the Hearing Officer discusses IBM's recommendation that the Board modify the language of Section IV.D of the proposed Process and Administration document such that at the end of a three-year performance period, any uncommitted EEC funds would be required to be used as a budget credit to ratepayers for efficiency services in the following year. The Hearing Officer notes that, as proposed, Section IV.D simply incorporates the flexibility contained in Board Rule 5.300 (which sets forth the methodology for calculating EEC rates). She recommends that the Board not adopt IBM's proposed change regarding this issue, and not rule on the merits of IBM's proposed change in this Docket, but rather allow IBM to raise the proposed change in the upcoming rulemaking proceeding regarding PSB Rule 5.300, if it desires.

No party filed comments on this aspect of the Proposal for Decision, and we accept the Hearing Officer's recommendation on this issue. However, we note that in this Docket and in past proceedings the DPS and VEIC have made compelling arguments regarding the desirability of providing the Board with flexibility to determine how uncommitted EEC funds should be used, if the funds are less than the specified threshold. Because the Board has had this flexibility, we were able to direct that the 2008 uncommitted EEC funds be used to leverage matching federal funds to implement smart-grid activities; we determined that this use of the uncommitted funds will provide customers with a greater benefit than they would have received if the uncommitted funds had been used to reduce future EEC rates. Accordingly, at the present time we do not see the benefit of removing the flexibility contained in Board Rule 5.300.

### VIII. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The findings and conclusions of the Hearing Officer are adopted, except as modified above.
2. The attached Order of Appointment, which has been modified to be consistent with this Order, shall be issued to Vermont Energy Investment Corporation ("VEIC"). The term of the Appointment shall be from the date of this Order through December 31, 2021.
3. The attached document titled "Process and Administration of an Energy Efficiency Utility Order of Appointment" ("Process and Administration document"), which has been modified to be consistent with this Order, is approved.
4. The June 25, 2010, Order in this Docket is modified as follows:
  - the threshold amount of additional funding that, if obtained by an EEU, would trigger the review of EEC collections, and an EEU's performance goals, performance indicators, and service offerings shall be \$100,000 (rather than five percent of the relevant budget);
  - the formulaic adjustments to performance goals to address budget fluctuations that are included in the Board's current contract with VEIC shall not remain in effect during the Transition Period; and
  - the guidelines for combined-heat-and-power and demand response shall be attached to individual Orders of Appointment (if they are relevant to that appointment) and shall be modified as attached to this Order.
5. The November 24, 2009, Order in this Docket is modified to allow the amounts to be paid to an Energy Efficiency Utility in the event of revocation or termination to be addressed in the Process and Administration document, rather than in an individual Order of Appointment.
6. This docket is remanded to the Hearing Officer for further proceedings.

Dated at Montpelier, Vermont, this 20<sup>th</sup> day of December, 2010.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: December 20, 2010

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: psb.clerk@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.*