

**STATE OF VERMONT  
PUBLIC UTILITY COMMISSION**

Case No. 17-3550-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged failure of Vermont Gas Systems, Inc. to comply with the certificate of public good in Docket 7970 by burying the pipeline at less than required depth in New Haven, Vermont	
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Case No. 18-0395-PET

Notice of Probable Violations of Vermont Gas Systems, Inc. for certain aspects of the construction of the Addison natural gas pipeline	
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**MOTION FOR INTERLOCUTORY REVIEW OF  
HEARING OFFICER’S JANUARY 29, 2021 ORDER**

Vermont Gas Systems, Inc. (“VGS” or the “Company”) moves the Vermont Public Utility Commission (“Commission” or “PUC”) for interlocutory review of the Hearing Officer’s January 29, 2021 Order re: Liability and Lifting of Stay of Proceedings in Case No. 18-0395-PET (the “Jan. 29 Order”) in the above-captioned matters. In support of this Motion, VGS provides the following Statement of Questions on Appeal and explains why this is exactly the type of case that is appropriate for interlocutory review. In addition to this Motion for Interlocutory Review, VGS is filing a separate Supporting Memorandum of Law and Fact setting forth the basis upon which the Commission should reject the clearly erroneous findings of fact and standardless and erroneous application of the law in the Jan. 29 Order.

In the Supporting Memorandum of Law and Fact, we detail nine distinct clearly erroneous findings of fact where the Jan. 29 Order’s finding is either: (a) directly contradicted by all expert witnesses on the relevant issue—including the Commission-appointed pipeline safety expert, (b) is supported by no evidence at all, or (c) ignores clearly relevant evidence. These

clearly erroneous findings form the basis of the Order’s application of the law, which leads to two fully meritless substantial change determinations, as well as significantly flawed legal reasoning—or a complete absence of legal analysis—in three substantial change determinations and one material deviation determination. The numerous errors of fact and reasoning in the Jan. 29 Order jeopardize a fair review of this matter as it enters into its next phase and threaten an expeditious and efficient resolution of the overall case.

## I. INTRODUCTION

The Commission approved construction of the Addison Natural Gas Project (“ANGP” or “Project”) more than seven years ago. VGS successfully completed the Project in 2017 and has been providing safe, reliable, and affordable service to Addison County residences and businesses for nearly four years. Public safety and pipeline integrity are VGS’s core priorities and the Company has utmost confidence in the safety and integrity of the ANGP.

The pipeline was constructed based on plans and specifications that provided a strong basis for quality assurance during construction.<sup>1</sup> On-site quality assurance was performed by a team of professional pipeline inspectors.<sup>2</sup> The Department of Public Service’s (the “Department”) PHMSA<sup>3</sup>-appointed safety inspectors were on site regularly.<sup>4</sup> The safety and integrity of the ANGP was confirmed by detailed and comprehensive in-line inspections following construction, and additional technical surveys of the pipeline’s integrity and coating found no problems with the pipe or its protective coating.<sup>5</sup> The safety of the pipeline has been confirmed by the independent investigation of the ANGP construction that was performed by

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<sup>1</sup> The Commission-appointed pipeline safety expert William Byrd issued a report of his independent investigation of the ANGP on December 11, 2019, with minor corrections on January 8, 2020 (the “Independent Report”), at 64, 72.

<sup>2</sup> Independent Report at 28.

<sup>3</sup> PHMSA is the federal Pipeline and Hazardous Materials Safety Administration.

<sup>4</sup> Independent Report at 12.

<sup>5</sup> Independent Report at 72.

Commission-appointed pipeline safety expert William Byrd. A summary of his findings concludes: “ANGP was designed and built with modern materials according to sound specifications and with thorough inspection, which provides the foundation for safe pipeline operations.” Independent Report at 72. Mr. Byrd’s investigation and VGS’s post-construction inspections and surveys make clear that there is no question as to the current safe operation of the Addison County pipeline today.

The question in this case is whether VGS complied with the Commission’s Final Order and CPG in Docket 7970. The Commission’s review of compliance with a CPG follows a familiar two-step process. First, the Commission reviews the relevant evidence and expert testimony and makes factual findings that are supported by the evidence. Second, it applies the law. In particular, the Commission assesses whether—based on its factual findings—a change to the approved project is a “substantial change” as defined by PUC Rule 5.408. A change is a substantial change only if it has the potential for a significant impact on the Section 248(b) criteria. This interlocutory appeal challenges the Jan. 29 Order for failure to adhere to both of these steps.

