

STATE OF VERMONT
PUBLIC UTILITIES COMMISSION

Investigation Pursuant to 30 V.S.A. §§ 30 and)
309 regarding the alleged failure of Vermont)
Gas Systems, Inc. to comply with the Certificate)
of Public Good in Docket 7970)
) Case No. 17-3550-INV
Notice of Probable Violations by Vermont Gas)
Systems, Inc.) Case No. 18-0395 INV
)

INTERVENORS’ REPLY TO VERMONT GAS SYSTEM’S MOTION
FOR PERMISSION TO FILE SUR-REPLY MEMORANDUM

Summary

Vermont Gas Systems, Inc. (VGS) has sought permission to file a sur-reply memorandum. VGS argues that it is entitled to file a sur-reply because Intervenor’s improperly raised two new claims in Intervenor’s Reply Brief.

Intervenor’s point out that the first allegedly new claim—Intervenor’s claim that at the time of installation the pipeline depth violated PHMSA’s 30-inch minimum depth requirement for all gas pipelines—was explicitly raised in Intervenor’s Proposed Findings and Conclusions of Law re: Load-Bearing Standard and Remedies dated January 10, 2022. Not only did Intervenor raise this issue but VGS responded to it in its February 16, 2022 Reply Memorandum. Intervenor’s discussion of this issue in their own Reply Memorandum was a recap of their lengthier discussion of this issue in the January 10 filing.

The second allegedly new claim, that VGS’s motions to reconsider were untimely, could not have been raised earlier by Intervenor—because the motions to reconsider were not filed until January 10, 2022. Intervenor were required to raise their objection on February 16 and they properly did so.

1. Violation of PHMSA's 30-inch Minimum Depth of Cover When Installed

Intervenors' January 10, 2022 Proposed Findings of Fact and Conclusions of Law stated at page 4 (emphasis added):

The investigator, William Byrd, used a probe to measure depth of cover in the Clay Plains Swamp on August 27, 2021. His measurements were set forth in Byrd Attachment 9, at pages 8-9. The measurements that were below 4 feet were: 3'7", 2'9", 2'9", 2'9", 2'6", 2'6", **2'5"**, 2'11", 3'0", 3'4" and 3.9". **There is no evidence that the soil over the ANGP had settled between completion of construction in September of 2016 and August 27, 2019. (VGS's Reply Brief dated October 20, 2021, p.20 states: "There is no evidence of trench settlement on the ANGP...")** Mr. Bubolz testified that he returned to the Clay Plains Swamp site two months after construction had been completed and he observed that **no settlement had occurred.** (Bubolz Deposition p.84) **The depth of cover that Mr. Byrd measured with his probe on August 27, 2019 was the depth of cover at time construction was completed.**

Intervenors' January 10, 2022 Proposed Findings of Fact and Conclusions of Law stated on pages 13-14 (emphasis added):

27. Mr. Shelton's and Mr. Byrd's measurements of **depth of cover included depths of 25.5 inches and 29 inches**, as noted in the January 29, 2021 order.
28. The pipeline, as planned, with a 4-foot depth of cover, would have produced stress on the pipeline of 45% of its SMYS and would have had a one-foot safety buffer that would have provided a safety factor in addition to HS20+15%. (12/8/21 tr.30-31) The pipeline, as built, will experience stress of 73% of SMYS at 2 feet and may have only a 5-inch safety buffer—but the buffer could be less than that if the site is not composed entirely of Livingstone Clay soils.
29. The pipeline's depth of 29" (Mr. Byrd's measurement) is 7 inches less than the minimum federal safety standard for Class 3 areas—36 inches—that the Commission ordered VGS to satisfy for the entire pipeline. **29 C.F.R. § 192.327.** Mr. Shelton's measurement of 25.5" is 10.5" less.
30. **The 29" and 25.5" depths also do not meet the federal safety standard for Class 1 areas, which is 30 inches. Id.**
31. **PHMSA's minimum depth of cover standards do not make exceptions for pipelines that an engineer, using API RP 1102, GPTC or CEPA modelling, concludes can safely be buried at reduced depth. The**

standards apply to all grades and thicknesses of pipeline steel and to all soil types. Id. Mr. Byrd measurements included a depth of 2’5”.

VGS responded to this argument in its February 16, 2022 Reply Memorandum at page 5, note 10. VGS responded both factually (that the depth of cover was at least 3 feet at time of installation) and legally (that it is only depth of cover at time of installation that is relevant under PHMSA’s regulations).

Intervenors’ February 16, 2022 Reply Memorandum reiterated the argument they had made in their January 10 submission. Intervenors did so in response to VGS’s argument that VGS’s engineers’ modelling of the HS-20+15% loading-standard sufficed to prove no substantial change. Intervenors argued that notwithstanding the modelling results, this section of the ANGP “was constructed and remains in violation of the mandatory nationwide federal class 1 depth-of-burial safety standard of 30 inches” and that “the nationwide minimum safety standard of 30 inches contains no exemption if engineers testify that the HS-20+15% load will be met under certain soil conditions.” Intervenors summarized the point by stating: “While VGS and VELCO are content to rely on engineering calculations and assumed soil conditions, the Pipeline and Hazardous Materials Safety Administration is not.” Therefore, the change from 48 inches to less than 30 inches was a substantial change.

Now, VGS seeks permission to respond in greater detail than the response it provided on February 16. VGS argues on page 2 that is entitled to do so because “until now, no party has alleged that VGS violated 29 C.F.R. § 192.327.” Intervenors’ January 10, 2022 Proposed Findings and Conclusions of Law, however, explicitly alleged that VGS had violated 29 C.F.R. § 192.327.

The Hearing Officer possesses discretion to allow a response to a reply brief, in this and any other proceeding. Some adequate legal cause must be shown. Intervenors have provided the facts above so that the Hearing Officer's decision is not based upon VGS's inaccurate assertions. No good cause has been shown.

2. Intervenors' Objection to the Untimely Motions to Reconsider Was Timely.

The Hearing Officer's February 5, 2021 order stated: "**Any motion for the reconsideration or interlocutory review of the January 29, 2021, Order shall be filed by not later than February 26, 2021.**" (Emphasis added.)

VGS filed its motions to reconsider on January 10, 2022. In their February 16, 2022 Reply Memorandum, Intervenors objected that these motions to reconsider (other than with regard to issues related to the loading-standard) were untimely. VGS now asks for the opportunity to respond to Intervenors' objection that its motions to reconsider were untimely.

Intervenors respectfully suggest, again, that the proper means by which VGS may obtain permission to file motions to reconsider nearly a year after the date set by the Hearing Officer (other than with regard to issues related to the loading-standard) is to file a motion for extension of time pursuant to Commission Rules 2.103, 2.105 and 2.212, Vermont Rule of Civil Procedure 6(b)(1)(B), *Petition of Stowe Cady Hill Solar*, CPG #16-0069 NMP, Order Denying Motions for Enlargement and Reconsideration, May 18, 2017, *Ying Ji v. Heide*, 2013 VT 81, ¶ 14, 194 Vt. 546, 82 A.3d 1160 and *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). VGS is seeking to brief a motion which it has yet to file. If and when VGS files the necessary motion, or is allowed to respond without filing the

motion, VGS must address the standards for excusable neglect under the Rule and the precedent.
Intervenors have already briefed why VGS cannot satisfy these standards.

Date: March 8, 2022

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