

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5980

Investigation into the Department of Public)	Hearing at
Service's proposed Energy Efficiency Plan Re:)	Montpelier, Vermont
Phase II)	June 29, 1999

Order entered: 9/30/99

PRESENT: Frederick W. Weston, III
Hearing Officer

APPEARANCES: Aaron Adler, Esq.
for Vermont Department of Public Service

Morris Silver, Esq.

* Mary Marzec, Law Clerk
for Central Vermont Public Service Corporation

* Martin P. Drescher, Esq.
Donald J. Rendall, Jr., Esq.
Sheehey, Brue, Gray & Furlong, P.C.
for Green Mountain Power Corporation

Edward V. Schwiebert, Esq.

* James C. Leary, Esq.
Reiber, Kenlan, Schwiebert, Hall & Facey, P.C.
for Vermont Marble Power Division of OMYA, Inc.

William F. Ellis, Esq.

McNeil, Leddy & Sheahan, P.C.
for City of Burlington Electric Department

Trevor R. Lewis, Esq.

* William B. Piper, Esq.
Primmer & Piper, P.C.
for Villages and Towns of Barton, Enosburg Falls, Hardwick,
Hyde Park, Jacksonville, Johnson, Ludlow, Lyndonville,
Morrisville, Northfield, Orleans, Readsboro, Stowe and Swanton
Electric Departments

- * Avram Patt, General Manager
- * William A. Powell
for Washington Electric Cooperative, Inc.

M. Jerome Diamond, Esq.
Diamond & Associates, P.C.
for Washington Electric Cooperative, Inc.

Michael Burak, Esq.
Burak, Andersen & Melloni, PLC
for Vermont Electric Cooperative, Inc.

- * Martin K. Miller, Esq.
Victoria J. Brown, Esq.
Miller, Eggleston & Cramer, Ltd.
for Citizens Utilities Company

- * Thomas Pierce, President
for Rochester Electric Light & Power Company

- * Leigh Seddon, Representative
for Vermont Natural Resources Council

- * Jenny L. Carter, Esq., Policy Director
for Vermont Public Interest Research Group

Beth Sachs
for Vermont Energy Investment Corporation

- Leonard H. Singer, Esq.
- * Algird F. White, Jr., Esq.
- * Barbara S. Brenner, Esq.
Couch White, LLP
for IBM Microelectronics & IBM Corporation

- * Gary Farrell, Chair
for Vermont Electricity Consumers Coalition

- * Candace Moot, President
for Vermont Ski Areas Association

Charles R. Nichols, Director, Environmental Issues
for Vermont Chamber of Commerce

- * Matthew Rubin, Director
for Vermont Independent Power Producers Association
- * David Tucker, Director
for Vermont Office of Economic Opportunity
- * Caryl J. Stewart, President of the Board
for Vermont Development Credit Union
- * Glenn A. Jarrett, Esq.
for Vermont Housing Finance Agency
- * Deirdre O'Callaghan, Esq., Vice President
for American Skiing Company
- * Mark Elwood Bennett, Esq.
- * David W. Marshall, Esq.
for Conservation Law Foundation
- * Sheri Larsen, Director of Government Relations
for Lake Champlain Regional Chamber of Commerce
- * Raymond J. Obuchowski, Esq.
for Associated Industries of Vermont

*Filed Notice of Appearance but did not attend hearing

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I. INTRODUCTION

This proposal for decision recommends that the Public Service Board approve a comprehensive settlement among the central, active parties to this docket. The settlement, which takes the form of a memorandum of understanding and a number of bilateral agreements, proposes a broad set of energy efficiency programs and a new, innovative manner of delivering them to Vermont's electricity consumers. The expected savings are enormous: the net benefits of these investments over the next five years are expected to total approximately \$64.86 million.¹ The settlement is the culmination of more than two years' labor by the Vermont Department of Public Service, the state's twenty-two electric distribution utilities, various consumer and environmental groups, the Legislature, and the Board; and it can rightly be seen as a tremendous achievement, in many ways a new beginning for the provision of least-cost energy services in this state, and a novel solution to what had been seen by many as a froward and almost irremediable problem. For all that, however, the work has only just begun.

In brief, the Memorandum of Understanding ("MOU") and bilateral agreements, if approved, will create a new entity, referred to figuratively as an "energy efficiency utility" ("EEU"), funded through charges on electricity usage, and directed to design and deliver comprehensive energy efficiency services to Vermont's households and businesses. The EEU will be an independent entity, unaffiliated with any of the state's electric or gas utilities, and it will be under contract to the Board. Routine administration of the EEU's contract will be handled by a contract administrator, and the funds to support the EEU's activities will be managed by a fiscal agent. This tripartite institutional structure, with ultimate responsibility for oversight residing with the Board, is intended to protect not only the EEU's independence, but

1. Present-valued, in year 2000 dollars. The gross totals of societal benefits and costs are estimated to be \$139.38 million and \$74.53 million, respectively (2000 \$). The benefit-cost ratio is 1.87, which is to say that every dollar of investment yields \$1.87 in gross savings. In nominal dollars, the saving should be even greater, since the investments will produce benefits over many years into the future, the value of which is discounted heavily in today's dollars. Exh. DPS-PHM-3; see, also, Docket 5980, Order of 1/19/99 at 5, 16-17 (referred to hereinafter as the "Phase I Order").

also to assure that its performance is continually and closely monitored and that it always has the strongest incentives to operate as efficiently as possible. The EEU, Contract Administrator ("CA"), and Fiscal Agent ("FA") will each be selected through an open, competitive bidding process.

Initially, the EEU will implement a set of energy efficiency programs proposed by the Vermont Department of Public Service ("Department" or "DPS"). These "core" programs will aim primarily at acquiring "lost opportunity" savings — efficiency measures that can only be cost-effectively captured at particular times, such as during new construction or extensive remodeling — from end-users in the four general customer classes found in Vermont: residential, commercial, industrial, and dairy agricultural. But the EEU's embrace can, and should, become more ecumenical: new technologies, changing markets, and its own expertise should all combine to uncover new opportunities for cost-effective savings. The evidence in this docket demonstrates that there is yet a great potential for significant reductions in the state's demand for electricity and, with them, large reductions in our total energy bill.

A. Background and History

The early procedural history of this case is described in the Board's Phase I Order² and need not be repeated in detail here. The salient events were the Board's conclusion in Docket 5854 that a new approach to the delivery of energy efficiency services in Vermont was needed, the filing, on May 23, 1997, of the Department's *The Power to Save: A Plan to Transform Vermont's Energy-Efficiency Markets* (the "Plan"), the opening and bifurcation of this docket (the first phase to address jurisdictional issues, and the second to deal with technical details), and the issuance of the Phase I Order, in which the Board concluded that it did in fact have jurisdiction to approve and implement a statewide energy efficiency entity. The Board set out the scope of issues to be taken up in Phase II, and remanded the case to me with instructions to complete the work within six months.

On February 2, 1999, Green Mountain Power Corporation ("GMP"), Central Vermont Public Service Corporation ("CVPS"), and Citizens Utilities Company ("CUC" or "Citizens")

2. *Id.* at 7 and 45.

filed a motion to alter or amend the Phase I Order. By separate filing, all but one of Vermont's municipal utilities (jointly, the "14 Municipals") joined the motion to alter or amend the Order.³ On February 16, 1999, the DPS filed its opposition to the motion. On February 22, 1999, the Board denied the motion. Notices of appeal were then filed by CVPS, GMP, BED, the 14 Municipals, and the Department.

Around this time, the state legislature was considering a new bill, S.137, which affirmed the Board's authority to create an independent state-wide energy efficiency entity, and, among other things, gave the Board explicit authority to fund the new entity through volumetric (usage-based) charges on customers' electricity consumption. Simultaneously, settlement negotiations among the parties began in earnest and continued into the spring. A status conference was held on April 14, 1999, during which the parties described in general terms the status of their negotiations and the potential issues to be litigated in the absence of settlement. On April 29, 1999, I issued an Order detailing the matters still to be resolved, and scheduled another status conference. The next day, the DPS, CVPS, and GMP filed three settlement documents: the Memorandum of Understanding ("MOU") and two bilateral agreements, one between the DPS and CVPS and the other between the DPS and GMP.⁴

During May and June 1999, the parties continued to negotiate and, one by one, additional signings-on occurred, in most cases accompanied by a bilateral agreement with the Department.⁵ Also during this period, parties filed written testimony and exhibits in support of the settlement. On June 1, 1999, the Governor signed S.137 into law.⁶ It became effective immediately.

After some relatively minor procedural disputes, an evidentiary hearing was held on June 29, 1999. A number of exhibits were admitted into record: the MOU and bilateral

3. The City of Burlington Electric Department ("BED"), which is represented separately from the others, did not join in the motion.

4. A note on terminology: I use the term *settlement* to describe the MOU and bilateral agreements ("bilaterals") as a whole. I also refer to the overall venture which the settlement establishes — *i.e.*, that which encompasses the EEU, Contract Administrator, and Fiscal Agent — variously as the "new regime," "new structure," or "EEU program."

5. A number of non-utility parties joined in the MOU, but most had no need of a bilateral agreement.

6. 1999 Vt. Laws No. 60. This Act had the effect of amending §§ 209 and 218c of Title 30 of the Vermont Statutes Annotated.

agreements between the DPS and each of the state's twenty electric companies, a bilateral agreement between the DPS and International Business Machines Corporation ("IBM"), and two schedules describing the programs' expected savings. At the hearing, no party opposed the settlement. In July, the Department filed bilateral agreements with each of the two remaining electric utilities, Barton Village, Inc., Electric Department ("Barton") and Washington Electric Cooperative, Inc. ("WEC").⁷ On August 4, 1999, a number of parties jointly filed a brief and proposed findings of fact. On August 17th, additional proposed findings were filed by the DPS and Citizens.

B. Structure of this Order

In order to simplify the drafting of this decision and, at the same time, to assure that all relevant information is available to the reader, I have included as appendices the MOU and the 23 bilateral agreements that together constitute the settlement. Consequently, I have not described the documents in great detail, but have instead concentrated on those aspects of them that appear most critical to achieving the overall objective: namely, the provision of least-cost energy services to Vermont's citizenry.

II. FINDINGS OF FACT AND DISCUSSION

A. General

The settlement, if approved, sets into motion a series of processes that will end in the creation of a new organization, an energy efficiency utility, whose mission will be to deliver cost-effective energy efficiency services to electricity consumers throughout the state. Historically, each of the state's 22 individual distribution utilities ("DUs") bore (and, in fact, still bears) that responsibility. Although there are obvious advantages associated with DU delivery of efficiency services (also referred to as "demand-side management" or "DSM") — *e.g.*, direct knowledge of, and contact with, its customer base — the program design and delivery

7. During the June 29th hearing, the parties agreed to allow these expected bilaterals to be entered into the record, unless written objections were filed within five working days of their submission. Tr. 6/29/99 at 9-11. No such objections were filed. For our purposes here, they are referred to as the "Barton Bilateral" and "WEC Bilateral."

inefficiencies that arise from the multitude of service territories have proven, in certain instances, to be costly barriers to the acquisition of customer and electric system savings. The parties agree that the time for a new approach is at hand.

The EEU will deliver energy efficiency programs statewide. The design and delivery of those programs will draw on the expertise and experience of many people and institutions, among them the Department and the DUs, who have been delivering programs during this past decade. Important objectives of this new strategy are:

- To ensure that all Vermont consumers are given the opportunity to participate in and benefit from a comprehensive set of cost-effective energy efficiency programs and initiatives designed to overcome barriers to implementation;
- To improve the delivery of services in areas where programs have not served consumers well;
- To improve the effectiveness of the delivery of energy efficiency services by eliminating redundant administrative functions in the many separate utilities; and
- To make it easier for energy efficiency businesses to market their services, by eliminating the many different program requirements of the many different utilities that serve Vermont consumers.⁸

The settlement includes committed budgets for the first five years (2000-2004), which cover all (administrative and program) costs of the EEU, the CA, and the FA. Specific allocations of the budgets for 2003 and 2004 have not now been set, but will be determined by the Board after a thorough review of the EEU's performance is completed in 2002. On the basis of that review and after giving interested parties an opportunity to comment, the Board may, if it deems appropriate, revise the overall budgets for those two years (2003 and 2004).⁹

Year	Budget
2000	\$8,490,128

8. Exh. DPS-MOU-1 (hereinafter, "MOU"); 1999 Vt. Laws No. 60; Parker pf. at 14. Unless otherwise noted, I am relying on the witnesses' Phase II prefiled testimony — *i.e.*, that which was admitted into the record during the June 29, 1999, hearing. Other testimony shall be denoted as "Phase I" testimony.

9. MOU, ¶¶ 17-18 and Attachment B. As discussed in greater detail in Section III.F., below, the actual total budgets agreed on by the parties (*i.e.*, the sum of the individual utility commitments as set out in the bilaterals) are slightly less in each of the first three years than those given in the MOU.

2001	11,157,722
2002	13,519,809
2003	15,945,344
2004	16,548,503

Under contract to the Board, the EEU will deliver the seven "core" programs outlined in the Plan. The Board will appoint a contract administrator to handle the day-to-day administration of the EEU contract, and will also appoint a fiscal agent to handle the collection and dispersal of the funds for the EEU.¹⁰ The Board will select the EEU, CA, and FA through a competitive solicitation. In 2002, the DPS will carry out an independent evaluation of the performance of the EEU, assess the prospective need for efficiency services, and, if it deems appropriate, update estimates of the avoided costs used to evaluate program cost-effectiveness, all of which will inform a Board decision on EEU program budgets for 2003 and 2004. The Settlement also calls on the Board to appoint an Advisory Committee for the EEU, to be comprised of representatives of the DPS, the DUs, consumers, and other stakeholder groups.¹¹

A Transition Working Group ("TWG"), chaired by the DPS and comprised of representatives of the DUs and other stakeholders, will be formed. Indeed, it already has been, and it has begun preparing for the transition from the existing utility DSM delivery system to the EEU structure. On July 7th, it filed an "Energy Efficiency Utility Transition Plan," which describes the tasks that the TWG will perform during the coming months.¹²

Lastly, the settlement sets out a process for the development of rules and methods for distribution utility planning ("DUP"), in many ways the next generation of integrated utility planning, but now targeted for companies that primarily provide transport services, rather than the full range of products that vertically-integrated firms typically offered. Here the challenge

10. And, presumably, for the CA and the FA itself. This is not explicitly stated in the MOU. Certainly it is a detail that can be dealt with in the bidding and contracting process.

11. MOU, ¶¶ 2-5.

12. *Id.*, ¶ 12 and Attachment B. The TWG does not request Board approval of the July 7th plan.

will be to plan and manage the transmission and distribution ("T&D") system in a manner that minimizes the societal costs of service, now and in the future.¹³

B. The Need for a New Statewide Energy Efficiency Services Delivery Program

The justifications for intervening in energy services markets to provide efficiency programs were exhaustively examined by the Board ten years ago in Docket 5270.¹⁴ The evidence taken in this and other dockets once more demonstrates that the market failures that prompted the creation of utility-sponsored DSM programs still exist and are still powerful disincentives to the efficient use of energy in this state; there is no need to analyze that evidence again here.¹⁵ Suffice it to say that our experience with those utility programs was varied for various reasons, so that today, facing fundamental economic and regulatory changes in the electric industry, we find that we must adapt our methods if we have any hope of further reducing our wasteful and uneconomic use of energy.

