

**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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**VERMONT GAS SYSTEMS, INC.’S RESPONSE TO  
INTERVENORS’ MARCH 26 REPLY FILING**

Vermont Gas Systems, Inc. (“VGS”) submits the following in response to Intervenor’s March 26 filing, which was styled as a Reply to the Department of Public Service’s (the “Department”) support for interlocutory review. “The purpose for having a motion, response, and reply is to give the movant the final opportunity to be heard, and to rebut the nonmovant’s response, thereby persuading the court that the movant is entitled to the relief requested by the motion.”<sup>1</sup> The rules do not allow a nonmovant to file a reply and assert new arguments in opposition to a motion, as Intervenor has done here.<sup>2</sup> Accordingly, to the extent

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<sup>1</sup> *Kozak v. Medtronic, Inc.*, No. H-03-4400, 2006 WL 237000, at \*4 (S.D. Tex. Jan. 31, 2006); *see also Medina v. Hunt*, No. 9:05-CV-1460, 2008 WL 4426748, at \*16 (N.D.N.Y. Sept. 25, 2008) (“[I]t is the movant who is shouldered with the ultimate burden on the motion and who therefore should be (for reasons of judicial efficiency and simple fairness) afforded the last word on the motion.”); *Gorokhovskiy v. State Pub. Def. Off.*, No. 20-CV-1098-PP, 2021 WL 39544, at \*5 (E.D. Wis. Jan. 5, 2021); *Bank of New York Mellon Tr. Co. v. Meachum*, No. 3:18-CV-2630-S-BN, 2020 WL 3883573, at \*4 (N.D. Tex. May 29, 2020).

<sup>2</sup> *Allco Renewable Energy Ltd. v. Kulkin*, No. 2:20-CV-44-JMC, 2020 WL 6397928, at \*6 (D. Vt. Nov. 2, 2020) (“As a general matter, courts will not consider arguments like this that are raised for the first time in a reply brief.”). *See also Bigelow v. Dep’t of Taxes*, 163 Vt. 33, 37–38, 652 A.2d 985, 988 (1994) (“It is a basic rule of appellate procedure that issues not briefed in the appellant’s or the appellee’s original briefs may not be raised for the first time in a reply brief.”); *Vermont Nat’l Bank v. Dowrick*, 144 Vt. 504, 509, 481 A.2d 396, 399 (1984); *Patterson v. Balsamico*, 440 F.3d 104, 113 n.5 (2d Cir. 2006).

the Vermont Public Utility Commission (the “Commission”) considers Intervenor’s new March 26 arguments, VGS respectfully requests the Commission also consider the following response.

Intervenor’s initial Opposition to VGS’s Motion for Interlocutory Review made no arguments regarding the efficiency of an interlocutory appeal in this case. For the first time in their March 26 filing, they assert that denying the motion is more efficient because the penalty phase of this matter would be limited to a paper proceeding followed by a subsequent phase to consider Certificate of Public Good (“CPG”) amendments.

While VGS supports an efficient penalty phase, it does not support opening a subsequent phase of litigation to consider CPG amendments. There is no basis in law or fact to redo the extensive factual investigation into the ANGP construction and resulting impacts that was already conducted in this case. Intervenor’s argue that such a proceeding is needed, complete with “testimony, cross-examination, and the opportunity for rebuttal,”<sup>3</sup> to determine if the pipeline is “actually” safe rather than “potentially” safe.<sup>4</sup> But the whole purpose of this investigation was to assess the impacts of construction, including impacts on safety. The Commission hired an independent pipeline safety expert for the express purpose of “conduct[ing] a thorough review of the construction, performance, and safety of the Addison natural gas pipeline . . . .”<sup>5</sup> Mr. Byrd conducted that review and, as directed by the Commission, issued a full report with his findings and conclusions regarding the impacts relating to all the issues raised in this case. The parties had full opportunity to present evidence regarding the potential impacts of ANGP construction. There is no good reason for another investigation into the ANGP, especially when any such

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<sup>3</sup> Intervenor’s Reply at 6.

