

**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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**VGS REPLY TO INTERVENORS’ OPPOSITION TO
MOTION FOR INTERLOCUTORY REVIEW OF
HEARING OFFICER’S JANUARY 29, 2021 ORDER**

Vermont Gas Systems, Inc. (“VGS”) submits the following Reply to Intervenors’ Opposition to VGS’s Motion for Interlocutory Review. Interlocutory review is warranted in this case because it will avoid duplicative piecemeal litigation in the penalty phase of this matter, avoid unnecessary delay and expense, and preserve judicial resources. Intervenors are the only party that opposes the Public Utility Commission’s (the “Commission”) review of the Hearing Officer’s January 29, 2021 Order (“Jan. 29 Order”). The Department of Public Service (the “Department”) and VELCO have both asserted that interlocutory review is necessary.

For the reasons set forth herein, Intervenors’ Opposition to Commission review at this time is (1) wrong as a matter of law, (2) misconstrues the legal basis for VGS’s Motion, and (3) mischaracterizes the underlying facts—in most cases without citing any evidence.

1. Interlocutory review by the Commission is legally warranted and will promote judicial economy and avoid undue delay, expense, and duplicative litigation.

“Interlocutory appeals are intended to be an ‘exception to the normal restriction of appellate jurisdiction to the review of final judgments’ and are ‘to be undertaken only in particular circumstances.’”¹ Commission review of a hearing officer’s decision is appropriate based on a “consideration of the benefits of early resolution of certain legal issues and the effects of not reaching such a resolution.”² The particular circumstances and nature of the legal and factual issues in this case make the Jan. 29 Order suited to interlocutory review because such review will avoid unnecessary delay and expense and conserve judicial resources.³

In the absence of Commission review at this time, the entire penalty phase of this case will rest on what VGS contends are two fully unfounded substantial change determinations regarding the Clay Plains Swamp; significantly flawed legal reasoning—or a complete absence of legal analysis—regarding three substantial change determinations and one material deviation determination; and nine distinct clearly erroneous findings. If VGS prevails on any number of these issues at the proposal for decision stage, the penalty phase of the litigation will have to be re-litigated at additional time and expense. Given the extraordinary scope of this investigation, the number of issues to address in a separate penalty phase, and the substantial legal and factual differences among the parties, Commission review prior to the penalty phase is warranted in this case.

¹ *Application of Orchard Rd. Solar*, Case No. 16-0042-NMP, 2019 WL 2053519, at *6 (Vt. Pub. Util. Comm’n May 1, 2019) (quoting *In re Amended Petition of VELCO*, Docket No. 7121, at 3 (Vt. Pub. Serv. Bd. Aug. 22, 2006)). See also *In re Pyramid Co. of Burlington*, 141 Vt. 294, 300-301, 449 A.2d 915, 918 (1982).

² *In Re Cent. Vermont Pub. Serv. Corp.*, Docket No. 6018, 1998 WL 265345 (Vt. Pub. Serv. Bd. Apr. 30, 1998).

³ *Application of Orchard Rd. Solar*, 2019 WL 2053519, at *6. The Vermont Supreme Court has repeatedly expressed that “lower courts must be mindful of this Court’s well-established policy of avoiding piecemeal appeals,” which “causes unnecessary delay and expense, and wastes scarce judicial resources.” *In re Pyramid*, 141 Vt. 294 at 300, 305.

Intervenors argue that the Commission’s authority to engage in interlocutory review is limited to circumstances where there is a controlling question of law or a collateral final order under V.R.A.P. Rule 5(b). While the Commission looks to the Rules of Appellate Procedure for guidance, it is not bound by those rules. Rather, the Commission has “inherent authority to conduct such review of determinations made by the Hearing Officer prior to the issuance of a proposal for decision.”⁴ There are no bounds to the Commission’s authority to conduct an interlocutory review as it has “broad discretion in the management of [its] proceedings.”⁵

Even if Rule 5(b) did strictly apply, the Vermont Supreme Court has held that the rule is meant to be flexible and focused on efficiency:

So long as the trial court has made an order, the remaining elements [should] be treated as guiding criteria rather than jurisdictional requisites. The three factors [set out in the Rule] should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal.⁶

Interlocutory review at this stage will result in notable and significant efficiencies. Accordingly, interlocutory review of the Jan. 29 Order is appropriate under both the inherent authority of this Commission and under V.R.A.P. Rule 5(b).