The Board concluded in rendering its decision in the first phase of this Docket that there remain in Vermont significant, cost-effective opportunities to acquire cost-effective energy efficiency savings — savings that can lower customers' bills and reduce the environmental impacts of electricity production and delivery.¹⁶ The Board observed the current trend in DU energy efficiency programs "is for less program spending on cost-effective

13. *Id.* at ¶ 28-42.

14. Docket 5270, Order of 4/16/90, Vol. II at 49-57, Vol. III at 19, 24-27, 37, 57, 151-52, and Vol. IV at 50.

15. Phase I Order at 8-9; Plunkett Phase I pf. at 4-16; Dockets 5270-CV-1 & -3 and 5686, Order of 9/4/96 at 20. In December 1996, the Board made the point again, this time stating that, even if retail electric competition is introduced, "we are persuaded that there is a strong likelihood that market barriers will continue to impede consumer acquisition of all cost-effective energy efficiency measures even after the establishment of competitive generation markets" Docket 5854, Order of 12/30/96 at 102, 105-106.

16. Phase I Order at 5-6. The estimates for cost-effective savings are substantial. For example, the DPS estimated that in 1998 the total cost-effective retrofit energy efficiency potential available was 1,315 GWh, including line losses, or 21.6 percent of the total estimated 1998 Vermont electric consumption, also including line losses. Assuming that implementation commenced in 1998, the DPS also estimated the cost-effective retrofit energy efficiency potential remaining in 2003 to be 1,015 GWh (net of core program savings and naturally occurring savings). The core programs are directed primarily at lost opportunities, not retrofit applications. Even so, the DPS estimated that in 1998 the total cost-effective energy efficiency potential in the markets targeted by the core programs was approximately 36 GWh, a still very ambitious number. Mosenthal Phase I pf. at 4-5; exh DPS-1 at 39-40, 55, and 75 (the "Plan").

energy efficiency, less energy savings, and more 'lost opportunities.' For the majority of Vermonters, the structure established in 1990 is no longer working effectively."¹⁷

The Board found that the evidence in Phase I of this docket demonstrates that the rate of acquisition of energy efficiency resources has declined in recent years in Vermont, while substantial cost-effective opportunities remain untapped, and timely opportunities are being lost. The Board found that acquiring these lost resources in the future, if they can be acquired at all, will be more costly to individual customers and the Vermont economy, and will delay the environmental gains achievable through reduced energy consumption.¹⁸

In that Phase I decision, the Board accepted the overall principle that the statewide, coordinated delivery of cost-effective energy efficiency programs will be more efficient and more effective than the current structure of delivery by twenty-two distribution utilities. The Board concluded that the statewide delivery mechanism must be an entity focused on maximizing cost-effective energy efficiency savings and independent of distribution utility control.¹⁹

C. The DPS's Energy Efficiency Utility Proposal

The MOU establishes that "[t]he EEU will deliver the Core Programs consistent with the core program proposals contained in the Plan."²⁰ While the settlement addresses the manner in which the core programs will be carried out and provides for a process by which program designs may be modified and new statewide programs introduced, the seven core programs describe the initial set of actions that the EEU will take.²¹ The programs are described briefly in the subsections that follow.

The MOU sets out broad guidelines for the administration of the programs and outlines a process for modifying them, if appropriate. The EEU will:

- Emphasize lost opportunity markets for all customer segments;

17. Phase I Order at 44.

18. *Id.* at 44-45.

19. *Id.* at 44, 53-54.

20. MOU, ¶ 3.

21. Parker pf. at 4.

- Emphasize retrofit markets for low-income and dairy farm customers;
- Stress market strategies;
- Coordinate with regional and national efficiency efforts;
- Target under-served market segments;
- Seek to maximize and facilitate customer contribution to efficiency measure costs, consistent with principles of sound program design;
- Promote development of innovative approaches to energy efficiency; and
- Refine the original core program designs during implementation, in consultation with the Advisory Committee appointed by the Board.²²

These provisions are consistent with the Plan, but ". . . they do make it clear that the EEU is expected to be flexible, intelligent, and responsive to customers and market forces in implementing and re-designing the programs it is charged to deliver."²³

1. The Commercial and Industrial Market Opportunities Program

The Commercial and Industrial Market Opportunities Program will assist eligible customers in making efficient choices when replacing equipment or when remodeling — those times when cost of efficiency is lowest and the magnitude of the opportunity is greatest. It will use planned customer investments to "leverage" additional investment in related efficiency measures. The program will employ a combination of detailed design and technical assistance, commissioning of customized efficiency projects, financial incentives delivered both to the end-use customers and to the suppliers of equipment and services, and strategies to coordinate with regional and national market transformation initiatives. The program aims to ensure that commercial and industrial ("C&I") customers do not forego opportunities to capture the cost-effective savings that will be yielded by incremental investment in new, higher efficiency equipment and business systems.²⁴

22. MOU, ¶ 4.

23. Parker pf. at 7.

24. Plan at 57-59 and Appendix 1.

2. The Commercial and Industrial New Construction Program

The Commercial and Industrial New Construction Program will offer eligible customers a package of technical assistance, financial incentives, inspections, and efficiency commissioning services aimed at achieving cost-effective savings in new construction and major renovations. The program will include two program tracks, one for customers engaged in Act 250 permit processes and one for all other customers. The program seeks to ensure that commercial and industrial customers do not lose the opportunities to acquire savings provided by incremental investments during new construction, investments that in the absence of the program would not be made.²⁵

3. The Dairy Farm Program

The Dairy Farm Program will expand the successful dairy farm program that has been run by a number of Vermont utilities. The program will offer dairy farms a comprehensive package of services including technical assistance, efficiency cost subsidies, and low interest loans. The program aims not only at capturing savings opportunities when new equipment investments are made, but also at finding cost-effective efficiency retrofit opportunities where no such expenditures would otherwise have been made. The program will target primarily those dairy farms that have not already participated in the earlier utility-sponsored programs. Because approximately 60 percent of Vermont dairy farms have already participated, this program is expected to reach maximum participation in two years, and then be phased out. Thereafter, eligible dairy farm customers may participate in the C&I Market Opportunities program.²⁶

4. The Residential New Construction Program

The Residential New Construction Program will introduce high-efficiency technologies and building practices into Vermont. To transform the market in this way, the program will use a combination of cash incentives, home energy ratings, technical assistance, education, direct

25. *Id.* at 59-62 and Appendix 1.

26. *Id.* at 62-63 and Appendix 1.

installation of energy efficiency measures, energy efficient mortgages, and partnerships with public and private construction trade allies. These initiatives will also be coordinated with efforts to adopt and update statewide energy building codes. The program will:

- Create consumer demand for advanced, energy efficient homes;
- Encourage the adoption of building practices that will improve the efficiency of homes;
- Secure high levels of compliance with the minimum standards embodied in the Vermont Residential Building Efficiency Standards law; and
- Create a business environment that will support this market transformation.²⁷

5. The Residential Low-Income Program

The Residential Low-Income Program will offer services targeted to single-family low-income homeowners and renters, and to building owners, managers, and occupants of low-income multi-family buildings (those with five or more housing units). The single-family component is a coordinated program that builds on the state's weatherization assistance program; it will offer additional measures and services where cost-effective. The multi-family component provides a "one-stop shopping" package of services, including technical analysis, financial assistance, performance contracting arrangements, contractor and construction management, direct installation of measures, and coordination of bulk purchases of efficient equipment.²⁸

6. The Efficient Products Program

The Efficient Products Program will aim to transform both the mix of products in the lighting and appliance markets and the decisions that consumers make when purchasing such goods. This effort will involve a combination of incentive payments, aggressive marketing, trade-ally cooperation, and coordination with other regional and national efforts. Initial work will focus on high-efficiency residential lighting products, refrigerators, room air conditioners,

27. *Id.* at 63-66 and Appendix 1.

28. *Id.* at 66-67 and Appendix 1.

and clothes washers. The program will also make maximum use of opportunities to coordinate with and enhance regional and national market transformation initiatives.²⁹

7. The Emerging Markets Initiatives Program

The Emerging Markets Initiatives Program will enable the EEU to develop and implement flexible strategies to promote overall market acceptance of high-efficiency products and services. The program will pursue cost-effective efficiency savings from markets or technologies that are not being fully served by the other core programs, the distribution utilities (through their DUP responsibilities), or the competitive energy services industry. By way of example, the Plan identifies three strategies:

- A Targeted Markets Initiative that will offer special DSM services to those market segments where intractable barriers or substantial untapped savings exist;
- An Innovative Projects Initiative that would accelerate the pace of sales of new and emerging technologies, equipment, systems or practices; and
- A DSM Bidding Initiative that would encourage submission to the EEU of unsolicited bids for cost-effective energy efficiency from customers, energy service providers, trade allies, and others.³⁰

8. The C&I Customer Credit Program

The DPS and IBM negotiated an arrangement that allows eligible C&I customers who, subject to specified criteria, implement efficiency measures on their own premises to receive, in payment for those investment, partial refunds of their contributions to the EEU program. See Section II.D.2.i., below for a discussion of this credit program.

29. *Id.* at 67-69 and Appendix 1.

30. *Id.* at at 69-71 and Appendix 1.

9. Projected Savings

The expected savings — in energy, capacity, and societal benefits — are summarized in the following tables.³¹ The energy and demand savings are cumulative. The societal costs and benefits are shown in constant, year 2000 dollars (millions).

	2000	2001	2002	2003	2004
Energy Savings (MWh)	24,188	54,255	87,254	127,573	171,568
Winter Peak Savings (kW)	4,891	10,962	17,745	26,118	36,878
Summer Peak Savings (kW)	3,420	7,743	12,777	19,085	26,647

	Societal Benefits	Societal Costs	Net Benefits	Benefit/Cost Ratio
C&I Programs				
Market Opportunities	\$33.967	\$18.206	\$15.761	1.87
New Construction	21.794	10.683	11.111	2.04
Dairy Farm	3.538	1.338	2.200	2.64
Subtotal, C&I	59.299	30.227	29.072	1.96
Residential Programs				
New Construction	15.821	7.848	7.793	2.02
Low-Income	19.076	18.133	.943	1.05
Efficient Products	34.710	9.170	25.540	3.79
Subtotal, Residential	69.608	35.151	34.456	1.98

31. Exhs. DPS-PHM-2 and DPS-PHM-3. Energy and capacity savings, in summer and winter, are broken down by program in exh. DPS-PHM-2.

Emerging Markets	10.477	5.313	5.163	1.97
EEU Overhead		3.836		
Grand Totals	\$139.383	\$74.528	\$64.855	1.87

10. Conclusion

The evidence demonstrates that the proposed programs have a high likelihood of generating net savings for Vermont's electricity consumers. Moreover, the savings are expected to be substantial. The program designs appear to strike an appropriate balance between, on the one hand, acquiring savings through direct and immediate assistance to customers and, on the other, transforming markets so as to embed those savings directly in the product stock and construction practices — between, in a sense, vaulting the market barriers and simply breaking them down. Of course, it is not that simple, since even the direct intervention programs have longer-term transformation impacts. What is important, though, is that the strategy be dedicated to minimizing the societal costs of providing energy services: I am confident that, given the uncertainties surrounding the several approaches, this mix of programs has a high probability of producing savings, now and in the future.

Although the scope of these programs remains unchanged from that originally proposed in the Plan, the settlement sets out new budgets for their funding. The budgets are scaled back from the initial proposal to the levels negotiated. The original budgets would have committed \$13 million to the EEU in the first year (then 1998) and increased it steadily each year following, so that by the sixth year \$17.8 million would have been dedicated to the EEU. The settlement budget starts at \$8.5 million in the first year (2000), ramps up to \$13.5 million in the third year of program operation, and increases to \$16.5 million in the fifth year.

The obvious question follows. If there are opportunities to acquire cost-effective energy efficiency savings that would have justified approval of the budgets originally proposed by the Department, does it make sense to accept lower levels of investment and necessarily forego

some increment of savings? The answer is yes, for several reasons. First, although the Hearing Officer in Phase I found that the Plan's proposed programs were "likely to provide substantial net societal benefits to Vermont ratepayers," the Board did not accept those findings for the purposes of definitive program design; rather, the Board remanded the case to me to take detailed evidence on this matter (among others).³² The evidence at this time supports only the stipulated budgets. Second, not only is the method of delivering the programs new, but in many ways the programs themselves are novel. Their increased focus on market transformation and the leveraging of customer investments suggests that direct program spending per saved kilowatt-hour will be lower than we have seen historically, which is, all else being equal, a good thing.³³ And lastly, these are budgets for five years only. The future can be cast in stone only for so long: if there are unmet needs in the coming years, I expect the parties and the Board to take appropriate actions to meet them.³⁴

Related to this, if only in part, is the absence of programs targeting particular retrofit markets, most notably residential and small commercial. Although certain segments of those markets may be covered by the C&I Market Opportunities Program, the Efficient Products Program, and the Emerging Markets Program, it is not clear to me that other segments will be adequately served; and thus I am concerned that the programs are not comprehensive within the meaning of 30 V.S.A. § 218c. This concern, however, does not rise to a level sufficient to warrant a recommendation of disapproval. Again, this is a problem (if it is a problem) for which remedial action can be taken, after some experience with the new regime is gained.

D. The Settlement

As noted earlier, the settlement now before the Board is comprised of the MOU and twenty-three bilateral agreements. The MOU has two appendices, one describing the

32. Phase I Order at 20-26, 44.

33. Put another way, the benefit-cost ratios of the programs are expected to be higher.

34. And the Legislature, too, if necessary. The new statute sets a limit of \$17.5 million on the amount of money that can be raised annually for the EEU program through the legislatively-authorized charge on customers' electricity usage. 30 V.S.A. § 209(d)(4).

"transition planning framework" and the other setting out the total program costs. The MOU provides the framework, goals, and overall procedures that the parties embrace.

The bilateral agreements are between the DPS, on the one hand, and each of Vermont's electric utilities and IBM, on the other. The bilaterals include:

- Party-by-party statements of support for the settlement;
- The specific budget commitments of distribution utilities for calendar years 2000, 2001 and 2002, for which Board approval is sought;
- The settlement provisions that each party wants to emphasize;
- Provisions that address the special needs of a particular party to the settlement; and
- Assertions of the "all-or-nothing" nature of the settlement, and the reservations of signatories' rights to litigate all outstanding issues if the Board, in approving the settlement, modifies any of its terms.

All active parties in this docket endorse the settlement: Vermont's electric utilities, the DPS, IBM, Vermont Energy Investment Corporation ("VEIC"), Vermont Natural Resources Council ("VNRC"), and Vermont Public Interest Research Group ("VPIRG").

1. The Memorandum of Understanding

The MOU is comprised of sixty-eight numbered provisions and two appendices that describe:

- The EEU, its goals, and general features of its management structure;
- The institutional relationships of the EEU, CA, FA, Board, DPS, and DUs;
- The "ground rules" for EEU operations;
- The scope of residual DU responsibilities for energy efficiency service planning and program delivery;
- Plans for an orderly transition to the new program;
- Budgets and funding practices;
- The regulatory treatment of direct and indirect costs, including the Account Correcting for Efficiency ("ACE");
- Plans for a collaborative to establish new rules and procedures for distribution utility planning;

- A process for managing the transition to the new structure, *i.e.*, events during the period between the signing of the MOU and the commencement of EEU operations; and
- Allocations of funds among the core energy efficiency programs.³⁵

2. The Bilateral Agreements

Each electric utility adopts (really, re-adopts) the provisions of the settlement outlined in the MOU, by having entered into a bilateral agreement with the Department.³⁶ Each bilateral also sets out particular provisions (rate-making and otherwise) that apply only to the signatory utility. In addition, IBM and the DPS negotiated a bilateral agreement that established a program that is aimed specifically at commercial and industrial customers that have not participated in the utility DSM programs. The twenty-three bilateral agreements all treat the overall settlement as a "bottom-line" resolution of the outstanding issues in this phase of the docket. The parties reserve the right to litigate all issues to be considered in Phase II of this docket if the MOU and bilateral agreements are not accepted in their entirety.