<sup>4</sup> *Id.* at 5 – 6.

<sup>5</sup> April 5, 2018 Order (broadening the scope of the investigation and the scope of the independent third-party expert’s review).

investigation would involve all of the same underlying facts and impacts that have been thoroughly investigated in this Case.

There is also no legal basis for re-investigating and re-litigating the impacts that were already investigated in this Case over the course of a three-year post-construction review of the ANGP. Intervenors' reliance on *Otter Creek* for that proposition is misleading. In that case, there was no separate investigation of impacts for purposes of considering a CPG amendment. Rather, the Commission considered *both* whether there was a CPG violation *and* whether the CPG should be amended based on the same record.<sup>6</sup> The proposal for decision concluded there was a CPG violation because the potential impacts of a change were significant, and recommended a CPG amendment be approved because the evidence demonstrated that those impacts were not "unduly adverse" under the (b)(5) criteria.<sup>7</sup> Thus, *Otter Creek* stands for the proposition that when there is a sufficient evidentiary record to evaluate the impacts of a change to a project, the Commission evaluates *in the same proceeding* both (1) whether there was a CPG violation, and if so, (2) whether a CPG should be amended.

The process followed in *Otter Creek* is efficient and should be followed here because the post-construction review of the ANGP addressed all the alleged changes to the project and the related impacts. Accordingly, as in *Otter Creek*, the Commission should address both whether impacts investigated in this case were significant and, if they were, whether they were unduly

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<sup>6</sup> *Petition of Otter Creek Solar*, Case No. 19-3031-PET, 2020 WL 1471758, at \*7 (Vt. Pub. Util. Comm'n Mar. 19, 2020) ("I recommend that the Commission find that the use of the temporary access drive off Cold River Road for construction purposes has the potential for significant impact under the transportation and public health and safety criteria of Section 248 and that an amendment to the CPGs is therefore necessary for this proposed change under those criteria. I also recommend that the Commission find that the evidence of record in this proceeding demonstrates that this proposed change will not have an undue adverse impact under those criteria and that the CPG amendment should therefore be granted."); *id.* ("The Department also correctly notes that amendments to the CPGs issued in Case Nos. 8797 and 8798 that are recommended in the proposal for decision are unnecessary in light of OCS's withdrawal of its proposed changes.")

<sup>7</sup> *Id.*

adverse. To facilitate this process, interlocutory review by the Commission is needed now because the January 29, 2021 Order fails to assess why the impacts should be considered potentially significant in some instances and does not address the impacts at all in others. In still other instances, the findings regarding impacts rest on clear error. The Commission's review will therefore facilitate not only a more efficient determination of whether the impacts in this case were significant, but also whether those same impacts should be considered undue or not if they were in fact significant.<sup>8</sup>

Moreover, there is no analogous Commission precedent that would instruct the Commission to initiate another contested proceeding to relitigate impacts separately for purposes of a CPG amendment, as Intervenors suggest. The Commission has uniformly resolved enforcement cases in a more efficient way by: (1) assessing penalties for CPG violations without considering whether an amendment is required<sup>9</sup>; (2) imposing a penalty, amending the CPG, and closing the case<sup>10</sup>; or (3) addressing the non-substantial change/amendment request, finding a violation, and offering a hearing to assess the penalty amount.<sup>11</sup> VGS is aware of only two cases where separate CPG amendment hearings were commenced—both involved projects built in

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<sup>8</sup> For example, even if the Commission were to conclude that the impacts resulting from a change in the depth of cover in the Clay Plains Swamp had the potential to be significant and required a CPG amendment, the fact that the pipeline satisfies the excessively conservative surface loading standard contemplated in the VELCO MOU demonstrates that the impacts are not undue.