The posture and substance of this litigation also makes it distinguishable from cases where the Commission has declined interlocutory review because review would have been premature and inefficient. For example, Intervenors cite *Application of Orchard Road Solar*, but the Commission found in that case that all of the “issues are best addressed together in a final appeal after the substantive facts on the feasibility of the alternative location have been

⁴ *Application of Seneca Mountain Wind, LLC*, Docket No. 7867, 2012 WL 5511135, at *4 (Vt. Pub. Serv. Bd. Nov. 8, 2012).

⁵ *In Re Vermont Elec. Power Producers, Inc.*, Docket No. 6270, 2001 WL 306856, at *4 (Vt. Pub. Serv. Bd. Feb. 1, 2001). See also *In Re Cent. Vermont Pub. Serv. Corp.*, 1996 WL 757103, at *32 (“[T]he decision to hear an interlocutory appeal is within our discretion.”).

⁶ *In re Pyramid*, 141 Vt. at 302 (citation omitted).

determined” and ordered that the matter proceed to an evidentiary hearing.⁷ Likewise, Intervenor’s reliance on *Portland Street Solar* is unfounded because it was another case where the Commission concluded it would be more “efficient for the hearing officer to proceed as soon as practicable to an evidentiary hearing addressing both the single-plant issue and ANR’s natural resources concerns with the site.”⁸ This reasoning does not apply here, where the parties have fully litigated the alleged Certificate of Public Good (“CPG”) violations, there was a 3-day evidentiary hearing, the evidentiary record is complete, and the Jan. 29 Order has made final liability determinations with respect to that record. This case is also distinct from those where the Commission has declined to review procedural orders of a hearing officer where the Commission’s review would not lead to “an expeditious resolution of the docket”⁹ because, unlike those cases, this is not an appeal from a procedural order.

Instead, this matter is more like *In Re Vermont Electric Power Producers*, where the Commission said that although it “generally disfavors interlocutory reviews,” it accepted an interlocutory review because “prompt Board review of the jurisdictional issues presented will facilitate a more efficient use of the Board’s and the parties’ resources.”¹⁰ Likewise in this case, it will be far more efficient for the Commission to evaluate the Jan. 29 Order’s findings of facts and conclusions of law now, before the parties rely on those conclusions in the penalty phase to

⁷ *Application of Orchard Rd. Solar*, 2019 WL 2053519, at *7 (cited in Intervenor’s Opposition at 4-6); *See also 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 petitione[r]’s motion to the Board for interlocutory review would be both inefficient and inappropriate.”).

⁸ *Petition of Portland Street Solar LLC*, Case No. 19-2484-NMP (August 19, 2020) (cited in Intervenor’s Opposition at 4-5).

⁹ *Application of Seneca Mt. Wind*, 2012 WL 5511135, at *5.

¹⁰ *In Re Vermont Elec. Power Producers, Inc.*, Docket No. 6270, 2001 WL 306856, at *4 (Vt. Pub. Serv. Bd. Feb. 1, 2001).

propose penalties under 30 V.S.A. § 30 and to argue about “whether additional remedies are appropriate.”¹¹ Waiting until after the penalty phase to review the Jan. 29 Order will likely result in duplicative penalty litigation. By contrast, review now presents an opportunity to narrow the scope of the penalty phase’s evaluation under 30 V.S.A. § 30 and to avoid unnecessary delay and expense associated with litigating about “additional remedies.”

Finally, the Commission should not ignore analogous precedent—as urged by Intervenors—regarding interlocutory appeal of a denial of a motion to intervene. Intervenors assert that such cases are distinguishable because a “denial of a motion to intervene is a final judgment with respect to the denial” and includes a review of “all questions of fact and of law.”¹² Such cases are a perfect analogy for the present appeal because the Jan. 29 Order *is* a final order regarding liability issued upon a complete evidentiary record. For the same reason that intervention orders are ripe for review when the factual and legal bases for the orders are complete, this appeal is ripe because the Jan. 29 Order was issued upon a complete evidentiary record.