Each agreement between a DU and the DPS establishes that DU's allocation of the EEU budget for the first three years, 2000, 2001, and 2002. These allocations represent the total funding contribution each utility has agreed to make to the EEU program during those years. These allocations are key elements of the bilaterals. In the cases of WEC and BED, the bilaterals establish that these DUs may carry out all or major portions of the system-wide programs in their service territories.

The agreements also address a variety of utility-specific DSM program cost-accounting and recovery issues, regulatory compliance requirements, and other matters. All of the bilaterals are appended to this Order; here I want to describe only the more notable features of them.

35. MOU generally. Refer to Appendix A to this Order.

36. Each bilateral agreement was entered into the record individually. For simplicity's sake, I refer to each by the name of the utility or company that signed it, as, for example, the "CVPS Bilateral."

a. CVPS

In addition to setting CVPS's annual funding commitments for 2000, 2001, and 2002, this company's bilateral resolves several other issues, including:

- The accounting and potential rate-making treatment of the DSM costs incurred by the company prior to January 1, 2000;
- The accounting and potential rate-making treatment of the company's ACE accruals, expenses incurred in connection with its on-going support for the EEU, and expenses associated with distributed utility planning;
- Accounting and potential rate-making treatment of employee severance and related expenses arising out of the transition to the new EEU structure; and
- Rate levels (specifically, the CVPS Bilateral states: "During calendar years 2000 through 2002, CVPS will reduce its approved rates by an amount equal to the benefits charge. However, so long as the sum of the benefits charge and CVPS's new rates does not exceed 100.25% of CVPS's previously approved rates, such reduction may be net of the sum of (a) recoverable amortizations of DSM costs and ACE amounts associated with CVPS's individual DSM programs implemented prior to January 1, 2000, and (b) the amount for EEU support set out in paragraph 8 [of the CVPS-DPS bilateral agreement].").³⁷

b. GMP

Like the CVPS Bilateral, GMP's Bilateral Agreement sets funding levels for the first three years and addresses several other issues, among which are:

- Any claims relating to GMP's DSM performance prior to January 1, 2000;
- The funding and implementation of system-wide programs through the end of 1999;
- The establishment of the EEU benefits charge for GMP customers or the funding of the EEU in the absence of a benefits charge;
- The accounting and potential recovery of costs arising out of the transition to the EEU and any costs thereafter in necessary support of the EEU; and
- Objectives for impacts on overall rates — no net increase in rates as a consequence of the EEU program for at least two years (2000 and 2001).³⁸

37. CVPS Bilateral.

38. GMP Bilateral; Grimason pf. at 5.

c. The 14 Municipal Utilities

The agreements with the fourteen municipal utilities establish the utility-specific funding commitments for 2000, 2001, and 2002. Each bilateral also identifies the utility's 1999 budget for DSM, which is relevant to the calculation of rate reductions reflecting the extent to which DSM costs in current rates are displaced by the benefits charge for the EEU program. With the exception of utility-specific information and additional, unique provisions in the Hardwick Electric Department ("Hardwick") and Village of Barton ("Barton") Bilaterals, the DPS's agreements with these 14 utilities are otherwise identical. The common elements address, among others, the following issues:

- The application of externalities adjustments to EEU programs and to programs conducted by these utilities;
- The T&D avoided capacity costs that may be used for municipal utility DSM programs not associated with the EEU program;
- A Board determination that it is reasonable for the municipal utility to enter into the bilateral and the MOU;
- Clarification that the commitment in MOU ¶ 66 does not create an obligation to act, but it shall apply when the municipal utility chooses to take any action with respect to the approval, establishment, funding and implementation of the EEU; and
- The nature of the utility's DUP obligations.³⁹

The Hardwick Bilateral addresses its practice of amortizing certain DSM costs over time instead of expensing and collecting them; the agreement also addresses the treatment of some of these costs in a recent rate case.⁴⁰

The Barton Bilateral addresses its practice of using revenue bond financing (pursuant to Board approval in Docket 5951) to make funds available for DSM programs.⁴¹

Based upon the evidence in this docket, I find that it is reasonable for each of the fourteen municipal utilities to enter into the MOU and its bilateral agreement.

39. The Municipal Bilaterals generally,

40. Hardwick Bilateral, ¶¶ 5 and 6.

41. Barton Bilateral, ¶¶ 4, 5, and 6.

d. Vermont Marble

In addition to establishing three-year funding levels and embracing the terms of the MOU, the bilateral agreement signed by the Vermont Marble Power Division of OMYA, Inc. ("VM") establishes that only the company's retail load is to be apportioned costs and expenses associated with the EEU program. Accordingly, only the retail load will be eligible for any system-wide programs approved for EEU implementation. The agreement also deals with certain of the company's DSM cost-accounting and rate-making practices.⁴²

e. BED

As do the other utilities' bilaterals, the BED agreement incorporates the MOU but provides that the Department shall presume that BED has the right to implement core programs in its service territory, with the exception of the Emerging Markets Program, and subject to DPS review and Board approval of a BED proposal that addresses various issues enumerated in the agreement.⁴³ The bilateral sets out the requirements for a BED proposal to deliver programs, as well as minimum standards for approval that the Board should apply when reviewing the proposal. The Board, after notice and opportunity for hearing, would approve BED's proposal if it finds that the anticipated benefits of BED's delivery of the core programs "outweigh the risks or potential inefficiencies of such delivery."⁴⁴ The Board may approve BED's proposal with modifications or conditions, and should take all appropriate steps to assure that the programs are properly implemented and meet standards equivalent to those for the EEU.⁴⁵

BED will, of course, remain subject to the provisions of 30 V.S.A. § 218c and Docket 5270, and to traditional principles of regulation, with respect to implementation of programs other than the core programs. With respect to any core programs that it delivers, BED will be

42. VM Bilateral.

43. BED Bilateral; tr. 6/29/99 at 27-28 (Parker).

44. BED Bilateral, ¶ 3.

45. *Id.*, ¶ 4. Designating BED to implement programs is consistent with 30 V.S.A. § 209(d)(2), which allows the Board to appoint "one or more entities" to deliver energy efficiency programs.

subject to the same performance standards as is the EEU, as well as to traditional regulatory review of any expenditures it makes in implementing those programs.⁴⁶

BED agrees to commit \$410,000 in calendar year 2000 to fund delivery of the core programs within its service territory. Of this amount, \$5,353 is specifically dedicated to funding BED's share of the Emerging Markets Program.⁴⁷

Like the bilaterals of the other municipal utilities, BED's Bilateral states that the agreement is contingent upon a finding by the Board that it is reasonable for BED to enter into the bilateral and the MOU.⁴⁸

Based upon the evidence in this Docket, I conclude that it is reasonable for BED to enter into the MOU and its bilateral agreement.

f. Washington Electric Cooperative

The WEC Bilateral establishes that it will directly administer two existing WEC energy efficiency programs, the residential new construction and residential retrofit programs. The agreement establishes that the annual budgets for the two programs will total \$155,000. In addition, the agreement commits WEC to annual EEU budget support of \$15,000, \$50,000 and \$75,000 for 2000, 2001, and 2002, respectively. The agreement also addresses DSM cost accounting issues related to the transition to the EEU.⁴⁹

g. Citizens Utilities

The CUC Bilateral includes provisions that explain how some specific MOU provisions addressing cost recovery will be applied to CUC.⁵⁰

46. *Id.*, ¶ 6.

47. *Id.*, ¶ 1.

48. *Id.*, ¶ 10.

49. WEC Bilateral.

50. CUC Bilateral.

h. Vermont Electric Cooperative

The bilateral agreement with Vermont Electric Cooperative, Inc., ("VEC") states that it will continue to provide, through 2002, a subset of DSM services that it has been offering since January 1996. The agreement identifies those services and explains how related costs will be treated for rate regulation purposes. VEC will provide its share of funding for the EEU, identified in the agreement, in addition to providing these services.⁵¹

i. IBM

In addition to the seven Core Programs proposed in the Plan, the bilateral agreement between the Department and IBM proposes a "C&I Customer Credit Program," which will be available to commercial and industrial customers who meet certain eligibility criteria. The specific terms of the program are set out in an attachment to the bilateral. In general, eligible customers may receive payments (drawn from EEU program funding) for cost-effective energy efficiency measures that they install in their facilities. Such payments, in effect refunds, will be capped at 70 percent of the amounts that the customers pay into the EEU program.⁵²

The program is limited to customers who have not previously received payments or incentives through utility DSM programs. It has the potential to capture savings not tapped by existing programs. It would encourage such customers to invest in cost-effective energy efficiency measures that customers might not otherwise adopt — *i.e.*, measures with "paybacks" greater than 18 months.⁵³ The C&I Customer Credit Program will be available in all service territories.⁵⁴

51. VEC Bilateral.

52. IBM Bilateral and Attachment A. Specifically, the refund cannot exceed 70 percent of the amount paid by the customer in the year that the measure(s) was installed and the calendar year either immediately preceding or immediately following, less any disbursements against those funds already made (presumably, this choice of years allows for payments in the first year of EEU operation). Also, to be eligible for the program, a C&I customer must be certified under ISO (International Standards Organization) standard 14001, a copy of which was filed by the DPS on August 17, 1999.

53. IBM Bilateral and Attachment; tr. 6/29/99 at 21-23, 36-46 (Parker).

54. IBM Bilateral. Note, however, that the BED Bilateral provides that BED will propose whether this program should be implemented in its service territory and, if so, BED will explain how it intends to do so. MOU, ¶ 26; BED Bilateral, ¶ 2.

This proposal is reasonable. It allows certain customers to "opt out" of the system-wide programs, but only if they implement energy-saving measures of their own. And, even then, because the refunds cannot exceed 70 percent of their payments into the EEU program, they will still be supporting the EEU's efforts elsewhere, which will have reliability and other system impacts from which they — and all customers — will benefit. Consequently, I recommend that the Board approve this new C&I Customer Credit Program.

j. Rochester Electric

Rochester Electric Light and Power Company's ("Rochester") Bilateral with the DPS states simply that it supports the MOU, will engage in distributed utility planning, and will provide funds in specified amounts to the EEU during the first three years of the EEU's operations.⁵⁵

k. Conclusion: Bilaterals

For the foregoing reasons, I recommend that the Board approve the 23 bilateral agreements in their entirety.

E. Institutional Structure

1. General

The parties have devised a set of institutional interrelationships that is intended to assure the smooth, unfettered delivery of energy efficiency services to Vermont ratepayers. It is not a particularly complex scheme, but it is nuanced.⁵⁶ How do the pieces fit together? Do they, as a whole, create an orderly and effective system of checks and balances? And are risks and rewards appropriately allocated among the several actors, thus aligning their self-interests with the greater public good?

According to the terms of the settlement, the management of this new system is ultimately the responsibility of the Board. There will also be a Contract Administrator, who

55. Rochester Bilateral.

56. In its general features, it does not differ much from that originally proposed in the Plan. Parker pf. at 7-8.

will handle the routine management of the Board's contract with the EEU, and a Fiscal Agent, who will collect and disperse all funds collected for this program from the DUs, as directed by the Board. The EEU, CA, and FA will all be independent actors selected by the Board through competitive solicitations. The Department will continue to serve as an independent reviewer, bringing issues related to program scope and EEU (and CA and FA) performance to the Board as it sees appropriate. Other parties are also free to petition the Board on these issues. While the settlement calls for the creation of a Board-appointed Advisory Committee to serve the EEU, this committee will have no formal authority: it will derive its powers solely from the expertise of its members and the soundness of its advice.⁵⁷

This institutional structure is established by the terms of the settlement. In fashioning it, the parties sought ". . . to create an entity that has a fair degree of opportunity to be creative and flexible, has a contract to provide energy services that are . . . performance-oriented."⁵⁸ Their objective is a system that will not only meet traditional performance criteria (quantifiable, such as savings achieved, improvements in program cost-effectiveness, comprehensiveness of services, and so on), but will also encourage the EEU to exercise the initiative and creativity needed to break down barriers and transform markets. Thus, the parties envision an EEU driven, at least in part, by bearing the risks and rewards of its own performance — giving it "a high degree of responsibility for [its] own performance and program design. And we really are asking [it] to take on the task of thinking about the markets [it] serve[s], responding aggressively with new opportunities to those markets and new strategies to those markets."⁵⁹

2. Roles of the Various Entities

The MOU describes in greatest detail the functions that the Board, EEU, Contract Administrator, Fiscal Agent, Advisory Committee, DPS, and distribution utilities will perform in the new system. Here I wish only to summarize the more important aspects of those roles.

57. Tr. 6/29/99 at 60-62 (Parker).

58. *Id.* at 54 (Parker).

59. *Id.* at 55 (Parker).

a. The Public Service Board

The Board sets the policy and structure for the EEU. It selects the entity to serve as the EEU, defines the terms of its contract with the EEU, and oversees performance of the contract. The Board will also select and contract with the individuals or organizations that will serve as the Contract Administrator and Fiscal Agent. The Board will review and approve the EEU budgets and allocations among program categories.⁶⁰ The Board will also be responsible for setting the charges to collect the monies for the programs from DU customers. And, lastly, the Board will be responsible for resolving any disputes that may arise.⁶¹

In general, then, the Board is the final authority responsible for directing and reviewing the work of the EEU and the other contractors. Other parties may be called upon to advise the Board (through filings or dockets), but it will retain final responsibility for assuring that the system functions as intended.⁶²

b. The Energy Efficiency Utility

The EEU will be an independent organization, perhaps a corporation, under contract to the Board. Its broad mandate will be to deliver comprehensive energy efficiency services statewide. Budgets and program objectives will be set by the Board, but the EEU will be responsible for proposing sensible program designs (and redesigns) and for implementing programs as cost-effectively as possible. The EEU will seek counsel from the Advisory Committee and from any other technical advisory committees the EEU itself appoints. The EEU will be responsible for responding to complaints and comments from the public. The EEU may, of course, reject advice from the public or the DPS or, in response to a complaint, take action differing from that which was requested; and, after review or upon petition, the Board may, of course, direct the EEU to act otherwise. The EEU will make recommendations about program designs and funding.⁶³

60. MOU, ¶¶ 17-19, 46.

61. MOU, ¶¶ 5-6, 10-11, 14, 16, 18-22, 24-27, 31-32, 44, 46-48, 50, 53, 58, 65, and 67.

62. The Board is also charged with certain duties under the new statute. As discussed in Section III.A., below, I conclude that the implementation of the settlement is consistent with the new law.