<sup>9</sup> See, e.g., *Investigation Pursuant to 30 V.S.A. §§ 30, 207, & 209 Regarding the Alleged Failure of Vermont Gas Sys., Inc. to Comply with the Final Order & Certificate of Pub. Good in Docket 7970 by Failing to Observe the Requirements of the Blasting Plan.*, Case No. 17-4630-INV, 2020 WL 5884935, at \*27 (Vt. Pub. Util. Comm'n July 31, 2020); *Investigation Pursuant to 30 V.S.A. §§ 30 & 209 Regarding the 150 Kw Net-Metered Solar Elec. Generating Sys. Owned by the Farm at S. Vill., Inc.*, Docket No. 8406, 2015 WL 5837392, at \*9 (Vt. Pub. Serv. Bd. Sept. 25, 2015); *In Re: Application of Ward & Maria Ogden*, Docket No. NM-2204, 2014 WL 4052762, at \*1 (Vt. Pub. Serv. Bd. July 14, 2014); *Joint Petition of Green Mountain Power Corp.*, Docket No. 7628, 2013 WL 494438, at \*3 (Vt. Pub. Serv. Bd. Feb. 4, 2013).

<sup>10</sup> *Sune Solar Xvi Lessor, LLC Compliance with Certificate of Pub. Good for the Installation & Operation of an 800 Kw Solar Elec. Generation Facility to Be Located in the Town of Rutland, Vermont.*, Docket No. 8889, 2017 WL 1364261, at \*3-4 (Vt. Pub. Serv. Bd. Jan. 13, 2017); *Investigation Pursuant to 30 V.S.A. §§ 30 & 209 Regarding the 22.5 Kw Net-Metered Solar Elec. Generating Sys. Owned by Lajeunesse Interiors, Inc.*, Docket No. 8446, 2016 WL 302133, at \*11 (Vt. Pub. Serv. Bd. Jan. 14, 2016).

<sup>11</sup> *Otter Creek Solar*, 2020 WL 1471758, at \*28.

unapproved locations and both had incomplete evidentiary records regarding the impacts of the change.<sup>12</sup> The ANGP was not built in an unapproved location, and this extensive investigation has included a thorough assessment of the impacts related to all alleged CPG violations. The Commission has an ample record before it to resolve all the issues in this case without a separate proceeding as urged by Intervenors.

For the foregoing reasons, if the Commission accepts Intervenors' new pleadings and arguments against interlocutory review, it should also consider the foregoing arguments. Because interlocutory review would promote an efficient resolution of this matter and comports with the Commission's procedural and substantive precedent regarding alleged CPG violations, the Commission should grant VGS's Motion; review the impacts that were extensively investigated in this matter; and provide clarity, efficiency, and fairness to the remainder of this proceeding.

DATED at Burlington, Vermont on this 2<sup>nd</sup> day of April 2021.

**VERMONT GAS SYSTEMS, INC.**

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<sup>12</sup> *Investigation Pursuant to 30 V.S.A. §§ 30 & 209 & Pub. Util. Comm'n Rule 5.110(c) into Alleged Lack of Adequate Notice & Violations of Certificate of Pub. Good #NMP-7438 Concerning the Constr. of A Grp. Net-Metered Solar Elec. Generation Facility in Guilford, Vermont*, Docket No. 8843, 2018 WL 1686082, at \*22-23 (Vt. Pub. Util. Comm'n Mar. 27, 2018) (explaining that, since the project was not building the approved location, "evidence in the form of revised plans and testimony documenting the construction of the Project at the As-Built Site is necessary to determine the impact of the relocation on all the Section 248 criteria and the public good overall"); *Petition of Vermont Community Wind Farm LLC*, Docket No. 7526, 2010 WL 125777, at \*1, 10 (Vt. Pub. Serv. Bd. Jan. 6, 2010) (explaining there was insufficient evidence to assess the impacts of building a ridgeline wind measurement tower in an unapproved location).