¹¹ Jan. 29 Order at 6.

¹² Intervenors’ Opposition at 7.

2. This appeal involves controlling questions of law regarding the Commission’s “substantial change” and “material deviation” standards.

Intervenors mischaracterize VGS’s Motion and the parties’ positions by arguing that this appeal only challenges factual findings and presents only a single question of law regarding the material deviation standard. While VGS does not dispute that its appeal does challenge nine distinct and clearly erroneous facts, VGS’s appeal also challenges the Jan. 29 Order’s six distinct applications of the controlling legal standard for a “substantial change” or “material deviation.”

The Jan. 29 Order is one that “involves a controlling question of law, about which there exists substantial ground for a difference of opinion”¹³ because there is a very clear difference of opinion among the parties and the Hearing Officer about the Commission’s controlling legal standards in this case. Intervenors have alleged that a mere “potential” for any impact is sufficient under the Commission’s substantial change standard. In contrast, the Department argues that most issues in this case rise only to the level of “material deviations” under the Commission’s standards.¹⁴ VGS acknowledges the distinction between a “substantial change” and “material deviation” in some cases, but argues that the central issues in this case present neither a substantial change nor material deviation under the Commission’s standard.

In particular VGS contends the following legal issues should be addressed on appeal:

1. The depth of cover in the Clay Plains Swamp had no potential impacts on safety because the construction met the highly conservative surface loading standard established under the VELCO MOU.
2. The installation of the pipeline in the Clay Plains Swamp was an appropriate application of the “open cut” trenching method approved by the Commission and had no potential for a significant impact on natural resources, consistent with the Agency of Natural Resource’s (“ANR”) own conclusion.

¹³ *Pet. of Great Bay Hydro Corp.*, Docket No. 8781, 2017 WL 1373298, at *3 (Vt. Pub. Serv. Bd. Feb. 16, 2017).

¹⁴ *See* Department’s Post-Evidentiary Hearing Brief (filed Oct. 2, 2020); Department’s Response to Motion for Interlocutory Review (filed Mar. 12, 2021).

3. VGS's installation of the ANGP on the trench bottom in an area with native sandy soils was expressly contemplated in VGS's written specifications, so that installation neither violated those written specifications nor had any impacts because the Commission-appointed expert found there were no potential safety concerns.
4. There was no change to the approved project regarding licensed engineers, no requirement that the construction management team include oversight from a licensed engineer, and no substantive concerns with the quality of the engineering design work, so there can be no related CPG violation under the Commission's legal standards.
5. Depth of cover at several non-jurisdictional streams was considered "immaterial" to the project's permits and was "purely of a technical nature,"¹⁵ so it could not have been considered a "material change," either under the Commission's substantial change standard or the few cases where the Commission has distinguished a "material deviation" from a "substantial change" based on "broad alterations" to a project.

Contrary to Intervenor's arguments, these issues are broader than the one legal question identified in their opposition regarding the Jan. 29 Order's application of the "material deviation" standard.

For example, regarding #1, VGS not only challenges the clearly erroneous finding that the loading standard was not met, but also the ultimate conclusion that there was a "potential" for any safety impacts, let alone a "significant impact." The Jan. 29 Order appears to reason that because a change to the depth of cover "may affect"¹⁶ safety under some circumstances, it constituted a substantial change. Intervenor goes even further, arguing that the "substantial change" standard is satisfied as long as there are potential unproven facts that could lead to impacts, and "whether the pipeline actually is safe must be decided" in subsequent litigation about CPG amendments.¹⁷

These formulations of the Commission's substantial change standard are contrary to the basic assessment of a "substantial change" under Rule 5.408. Rule 5.408, as applied consistently

¹⁵ Jan. 29 Order at 41.

¹⁶ *Id.* at 27.

¹⁷ Intervenor's Opposition at 11.

by the Commission, requires that a substantial change be one with the “potential for *significant impact* with respect to any of the criteria of Section 248(b).”¹⁸ It is legal error to read the “significant impact” language out of the rule and simply conclude that a change with potential for *any* impacts is a substantial change.¹⁹ It is also a waste of resources to postpone the determination of whether there were any actual impacts on safety to yet another proceeding to address the exact same facts and circumstances that have been thoroughly litigated, as Intervenors propose.