First, many of the Jan. 29 Order’s factual findings are not based on the evidence. The following is just one demonstrative example of the nine distinct and clearly erroneous findings detailed in VGS’s Supporting Memorandum of Law and Fact. The Order at 27 states:

*In their after-the-fact reviews, VELCO, Mr. Byrd, and Mr. Berger all acknowledge that Vermont Gas’s failure to properly bury the pipeline in the Clay Plains Swamp may affect the safety of the pipeline.*

In fact, VELCO, Mr. Byrd, and the Department’s pipeline expert Mr. Berger all reached the **opposite** conclusion, specifically discussing how safety was *not* affected because the standard for surface loading was met:

**VELCO:** *VELCO accepts the installation of the pipeline within our ROW corridor given that the HS20+15% loading specifications have been accomplished in all areas subject to our agreement.*<sup>6</sup>

*VELCO appreciates the updated information and understands that the loading of HS20+15% has been met at a less-than 4' burial depth in certain areas. The loading criteria, not the depth, is VELCO's primary objective that needs to be maintained.*<sup>7</sup>

**Mr. Byrd:** *VGS and its contractors addressed the constructability issues in [the Clay Plains Swamp] in a reasonable fashion and with proper regard for environmental protection and public safety.*<sup>8</sup>

*ANGP would easily pass the "very conservative" screening analysis and require no further analysis, while greatly exceeding HS20+15% [loading] standards - regardless of soil compaction. Surface loading under any anticipated scenarios isn't a concern for ANGP. This has been confirmed by multiple analyses from different engineers using different software.*<sup>9</sup>

**Mr. Berger:** *Based on [the data from Mott MacDonald], the loading on the pipeline by heavy equipment does not impair the integrity of the pipeline.*<sup>10</sup>

VELCO, Mr. Byrd, and Mr. Berger all agreed that the loading standard was met and that the installed depth of the pipeline was safe. The Jan. 29 Order's findings on this point are directly contradictory to the actual evidence. This is just one example of the nine distinct and material findings in the Jan. 29 Order that are clearly erroneous.

Second, the Jan. 29 Order does not apply the law in many of its conclusions. The Commission has a well-established analysis for determining whether there has been a "substantial change" to a project. The term "substantial change" is defined as a change that "has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the State under Section 248(a)." PUC Rule 5.408. In some instances, the Jan. 29

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<sup>6</sup> Exhibit VGS-JSH-9 (July 29, 2020 correspondence from VELCO).

<sup>7</sup> Exhibit VGS-JSH-9.

<sup>8</sup> Independent Report at 70.

<sup>9</sup> Independent Report at 67 (emphasis added).

<sup>10</sup> June 21, 2017 Letter of David Berger, David Berger Associates, to Timothy M. Duggan, Department, at 1. This letter was Attachment 2 to the June 23, 2017 Letter of Timothy M. Duggan, Department, to Judith Whitney, Clerk of the Commission.

Order does not properly apply this legal standard because the underlying facts are clearly erroneous. For example, if VELCO, Mr. Byrd, and Mr. Berger all acknowledge that the pipeline meets the relevant loading standard and is safe, it is error to conclude, as the Jan. 29 Order does at 27, that:

*[T]hey all support the Intervenors' conclusion that the failure to achieve the four-foot burial depth had a potential impact on public health and safety and hence is a substantial change made in violation of the 2013 Final Order, CPG, and Rule 5.408.*

If the evidence shows there is no potential for a significant impact, as it does, it is legal error to conclude there was a “substantial change.” Accordingly, the Commission should reject the Jan. 29 Order’s legal conclusions where they rest on clearly erroneous facts.

In other instances, the Jan. 29 Order’s application of the law is erroneous because there is no judicial assessment or application of a cognizable standard. The Order’s conclusion regarding non-jurisdictional streams is a good example. The Order acknowledges that burial at several non-jurisdictional streams “results in no significant impact and is immaterial to the Project’s [permits],” and was “purely of a technical nature with no impacts on pipeline safety or the environment.” Jan. 29 Order at 41. The Jan. 29 Order concludes, however, that VGS made a “material deviation,” but provides no judicial assessment of how that conclusion is consistent with the Commission’s standard. Moreover, in this example and others, the shortcoming is not just an absence of analysis, it is a failure to apply the Commission’s standard at all.<sup>11</sup>

