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	

VERMONT GAS SYSTEMS, INC.'S OPPOSITION TO INTERVENORS' MOTION FOR RECONSIDERATION

On April 6, 2023, the Vermont Public Utility Commission ("Commission") issued a Final Order Approving Proposal for Decision ("Final Order") in the above-captioned matter. On April 10, 2023, Intervenors filed a Motion to Alter or Amend ("Intervenors' Motion") pursuant to Commission Rule 2.221. By this filing, VGS submits its opposition to Intervenors' Motion.

Standard of Review

Intervenors' Motion seeks to alter or amend pursuant to Commission Rule 2.221.[1] As of January 18, 2023, motions to reconsider are subject to Rule 2.221, which incorporates the language of V.R.C.P. 59 without modification.[2] Because Rule 2.221 "is identical to the current

[1] Intervenors' Motion at 1.

[2] *Pet. of Vermont Gas Sys., Inc., Pursuant to 30 V.S.A. Section 248(i), for Approval of an Out-of-State Renewable Gas Purchase Contract with A Term Exceeding Five Years*, Case No. 22-2230-PET, 2023 WL 1815671, at *1 (Vt. Pub. Util. Comm'n Jan. 30, 2023).

V.R.C.P. 59," the Commission has explained that "any precedent interpreting V.R.C.P. 59 would apply equally to motions filed under Commission Rule 2.221."[3]

Accordingly, reconsideration under Rule 2.221 "is appropriate only to avoid an unjust result due to 'mistake or inadvertence of the [Commission], and not the fault or neglect of a party.'"[4] The disposition of a reconsideration motion rests with the discretion of the Commission.[5] Indeed, "[g]ranting reconsideration is an extraordinary remedy to be used with great caution."[6] Motions for reconsideration do "not permit parties to relitigate issues or correct previous tactical decisions."[7] Nor is it a "vehicle to introduce new evidence or advance arguments that could have been made previously."[8]

Discussion

Intervenors' Motion seeks reconsideration of the Commission's Final Order regarding (1) AC mitigation, (2) CPG amendments and remedial actions to be taken in this case, (3) admission of the Agency of Natural Resources' ("ANR") letter from 2017, and (4) a variety of other findings. For the reasons set forth herein, there was no error in the Commission's Final Order and Intervenors' Motion should be denied.

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3 *Id.*

4 *Id.* at 3 (citing *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588 (1996)).

5 *Id.* (citing *Alden v. Alden*, 2010 VT 3, ¶ 7, 187 Vt. 591, 592 (2010)).

6 *Id.* at 4 (citing *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970*, Docket No. 8643, Order of 11/3/16 at 2).

7 *Id.* (citations omitted).

8 *Id.*

1. The Commission's Conclusions Regarding AC Mitigation Do Not Contain Any "Mistake or Inadvertence" Because The Evidentiary Record Demonstrates AC Mitigation Was Effectively Accomplished And That State PE Licensing Was Inapplicable.

The Commission rejected Intervenors' proposed AC mitigation findings for three reasons: (1) AC mitigation on the pipeline was "effectively accomplished,"[9] (2) "the evidence did not conclusively support a finding that the Vermont-engineer requirement was applicable to the AC mitigation plan,"[10] and (3) Intervenors' argument that a violation of engineering licensing requirements creates a "*per se* threat to public safety" was uncertain and unsupported.[11] The Commission should deny Intervenors' Motion because the Commission's conclusions are supported by an extensive evidentiary record and contain no mistake or inadvertence that would warrant reconsideration.