63. MOU, ¶¶ 2-11, 13, 19, 38-42, 45-46, 48, 52.

It is obvious that the contract between the Board and the EEU will be a (if not *the*) critical feature of the new system. It will define the EEU's responsibilities and standards of performance, and will establish incentives for that performance. Properly structured, the contract will assure that the EEU approaches its assignment with enthusiasm, creativity, and initiative, and thus achieve the broad program goals.⁶⁴

c. The Contract Administrator

The Contract Administrator ("CA") will handle the day-to-day management of the contract between the Board and the EEU. It will interpret its terms, administer any contractually-set reporting requirements, and receive and resolve complaints from, or disputes among, affected persons. The CA will have thirty days in which to resolve such matters and then, if unresolved, to present them to the Board. While the CA may, if deemed appropriate, monitor meetings of the Board-appointed Advisory Committee, the CA will have no role on that committee.⁶⁵

The MOU also authorizes the CA to take steps to assure the continuing delivery of energy efficiency programs during the transition to the EEU:

If for any reason an EEU has not been established by January 1, 2000, the Contract Administrator shall be authorized to enter into such contracts with DUs, upon reasonable notice, until the establishment of an EEU, and each DU shall work in good faith with the Contract Administrator. . . .⁶⁶

This provision gives the parties and Board some flexibility, in the event that the MOU's proposed schedule cannot be met. See Section III.B., below.

d. The Fiscal Agent

The Fiscal Agent fulfills an accounting function, taking in monies collected by distribution utilities, making sure the correct amounts are collected, and dispersing those funds to the EEU and to any other entities funded by the program charges. The FA will also account for the funding of those special activities of the DPS set out in the MOU, *e.g.*, program

64. Tr. 6/29/99 at 84 (Parker).

65. MOU, ¶¶ 5-6; tr. 6/29/99 at 57-59, 64-71, 96-98 (Parker).

66. MOU, ¶ 27.

evaluation. The FA will carry out these functions on behalf of the Board and, accordingly, will keep the Board apprised of the status of program accounts.⁶⁷

e. The Advisory Committee

The MOU calls on the Board to ". . . appoint an advisory committee to the EEU which shall consist of representatives from DUs, consumers, the DPS, and others deemed necessary by the Board."⁶⁸ The Advisory Committee ("AC") will be a channel of communication between important stakeholders and the EEU. It will provide advice but will have no authority over the EEU. As DPS witness Parker explained, it will be ". . . independent of the EEU management or control. It is purely advisory to the EEU in its function. It advises the efficiency utility as it sees fit. It is not a corporate entity with legal standing in any proceeding. It may have members who bring with them party status of various kinds. . . ." ⁶⁹

f. The Department of Public Service

The Department ". . . will continue to be a party to any [Board] proceeding and will continue, as it does now, to represent ratepayers [and] the public interest in those proceedings. The Department has a specific role as . . . the entity that will be in charge of providing for formal evaluation of the efficiency utility program — programs and program performance."⁷⁰ The DPS will also develop and present avoided cost information, necessary to assess program design and expected benefits, for consideration by the Board. In its role on the AC and in its traditional public advocacy role before the Board, the DPS will continue to propose new initiatives that may, or may not, be appropriate for the EEU to take on. The DPS will not have

67. *Id.*, ¶¶ 5-6. In response to questioning, DPS witness Parker stated that he expected that the FA and CA would be separate entities. Tr. 6/29/99 at 98-99, 101-102 (Parker). Given the distinct functions that the two perform, it is reasonable to think that the requisite skills for the two are not likely to reside in a single person or organization.

68. MOU, ¶ 5. The MOU allows the EEU to appoint other advisory committees to serve its program management needs, but this is a prerogative, not an obligation, of the EEU.

69. Tr. 6/29/99 at 104 (Parker).

70. *Id.* at 106.

any direct authority over the EEU, except that the Department will be able to require the EEU to make information in its possession available to the Department on request.⁷¹

g. The Distribution Utilities

Upon approval of the MOU, the distribution utilities will be relieved of their obligations to design and implement energy efficiency programs (except for those associated with distributed utility planning). Specifically, the MOU calls on the Board to specifically find:

that the EEU structure and System-wide Program proposal outlined (in the Settlement MOU), when approved by the Board and implemented in accordance with this MOU, shall be considered to fulfill the future obligations of each DU which signs this MOU to plan for and conduct System-wide (DSM) Programs⁷²

The DUs are committed to support the transition to the new structure and to ". . . cooperate in good faith with the EEU . . ." ⁷³ The DUs are free to conduct their own programs voluntarily, as long as they do not conflict with EEU programs; however, the costs of such programs will be borne by the DU and their recovery will be subject to traditional rate-making principles and applicable DSM cost recovery mechanisms (excluding ACE). The DUs are not assigned any management responsibility for the conduct of EEU programs; they will be represented on the Advisory Committee and will, of course, always have the opportunity to petition the Board on matters relevant to them.

3. Effectiveness of the Institutional Structure

The parties' — and the Board's — overall goal is to create an organization that facilitates creative, effective conduct of the program mission, while ensuring that oversight and performance incentives (those both contractually defined and intrinsic to the institutional structure) will move actors, especially the EEU, to do their jobs effectively. In assessing

71. MOU, ¶¶ 5-6, 8, 10, 11, 12*ff*. Under the MOU, the DPS has a variety of other obligations that I have not mentioned, but they do not bear directly on its role in assuring that the EEU and other entities perform as expected.

72. MOU, ¶ 16. The expression "System-wide Programs" is defined by the MOU and quoted in footnote 90. This finding would apply only to the system-wide programs; any DSM obligations that the utility has with respect to distributed utility planning would still be subject to the requirements of these statutes.

73. *Id.*, ¶¶ 12 and 15.

whether the proposed structure is adequate to achieve this, I consider the relationships among the components of that structure, the allocations of responsibility and authority, the balance between risks and rewards, and the distribution of "checks and balances." I have organized these considerations in the following three questions:

- Will the public stakeholders, especially DUs and consumer representatives, be given adequate opportunities to communicate their ideas or complaints and will the structure ensure that their interests are adequately protected, in the event that the EEU takes actions with which the stakeholders disagree?
- Can the Board, as a practical matter, manage this structure effectively, given its role as a quasi-judicial agency, charged with the overall regulation of the state's utilities and related services?
- Are there any elements of this structure which pose a real or apparent conflict of interest for any of the key players?

The success of this program over the long term requires affirmative answers to these questions. I take up each in turn in the following sections.

a. Public Participation

The settlement provides an orderly process for interested parties to bring to the Board their concerns and comments on EEU program budgets, plans, and implementation practices. First, any interested party may communicate with the EEU directly. Second, there will be an Advisory Committee, giving those parties appointed to it another means by which to advise the EEU. In addition, the MOU provides that any person or entity may complain to the Contract Administrator about the EEU's performance under the terms of its contract. The CA will then attempt to resolve the complaint through negotiation. If no resolution is achieved within 30 days of the complaint, the CA is to refer the complaint to the Board for review.⁷⁴

This process is open and fair. It is flexible, provides several ways to communicate with the EEU, demands that the EEU be responsive, but leaves responsibility for the EEU's performance and day-to-day management in the hands of the EEU, where it belongs. The Board, of course, retains ultimate authority over the EEU and the other entities: but in this regard it will be functioning in much the same way that it does when regulating utilities

74. MOU, ¶¶ 5-6, 67.

generally. Although under contract to the Board, unlike utilities, the EEU will nonetheless bear the risks of poor performance, which should provide powerful incentives to satisfy its contractual obligations.⁷⁵

The Board should ask bidders for the EEU to describe how they will obtain information from, and be responsive to, the public; a fuller understanding of expectations and responsibilities will be developed through the contract negotiations. In the end, the EEU's primary function will be to acquire energy efficiency savings from Vermont consumers. In addition the formal complaint process provides an expeditious process for addressing questions about the EEU's performance and other related matters. For all these reasons, therefore, I conclude that there will be adequate means to assure public participation in the new regime, and that potential parties' rights will be adequately protected by the proposed dispute resolution process.

b. Practical Aspects of the Board's Role

The settlement provides a cohesive structure for the management and delivery of the statewide programs. The process requires little day-to-day involvement of the Board members or their staff. The Contract Administrator will interpret the terms of the EEU contract and will assess whether these contract terms are being fulfilled. The Contract Administrator will be empowered to require reports from the EEU and to inquire into its activities. In addition, as already discussed, the settlement provides for a formal complaint process that allows representatives of the DPS, the DUs, or any other person or entity to address problems regarding the EEU performance of its contract terms, and it is reasonable to expect that few complaints (at least, after the early years of program operation) will rise to a level requiring formal Board action.

This is straightforward and appears to me to be well within the Board's expertise and statutory mandates to oversee. In fact, the Board has had experience with an arrangement

⁷⁵. In contrast, utilities' obligations are set by statute, rule, and case law.

similar in certain respects to the proposal here.⁷⁶ The lesson learned is that, so long as roles are well defined and duties properly assigned, a contract-based system can operate effectively.

c. Conflicts of Interest

i. The Public Service Board

Under state law, the Board must ensure that the public's need for energy services, now and in the future, is met at the lowest total societal cost.⁷⁷ Thus, whether delivered by an EEU or the utilities themselves, the Board must assure, among other things, that comprehensive energy efficiency services and measures are being deployed. The structure that the parties propose here formalizes certain aspects of the Board's role through contract. It places responsibility for the oversight of the EEU in the hands of the Board and its contractors, the Contract Administrator and Fiscal Agent. The settlement does not envision that either the Contract Administrator or the Fiscal Agent will have significant management responsibilities, but rather that they will perform certain, limited administrative functions delegated by the Board.

The MOU and the newly enacted amendments to 30 V.S.A. § 209 enumerate specific tasks that the Board will perform. The Board will:

- Select through a competitive solicitation the CA, the FA, and the organization that will serve as the EEU;
- Establish the terms of the contract with the EEU;
- Resolve disputes and complaints;
- Determine funding levels and allocations;
- Evaluate proposals for new program initiatives;
- Review the DPS's evaluation, to be performed and filed in 2002, of the performance of the energy efficiency regime during its first three years;
- Determine whether to approve or modify avoided cost updates provided by the Department for use in assessing expected program benefits; and
- Conduct and submit to the legislature an evaluation of the EEU's programs.

76. Docket 5837, Order of 3/15/96 (designation of purchasing agent for QF (qualifying facility) power under Board Rule 4.100).

77. 30 V.S.A. §§ 203 and 218c.

Will the performance of any of these tasks conflict with Board actions in other areas? Is there anything about the tasks and structure that can adversely and improperly affect the Board's ability to perform its duties, both generally and with respect to energy efficiency services?

The answer to both questions is a clear no, for several reasons. First, the Board will have no pecuniary interest in the conduct of the statewide energy efficiency programs, the primary mission of the EEU. Second, the Board remains responsible for ensuring that the overall cost of electricity services is minimized. The new management structure does not change this. If the EEU proves ineffective in delivering the services called for by its contract, the Board will be free, and motivated, to devise remedies.⁷⁸ There is nothing in the new structure that should change the Board's interest in capturing the full potential of cost effective energy efficiency to minimize the electricity bills of Vermont consumers and to protect the Vermont environment. Third, the public, competitive processes for selecting the EEU, the CA, and the FA offer a strong assurance that the best candidates for the jobs will be chosen. Fourth, there are open, public processes for resolving disputes, considering budget allocations, and determining total budget commitments. And fifth, the Board must report to the Legislature on the achievements of the programs.

ii. The Department of Public Service

The Department retains responsibility for appearing as a party in any Board proceeding regarding the EEU or the MOU. It will continue, as it does now, to represent the public interest in such proceedings. The settlement specifically assigns the DPS responsibility for:

- Providing a formal evaluation of the programs approved by the Board for EEU implementation;
- Updating avoided costs;
- Conducting an evaluation relative to the EEU during calendar year 2002; and

⁷⁸ Including dissolve the contract and hire a new EEU. There should be contract provisions that dictate the conditions under which such actions could be taken.

- Chairing the Transition Working Group.⁷⁹

These responsibilities are essentially the same as those that it has historically borne. Should, however, the Board be concerned that the DPS's advocacy of the EEU-structure will undermine its ability to fairly and objectively evaluate the system's functioning and achievements?

The Department states that its primary purpose is to be a responsible, competent advocate for the public, and it firmly asserts it can provide effective public advocacy in matters relating to the EEU, just as it has when reviewing and litigating the implementation of utility DSM programs whose designs were supported by the Department.⁸⁰ The Department states that it will be guided in performing its roles by relevant Board orders and statutes, including but not limited to

30 V.S.A §§ 202a [state energy policy], 209(d) [Board-approved energy efficiency programs and independent implementation entity], and 218c [least-cost planning].⁸¹

I am quite confident that neither the new structure nor the Department's role in creating it will threaten the integrity of the DPS's evaluations of the EEU or its calculations of avoided costs. First, though one can surmise that the effects of its advocacy for the EEU might lead it to deflect or ignore legitimate criticisms of the EEU, one can just as reasonably argue that that very advocacy will propel the DPS to be vigilant in its scrutiny of the EEU, and to take all steps possible to assure that the EEU is in deed, rather than merely word, performing as expected. Second, the public process that accompanies any evaluation provides a strong check on any potential conflict, or appearance of conflict, of DPS interests.⁸² And third, the Board

79. MOU at ¶¶ 11 and 18, and Attachment A. Paragraph 11 seems to confer upon the DPS a general duty to evaluate the programs and EEU performance. The frequency of such evaluations is not stated. Paragraph 18 describes a specific evaluation to be performed in 2002, in advance of a Board decision on the EEU's budgets for years 4 and 5 (2003 and 2004). Presumably, the ¶ 18 evaluation would also satisfy the DPS's ¶ 11 obligation, in that year.

80. Tr. 6/29/99 at 125 (Parker).

81. *Id.* at 113-114 (Parker).

82. MOU, ¶¶ 11, 18. These paragraphs require that the Board review and, if justified, approve the Department's evaluations of the EEU and its programs, but only after other interested parties are given the opportunity to review and comment on the evaluations. Also, provision is made for technical workshops to be held. This is a sensible procedure. Even so, I believe it would be improved if the Department were to invite public input during the planning stages of the evaluations, so that evaluators may be alerted to issues

(continued...)

must assure that independent evaluations of the programs are performed. The recently amended Section 209 of Title 30 mandates that the Board shall:

(10) provide for the independent evaluation of the programs conducted under subsection (d) of the section; [and]

* * *

(12) Require verification, on or before January 1, 2003, and every three years thereafter, by an independent auditor of the reported energy and capacity savings and cost-effectiveness of any savings reported by any entity appointed by the board to deliver energy efficiency programs under subdivision (d) (2) of the section.

The Board can assess at the time what will be required of these evaluations to ensure that they are objective and fair. I fully expect that the Board and other parties will see no reason to doubt the Department-sponsored evaluations, but, if there is cause, the Board can remedy it by commissioning its own evaluations.

iii. Other Parties

The settlement identifies for the DUs and others important roles in creating and implementing the EEU program. If the MOU is approved by the Board, penalties and remedies will be available for DUs that do not comply with its terms.⁸³

The effects of the settlement on the DUs are straightforward. The EEU's activities will be deemed to satisfy the DUs' on-going obligations under various statutes and dockets to provide DSM services, except for DUP DSM.⁸⁴ In addition, Board approval of the MOU:

shall be considered to resolve all claims based on actions or failures to act prior to January 1, 2000, that a DU which signs this MOU failed to satisfy its DSM obligations to customers under 30 V.S.A. § 218c, 218b; the Board's orders in Docket Nos. 5270 or 5330; or any requirements to plan for and conduct System-

82. (...continued)

that warrant investigation *before* the evaluations are completed. Consequently, I recommend the Board direct the DPS to conduct a scoping workshop before beginning an evaluation. The study should, of course, remain the responsibility of the DPS, but surely both the DPS's efforts and the Board's decisions will be better served by the early receipt of public comment on the EEU and its programs.

