

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 17-3550-INV

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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

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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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Order entered: 03/24/2022

**PROCEDURAL ORDER DENYING VERMONT GAS’S MOTION FOR SUR-REPLY  
AND SEEKING ADDITIONAL BRIEFING FROM THE PARTIES**

On December 23, 2013, the Vermont Public Utility Commission (“Commission”) issued a final order (the “2013 Final Order”) and certificate of public good (“CPG”) in Docket 7970, in which the Commission authorized Vermont Gas Systems, Inc. (“Vermont Gas”) to construct a natural gas transmission pipeline from Chittenden County into Addison County, Vermont (the “Project”).<sup>1</sup>

This proceeding concerns an investigation into whether Vermont Gas violated the 2013 Final Order and CPG while constructing the Project. This proceeding also addresses a Notice of Probable Violation filed by the Vermont Department of Public Service (the “Department”) with the Commission for alleged violations of pipeline safety regulations by Vermont Gas during the construction of the Project.<sup>2</sup>

On February 24, 2022, Vermont Gas filed a motion requesting leave to file a sur-reply brief in response to the Intervenor’s reply brief filed on February 16, 2022.<sup>3</sup>

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<sup>1</sup> *Petition of Vermont Gas Systems, Inc. for a certificate of public good authorizing the construction of the “Addison Natural Gas Project,”* Docket 7970, Order of 12/23/13.

<sup>2</sup> *Notice of Probable Violations of Vermont Gas Systems, Inc. for certain aspects of the construction of the Addison natural gas pipeline,* Case No. 18-0395-PET, filed 2/13/18.

<sup>3</sup> The Intervenor’s are Kristin Lyons, Nathan and Jane Palmer, Rachel Smolker, and Laurence Shelton.

In this Order, I deny Vermont Gas's motion to file a sur-reply brief. However, I also request briefing by the parties on the issue of whether Vermont Gas violated 49 C.F.R. § 192.327 in its construction of the pipeline in the Clay Plains Swamp in New Haven, Vermont.<sup>4</sup>

### I. BACKGROUND

On July 14, 2017, the Commission initiated an investigation in Case No. 17-3550-INV, pursuant to 30 V.S.A. §§ 30 and 209, into whether Vermont Gas violated the 2013 Final Order and CPG by burying the pipeline at less than four feet at 18 locations in New Haven, Vermont, in violation of the 2013 Final Order, CPG, and the memorandum of understanding between Vermont Gas and Vermont Transco LLC/Vermont Electric Power Company, Inc. ("VELCO").

On April 5, 2018, I notified the parties that the Commission had broadened the scope of the investigation to include a thorough review of the construction, performance, and safety of the pipeline. Among other things, this included the notice of proposed violations filed in Case No. 18-0395-PET.

On January 29, 2021, I issued an interim order in which I found that Vermont Gas had violated the final order and CPG issued in Docket 7970 (the "Liability Order").<sup>5</sup> The order provided the parties an opportunity to request that I reconsider my findings or to seek interlocutory review of those findings with the Commission.

On February 26, 2021, Vermont Gas filed a motion for interlocutory review of the Liability Order.

On April 30, 2021, the Commission, without addressing the merits of the Liability Order, denied Vermont Gas' motion for interlocutory review.

As part of its April 30 order, the Commission directed me to reopen the evidentiary record to take additional testimony on whether VELCO had affirmatively concluded that the loading standard that Vermont Gas achieved in the VELCO right-of-way in the Town of New

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<sup>4</sup> See Docket 7970, Order of 12/23/13, at 87, findings 259-261 (Vermont Gas committed to construct the Project "to meet or exceed all applicable state and federal codes and standards, including Part 192 of Title 49 of the Code of Federal Regulations (the safety standards of the Office of Pipeline Safety at the U.S. Department of Transportation)").

<sup>5</sup> The order was interim in nature and did not constitute a proposal for decision because it dealt only with whether Vermont Gas's actions had violated the requirements imposed by the order and CPG in Docket 7970. Because the parties had agreed to bifurcate this matter into two phases, with the first addressing the question of liability only and the second addressing any resultant penalties, the Liability Order did not address any penalty amounts associated with the violations that I had found.