The other issues on appeal present similar questions about the application of the Commission’s legal standards. Issue #3 above, for example, concerns compliance with written specifications. This is not a mere factual challenge. The Jan. 29 Order disregards whether there were any potential impacts at all in finding a CPG violation. It never states how the installation on native sandy soils resulted in potential safety impacts, and ignores expert testimony that there were no potential impacts. The Jan. 29 Order also fails to apply any standard whatsoever to the conclusion that installation of trench breakers—which no party or witness ever alleged was a safety requirement—could constitute a significant impact on safety. It is legal error under Rule 5.408 to determine that conduct constitutes a substantial change without determining that the change had the potential for a significant impact. The Jan. 29 Order identifies no such impacts.

¹⁸ PUC Rule 5.408 (emphasis added).

¹⁹ It is also legal error to define a “substantial change” based on whether approval was sought before or after the change. If it is a substantial change as defined by the rule, failing to obtain approval is a violation of the rule. If it is not a substantial change, no approval is required by the rule. Redefining substantial change so that the determination hinges on whether you obtain prior approval, rather than on whether there is a potential for significant impacts, creates a circular argument under which any change at all can arbitrarily be considered a substantial change.

3. Intervenor’s Opposition misconstrues the facts and VGS’s arguments in support of Interlocutory review.

The Commission should not rely on Intervenor’s inaccurate characterization of the facts and arguments VGS presented in support of its request for interlocutory review.

First, Intervenor argues that VGS misconstrues the Jan. 29 Order by challenging a finding that they claim the Hearing Officer never made. Specifically, they assert that the Hearing Officer “does not find that the pipeline will not meet load-bearing requirements.”²⁰ This is contrary to the express language of the Jan. 29 Order, which states, “[t]he failure to meet the required load standard has a potential impact principally on public safety under § 248(b)(5).”²¹ The Jan. 29 Order clearly, and erroneously, concluded there was a “failure to meet the required load standard.”

Second, Intervenor claims VGS’s Memorandum is “strikingly misleading” about Mr. Byrd’s testimony regarding the loading standard. Mr. Byrd’s testimony speaks for itself. VGS can find no place where Mr. Byrd expressed anything substantially different from his report, where he testified that “ANGP would easily pass the ‘very conservative’ screening analysis and require no further analysis, while greatly exceeding HS20+15% standards - regardless of soil compaction. Surface loading under any anticipated scenarios isn’t a concern for ANGP.”²² VGS stands by its understanding of Mr. Byrd’s testimony.

Third, Intervenor falsely claims that VGS relied on a mere absence of evidence regarding impacts to the environment in the Clay Plains Swamp. VGS argued that the Jan. 29 Order’s conclusion that installation of the pipeline in the Clay Plains Swamp had an impact on natural resources was erroneous because the underlying factual finding that soils were not segregated

²⁰ Intervenor’s Opposition at 11.

²¹ Jan. 29 Order at 28.

²² Independent Report at 67.

was unsupported by any evidence.²³ The evidence in the record demonstrated exactly the opposite, that soils were in fact segregated. This conclusion was consistent with (1) ANR's own review and comment on the construction techniques in the Clay Plains Swamp, (2) photos in evidence demonstrating that soils were segregated and piled adjacent to the trench, and (3) the same witness cited by Intervenors, who testified the top layer of soil and subsoils were piled on opposite sides of the trench (the same thing shown in the photo) because "it was a requirement."²⁴

In contrast, the testimony cited by the Jan. 29 Order²⁵ is in a different portion of the deposition transcript that does not discuss how soils were segregated at all. Instead, the witness discussed the general challenges of working in a narrow and wet right away. One of those challenges, cited by Intervenors, was "it don't stack. It's just muck . . ." ²⁶, referring to the soils in that area. But this testimony does not support the conclusion in the Jan. 29 Order that soils were not segregated. The Hearing Officer should not have adopted Intervenors' misleading citation to this portion of the deposition verbatim while ignoring photographic evidence and other portions of the testimony that actually address the relevant question of soil segregation.