First, the Commission's conclusion that "AC mitigation was effectively accomplished" is consistent with the hearing officer's conclusion in the Liability Order, where he stated, "I find that Vermont Gas complied with the 2013 Final Order and CPG by installing an adequate corrosion protection system that *includes an AC mitigation system*."[12] The hearing officer also found that, "Inspection readings from the solid state decouplers installed on the pipeline indicated that *the AC mitigation was properly installed and functioning*."[13] Accordingly, Intervenors' claim that the Commission mischaracterized the hearing officer's conclusions about AC mitigation is incorrect.[14]

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9 Final Order at 10.
10 *Id.*
11 *Id.*
12 Order Re: Liability and Lifting of Stay of Proceedings in Case No. 18-0395-PET (issued January 29, 2021) (the "Liability Order") at 43 (emphasis added).
13 *Id.* at 42 (citing Byrd Report at 26) (emphasis added).
14 Intervenors' Motion at 7 (arguing that the Commission "erroneously states that the Hearing Officer's Liability Order had found that the Mitigation Plan was "effectively accomplished").

Second, the conclusion that AC mitigation was effectively accomplished is overwhelmingly supported by the evidence in this case. Mr. William Byrd testified that "[t]he AC mitigation system was thoroughly designed by ARK Engineering and Technical Services, as described in their report of May 20, 2016 (Attachment A#30), considering both normal and abnormal operating conditions."[15] Mr. Byrd also testified that he "found the ARK designs to be thorough and technically sound and [saw] no indication that they were inadequate for their intended purpose or prepared by a person who was not qualified to do so. Quite the opposite."[16] Intervenors' assertion that the Commission's conclusions on Page 10 "are without basis in the record and are contradicted by the record" is incorrect.[17] The principal testifying expert on this issue—Mr. Byrd—unmistakably concluded that AC mitigation was effectively accomplished.[18]

Third, the Commission's conclusion that "the evidence did not conclusively support a finding that the Vermont-engineer requirement was applicable to the AC mitigation plan" [19] is also supported by the record. The only expert witness with any applicable knowledge about AC mitigation plans—Mr. Byrd—testified: "I disagree with Mr. [Greg] Liebert's opinion that the cathodic protection and AC mitigation system designs were required to have a PE stamp."[20] Attorney Dumont cross-examined Mr. Byrd on this issue. He asked Mr. Byrd whether he agreed with Mr. Liebert's assertion that "typically, AC mitigation plans are signed and sealed by electrical engineers."[21] Mr. Byrd responded: "I do not agree with that assertion."[22] Accordingly,

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15 Byrd Report at 26.
16 *Id.* at 63.
17 Intervenors' Motion at 4.
18 Subsequent tests of the AC mitigation in 2021 confirmed that it is properly functioning. St. Hilaire pf. at 10 (filed September 10, 2021).
19 Final Order at 10.
20 Byrd Report at 63.
21 Tr. 09-01-2020 at 142.
22 *Id.* at 142.

Intervenors' claim that "Mr. Liebert's testimony was uncontradicted" on this issue is patently false.[23]

Moreover, as explained by Mr. Byrd, the National Association of Corrosion Engineers ("NACE") issues relevant certifications for corrosion protection and AC mitigation, and the "person who signed off on the AC mitigation program has high levels of certification through NACE."[24] Intervenors assert that AC mitigation is "pure Electrical Engineering" and that the Commission "incorrectly cited Mr. Byrd's statements about *Corrosion Engineering* to excuse the lack of a licensed engineer's signature on the Issued for Construction plans for *AC Mitigation*,"[25] but Mr. Byrd clearly disagrees. Mr. Byrd testified that: "99 percent of licensed electrical engineers have absolutely no idea how to design an AC mitigation for a buried steel pipeline, and with good reason. They never do it."[26]

For the above reasons, the Commission's conclusion that "the evidence did not conclusively support a finding that the Vermont-engineer requirement was applicable to the AC mitigation plan" is supported by the record in this case, including the opinion of pipeline expert Mr. Byrd. The evidence supports the conclusion that those requirements are irrelevant to AC mitigation.