Haven would not limit VELCO's ability to repair or construct transmission infrastructure at that location in the future (the "loading-standard issue"). The Commission further directed me to conduct an evidentiary review of the penalty criteria in 30 V.S.A. § 30 so that I could issue a proposal for decision that makes recommendations both on whether Vermont Gas violated the 2013 Final Order and CPG, including any amendments to the conclusions and recommendations in the Liability Order based on any new evidence regarding the loading-standard issue, and an appropriate civil penalty.<sup>6</sup>

An evidentiary hearing was held on December 8, 2021, consistent with the directive of the Commission's April 30, 2021, order.

On January 10, 2022, Vermont Gas filed proposed findings of fact and a post-hearing memorandum. In the memorandum, Vermont Gas requested that I reconsider the findings and conclusions that I reached in the Liability Order, reiterating many of the same arguments made in its motion for interlocutory review of February 26, 2021, along with additional proposed findings and conclusions.

On January 11, 2022, the Intervenors filed a post-hearing brief that included the following proposed findings referencing the applicability to the Project of the federal pipeline safety standards at 49 C.F.R. § 192.327:

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 [Vermont Gas] to satisfy for the entire pipeline. 49 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 standards for Class 1 areas, which is 30". *Id.*

31. [The Pipeline and Hazardous Materials Safety Administration's ("PHMSA")] minimum depth of cover standards do not make exceptions for pipelines that an engineer, using APR RP 1102, GPTC or CEPA modelling, concludes can safely be buried at reduced depth. The standards apply to all grades and thicknesses of steel pipe. *Id.*<sup>7</sup>

In their reply brief of February 16, 2022, the Intervenors addressed the substance of these proposed findings by arguing that "[t]his section of the [Project] was constructed and remains in violation of the mandatory nationwide federal class 1 depth-of-burial safety standard of 30

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<sup>6</sup> Case Nos. 17-3550-INV and 18-0395-PET, Order of 4/30/21, at 2.

<sup>7</sup> Intervenors' Brief of January 11, 2022, at 13-14.

inches. 49 C.F.R. § 192.327.”<sup>8</sup> The Intervenor also argue that Vermont Gas’s request that I reconsider the findings and conclusions in the Liability Order should be limited to changes related to the loading-standard issue.

On February 16, 2022, Vermont Gas also filed its reply brief, which reiterates its request for my reconsideration of the Liability Order. Citing broadly to 3 V.S.A. § 811 and 30 V.S.A. § 8, Vermont Gas argues that, because the Liability Order was not a proposal for decision, I should reconsider the findings and conclusions in the Liability Order. “The Hearing Officer must revise facts and conclusions where he finds—upon reconsideration—that the [Liability] Order does not ‘effect a fair and reasonable resolution’ of the case.”<sup>9</sup> The Vermont Gas reply brief also responds to and disagrees with the Intervenor’s proposed findings quoted above:

[The] Intervenor assert that the depth of cover measured by Mr. Byrd in August 2019 was the depth of cover at the time of construction in 2016. This is also false. The depth of cover at the time of construction was over three feet when final depth of cover measurements were taken in 2016, in compliance with PHMSA regulations.<sup>10</sup>

On February 24, 2022, Vermont Gas filed its motion requesting that it be allowed to file a sur-reply brief to the Intervenor’s February 16, 2022, reply brief. In that motion, Vermont Gas again reiterates its request for my reconsideration of the Liability Order, arguing that “[t]here is no basis for excluding argument on any issues in the case where a proposal for decision has not yet issued.”<sup>11</sup> Vermont Gas concludes its motion by requesting that the “Hearing Officer disregard the new arguments made by the Intervenor in their reply brief or, in the alternative, allow [Vermont Gas] to respond in a sur-reply.”<sup>12</sup>

On March 8, 2022, the Intervenor filed a response opposing the Vermont Gas motion for a sur-reply. The Intervenor contend that Vermont Gas was on notice of the Intervenor’s position that the pipeline in the Clay Plains Swamp in New Haven violates the depth-of-burial safety standard of 30 inches in 49 C.F.R. § 192.3276 and that the Intervenor’s January 11 proposed findings are “in response to [Vermont Gas’s] argument that [Vermont Gas’s]

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<sup>8</sup> Intervenor’s Reply Brief at 11.