83. MOU, ¶ 56.

84. *Id.*, ¶ 16.

wide Programs contained in a Board order specific to a DU which signs this MOU.⁸⁵

Lastly, the DUs are required to act in good faith to support the approval, establishment, funding, and implementation of the EEU.⁸⁶

The distribution utilities will willingly give up a part of their business.⁸⁷ In return, they will no longer face particular regulatory uncertainties. They will have no direct control over the EEU, CA, or FA. They have agreed to support EEU activities. The only potential problem that comes to mind is a variation on the one that led to the creation of the Account Correcting for Efficiency ("ACE") over ten years ago, namely, the reluctance of a firm to take actions that will reduce sales and, thereby, profits. Conceivably, DUs (particularly those that still retain entitlements to generation) might resist efforts to reduce their customers' electricity usage, but, in light of their promise not to do so and given other changes to the electric sector that may soon be upon us,⁸⁸ I conclude that the DUs' inherent ambivalence to DSM (if any at all) will not jeopardize the workings of the new system.

iv. Conclusion: Conflicts of Interest

The settlement provides an innovative structure that sets out clear lines of authority and responsibility for all the players, and also provides for the important public participation that can only strengthen its prospects for success. The structure provides ample opportunity for public scrutiny and redress should conflicts, or appearances thereof, arise.

d. Conclusion: Effectiveness of the Institutional Structure

Out of intensive negotiations emerged the MOU and the institutional structure that it proposes. That structure differs from the one outlined by the Board in the Phase I Order. The

85. *Id.*, ¶ 53.

86. *Id.*, ¶ 66.

87. *Id.*, ¶ 61. Not all will give up all aspects of providing DSM services. BED and WEC, for instance, will continue to deliver programs in their service territories. Nor, in the case of Citizens, will approval of the MOU resolve all outstanding claims with respect to DSM. See Section II.D.2., above, and the bilateral agreements for more detail.

88. See Docket 5854, Order of 12/30/96.

Board considered how the efficiency entity's own management could be constituted to relieve potential conflicts and conflicts of interest. The Board suggested that:

In order to ensure that a broad range of expertise and interests is represented, the management committee might well be structured in the following manner: two utility representatives with experience in energy efficiency programs; a DPS representative; a business energy efficiency specialist; a residential energy efficiency specialist; and a low-income advocate energy specialist. The management committee should have the authority to appoint an executive director, to issue requests for proposals, and to select contractors to implement specific energy efficiency programs. The management committee should also recommend new programs and annual budgets for Board review and approval.⁸⁹

It was a suggestion merely, and the Board invited the parties to make other recommendations as they saw fit.

The settlement offers an alternative that does not require that possibly conflicting parties sit together on a board of directors or management committee. Instead, it sets up a process by which all parties will have an opportunity, first, to participate in the drafting of the contracts between the Board and the EEU, CA, and FA, next, to bring complaints to the Board about the EEU's performance, and, third, to review and comment on periodic evaluations of the EEU and its programs. One of the appeals of the parties' proposal is that it assures that debates about the EEU's performance will be public, not merely closed-door affairs among its managers. That said, the MOU makes no prescriptions about the make-up of the management or directors of the EEU itself. The Board, in its request for bids, should ask each respondent to describe the management and ownership structure of its proposed EEU, so that the Board can be assured of its independence.

Lastly, the settlement has the support of a large and diverse group of interested and thoughtful parties. That fact by itself offers significant assurance that the proposed institutional structure offers a solid foundation for this new innovative program.

For all these reasons, I conclude that the institutional structure envisioned by the settlement is not only workable but in fact is well constructed to support the objectives for which it was framed. I therefore recommend that the Board approve it.

⁸⁹. Phase I Order at 53-54.

F. The Funding Plan

1. General

Under the MOU, the system-wide program activities of the EEU shall occur within a Board-approved budget, with annual re-allocations among programs as described below.⁹⁰ The annual budgets (as originally filed and as revised) are the following:⁹¹

Year	MOU Budget	Revised Budget
2000	\$8,490,128	\$8,256,632
2001	11,157,722	10,240,568
2002	13,519,809	12,478,531
2003	15,945,344	15,945,344
2004	16,548,503	16,548,503

Attachment B to the MOU describes the initial plan for allocating the program budgets. These budgets will fund the EEU program costs, the EEU's administrative costs, and the costs incurred by the Contract Administrator and Fiscal Agent. This budget allocation plan describes the actual allocation for 2000, but allows changes in subsequent years. The MOU also establishes a public process for amending annually the allocation of the budgets among programs but states clearly that the budget totals shall not change.⁹² The two following tables recapitulate the funding allocations for the first EEU program year, 2000. The first shows subtotals by program and the second shows them by type of expenditure.

90. MOU, ¶ 46. The parties agreed that at no time during the first five years of the program should the DU contributions to the EEU for the core programs exceed the equivalent of \$0.0029/kWh on total statewide retail sales. "System-wide programs" is defined in the MOU to mean "all DSM programs, including but not limited to the Core Programs, except for those programs offered or required to be offered by a DU as a result of [distributed utility planning]". *Id.*, ¶ 1.

91. Exhibit DPS-MOU-1 at ¶ 17 and Attachment B; the 22 utility bilaterals; DPS Letter, 8/30/99. Note also that the figures for WEC include the \$155,000/year, for the first three years, that it will allocate to its own programs. Refer to Section II.D.2.f., above. Amounts for BED in 2001 and 2002 are not included in the "Revised Budget" column, since BED has yet to propose (and the Board to approve) core program funding levels for those years.

92. MOU, ¶ 19 and Attachment B. These figures are as originally filed. The parties have not yet informed the Board how they will change in relation to the revised totals.

Program Category	Year 2000	
	Components	Totals
Commercial and Industrial Programs		
Market Opportunities Program		
Measure-Related Program Costs	\$981,432	
Non-Measure Program Costs	\$559,443	
Subtotal Program Costs		\$1,540,875
Commercial and Industrial New Construction		
Measure-Related Program Costs	\$501,447	
Non-Measure Program Costs	\$566,307	
Subtotal Program Costs		\$1,067,754
Dairy Farm		
Measure-Related Program Costs	\$257,067	
Non-Measure Program Costs	\$162,754	
Subtotal Program Costs		\$419,822
C&I Emerging Markets Program		\$50,000
Total Commercial & Industrial		\$3,078,451
Residential Programs		
Residential New Construction		
Measure-Related Program Costs	\$357,799	
Non-Measure Program Costs	\$589,546	
Subtotal Program Costs		\$947,345
Low-Income		
Measure-Related Program Costs	\$870,000	
Non-Measure Program Costs	\$983,000	
Subtotal Program Costs		\$1,853,000
Efficient Products		
Measure-Related Program Costs	\$625,374	
Non-Measure Program Costs	\$760,002	
Subtotal Program Costs		\$1,385,376
Residential Emerging Markets Program		\$50,000
Total Residential Program Costs		\$4,235,721
Efficiency Utility, Fiscal Agent, & Contract Manager Non-Program Budget		\$1,175,956
Grand Total of All Program Costs		\$8,490,128

Type of Expenditure	Year 2000	
	Components	Totals
Commercial and Industrial Programs		
Measure-Related Program Costs	\$1,739,947	
Non-Measure Program Costs	\$1,288,504	
Subtotal Program Costs		\$3,028,451
C&I Emerging Markets Program		\$50,000
Total Commercial & Industrial		\$3,078,451
Residential Programs		
Measure-Related Program Costs	\$1,853,174	
Non-Measure Program Costs	\$2,332,548	
Subtotal Program Costs		\$4,185,721
Residential Emerging Markets Program		\$50,000
Total Residential Program Costs		\$4,235,721
Efficiency Utility, Fiscal Agent, & Contract Manager Non-Program Budget		\$1,175,956
Grand Total of All Program Costs		\$8,490,128

Attachment B provides similar detail for subsequent years; these, however, will be subject to reconsideration according to the budget allocation process.⁹³

The total each DU must collect from its customers for the EEU program is set forth in each bilateral agreement. The bilateral agreements offer DU resource commitments for the first three years, 2000, 2001, and 2002. In 2002, the DPS will carry out an evaluation (the scope of which is only broadly described in the MOU) of the performance of the EEU, the remaining economically achievable energy efficiency potential, and the continuing need for EEU programs to achieve such potential. The settlement calls on the Board to offer parties to this docket the opportunity to comment on the report and then, in light of those comments, to take action, if appropriate, on the budgets for 2003 and 2004.⁹⁴

The MOU provides that this EEU program budget will be funded through a separately stated, non-bypassable, volumetric system benefits charge on the bill from the electric utility to

93. *Id.*

94. *Id.*, ¶ 18.

customers, as authorized under newly enacted 30 V.S.A. § 209(d)(3). The MOU provides that rate design for the benefits charge will be set by the Board. In its 2002 evaluation report, the DPS may make recommendations about whether to eventually create a uniform state-wide charge.⁹⁵

I conclude that the proposed funding and collection mechanism for the new DSM delivery system is consistent with 30 V.S.A. § 209(d)(3), and that the specific yearly budgets each satisfy the requirements of 30 V.S.A. § 209(d)(4).⁹⁶ DSM services will in the future be delivered on a "pay-as-you-go" basis, instead of by investment and amortization, but this should not affect the quality or comprehensiveness of measures and programs.

The following table breaks down the total annual budgets for the first three years, by utility:⁹⁷

Statewide Program Budget Commitments			
	Year		
	2000	2001	2002
Total Budgets	\$8,256,631	\$10,240,568	\$12,478,531
<i>Municipal Utilities</i>			
Barton	\$29,276	\$36,961	\$43,304
Enosburg Falls	\$37,283	\$47,070	\$55,147
Hardwick	\$60,887	\$76,870	\$90,061
Hyde Park	\$20,410	\$25,768	\$30,190
Jacksonville	\$11,264	\$14,221	\$16,661
Johnson	\$34,316	\$43,324	\$50,758
Ludlow	\$89,318	\$112,764	\$132,115
Lyndonville	\$127,238	\$160,638	\$188,203
Morrisville	\$83,477	\$105,390	\$123,475
Northfield	\$50,014	\$63,143	\$73,978
Orleans	\$34,957	\$44,133	\$51,706
Readsboro	\$4,673	\$5,900	\$6,912
Stowe	\$115,652	\$146,011	\$171,067

95. *Id.*, ¶ 21, 47.

96. See Section III.A., below, which takes up the legal requirements in greater detail.

97. The 22 utility bilaterals. These match the revised figures filed by the DPS on August 30, 1999. The figures may not add up precisely, because of rounding. Also, these amounts include the costs associated with WEC's self-implementation of programs.

Swanton	\$106,949	\$135,023	\$158,193
Burlington	\$410,000	<i>see note</i>	<i>see note</i>
<i>Other Utilities</i>			
Rochester	\$12,890	\$16,273	\$19,066
Central Vermont	\$3,548,757	\$4,628,213	\$5,535,267
Green Mountain	\$2,461,512	\$3,303,572	\$4,248,473
Citizens Utilities	\$557,736	\$704,142	\$824,972
Vermont Electric Coop	\$273,238	\$344,963	\$404,158
Vermont Marble	\$16,784	\$21,189	\$24,825
Washington Electric Co-op	\$170,000	\$205,000	\$230,000

N.B.: Funding levels for 2001 and 2002 will be proposed by BED and will be subject to Board approval.

2. Impact of the EEU Funding Plan on Consumer Bills and Rates

These statewide programs affect consumer bills in two ways. First, the program costs will be recovered in the rates consumers pay for their electricity. Second, participating in these energy efficiency programs offers consumers the opportunity to reduce their electricity usage while still getting the often essential benefits they seek from electricity service.⁹⁸

The MOU and associated bilateral agreements with individual electric utilities aim to minimize increases in overall electricity rates. The MOU specifically states, "The Parties agree that the budgets set out in Attachment B were developed to strike a balance between an appropriate ramp-up of EEU funding and the avoidance of significant rate impacts."⁹⁹ In providing for a benefits charge to collect funds from consumers for this new EEU program, the MOU provides that current rates of each DU will be reduced to reflect as much as possible the extent to which DSM costs in current rates will be displaced by such a benefits charge. Any such reduction is to be made: (a) in a rate proceeding concerning the electric utility which is currently pending before the Board; (b) through a rate reduction which the electric utility shall file with the Board, pursuant to 30 V.S.A. § 225(a), to take effect as discussed immediately below; or (c) through a petition filed with the Board by the DPS. The effective date of any such

98. See Section II.C. 8., above, for details on expected savings.

99. MOU, ¶ 21.

reduction in the rates of an electric utility is to be the same as the first date on which the benefits charge goes into effect. Should a subsequent year's allocation to an electric utility of the EEU budget require a reduction in the rates of the electric utility, then the effective date of such reduction is to be the same as the first date on which the subsequent year's allocation goes into effect. The Core MOU and associated bilateral agreements between the DPS and all of the municipal utilities except BED also contain additional specific provisions governing rate reductions by those municipal utilities.¹⁰⁰

The MOU provides that, within each DU service territory, the cost recovery for this EEU program will be allocated, to the greatest extent possible, among customer classes in the same manner and using the same methodology as other comparable costs are allocated under the DU's approved rate design, as may be amended with Board approval from time to time.¹⁰¹

Overall the settlement plan generally holds DSM-related costs in rates relatively constant.¹⁰² For customers in some service territories there will be no overall rate impacts, but for others there will be: efforts were made in the negotiations to keep any rate increases very small.¹⁰³ For example, the rate impacts for GMP and CVPS customers are set by the terms of the bilateral agreements for the first three program years, the years for which budgets have been established. CVPS customers will see an overall increase of no more than 0.25 percent during this period; and GMP customers will experience no rate impacts in the first two program years.¹⁰⁴

100. *Id.*, ¶¶ 22-23; exhs. DPS-MOU-4, 6 through 15, 17-18; Barton Bilateral. During a status conference on August 25, 1999, counsel for the Department argued that, as general matter, the EEU-benefits charge need not be considered in individual rate cases for all of the utilities, pursuant to the requirements of 30 V.S.A. §§ 218, 225-227; rather, it can be implemented through a generic proceeding, pursuant to 30 V.S.A. § 209(d)(3) and (4). I concur: the new statute expressly provides that, "[i]n addition to its existing authority, the board may establish by order or rule a volumetric charge to customers for the support of" the EEU programs. 30 V.S.A. § 209(d)(3). Thus, setting rates for the EEU is distinct from setting rates for utilities. Any utility rate decreases to offset the EEU charge must, of course, occur in accordance with applicable law. 30 V.S.A. § 225(a).

101. MOU, ¶ 48.

102. Tr. 6/29/99 at 148-149 (Parker).

103. *Id.* at 149-150, 154-156.