As detailed in VGS’s Supporting Memorandum of Law and Fact, the Commission should reject the Jan. 29 Order where CPG violations are found without supporting evidence of any impacts under Section 248 and without applying the Commission’s standard. While VGS

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<sup>11</sup> In the vast majority of cases, the Commission has said that even a “material deviation” must have “the potential for significant impact” as contemplated by Rule 5.408. *See* Supporting Memorandum of Fact and Law, Standard of Review. The non-jurisdictional stream issue clearly does not meet that standard based on the Jan. 29 Order’s findings.

acknowledges that this was a large and complex project with many challenges, the Commission should not adopt a new standard under which *any* deviation from the plans is a CPG violation even if there is no evidence of potential impacts.

## II. STATEMENT OF QUESTIONS ON APPEAL

1. **Burial Depth: Whether the Jan. 29 Order’s finding that the pipeline did not comply with the surface loading standard required in the VELCO right of way was clearly erroneous.**

**Answer:** Yes. The Jan. 29 Order erred in finding that VELCO, Mr. Byrd, and Mr. Berger all concluded that the burial depth of the pipeline could impact safety. Each witness testified that the opposite was true. The evidence that the ANGP satisfied the surface loading standard required in the VELCO Memorandum of Understanding (“MOU”) was “confirmed by multiple analyses from different engineers using different software” and independently confirmed by Mr. Byrd.<sup>12</sup> The Jan. 29 Order’s conclusion that “failure to meet the required load standard has a potential impact principally on public safety under § 248(b)(5)” is therefore erroneous because it is based on clearly erroneous findings.

2. **Trenching Techniques: Whether the Jan. 29 Order’s finding that trench construction in the Clay Plains Swamp had potential impacts on natural resources was clearly erroneous.**

**Answer:** Yes. The Jan. 29 Order’s substantial change conclusion relies on two factual findings: (1) the trenching process was “unapproved,” and (2) the wetland soils were not segregated as contemplated in the Final Order and CPG, resulting in potential impacts to natural resources. Both findings are clearly erroneous. First, testimony from multiple pipeline construction experts and statements from the Agency of Natural Resources (“ANR”) confirmed that the trenching process had no impacts on safety or the environment and that it was an

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<sup>12</sup> Independent Report at 67.

appropriate application of the open-cut trenching method approved by the Commission.<sup>13</sup>

Second, photos and sworn testimony clearly show soils were segregated and stockpiled in the Clay Plains Swamp.<sup>14</sup> The Jan. 29 Order’s finding to the contrary, which is quoted verbatim from Intervenors’ legal brief, is a clearly erroneous finding that leads to further error in concluding the trench construction method was a substantial change with a potential impact on natural resources.

**3. Whether the Jan. 29 Order was clearly erroneous and wrong as a matter of law by finding substantial changes or material deviations based on non-compliance with technical or written specifications that had no impact on pipeline safety, integrity, or the environment.**

**Answer:** Yes. The Jan. 29 Order was based on clearly erroneous findings of fact and errors of law with respect to several issues that had no potential impacts under the Section 248 criteria:

**Vermont-Licensed Engineer**

The finding that VGS did not staff the Project with a Vermont-licensed “responsible charge engineer” was clearly erroneous because it is undisputed that Clough Harbour & Associates was VGS’s engineer of record through the entire project.<sup>15</sup> There was “no evidence that the engineering or design work for the ANGP was deficient, was not performed by competent engineers, or posed a risk to ‘public health, safety, and welfare.’”<sup>16</sup> Whether CHA’s engineers should have stamped the construction drawings was a compliance issue under Title 26 licensing requirements—not a substantive concern with the quality of the engineering.

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<sup>13</sup> See Supporting Memorandum of Fact and Law, Discussion Sections B.1, and B.3.

<sup>14</sup> See Supporting Memorandum of Fact and Law, Discussion Section B.2.

<sup>15</sup> See Supporting Memorandum of Fact and Law, Discussion Section C.

<sup>16</sup> Independent Report at 64.

Concluding this constituted a substantial change where there is clearly no substantive concern with the engineering work, and therefore no impact on Section 248(b) criteria, was legal error.

The Jan. 29 Order also erred as a matter of law by concluding that Title 26 and the Final Order required the engineer of record to “supervise” construction. There is no such requirement under Title 26 or the Final Order and CPG.

