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	

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	

VGS'S MOTION FOR LEAVE TO FILE A SUR-REPLY

Vermont Gas Systems, Inc. ("VGS") moves for leave to file a sur-reply in response to new claims asserted by Intervenors in their Reply filed February 16, 2022 ("Intervenors' Reply").

As a general rule, the Commission will not consider a new matter addressed for the first time in a reply brief.[1] If it chooses to allow such argument to be considered, however, it is appropriate to afford the other party an opportunity to respond.[2] Accordingly, VGS moves the Hearing Officer to disregard the new arguments asserted in Intervenors' Reply that are described below, or, alternatively, to grant leave for VGS to file a sur-reply responding to Intervenors' new contentions.[3]

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[1] *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*, Case No. 17-3550-INV, 2021 WL 1771953, at *2 (Vt.P.S.B. Apr. 30, 2021)(citing Vermont Rule of Civil Procedure 78(b))(hereinafter "Remand Order").

[2] *Petition Bell*, 17-4571-PET, 2018 WL 580532, at *1 (Vt.P.S.B. Jan. 22, 2018)(granting a motion for leave to file a sur-reply where new contentions were raised in the reply).

[3] VGS has not included its proposed Sur-Reply along with this motion based on guidance from the Commission denying such motions where they were "not allowed" and suggesting that filing a sur-reply without leave is "un-permitted." *See, e.g.*, Remand Order (discussing sur-replies).

First, Intervenors argue for the first time that the Addison Natural Gas Project ("ANGP") was constructed and remains in violation of the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") depth of cover requirements in 49 C.F.R. § 192.327.[4] This legal assertion was never raised in Intervenors' January 10, 2022 Brief, nor was it discussed in Intervenors' October 2, 2020 Proposed Findings of Fact and Conclusions of Law submitted more than a year ago. In prior filings, Intervenors have referred to this federal code requirement,[5] but they have never argued that VGS violated it, or gone so far as to suggest, as they do in their reply brief, that VGS is *currently* in violation of it.

Intervenors' new legal assertion is wrong. Mr. Byrd explained in his Independent Report that PHMSA has stated on repeated occasions that the depth of cover requirements of 49 C.F.R. Part 192 apply to new construction only and do not impose an ongoing requirement.[6] The ANGP was installed between three feet and four feet deep in the Clay Plains Swamp.[7] Lesser depth-of-cover measurements were not taken until nearly two years later.[8] While VGS has mentioned this issue in prior filings,[9] it has not fully briefed it because until now, no party has alleged that VGS violated 49 C.F.R. § 192.327. Accordingly, the Hearing Officer should either disregard Intervenors' new legal assertion on this issue or allow VGS an opportunity to file a sur-reply to fully brief the issue.

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4 Intervenors' Reply at 11.

5 Intervenors have asserted that VGS committed to meeting that code, Intervenors' October 2, 2020 Proposed Findings of Fact and Conclusions of Law ¶ 45, and compared Mr. Byrd's depth of cover measurements to the requirements of federal code, Intervenors' January 11, 2022 Corrected Proposed Findings of Fact and Conclusions of Law at 13, ¶ 29.

6 Independent Report at 51 n. 32 (explaining that depth of cover requirements are for new construction, not ongoing maintenance, citing PHMSA letters of interpretation). *See also* 49 C.F.R. § 192.327 (providing that buried transmission lines must be "installed" with minimum depth of cover as specified in that section).

7 Independent Report Attachment #9 (showing surveyed depth in 2016 with 2019 measurements); Exhibit JSH-2 (affidavit explaining depth of cover survey process and certifying the depth of cover at the time of construction); Independent Report *supra* at 51 n. 32.

8 Independent Report Attachment #9.

9 See VGS Reply Brief at 5 n. 10.

Second, Intervenors present new arguments asserting that VGS is barred from arguing the Hearing Officer should correct anything in his January 29, 2021 liability order[10] ("Jan. 29 Order") other than the loading standard findings, even though all parties have requested some modification of that order. For example, the Department argues that the Jan. 29 Order's findings regarding burial method and engineering should be revised, among other proposed clarifications.[11] Intervenors themselves argue the findings regarding burial method "would benefit from clarification or correction."[12] There is no basis for excluding argument on any issues in the case where a proposal for decision has not yet issued.