104. CVPS Bilateral; GMP Bilateral.

3. Equity

From the outset of the Board's efforts to ensure that Vermont utilities identified and took steps to capture the benefits of energy efficiency for the economy and environment, the Board has sought to ensure that all consumers have access to these benefits. The Board has also sought to ensure that all the consumers who contribute to the cost of utility energy efficiency programs also have the opportunity to obtain the bill-reducing benefits of participating in the programs. In the recently enacted statute, the Legislature also addresses the equity issue, stating that the Board is to "ensure that all retail consumers, regardless of retail electricity or gas provider, will have the opportunity to participate in and benefit from a comprehensive set of cost-effective energy efficiency programs and initiatives designed to overcome barriers to participation."¹⁰⁵

The MOU articulates principles to guide the work of the EEU in this regard. Paragraph 45 of the MOU sets the following objective for the administration of the EEU programs:

Over time, the System-wide Programs offered by the EEU should generally reflect a level of expenditure that corresponds to electric energy use by geographic region and customer class throughout the state. In this regard, the design of the System-wide Programs and the budgets for those Programs should generally seek to provide a level of service to customer classes and regions of the state that corresponds to their share of the eligible energy efficiency potential and their contribution to DSM expenditures.¹⁰⁶

The MOU also notes that the resource commitment embodied in each utility's budget for the first three program years set forth in each bilateral agreement has been determined on a company-specific basis, based in part on a reasonable estimate of the eligible markets for the core programs in each service territory.¹⁰⁷

The MOU's budget allocation process also provides that, in response to an EEU reallocation request, a utility may contest whether the EEU has made sufficient efforts, over

105. 30 V.S.A. § 209(e)(1).

106. MOU, ¶ 45.

107. *Id.*, ¶ 47.

time, to deploy measures to customers and customer classes in that utility's service territory, in a manner consistent with the MOU's distributional equity principle.¹⁰⁸

The C&I Customer Credit Program, anticipated in the MOU and detailed in the IBM Bilateral, addresses the needs of customers who, for one reason or another, have chosen not to participate in utility energy efficiency service programs. It offers C&I customers the opportunity to obtain funding support from EEU resources for qualifying energy efficiency initiatives they take themselves.¹⁰⁹

I conclude that, taken all-in-all, the settlement can achieve a reasonable level of distributional equity in the delivery of efficiency services among Vermont's customers — indeed, a greater equity than the current multi-utility program has given us, because of the variations in programs and program designs across the many service territories. In addition, the core programs are in large part focused on lost opportunities, whose occurrences spring up throughout the state, constantly and steadily, unaffected by geography and the degree of earlier DSM efforts.¹¹⁰

4. Long-Term Funding

The MOU provides budgets for the statewide EEU programs for the next five years, from calendar year 2000 through 2004.¹¹¹ The bilateral agreements set the funding commitment for each utility service territory for each of the first three years: 2000, 2001, and 2002.¹¹² The allocations among service territories for 2003 and 2004 will be considered by the Department, Board, and other parties in accordance with the terms of ¶ 18 of the MOU.¹¹³

The MOU directs the DPS to conduct an evaluation during the third year of the EEU program, calendar year 2002, addressing:

- The remaining, economically achievable, energy efficiency potential;

108. *Id.*, ¶ 19.

109. *Id.*, ¶ 26. See Section II.D.2.i., above.

110. Tr. 6/29/99 at 142-143 (Parker).

111. MOU, ¶ 17 and Attachment B.

112. All DU Bilaterals.

113. MOU, ¶ 18.

- The performance of the EEU in achieving available efficiency potential, reducing barriers in energy efficiency markets, and meeting distributional equity objectives for core energy efficiency programs;
- The continued need to direct EEU resources toward energy efficiency markets; and
- Any other factors the DPS deems relevant.¹¹⁴

The DPS is to present a report based on this evaluation to the Board, with copies to all DUs, all parties on the service list for this docket, and any other person seeking intervention. The report will include recommendations for changes in budgets for calendar years 2003 and 2004 and may address other appropriate changes in the EEU program. The MOU calls on the Board to then offer interested parties the opportunity to submit comments and request a technical workshop prior to acting on the DPS report.¹¹⁵

This process will provide the Board with valuable information upon which to gauge the progress of the EEU and to consider any needed changes in the EEU program as it (the Board) considers what resource commitments are appropriate for subsequent years. This aspect of the settlement offers the Board, DPS, EEU, and other interested parties a well-timed opportunity to evaluate the efficacy of the new program, to make "mid-course" corrections, and "fine-tune" the budgets and allocations. At that time, the Board can also consider the frequency with which such reviews (as distinct from the annual program reallocation process described in ¶ 19 of the MOU) should take place in the future.

5. Conclusion: Funding

The funding levels and process for budget adjustments that the parties propose are reasonable. I recommend that the Board approve them. I direct the parties to file, with their comments on this proposed decision, a table showing the revised allocations of funds among programs (the totals should match those given in the Department's August 30, 1999, filing).

114. *Id.*

115. *Id.*

G. ACE, Rate Regulation, and Other DU Cost Recovery Provisions1. Account Correcting for Efficiency

The MOU provides that electric utilities that currently accrue monies under the rules for the Account Correcting for Efficiency ("ACE") shall be allowed to accrue and recover ACE on energy savings attributable to System-wide Programs delivered by the EEU for up to two calendar years after January 1, 2000, or until the electric utility receives a Board order with respect to replacing the ACE mechanism in a rate case, whichever is earlier. At the time of that rate case, the electric utility may present evidence and argument concerning: (a) the extent to which revenue erosion due to core program savings has or will have an effect on the electric utility's opportunity to earn its allowed return; (b) the appropriateness of establishing a rate-making method to ameliorate any such effect; and (c) a proposed rate-making method, other than ACE, to ameliorate any such effect.¹¹⁶

The Parties agree that, with the elimination of ACE, an examination as to whether any regulatory changes are needed that would "allow DUs the reasonable opportunity to earn their allowed return" is appropriate.¹¹⁷ The parties commit to perform such an examination, and to develop and implement any needed changes, by January 1, 2001 (presumably with Board or Legislative approval). If agreement on a new mechanism cannot be reached, the matter will be taken up, as appropriate, in rate cases.¹¹⁸

This treatment of ACE is appropriate. ACE originally served to ensure that the electricity sales reductions associated with utility-sponsored energy efficiency programs did not undermine the utility's commitment to delivering the programs, by allowing it to recover *net* revenues lost through efficiency savings. It was intended to remove a utility's disincentive to manage its own costs, and therefore its customers', in the most efficient manner possible.¹¹⁹ The parties propose here to allow utilities to continue for this limited time to accrue and recover ACE attributable to EEU programs. The Board will consider whether any reason remains to provide a different mechanism to replace ACE for programs carried out by the

116. *Id.*, ¶ 43.

117. *Id.*, ¶ 44.

118. *Id.*

119. Docket 5270, Order of 4/16/90 at Vol. III, 138-150, and Vol. IV, 18-28.

EEU, though it appears now that its justification is much diminished.¹²⁰ The Board may then also consider adjustments in the treatment of ACE (or alternatives to it) for programs carried out by utilities, or by the EEU on behalf of the utilities, under the rules of distributed utility planning.

2. Rate Regulation and DU Cost Recovery Provisions

The settlement specifically addresses the recovery of certain costs incurred by utilities. First, the MOU provides that the establishment, funding, and support of the EEU, if approved by the Board,

shall be considered to resolve all claims based on actions or failures to act prior to January 1, 2000, that a DU which signs this MOU failed to satisfy its DSM obligations to customers under 30 V.S.A. §§ 218c, 218b; the Board's orders in Docket Nos. 5270 or 5330; or any requirements to plan for and conduct System-wide Programs contained in a Board order specific to a DU which signs this MOU. This resolution shall include any claims accruing prior to January 1, 2000, founded upon such obligations, including but not limited to claims of imprudence or non-used and usefulness based upon failure to satisfy such obligations.¹²¹

The scope of this general provision is defined further in paragraphs 54, 55, 56, and 57 of the MOU. In addition, bilateral agreements with several DUs set cost recovery terms that are unique to those DUs; I have summarized those terms in Section II.D., above.¹²²

The MOU specifically considered the prospect of the then pending legislation (S.137), which would enable the Board to establish a separately stated systems benefit charge to fund this EEU program. The MOU supports funding the EEU budget through a separately stated, non-bypassable, volumetric system benefits charge on the bill from DU customers. This provision also establishes that the amount of such a system benefits charge will be determined

120. My personal belief is that, since ACE was designed to align a utility's profit (or, at least, financial viability) incentives with the public interest (which here encompassed improvements in economic efficiency and environmental protection), it will neither be appropriate nor necessary to continue allowing utilities to collect it if they are not making efficiency investments themselves. If, in the future (and as always), a utility suffers revenue reductions (because of EEU activities or for any reason), it will be free to petition the Board for rate relief.

121. MOU, ¶ 53.

122. See also the relevant Appendices to this Order.

separately for each DU, to yield the funding levels agreed on in the individual bilateral agreements.¹²³ This anticipates, therefore, that the system benefits charge must necessarily vary from utility to utility.

As I observed earlier, the settlement has attempted to achieve a balance between ramping up EEU funding and avoiding significant rate impacts. Achieving this has been served by offsetting the new system benefits charge with reductions in current rates to reflect the reductions in costs DUs will be incurring when statewide energy efficiency program responsibilities are transferred from the DUs to the EEU.¹²⁴ The MOU provides that, if the new law authorizes a separately-stated systems benefits charge, the effective date of any reduction in the rates for each DU shall be the same as the first date on which the benefits charge goes into effect.¹²⁵ With the authority granted to it under 30 V.S.A. § 209(d)(3), the Board can implement the terms of the MOU by establishing the new system benefits charge, to be balanced by offsetting rate reductions, where appropriate.

The settlement also provides a number of specific cost recovery provisions that the Board should expect to deal with in future utility rate proceedings. They address, among other things:

- *DU costs associated with the transition to the EEU.* Costs incurred by a DU for developing and implementing the transition plan will be eligible for recovery in the DU's next rate case subject to traditional rate-making principles and applicable DSM cost recovery mechanisms.¹²⁶
- *DU costs associated with DUP-related DSM activities.* Accounting and rate-making for costs incurred by a DU in connection with DSM activities carried out for DUP purposes are to be performed under existing DSM rate-making rules and principles, including the ACE mechanism. Prudence, used-and-usefulness and other rate-making concepts will apply as defined in the April 16, 1990, Order in Docket 5270.¹²⁷

123. MOU, ¶¶ 20-21.

124. *Id.*, ¶ 22; see Section II.F.2., above.

125. MOU, ¶ 23.

126. *Id.*, ¶ 12 and Attachment A.

127. *Id.*, ¶ 33.

- *Distributed Utility Planning*. Distribution utilities will budget and pay for DUP planning and implementation.¹²⁸
- *Dockets 5841/5859*. The MOU does *not* resolve any claims addressed, or arising out of, the Board's Order in Dockets 5841/5859.¹²⁹
- *DU responsibility for DPS costs associated with this proceeding*. The MOU establishes the terms of DU commitments to pay costs incurred by the DPS for work associated with this docket and the transition to the EEU.¹³⁰

The provisions for cost recovery contained in the MOU and bilaterals are reasonable and straightforward. If adopted by the Board, they will facilitate the transition to the new regime with as few financial impacts — on ratepayers as well as utilities — as possible. I recommend that the Board approve these provisions.

H. The Transition

The settlement provides a plan for an orderly transition from the current utility delivered energy efficiency program structure to the EEU. The MOU appends, as Attachment A, a transition planning framework document to guide the process. Under the terms of that document, a transition working group will be formed, chaired by the DPS and comprised of DPS staff (and contractors) and electric utility staff (and contractors). TWG work includes, but is not limited to, submission to the Board of a transition plan, a proposed request for proposal ("RFP") for the EEU (with suggested contract provisions), and proposed RFPs for the Contract Administrator and Fiscal Agent. The MOU calls for a public process for EEU selection, including a technical workshop held under the auspices of the Board.¹³¹

The Settlement MOU sets forth the agreed-upon goals of the transition process:

- To achieve an orderly and efficient transfer of program responsibilities from electric utilities to the EEU by a date certain;

128. *Id.*, ¶ 37.

129. *Id.*, ¶ 55. This refers to rate cases involving Citizens Utilities Company.

130. *Id.*, ¶¶ 62-65.

131. *Id.*, Attachment A.

- To preserve effective program delivery, infrastructure, and expertise related to programs and DUP;¹³²
- To restrain any rate impacts of the transition that may, for some electric utilities, result from changing from past DSM-accounting and rate treatment methods to a "pay-as-we-go" approach; and
- To enable an EEU, as soon as possible, to effectively deliver and attain savings from the core programs and other system-wide programs as may be approved by the Board.¹³³

Because timing is critical to the successful implementation of the MOU, the TWG commenced operations in advance of a Board order in this docket.¹³⁴ It has already developed the transition plan contemplated by the MOU; the "Energy Efficiency Utility Transition Plan" was filed on July 7th. The TWG has been developing the draft RFPs for the competitive selection of the Contract Administrator, the Fiscal Agent, and the EEU. On August 6, 1999, the DPS convened a public workshop to consider the scope and content of the RFP for the EEU. And at the August 25, 1999, status conference, the DPS announced plans to submit draft RFPs for the selection of the EEU, Contract Administrator, and Fiscal Agent in early September.

The MOU and the July 7, 1999, Transition Plan propose schedules that call for transition to the EEU by January 2000. These schedules were prepared before all the parties to the settlement had yet executed their commitments. Given the magnitude and complexity of the tasks that remain before the EEU will be operational, it seems obvious that the January 1, 2000, start date will not be met. During the August 25th status conference, I asked the parties how this probable delay will effect the settlement and the transition. The DPS (with the general concurrence of the other parties) stated that the implementation of the EEU could tolerate being put off until March 2000, but that further delay would likely disrupt an otherwise orderly transition. Accordingly, I urge the Board to proceed as quickly as possible to approve this settlement and to take the necessary steps to fully implement the terms of the MOU and bilateral agreements. See Section IV.,B.1., below, for scheduling recommendations.

132. This was reiterated by many parties during the status conference of August 25th. The potential loss of qualified personnel counsels for expeditious approval of the settlement and selection of contractors.

133. MOU, ¶ 12 and Attachment A.

134. Parker pf. at 9; tr. 6/29/99 at 18-20 (Parker).

I. Distributed Utility Planning

The settlement calls on the Board to initiate a collaborative process to establish guidelines for distributed utility planning by Vermont DUs. One objective of DUP is to explore options for using DSM and distributed generation to reduce the cost of maintaining the reliability of power delivery, by avoiding or deferring transmission, distribution, and other network investments.¹³⁵

The MOU provides that electric utilities must engage in least-cost transmission and distribution system planning and effectively implement such plans. Utility transmission and distribution planning activities will be conducted under DUP. The guidelines described in the Plan are to serve as a starting point for a collaborative process to develop rules and methods for DUP in Vermont. The collaborative will seek to provide to the Board recommendations on, among other things, guidelines for use in DUP activities by individual electric utilities, procedures for revising integrated resource plan ("IRP") filings to reflect the principles and practices of DUP, and externalities and risk adjustments (including methodologies) to be used in DUP. Electric utilities are expected to develop the necessary skills and capabilities to perform DUP, and coordinate their activities with the EEU.¹³⁶

The parties request that, within 60 days of approval of the settlement, the Board open a proceeding under the auspices of which the DUP collaborative process will take place. The parties agree to complete this collaborative process within 120 days of the opening of that proceeding. At the end of the collaborative process, the parties will either recommend an agreed-upon proposal to the Board or file their own recommendations with the Board.¹³⁷

The MOU goes into great detail about the conduct of distributed utility planning and the obligations of the parties. It is not necessary to do so again here.¹³⁸ I only note my strong belief in the principles of least-cost, integrated planning, and my support for a process that will concentrate those methods upon the transport components of the electric system. This is an emerging field. To help all parties develop appropriate DUP strategies, the parties have

135. Chernick Phase I reb. pf. at 5, 10.

136. MOU, ¶¶ 28 and 30; refer also to the Plan (exh. DPS-1) at Chapter 8 and Appendix 5.

137. MOU, ¶ 31.

138. *Id.*, ¶¶ 32-42.

agreed to pursue a formalized consensus-building approach under a collaborative process. I recommend that the Board approve this initiative.