<sup>9</sup> Vermont Gas’ Reply Brief at 4 (no citation).

<sup>10</sup> *Id.* at 5 (citing exh. JSH-2).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Vermont Gas Motion for Sur-Reply at 5.

engineers' modelling of the HS-20+15% loading standard sufficed to prove no substantial change."<sup>13</sup>

The Intervenors also argue that Vermont Gas responded to their proposed findings of January 11 in Vermont Gas's reply brief of February 16, which asserts that the depth of cover at the time of construction was over three feet: "[Vermont Gas] 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)."<sup>14</sup>

No other parties have filed responses to the Vermont Gas motion for sur-reply or otherwise addressed the Intervenors' argument that the pipeline in the Clay Plains Swamp violates 49 C.F.R. § 192.327.

## II. DISCUSSION

### A. Motion for Sur-Reply

The Intervenors first raised the issue of the pipeline's compliance with 49 C.F.R. § 192.327 in the Clay Plains Swamp in their brief of January 11, 2022. Vermont Gas responded to that position in its reply brief of February 16, 2022. Given that Vermont Gas had an opportunity to respond to the Intervenor's arguments on this issue in its reply brief, and did so, there is no basis to grant Vermont Gas's request to file a sur-reply brief.

However, I believe that an accurate resolution of this issue is important to this case. Therefore, rather than simply grant a single party an opportunity to advance its position on the issue, I am establishing dates for all parties to file both briefs and reply briefs on whether the pipeline is in compliance with the applicable federal burial depth standard. In their filings the parties should explain and identify: (1) the federal minimum burial depth standard that is applicable to the pipeline; (2) the time and conditions at which compliance or non-compliance with the applicable standard should be determined; and (3) the facts that exist in the evidentiary record that are relevant to a determination of compliance or non-compliance with the applicable standard. Initial briefs from the parties on this issue are due on April 15, 2022, with reply briefs due on April 29, 2022.

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<sup>13</sup> Intervenors' Response to Vermont Gas Motion for Sur-Reply at 3

<sup>14</sup> *Id.*

**B. Vermont Gas's Request for Reconsideration**

Vermont Gas has requested that I reconsider the findings and conclusions that I made in the Liability Order, reiterating many of the same arguments it used when it filed its request for interlocutory review and relying on new evidence that was admitted into the record since that time.

When the Commission directed me to reopen the record to take evidence on the loading-standard issue, it also directed me to take evidence on the penalty factors found in 30 V.S.A. § 30 so that I could issue a complete proposal for decision, including any amendments to the conclusions and recommendations in the Liability Order based on any new evidence regarding the loading-standard issue.

I am denying Vermont Gas's request that I issue a separate reconsidered Liability Order. That approach would simply serve to prolong this case beyond what is necessary. After I review the parties' briefs on the federal burial standard, I will issue a proposal for decision that incorporates by reference my previous Liability Order—with an explanation of any changes to the Liability Order if I find reason to reconsider any portions of that order—along with a proposed penalty amount as applicable. At that time, all parties, including Vermont Gas, will have an opportunity to raise their arguments on the merits of the proposal for decision's recommended findings and conclusions in their comments to the Commission and, if requested, oral argument before the Commission. Granting Vermont Gas's request would insert another layer of unnecessary process into this proceeding, and I decline to do so.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 24th day of March, 2022.



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Michael E. Tousley, Esq.  
Hearing Officer

OFFICE OF THE CLERK

Filed: **March 24, 2022**

Attest: Pamela Lenahan  
Deputy Clerk of the Commission

*Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: [puc.clerk@vermont.gov](mailto:puc.clerk@vermont.gov))*

PUC Case No. 17-3550-INV & 18-0395-PET- JOINT SERVICE LIST

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