While VGS briefly addressed Intervenors' initial claim that there was "no reason to address" issues other than the loading standard because such issues "have already been briefed and decided,"[13] VGS has not had an opportunity to respond to Intervenors' new sweeping procedural argument that VGS is legally barred from challenging the Jan. 29 Order. Intervenors' new assertion treats the Jan. 29 Order as if it were a final merits order, even though that order expressly stated that it was "not a final judgment" and "not a proposal for decision."[14]

Intervenors' new argument that post-hearing briefing was limited to the loading standard issue is also inconsistent with the Hearing Officer's October 19, 2021 Scheduling Order, which provided no such limitation. VGS's January 10, 2022 filing addressed all of the issues in the case because the Proposal for Decision will likewise address all of the issues in the case in accordance with 3 V.S.A. § 811.

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[10] January 29, 2021 Order re: Liability and Lifting of Stay of Proceedings in Case No. 18-0395-PET.

[11] Department of Public Service's Reply Brief at 4–14 (filed Feb. 16, 2022).

[12] Intervenors' Reply at 20.

[13] See VGS Reply Brief at 3 (explaining that the Hearing Officer must address all the issues in a Proposal for Decision in accordance with 3 V.S.A. § 811, and has both the authority and duty under 30 V.S.A. § 8 to revise findings and conclusion where necessary to effect a fair and reasonable resolution of the case).

[14] Jan. 29 Order at 2.

Intervenors also claim that the Hearing Officer's consideration of issues other than the loading standard will cause prejudice and delay, which is wrong as a matter of fact and law. VGS's objection to the Jan. 29 Order is well known, as detailed in VGS's Motion for Interlocutory Appeal, its supporting Memorandum of Fact and Law, filed February 26, 2021, and its Proposed Findings of Fact and Post-Hearing Memorandum of Fact and Law, filed January 10, 2022. There can be no prejudice where Intervenors have been aware of VGS's arguments for the past year, and have had just as long to respond in kind to those arguments. The fact that Intervenors did not choose to respond to VGS's merits arguments in their reply brief does not constitute prejudice.

Moreover, it is well established that hearing officers have broad powers to modify or correct their own orders—especially before the matter is submitted to the Commission in a Proposal for Decision.[15] VGS believes it is the Hearing Officer's duty to do so. For the sake of both fairness and judicial economy, the Proposal for Decision in this case should correct any error in the Jan. 29 Order rather than requiring VGS to appeal those issues to the Commission merely as a matter of form. Accordingly, the Hearing Officer should either disregard Intervenors' new legal assertions about what issues may be argued at this stage or allow VGS an opportunity to file a sur-reply to fully brief the issue.

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[15] 30 V.S.A. § 9 ("The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction."); *McLaughlin v. Pallito*, 2017 VT 30, ¶ 15, 2017 WL 1838754 (citing *Town of Putney v. Town of Brookline*, 126 Vt. 194, 201(1967) (acknowledging court's "power to open, vacate and correct their own judgments ... to relieve a party against the unjust operation of a record resulting from a mistake on the part of the court"); *St. Pierre v. Beauregard*, 103 Vt. 258, 261 (1931) (recognizing court "has the incidental power, independent of any statute, to revise and correct its records, and, if necessary, for sufficient reasons, to order a case to be brought forward after final judgment, and vacate the judgment and open the case for further proceedings"); *Mosseaux v. Brigham*, 19 Vt. 457, 460 (1847) (recognizing "revisory power by a court ... to correct their records according to the truth, if erroneously made, or to relieve a party against the unjust operation of a record")).

For the foregoing reasons, VGS respectfully requests that the Hearing Officer disregard the new arguments made by Intervenors in their reply brief or, in the alternative, allow VGS to respond in a sur-reply.

DATED at Burlington, Vermont, on this 24th day of February 2022.

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