J. Avoided Costs, Environmental Costs, and Risk Mitigation

The MOU states that all decisions regarding DSM program design, measure selection, and measure installation shall be made based on the societal cost-effectiveness test as defined in Docket 5270.¹³⁹ This test, which includes adjustments for comparative risks and external costs, is to be used in screening all DSM measures and programs, including the core programs, and in DUP.¹⁴⁰ The MOU also states that, in applying the societal test to DSM programs and measures, statewide avoided costs as approved by the Board for energy, capacity, risk, losses, and externalities shall be used, except that in DUP planning and implementation, area-specific T&D avoided costs should be substituted for system-wide T&D avoided costs. By approving the MOU, the Board will be approving the statewide avoided costs proposed by the DPS in the Plan for use in system-wide programs.¹⁴¹

1. Statewide Avoided Costs

In the Plan, the Department presents avoided costs on a statewide basis.¹⁴² In support of the program proposals embodied in the MOU, the DPS used the avoided costs that it developed for the Plan in 1997, inflated to dollars in the year 2000 and adjusted for externalities (as described in Section I.2., Environmental Costs, below).¹⁴³

a. Avoided Generation Costs

Markets for electric power have evolved greatly during the past three decades. What was once a network of individual utilities, uncoordinated in their planning and dispatch, is now a highly integrated grid, managed by a single entity, the New England Independent System

139. Docket 5270, Orders of 4/16/90 and 6/6/90.

140. MOU, ¶ 49.

141. *Id.*, ¶ 50.

142. Exh. DPS-1, Chapter 4 and Appendix 4; Chernick Phase I pf. at 5.

143. Mosenthal supp. pf. at 4-5. The DPS used actual inflation rates through the first quarter of 1999 and an assumed annual rate of 2.0 percent for the remainder of 1999.

Operator, responsible for maintaining system reliability and facilitating market-based power transactions. As a consequence, avoided generation costs, which once were determined largely by each utility's resource needs, are now largely a function of market prices. As a general matter, it is reasonable to assume that avoided generation costs are uniform across the state, because the generation costs avoided by a reduction in load anywhere in Vermont will be determined by the New England regional power market. DSM frees up power for sale into the market or it avoids a purchase of power. Either way, the market price, or value, of the power is the same.¹⁴⁴ Similarly, that price is the same whether the power costs are avoided by a utility or by a marketer serving a direct access customer. Moreover, since the avoided generation costs are based primarily on the costs of new power plants, the costs of new utility-owned generation (if there is any) should be quite similar to the market price.¹⁴⁵

The Plan's avoided generation costs reflect regional power market prices.¹⁴⁶ This is a sensible approach, and I recommend that the Board adopt it.

b. Avoided T&D Costs

In contrast to its treatment of avoided generation costs, the Plan uses statewide averages for avoided T&D costs.¹⁴⁷ This aggregation of investment and load data, across areas and over time, has been a standard practice of utilities for many years, and it arises from particular characteristics of T&D that differentiate it from generation.¹⁴⁸

- T&D costs can vary geographically, but not necessarily on the scale of utility service territories.
- Some transmission investments (costs), particularly at the VELCO level and for transmission into the state, are essentially state-wide (*i.e.*, yield state-wide benefits).
- Using state-wide averages may provide more stable estimates of avoided T&D costs. Since T&D avoided costs are averaged over a wider territory, the resulting

144. Either the utility re-sells its excess supply at the market price or it avoids buying new supply at the market price. Tr. 1/22/98, Vol. 1 at 184-189.

145. Chernick Phase I pf. at 5-7.

146. *Id.*, at 13; exh. DPS-1 at 24-31 and Appendix 4-1.

147. Exh. DPS-1 at 31-32 and Appendix 4-2. These avoided T&D costs include estimates of line losses avoided by DSM.

148. Chernick Phase I pf. at 9-10; Chernick Phase I reb. pf. at 30.

figures are more likely to reflect the expected value of future investments than would the outputs of an analysis of any one utility's service territory.

- The state-wide average will tend to balance the over- and under-building that results from the inherently discrete nature of T&D investments and the inevitable variations between local-area demand forecasts and actual loads.
- Load growth in one utility's service territory may increase the possible need for investments by another utility, because of the interdependent nature of neighboring utility systems. Thus, it does not necessarily follow that the T&D costs caused by incremental load growth in an area are necessarily the costs that would be incurred to deploy facilities in that area. State-wide averaging will overcome these anomalies.¹⁴⁹

Lastly, it is likely that the production and use of disaggregated T&D estimates — and the administration of the resulting efficiency programs — is not justified by the costs, at least for now.¹⁵⁰ For all these reasons, I recommend that the Board adopt the Plan's methods and calculations for avoided transmission and distribution costs, for the purposes of designing and testing the cost-effectiveness of system-wide efficiency programs.¹⁵¹

2. Environmental Costs

In the Phase I Order, the Board declined, for several reasons, to depart from the approach to accounting for the external environmental costs of electricity production that it adopted ten years ago in Docket 5270. The Board did note, however, that if other approaches were proposed in the context of utility settlements, it will review the reasonableness of those alternatives on a case-by-case basis.¹⁵² In this docket, the parties do in fact propose a new method of externalities accounting for the limited purposes of the EEU program planning and evaluation.

The MOU proposes that an externalities adder of 0.7 cent/kWh replace the five-percent mark-up on avoided costs (set by the Board in Docket 5270) as a rebuttable presumption for system-wide programs only, provided that this new adder is non-precedential as to any other

149. Chernick Phase I pf. at 7-9; Chernick Phase I reb. pf. at 31; tr. 1/22/98, Vol. II at 5 (Chernick).

150. Chernick Phase I pf. at 11-12.

151. As noted in Section II.H., above, the parties have agreed to develop other area-specific T&D avoided costs for DUP purposes.

152. Phase I Order at 55.

matters, including but not limited to supply purchases and distributed utility planning (including DSM programs offered as a result of DUP).¹⁵³ The MOU also directs the DPS to develop externalities adders for fuel-consuming end-use efficiency measures;¹⁵⁴ these adders will be based on those originally contained in the Plan, and will be used only for the planning and implementation of system-wide programs. Until an approach to dealing with externalities for the purposes of DUP DSM is produced through the DUP collaborative process, each utility will use the five-percent externalities adder (for DUP DSM only) as set out in Docket 5270.¹⁵⁵

A per-kWh cost for externalities has some advantages over the percentage adder called for in Docket 5270. A percentage adder can, in certain contexts, produce some counter-intuitive results. For example, if additional environmental controls on the marginal energy source raise its cost, actual external costs will decline, but the five-percent adder would increase as the costs of the generation source increase. Also, the five-percent adder does not reflect the fact that avoidable emissions may change over time relative to other avoidable costs.¹⁵⁶

I recommend that the Board adopt this new method of accounting for the external environmental costs of electricity production and delivery, for the purposes of system-wide program planning. It is simple, reasonable, and methodologically sound. Also, it is consistent with the requirements of 30 V.S.A. § 209(e)(8), which authorizes the Board to approve programs that "reasonably reflect . . . environmental benefits." Avoiding the environmental impacts from power plants is one of the benefits of the proposed programs.

3. Risk Mitigation

In Docket 5270, the Board adopted a ten-percent adjustment (a reduction) to the cost of energy efficiency investments for planning purposes, to reflect the comparative benefits of

153. MOU, ¶ 51.

154. These adders reflect the fact that some efficiency measures, such as replacing electric space- and water-heating devices with fossil-fuel-fired ones, have local environmental impacts and, therefore, the adders will offset, in some degree, the \$0.007/kWh supply-side adder when such end-use measures are analyzed.

155. MOU, ¶ 51.

156. Chernick Phase I reb. pf. at 55.

DSM in mitigating certain supply risks facing utilities.¹⁵⁷ The Department used this adjustment in its screenings of the proposed core programs.¹⁵⁸ The MOU provides that this risk adjustment will continue to be used in assessing system-wide programs. The parties have agreed to seek consensus on the risk adjustment to be used in DUP as part of the collaborative process established by the MOU, with any disputes to be resolved by the Board.¹⁵⁹ This is reasonable, and I recommend its adoption by the Board.

III. CONCLUSIONS

A. Applicable Law

In the Phase I Order, the Board concluded that, under then current law, it was authorized to approve and implement a state-wide delivery mechanism for energy efficiency programs. On June 1, 1999, the Governor signed into law S.137, a bill that amended Sections 209 and 218c of Title 30. The new law confirmed the Board's authority to appoint "one or more entities" to deliver energy efficiency services in the state, enumerated criteria to be met before doing so, and set overall funding levels and rate design requirements. In addition, the new statute "shall apply to the pending proceeding in docket 5980 before the public service board and to any pending challenges to the board's jurisdiction to authorize and fund an entity, independent of the electric utilities, to deliver energy efficiency programs."¹⁶⁰ In the sections that follow, I examine the settlement in the context of the applicable law.

1. 30 V.S.A. § 209(d)(1): Efficiency Programs and Their Implementation

The new law amends 30 V.S.A. § 209(d). As amended, the first subsection, 30 V.S.A. § 209(d)(1), specifically provides that:

The public service department, any entity appointed by the board under subdivision (2) of this subsection, all gas and electric utility companies, and the board upon its own motion, are encouraged to propose, develop, solicit and monitor energy efficiency and conservation programs and measures. Such

157. Docket 5270, Order of 4/16/90, Vol. IV at 9-12, Vol. III at 164; exh. DPS-1 at 34.

158. Tr. 2/2/98, Vol. I at 72 (Mosenthal).

159. MOU, ¶¶ 30, 50.

160. 1999 Vt. Laws No. 60, § 3.

programs and measures, and their implementation, may be approved by the board if it determines they will be beneficial to the ratepayers of the companies after such notice and hearings as the board may require by order or by rule.

Based on the evidence in this docket, I conclude that the proposed core programs, implemented in accordance with the MOU and associated bilateral agreements, will be beneficial to the ratepayers of Vermont's electric utilities.

2. 30 V.S.A. § 209(d)(2): Appointment of an Independent Efficiency Entity

30 V.S.A. § 209(d)(2) authorizes the Board to appoint one or more independent entities to develop, implement, and monitor energy efficiency programs, including programs delivered in more than one service territory. Specifically, it states that:

In place of utility-specific programs developed pursuant to section 218c of this title, the board may, after notice and opportunity for hearing, provide for the development, implementation, and monitoring of gas and electric energy efficiency and conservation programs and measures, including programs and measures delivered in multiple service territories, by one or more entities appointed by the board for these purposes. The board may specify that the implementation of these programs and measures satisfies a utility's corresponding obligations, in whole or in part, under section 218c of this title and under any prior orders of the board.

The overall settlement is consistent with the terms of this subsection. The settlement asks that the Board appoint an EEU pursuant to a competitive process. The EEU will perform the tasks assigned to it by the MOU, under contract with the Board. The EEU's on-going implementation of the core programs, and any other system-wide programs that the Board approves will satisfy utility DSM obligations, as specifically set out in the MOU and associated bilateral agreements. All these actions are authorized by the new law.

3. 30 V.S.A. § 209(e): Objectives

The General Assembly set out thirteen requirements that must inform the Board's discretion in appointing an entity to deliver energy efficiency programs. In the subsections that follow, I conclude that these criteria are met by the settlement.

a. 30 V.S.A. § 209(e)(1)

The Board shall "[e]nsure that all retail consumers, regardless of retail electricity or gas provider, will have an opportunity to participate in and benefit from a comprehensive set of cost-effective energy efficiency programs and initiatives designed to overcome barriers to participation."¹⁶¹ I conclude that the core programs are designed to overcome market barriers to the acquisition of energy efficiency programs. The proposed programs are cost-effective, reasonably comprehensive with respect to the market segments which they address, and open to all retail electric utility customers regardless of provider.¹⁶²

b. 30 V.S.A. § 209(e)(2)

The Board shall "[r]equire that continued or improved efficiencies be made in the production, delivery, and use of energy efficiency services."¹⁶³ As the record shows, one essential purpose of the core programs and the EEU proposal is to increase efficiency in the production, delivery, and use of energy efficiency services by reducing the number of core program implementation entities and by providing uniform programs throughout the state.

c. 30 V.S.A. § 209(e)(3)

The Board shall "[b]uild on the energy efficiency expertise and capabilities that have developed or may develop in the state."¹⁶⁴ The designs of the core programs reflect a decade's experience with DSM implementation in Vermont: in their general features they are similar to programs that have been in effect for a number of years, changed in particular ways to improve participation, increase the comprehensiveness of savings, and transform markets.¹⁶⁵ Also, by reversing the decline in energy efficiency activity in the state, the EEU proposal will maintain and build on the state's considerable expertise and capability. For example, the bilateral agreement between CVPS and the DPS specifically provides for a plan to assist potentially

161. 30 V.S.A. § 209(e)(1).

162. The proposed core programs will target electric, not gas, efficiency savings. The MOU does not, however, restrict the EEU's activities only to the electric sector. As experience with the new regime develops, the Board should consider whether to expand the EEU's responsibilities.

163. 30 V.S.A. § 209(e)(2).

164. 30 V.S.A. § 209(e)(3).

165. Exh. DPS-1 (the Plan) at 1-11, 56-57, Appendix 1.

displaced utility employees as a means of preserving Vermont's energy efficiency infrastructure. The Transition Working Group process also calls for additional such actions.

d. 30 V.S.A. § 209(e)(4)

The Board shall "[p]romote program initiatives and market strategies that address the needs of persons or businesses facing the most significant barriers to participation."¹⁶⁶ The core programs meet this objective by focusing on lost opportunity markets, which typically contain the most severe market barriers to energy efficiency, and by providing retrofit services to low-income and farm customers.

e. 30 V.S.A. § 209(e)(5)

The Board shall "[p]romote coordinated program delivery, including coordination with low income weatherization programs, other efficiency programs, and utility programs."¹⁶⁷ A central purpose of the EEU proposal is to promote coordinated program delivery statewide. Also, the MOU requires the EEU to coordinate with regional and national energy efficiency efforts. In addition, the residential low-income program includes coordination with the state weatherization program; and the MOU provides that the EEU may provide, on a fee-for-service basis, apart from its system-wide program activities, assistance in utility DUP efforts.

f. 30 V.S.A. § 209(e)(6)

The Board shall "[c]onsider innovative approaches to delivering energy efficiency, including strategies to encourage third party financing and customer contributions to the cost of efficiency measures."¹⁶⁸ The state-wide core programs and the EEU proposal clearly constitute innovative approaches to delivering energy efficiency in Vermont. Also, the MOU requires that the EEU refine the core program designs, as appropriate, in furtherance of several objectives, including but not limited to maximizing and facilitating customer contributions to measure costs and promoting other, creative approaches to energy efficiency.

166. 30 V.S.A. § 209(e)(4).

167. 30 V.S.A. § 209(e)(5).