### **Compliance with Written Specifications**

The Jan. 29 Order finding that VGS failed to comply with its own written specifications by installing the pipeline directly on the trench bottom is clearly erroneous because the written specifications expressly allowed for installation on the trench bottom.<sup>17</sup> Moreover, the Jan. 29 Order’s conclusion that this was a substantial change is wrong as a matter of law because the evidence showed there was no impact on pipeline safety or integrity. Likewise, the Jan. 29 Order’s finding that VGS failed to comply with written specifications regarding trench breakers was clearly erroneous because there was no evidence that VGS’s installation of trench breakers had any impacts under Section 248(b) criteria and none were identified in the Order.

### **Non-Jurisdictional Streams**

The Jan. 29 Order further erred by concluding that burial at several non-jurisdictional streams was a material deviation because the evidence expressly showed that the deviation “results in no significant impact and is immaterial to the Project’s [permits],” and was “purely of a technical nature with no impacts on pipeline safety or the environment.” Jan. 29 Order at 41. It is wrong as a matter of law to conclude a deviation with no impacts is a CPG violation.

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<sup>17</sup> See Supporting Memorandum of Fact and Law, Discussion Section C.

## **Compaction**

Finally, the Jan. 29 Order was clearly erroneous because it concluded there was no evidence that VGS properly compacted the backfill on the ANGP. On the contrary, the evidence demonstrated there was no impact on pipeline integrity resulting from compaction techniques and the issue was limited to VGS's failure to *test* compaction.<sup>18</sup> Although there is no evidence that compaction was inadequate at several road crossings, VGS agreed to a belt-and-suspenders monitoring protocol that will ensure there are no impacts on roads.

## **III. DISCUSSION**

This case is exactly the kind of case that warrants interlocutory review by the Commission. The evidentiary record is complete regarding the issues to be decided by the Commission in this phase of the proceedings. The Jan. 29 Order has the practical effect of a final order regarding liability, and there are no outstanding factual issues that would render the Commission's review premature. The matter has been bifurcated to separately consider penalties under 30 V.S.A. § 30 as well as "whether any additional remedies are appropriate." Jan. 29 Order at 53. The numerous errors of fact and reasoning in the Jan. 29 Order jeopardize a fair review of this matter as it enters the penalty phase and threaten an expeditious and efficient resolution of the overall case. Interlocutory review is consistent with the Commission's inherent authority as well as the principles, standards, and guidance the Commission considers under Vermont Rule of Appellate Procedure 5(b). For these reasons, VGS respectfully requests that the Commission grant its Motion for Interlocutory Review.

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<sup>18</sup> See Supporting Memorandum of Fact and Law, Discussion Section C.

**A. Interlocutory Review Is Consistent with the Commission’s Exercise of Inherent Authority Where the Order Reviewed Has the Practical Effect of a Final Order and Review Will Promote Efficient Resolution of a Case.**

The Commission has “inherent authority to conduct [interlocutory] review of determinations made by the Hearing Officer prior to the issuance of a proposal for decision.” *Application of Seneca Mountain Wind, LLC*, Docket No. 7867, 2012 WL 5511135, at \*4 (Vt. Pub. Serv. Bd. Nov. 8, 2012) (citing *Dudley v. Snyder*, 140 Vt. 129, 131 (1981) (“[I]t is within the plenary power of the court to [modify an interlocutory order] as justice requires....”). The Commission has said that it will grant interlocutory review where it “will lead to an expeditious resolution of the docket, or when the Hearing Officer’s decision has the practical effect of a final order.” *Id.*<sup>19</sup>

This is a unique case involving a multi-year investigation of VGS’s construction of the ANGP, including an independent review conducted by a Commission-appointed pipeline safety expert. This case is a proper candidate for interlocutory review because the Jan. 29 Order reached the merits of the liability issues in this case based on a complete evidentiary record. The Order was issued after a full evidentiary hearing lasting three days and extensive briefing that was submitted on all issues. Because the factual record as to liability is fully and completely developed, and no additional evidence will be received on those issues, the issues are ripe for appellate review. *See In Re Sprint Commc ’ns Co., L.P.*, Docket No. 6373, 2000 WL 33175714, at \*1 (Vt. Pub. Serv. Bd. Nov. 3, 2000) (granting a motion for interlocutory review where “the