Next, Intervenors misconstrue VGS's objection to the Jan. 29 Order regarding engineering oversight in two ways. First, Intervenors claim that a Vermont-licensed engineer was not part of the design team.²⁷ This is patently false. There were multiple Vermont-licensed engineers on the design team and there has never been any concern about the adequacy of the engineering plans. The dispute in this case raises a very specific concern about the import of the

²³ VGS Memorandum of Fact and Law (filed Feb. 26, 20121) at 15 – 16.

²⁴ Bubolz at 104 (explaining that some excavated material was place on the matting and the "first couple feet" were placed on the other side because "it was a requirement").

²⁵ Jan. 29 Order ¶ 30 (citing Bubolz Deposition at 88).

²⁶ Intervenors' Opposition at 17 (quoting Bubolz at 88).

²⁷ Intervenors' Opposition at 23 ("In sum, a Vermont licensed engineer neither participated in the design of the project nor acted as the Responsible Charge Engineer by signing and sealing the key design documents.").

engineer of record’s signature and seal on the plans—not whether there were licensed engineers on the design team at all. Second, Intervenor claim VGS is “specious” when it argues there is a distinction between having a Vermont-licensed engineer perform design work and having engineers perform construction oversight as part of the construction management team. Title 26 and the applicable rules require that engineers performing design work comply with its provisions. In contrast, there is no requirement under the CPG, the Final Order, or the state or federal pipeline safety regulations that engineers must perform construction oversight as part of the construction team. Accordingly, the Jan. 29 Order erred as a matter of law when it concluded that not having the design team perform construction oversight was a violation of the CPG.

Finally, Intervenor claim VGS makes the “outlandish argument that laying the pipeline directly on trench bottom has no potential to affect public safety and failure to use trench breakers has no potential to harm wetlands.”²⁸ As noted above, installation on the trench bottom was expressly contemplated in VGS’s written specifications, so it is inaccurate to say VGS violated those written specifications.²⁹ Second, the Commission-appointed pipeline safety expert, Mr. Byrd, testified this installation did not have any safety impacts.³⁰ It is unreasonable to suggest, as Intervenor do, that this installation was wrong because of rocks in the soil, when it is undisputed that the location at issue was all sand—no rocks.³¹ That is why the construction team issued a directive allowing trench bottom installation in accordance with the written

²⁸ Intervenor’s Opposition at 25.

²⁹ VGS Memorandum of Fact and Law (filed Feb. 26, 2021) at 22.

³⁰ Independent Report at 66 (stating “burial directly on the trench bottom in some locations, had no deleterious effects on corrosion control and did not create a corrosive environment for the pipeline”).

³¹ *Id.* at 37 – 38 (“This document serves to direct the construction without pipe supports in the sand area from station 240+26 to station 279+75, as the uniform sand in the trench meets requirements for select backfill.”)(quoting VGS’s Project Directive regarding these locations).

specification.³² Finally, the Jan. 29 Order found that the trench breaker installation had potential impacts on safety, not wetlands, which is why VGS asserts this conclusion is wrong as a matter of law and fact.³³ There was no evidence of any impacts on wetlands or safety.³⁴

Because Intervenors' Opposition to the Commission's review is based on mischaracterizations of VGS's Motion for Interlocutory Review and the Jan. 29 Order itself, the Commission should not rely on these representations when determining whether interlocutory review will result in judicial economy and reduce the time and expense of a penalty phase.

Conclusion

For the foregoing reasons, as well as those set forth in VGS's February 26, 2021 Motion for Interlocutory Review and Supporting Memorandum of Fact and Law, the Commission should review the Jan. 29 Order for clearly erroneous findings of fact and standardless and erroneous application of the law.

DATED at Burlington, Vermont, on this 26th day of March 2021.

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³² No party ever alleged that there were rocks in this area that posed a safety issue and even the Department's initial NOPV on this issue cited soil oxygen differentials as a potential concern—not rocks, a concern that was subsequently evaluated and resolved by Mr. Byrd with no concerns about safety impacts.

³³ Jan. 29 Order at 31 ("Vermont Gas's failure to conform with the Project's trench bottom and trench breaker specifications has a potential for significant impact on public health and safety.").

³⁴ VGS Memorandum of Fact and Law (filed Feb. 26, 2021) at 24.