168. 30 V.S.A. § 209(e)(6).

g. 30 V.S.A. § 209(e)(7)

The Board shall "[p]rovide a reasonably stable multi-year budget and planning cycle and promote program improvement, program stability, and maturation of programs and delivery resources."¹⁶⁹ The settlement meets this objective by providing for a five-year budget path, with a gradual "ramp-up" of the EEU budget. The MOU also provides that, during the third year of operation, the Department will prepare an evaluation of the EEU, which is to inform potential revisions to the fourth and fifth year budgets.

h. 30 V.S.A. § 209(e)(8)

The Board shall "[a]pprove programs, measures, and delivery mechanisms that reasonably reflect current and projected market conditions, technological options, and environmental benefits."¹⁷⁰ The proposed EEU program is based on an analysis which reasonably estimates current and projected, economically-achievable, energy efficiency potential for the markets to be served by the core programs. Using reasonable estimates of current and projected avoided costs (stipulated to by parties for this purpose), the core programs show a high likelihood of being cost-effective. The stipulated avoided costs were adjusted for the expected environmental benefits of avoiding additional electric generation.

i. 30 V.S.A. § 209(e)(9)

The Board shall "[p]rovide for delivery of these programs as rapidly as possible, taking into consideration the need for these services, and cost-effective delivery mechanisms."¹⁷¹ The MOU provides for implementation early in 2000 and creates a process to speed the transit from utility-sponsored DSM programs to the EEU-implemented core programs.

169. 30 V.S.A. § 209(e)(7).

170. 30 V.S.A. § 209(e)(8).

171. 30 V.S.A. § 209(e)(9).

j. 30 V.S.A. § 209(e)(10)

The Board shall "[p]rovide for the independent evaluation of programs delivered under subsection (d) of this section."¹⁷² The MOU proposes that the Department will bear on-going evaluation responsibilities for the core programs and that, during 2002, the Department will also prepare an evaluation of, and report on, both the core programs and EEU generally. The Department will be guided in performing these duties by relevant Board orders and statutes. The DPS's fundamental mission — to be a responsible and competent advocate for the public — remains a potent incentive for it to perform an objective, balanced evaluation of the EEU program. I am confident that the Department's ongoing evaluations and year 2002 report will be sufficient to satisfy this statutory objective, but if, for any reason the Board deems otherwise, it (the Board) can readily commission its own evaluation of the overall program.

k. 30 V.S.A. § 209(e)(11)

The Board shall "[r]equire that any entity approved by the board under subsection (d) of this section deliver board-approved programs in an effective, efficient, timely, and competent manner and meet standards that are consistent with those in section 218c of this title, the board's orders in public service board docket 5270, and any relevant board orders in subsequent energy efficiency proceedings."¹⁷³ As the evidence demonstrates, the EEU proposal under consideration in this docket meets this condition.

l. 30 V.S.A. § 209(e)(12)

The Board shall "[r]equire verification, on or before January 1, 2003, and every three years thereafter, by an independent auditor of the reported energy and capacity savings and cost-effectiveness of programs delivered by any entity appointed by the board to deliver energy efficiency programs under subdivision (d)(2) of this section."¹⁷⁴ The MOU provides for evaluations to be performed at regular intervals, and for a comprehensive evaluation of the

172. 30 V.S.A. § 209(e)(10).

173. 30 V.S.A. § 209(e)(11).

174. 30 V.S.A. § 209(e)(12).

programs and EEU itself to be conducted in 2002. Thereafter, evaluations will be a matter of Board compliance with this subsection of the statute.

m. 30 V.S.A. § 209(e)(13)

The Board shall "[e]nsure that any energy efficiency program approved by the board shall be reasonable and cost-effective."¹⁷⁵ The record demonstrates that the proposed programs are reasonable and likely to be cost-effective.

B. Conclusion and Recommendations

Based on the evidence and testimony before me, I recommend that the Board approve, in their entirety, the Memorandum of Understanding, its Attachments (as revised), and the twenty-three Bilateral Agreements entered into by the central parties to this docket. No party opposes the settlement.

1. Scheduling

Further action required of the Board to develop the request for proposals, award and negotiate contracts, and establish the benefits charge to fund the new programs can be taken up in either a third phase of this docket or in a separate docket opened for those purposes. Certain milestones set in the schedule originally proposed by the parties in the MOU have already passed unachieved, due in part to the complicated and time-consuming nature of the bilateral negotiations. As previously noted, the consequences of delay were discussed during the August 25th status conference. What follows here are recommended changes to the proposed schedule, whose aim is to get the EEU up and running not by January 1, 2000, but certainly within the first quarter of the new year.

175. 30 V.S.A. § 209(e)(13).

Potential Timeline for EEU Implementation			
		Parties'	Board Staff
		Proposed	Possible
	Task	Dates	Revised Dates
	PSB Order on MOU	8/31/99	9/30/99
Task 1:	Hire EEU Contractor		
	Board Review of EEU RFP	9/1/99-9/14/99	9/27/99-10/15/99
	EEU RFP Issued	9/15/99	10/18/99
	EEU bidders' conference	na	10/26/99
	EEU Bids Due	10/20/99	11/23/99
	Oral presentations by EEU Bidders to PSB (workshop format)	10/21/99-11/10/99	12/1/99
	PSB issues draft decision on EEU Contractor	11/11/99-11/24/99	12/31/99
	PSB issues final decision on EEU Contractor	11/24/99	1/31/00
	Final contract agreement negotiations	11/25/99-12/15/99	1/31/00-2/15/00
	TWG completes all tasks required for transition	12/16/99-1/7/00	na
	Attorney General approves contract with EEU Contractor	na	2/15/00-2/28/00
	EU operational transition begins	1/7/00	3/1/00
Task 2:	Hire Fiscal Agent Contractor		
	Issue RFP for Fiscal Agent	na	11/1/99
	Fiscal Agent bids due	9/14/99	11/19/99
	Award Fiscal Agent contract	9/28/99	12/10/99
	Fiscal Agent begins service	na	1/1/00
Task 3:	Hire Contract Administrator Contractor		
	Issue RFP for Contract Administrator	na	10/1/99
	Contract Administrator bids due	9/14/99	10/22/99
	Award Contract Administrator contract	9/28/99	11/12/99
	Contract Administrator begins service	na	12/1/99
Task 4:	Implement tariff changes for all utilities		
	Generic proceeding to make tariff changes	na	9/30/99-11/12/99
	Customers notified of tariff changes	na	11/12/99-12/10/99
	Tariff changes reflected in bilateral agreements go into effect	1/1/00	1/1/00

C. Comments on the Proposal for Decision

On September 8, 1999, this proposal for decision was served on all parties to this proceeding in accordance with 3 V.S.A. § 811. On September 15th, a number of parties filed comments on the proposal. In all, the parties support it and recommend that the Board adopt it; there were, however, several minor changes that they requested. I have reviewed the recommended changes and conclude that they are reasonable. I have incorporated these changes in this proposal for decision and, because they are not adverse to any party's interest, I also conclude that the proposal need not be reissued to the parties for comment.¹⁷⁶ Accordingly, and based on the evidence in the record and the testimony presented at the hearing, I hereby report the above findings and proposal for decision to the Board in accordance with 30 V.S.A. § 8.

Dated at Montpelier, Vermont, this 28th day of September, 1999.

s/Frederick W. Weston, III
Frederick W. Weston, III
Hearing Officer

176. See 30 V.S.A. § 811. Specifically, I have made changes in response to the comments of the Department, VPIRG, CVPS, GMP, and BED.

IV. BOARD DISCUSSION

Today we approve a comprehensive settlement among all the active parties in this docket: the Department of Public Service, the state's twenty-two electric distribution utilities, certain consumer and environmental advocates, and IBM.¹⁷⁷ This settlement, an extraordinary achievement, calls for the creation of a single, statewide entity, charged with the mandate to deliver a broad set of end-use energy efficiency programs to Vermont's electricity customers. The investments that will be made through these programs over the next five years are expected to save households and businesses more than 64 million dollars, to mitigate the harmful environmental effects of electricity production and delivery, and, by making more dollars available for savings and investment in the state, to improve Vermont's overall economic efficiency.¹⁷⁸

We applaud the parties' sustained, creative, and productive efforts. The settlement has been hammered out by parties representing a wide range of divergent interests and, for that reason, it carries with it the highest prospects for success. It embodies a new vision for the delivery of energy efficiency services to Vermont's consumers, building firmly on work begun more than a decade ago and evolving naturally as the electric industry itself evolves. Moreover, it gives life to a newly enacted statute which renews a decade-old legislative mandate for cost-effective investment in energy efficiency measures and which also affirms the Board's authority to implement innovative mechanisms to acquire those savings.

177. The settlement was not opposed by any party. Signatories to the Memorandum of Understanding are the Department of Public Service, Central Vermont Public Service Corporation, Green Mountain Power Corporation, Barton Village, Inc., Electric Department, City of Burlington Electric Department, Citizens Utilities Company, Village of Enosburg Falls Water & Light Department, Town of Hardwick Electric Department, Village of Hyde Park Electric Department, Village of Jacksonville Electric Department, 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, Rochester Electric Light and Power Company, Town of Readsboro Electric Light Department, Town of Stowe Electric Department, Swanton Village, Inc., Electric Department, Vermont Electric Cooperative, Inc., Vermont Marble Power Division of OMYA, Inc., Washington Electric Cooperative, Inc., International Business Machines, Inc., Vermont Energy Investment Corporation, the Vermont Natural Resources Council, and the Vermont Public Interest Research Group.

178. Exh. DPS-PHM-3; exh. DPS-1 at 9, fn. 12. The \$64 million in savings is given in constant (year 2000) dollars and is net of the projected costs of the programs. In nominal dollars, the savings will be far greater, and will be spread out over a number of years.

In 1990, after an extensive and far-reaching investigation, this Board directed the state's electric and gas utilities to engage in integrated, least-cost resource planning and to invest in demand-reducing measures on their customers' premises, where those investments were expected to be more cost-effective than alternative investments in new supply-side facilities. In the years that followed, the utilities designed and implemented a patchwork of programs, with each company emphasizing different objectives and acquiring savings at different rates. They accomplished much, but did not acquire all the savings that were available and would have benefitted Vermont. Despite imperfections, however, in the aggregate their achievements are worthy of some note: between 1992 and 1996, Vermont's energy efficiency programs that, over their lifetimes, will have avoided the need to produce over 2.3 million megawatt-hours, preventing the associated environmental costs, and will have saved consumers more than two hundred million dollars.¹⁷⁹ Since then, however, Vermont utility investments in efficiency have fallen off, casualties of a growing uncertainty in the face of significant upheaval in the electricity sector, both in Vermont and throughout the nation. Yet, as the evidence in this docket demonstrates, the opportunities for cost-effective investment in energy efficiency did not likewise fall off and, by mid-decade it became clear that a new approach was called for.¹⁸⁰ The creation of an energy efficiency utility is a logical next step: it will provide a set of uniform programs throughout the state, tailored as appropriate to the various customer classes, but taking advantage of a single delivery mechanism, more efficient in design and implementation and, under the structure approved here, more open and responsive to the public.

Our conviction that energy efficiency is a critical component of a balanced, environmentally sustainable, and economically rational resource portfolio has remained strong, and today we approve the settlement proffered by that broad spectrum of parties who share this conviction. Ten years ago, utility-sponsored DSM and IRP revolutionized the way companies

179. Exh. DPS-1 at 12 and fn. 15 (12 years of annualized savings); Docket 5854, Order of 12/30/96 at 102, fn. 104. This savings estimate is rendered in nominal dollars, and is therefore not directly comparable to the \$64 million in expected savings for the first five years of the EEU. However, given the nature of discounting future cash flows for analytical purposes, it appears safe to say that the EEU program benefits will be, in nominal dollars, of at least the same magnitude as the earlier savings.

180. Docket 5854, Order of 12/30/96 at 102-109; see, also, Docket 5983 (*Tariff Filing of Green Mountain Power Corporation*), Order of 2/27/98 at 261-263, for a discussion of some of the challenges that counseled a reconsideration of Vermont's methods for acquiring DSM resources.

met demand for energy services; today, the efficiency utility concept introduces new refinements to those practices and puts into place an institutional structure that will capture savings no matter how the underlying industry is organized — whether competitive or monopoly-regulated.

We have reviewed the record in this docket, the proposal for decision, and the parties' comments on the proposed decision. We note that, in response to those comments, the Hearing Officer has amended the proposal for decision to incorporate all the material suggestions of the parties and, after concluding that his amendments were not adverse to any party, he has signed it and submitted it to us. We adopt the Hearing Officer's findings and conclusions and, in so doing, approve the Memorandum of Understanding and Bilateral Agreements in their entirety. These documents speak for themselves; however, three explanatory comments are in order.

The first involves a point of terminology. While we accept the MOU and the Bilateral Agreements in their entirety, we wish to clarify the authority we intend to give the Contract Administrator and the Fiscal Agent. The MOU refers to both the Contract Administrator and the Fiscal Agent as "agents" of the Board. The term "agent" is susceptible of a range of meanings.¹⁸¹ We will *not* be designating these two entities as our agents in the sense of an agent with broad legal authority to bind its principal; rather, the Contract Administrator and Fiscal Agent will be independent contractors. This means that they will not have the legal authority to make decisions that bind the Board, except to the extent that their contracts with the Board so provide.¹⁸² This is not meant to diminish the Contract Administrator's authority to negotiate solutions to disputes among affected persons. Instead, it is a recognition that 30 V.S.A. § 209 gives the Board specific responsibilities with respect to the implementation of an energy efficiency utility, and we are not delegating our statutory authority to a contractor.

The second addresses questions of rate design. We are aware that the Hearing Officer originally supposed that it was the parties' intent that the system benefits charge to fund the

181. See, *e.g.*, the definitions of "agency" and "agent" in Black's Law Dictionary (5th ed.) at 57-60.

182. We discussed the law of agency extensively in Docket No. 5132. *In re CVPS* (May 15, 1987), 83 PUR4th 532. As our Order in that docket indicates, one must review the specific language in a contract in order to determine whether the contract creates an agency relationship and to determine the scope of any such relationship. 83 PUR4th at 570-572.

EEU would be set at the same level for all customers within a particular utility service territory. This presumption led to comments expressing several concerns and, after considering the issues, the Hearing Officer amended his draft proposal for decision as the parties requested. As with his other changes, we approve this one, which simply leaves to a later time a final disposition of the appropriate rate design for the system benefits charge. This is sensible, because rate design, like much else in regulation, is fact-dependent. A fuller evaluation of the EEU's rate treatment as contemplated by the MOU has yet to be conducted.¹⁸³ As set out in the revised schedule, we expect this work to be completed by mid-November.

Lastly, we recognize that the schedule proposed by the parties and revised by the Hearing Officer is ambitious. We understand that the parties are making every attempt to meet these deadlines, and we intend to support them in that effort. As part of that, we note that minor deviations from the exact dates in the schedule will not require modifications of this Order, if they are not material in nature (by which we mean that they are not likely to significantly affect the commencement date of the EEU's operations).

V. ORDER

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

1. The findings and conclusions of the Hearing Officer are adopted.
2. The Memorandum of Understanding, its Attachments (as revised), and the twenty-three Bilateral Agreements (all appended to this Order) are approved, in their entirety.
3. The core programs described in the Department's report, *The Power to Save: A Plan to Transform Vermont's Energy-Efficiency Markets*, are approved.
4. An investigation into distributed utility planning shall be opened in a separate docket.

183. MOU, ¶ 47.

Dated at Montpelier, Vermont, this 30th day of September, 1999.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/Suzanne D. Rude</u>)	BOARD
)	
)	OF VERMONT
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

FILED: September 30, 1999

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 of any technical errors, in order that any necessary corrections may be made.

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.