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<sup>19</sup> *See also In Re Cent. Vermont Pub. Serv. Corp.*, Docket No. 5270-CV-1, 1996 WL 757103, at \*32 (Vt. Pub. Serv. Bd. Sept. 4, 1996) (“[T]he decision whether to hear an interlocutory review is within our discretion.”); *In Re Vermont Elec. Power Producers, Inc.*, Docket No. 6270, 2001 WL 306856, at \*4 (Vt. Pub. Serv. Bd. Feb. 1, 2001) (granting a motion for interlocutory review and noting “we have broad discretion in the management of our proceedings”). The Commission also hears interlocutory appeals where the issue on appeal has been fully factually developed, such as when an intervenor challenges the denial of a motion to intervene. *See, e.g., Petition of GMP Solar - Hartford, LLC*, Docket No. 8580, 2016 WL 1463928, at \*2 (Vt. Pub. Serv. Bd. Apr. 6, 2016) (construing the motion as a request for interlocutory review and reaching the merits of the motion to intervene); *Petition of GMP Solar - Richmond, LLC*, Docket No. 8564, 2015 WL 9425798, at \*2 (Vt. Pub. Serv. Bd. Dec. 11, 2015) (same).

factual record in the docket is not in dispute and Board review and disposition of the jurisdictional issue at this time would allow for conservation of resources by the Board and other parties”). This appeal will offer the exact same issues and arguments for review regardless of whether it is considered by the Commission now or following a potentially lengthy penalty phase.<sup>20</sup> Accordingly, the Commission can address controlling questions regarding liability without risking a do-over at a later time.<sup>21</sup>

Perhaps more importantly, the Commission should exercise its inherent authority to review the Hearing Officer’s Jan. 29 Order because the Commission’s review will facilitate a more expeditious resolution of the matter. The Jan. 29 Order bifurcated the proceeding to separately consider civil penalties to be imposed under 30 V.S.A. § 30 and “whether additional remedies are appropriate.” Jan. 29 Order at 6. It is not expeditious to proceed to a separate penalty phase when issues of liability remain disputed, particularly when the penalty phase involves not just an assessment of a penalty, but also consideration of whether additional remedies are appropriate. Such a proceeding has the potential to be lengthy, difficult, and costly when premised on erroneous factual findings and final conclusions in the Jan. 29 Order. An interlocutory review by the Commission now has the potential to significantly abridge the penalty phase of the proceeding by narrowing the scope of the issues to be addressed. Given that

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<sup>20</sup> That distinguishes this case from other instances in which the Commission has denied motions for interlocutory review on the ground that there were outstanding factual issues and that additional evidence would be received by the Hearing Officer on those issues. See *Petition of Great Bay Hydro Corp.*, Docket No. 8781, 2017 WL 1373298, at \*4 (Vt. Pub. Serv. Bd. Feb. 16, 2017) (denying interlocutory review because “there appear to be a number of factual issues related to the sale, interconnection, and delivery of energy generated by Great Bay’s hydroelectric facility that merit further investigation”); *Petition of Cent. Vermont Pub. Serv. Corp.*, Docket No. 5288, 1988 WL 546350 (Vt. Pub. Serv. Bd. Sept. 29, 1988) (“[G]iven the current posture of this docket, and the absence of sufficient evidence to enable either the hearing officer or the Board to reach any conclusions on the merits of the issues raised, forwarding petitioner’s motion to the Board for interlocutory review would be both inefficient and inappropriate.”).

<sup>21</sup> See *In re Pyramid Co. of Burlington*, 141 Vt. 294, 304 (1982) (denying interlocutory review where there was no factual record because the Court would be able to “answer these questions more wisely on the basis of distinctions drawn from the factual record”).

many of the Jan. 29 Order's findings and conclusions are contrary to all expert testimony and agency comments, the likelihood of realizing efficiencies in the administration of this case following Commission review are substantial and make interlocutory review at this time proper.

Consistent with this underlying purpose of encouraging efficiency, the Commission has granted a motion for interlocutory review precisely because it would "save the parties considerable time and money in conducting the remainder of what would be an unnecessary docket." *Petition of Vermont Elec. Power Producers, Inc.*, Docket No. 5736, 1995 WL 881118 (Vt. Pub. Serv. Bd. Mar. 13, 1995). And, even though interlocutory appeal is infrequently granted, the Vermont Supreme Court has reviewed on an interlocutory basis challenges to liability before the damages phase in a bifurcated case. *See White Current Corp. v. Vermont Elec. Co-op., Inc.*, 158 Vt. 216, 218-19 (1992).

**B. Interlocutory Review Is Consistent with the Guiding Principles of V.R.A.P. 5(b) Because the Factual Record Regarding Liability Is Complete and Interlocutory Review Will Provide a More Efficient Resolution of the Case.**

Commission review of the Jan. 29 Order is also consistent with the Vermont Rules of Appellate Procedure, to which the Commission has at times turned for "guidance" when considering whether to engage in interlocutory review.<sup>22</sup> Under V.R.A.P. 5(b), an interlocutory appeal must be permitted where: "(A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation." Both the Commission and the Vermont Supreme Court view the Rule 5(b) standard as "guiding criteria" under which the

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<sup>22</sup> See e.g., *In Re New England Tel. & Tel. Co.*, Docket No. 5713, 1999 WL 33119758 (Vt. Pub. Serv. Bd. June 4, 1999).

probable benefits and drawbacks of early review are considered.<sup>23</sup> Consideration of the factors in V.R.A.P. 5(b) should be flexible and focused on the efficiencies that can be gained by reviewing the order on an interlocutory basis.<sup>24</sup>

The controlling question of law factor “requires a practical application that focuses upon the potential consequences of the order at issue.”<sup>25</sup> An order may be “‘controlling’ if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.”<sup>26</sup> A main purpose of the “controlling question of law” component of the Rule 5(b) analysis is to ensure that the appellate court does not conduct a review without a full factual record. As the Vermont Supreme Court has held, “[where t]he litigants [have] not yet . . . narrowed the case’s issues sufficiently for appellate review[,] [w]e are deprived of the benefits of a final trial court opinion.”<sup>27</sup> As discussed above, the concern that granting review too early may result in “improvident appellate decision making” without a complete factual record is completely mitigated in this case because the factual record on liability has been fully developed and the Hearing Officer has issued a final order on liability.<sup>28</sup> As also explained above, interlocutory review will materially advance the termination of the litigation by narrowing the scope of issues to address during the penalty phase.

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<sup>23</sup> *Petition of Green Mountain Power Corp. Requesting an Increase in Rates*, Docket No. 4865, 1984 WL 262817 (Vt. Pub. Serv. Bd. Apr. 5, 1984); *In re Pyramid*, 141 Vt. at 302 (“The three factors [set out in the Rule] should be viewed together as the statutory equivalent of a direction to consider the probable gains and losses of immediate appeal.”); see also *In Re Cent. Vermont Pub. Serv. Corp.*, Docket No. 6018, 1998 WL 265345 (Vt. Pub. Serv. Bd. Apr. 30, 1998) (“[I]nterlocutory appeal essentially involve[s] a consideration of the benefits of early resolution of certain legal issues and the effects of not reaching such a resolution.”).

<sup>24</sup> *In re Pyramid*, 141 Vt. at 301-02.

<sup>25</sup> *In re Pyramid*, 141 Vt. at 303.

<sup>26</sup> *In re Pyramid*, 141 Vt. at 303.

<sup>27</sup> *In re Pyramid*, 141 Vt. at 300–01; see also *Retail Pipeline, LLC v. JDA Software Grp., Inc.*, 2018 WL 2298355, at \*2 (D. Vt. May 21, 2018); *State v. Dubois*, 150 Vt. 600, 603 (1988) (“[I]f the resolution of the issue on appeal may be dictated by the facts that are developed at trial, interlocutory review is improper.”).

<sup>28</sup> See *In re Pyramid*, 141 Vt. at 301.

This is *exactly* the type of situation that the drafters of the interlocutory appeal rule envisioned: where a lengthy damages calculation could be avoided by an interim appeal on liability.<sup>29</sup>

For all of the above reasons, VGS respectfully requests that the Commission grant VGS's Motion, conduct a substantive review of the Jan. 29 Order, and issue an order overturning the erroneous findings of fact and conclusions of law.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should grant this Motion for Interlocutory Review and overturn the Jan. 29 Order's clearly erroneous findings of fact and standardless and erroneous application of the law as detailed in the Supporting Memorandum of Law and Fact.

DATED at Burlington, Vermont, on this 26<sup>th</sup> day of February 2021.

**VERMONT GAS SYSTEMS, INC.**

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<sup>29</sup> See *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996) (interlocutory appeal appropriate “where a lengthy accounting is required upon finding liability under a contract”); *Laurent v. PricewaterhouseCoopers LLP*, 2014 WL 251986, at \*2 (S.D.N.Y. Jan. 22, 2014) (“This case, which requires a complex accounting of ‘whipsaw’ damages, squarely presents circumstances that the Second Circuit and House Committee have determined warrant interlocutory review.”).