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[23] Intervenors' Motion repeatedly cites to Mr. Liebert's Rebuttal Testimony. That testimony was not admitted into evidence in this case. On November 8, 2021, Attorney Dumont filed a letter withdrawing the September 10, 2021 testimony of Mr. Liebert and Mr. Palmer. In that letter, Attorney Dumont explained that he was withdrawing Mr. Liebert's testimony because Mr. Liebert had reached the conclusion that Mott MacDonald's evaluation of the loading standing was correct and Mr. Liebert's testimony on that issue was wrong. Accordingly, the Commission should not consider or rely upon Mr. Liebert's rebuttal testimony.

[24] Tr. 09-01-2020 at 142.

[25] Intervenors' Motion at 4 (emphases in original).

[26] Tr. 09-01-2020 at 142.

2. The Final Order Complied With 3 V.S.A § 809 Because Initial Notice In This Case Expressly Stated That The Proceeding Would Involve Consideration of "Whether It Is Appropriate To Order Any Remedial Action, Impose A Penalty, Or Take Any Other Steps Authorized By Law."

The Commission should reject Intervenors' claim that they were denied adequate notice that the Commission would consider remedial action in this case, including whether to amend the Docket 7970 CPG and impose further conditions on the CPG, because Intervenors have had adequate notice. Claims by a party to an administrative proceeding that they were denied notice under 3 V.S.A. § 809(a), (b), and (c) are reviewed based on the fairness of the whole procedure.

> The question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure. Critical to a determination of whether the procedure was fair is whether or not the parties were given an adequate opportunity to prepare and respond to the issues raised in the proceeding.[27]

In this case, the original notice of this proceeding expressly stated that the Commission would consider "whether it is appropriate to order any remedial action, impose a penalty, or take any other steps authorized by law."[28] The fact that the scope of that initial notice was subsequently expanded by the Commission—based upon Intervenors' own motion to broaden the scope of this case[29] —has no bearing on the conclusion that the original notice itself satisfied 3 V.S.A. § 809.

Additionally, the process in this case provided Intervenors with an "adequate opportunity to prepare and respond to the issues raised in the proceeding."[30] This case has been litigated for more than five years. Intervenors have had extensive opportunity to submit evidence and briefing on all the issues—including all remedial measures proposed by the experts. Some of the remedial measures under consideration in this case stem from VGS's March 2018 Stipulated Remedial

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27 *In re Twenty-Four Elec. Utilities*, 160 Vt. 227, 234, 1993 WL 237747 (1993) (quoting *In re Green Mountain Power Corp.*, 131 Vt. 284, 293 (1973)). Intervenors' "due process" challenge is reviewed under the same standard. *See, e.g.*, *In re Vermont Health Serv. Corp.*, 155 Vt. 457, 460 (1990)(explaining that Section 809 is "coterminous with the minimum standard of due process necessary for a fair proceeding").

28 Final Order at 21.

29 April 5, 2018 Notice of Broadened Scope of Independent Expert Review (citing Intervenors Motion).

30 *In re Twenty-Four Elec. Utilities*, 160 Vt. at 234.

Action Compliance Plan filed in Case No. 18-0395-PET. Those were evaluated by Mr. Byrd in 2019 and the remainder of the proposed remedial measures are also contained in Mr. Byrd's Report, which was issued January 2020. Since then, Intervenors have had ample opportunity to conduct discovery; cross examine witnesses, including Mr. Byrd; and submit evidence regarding the recommended remedial measures in this case.[31]

Additionally, Intervenors' extensive briefing in their Motion on the issue of notice fails to address the Commission's reasoning in the Final Order that adequate notice of remedial measures was provided because the notice "specifically contemplated whether to impose remedial measures, the very topic of the CPG amendment process we are establishing as part of this case."[32] Intervenors' Motion does not address the Commission's discussion on this point and offers no rebuttal to the conclusion that notice was provided to the appropriate parties and was broad enough to encompass remedial measures.

Intervenors also erroneously argue that notice of the Commission's remedial measures in this case must be provided "pursuant to § 248(a)(4)(C) and (D)."[33] This argument is inconsistent with Section 248(a)(4)(C) and 248(a)(4)(D), which are specific procedural requirements that apply in only two circumstances. Section 248(a)(4)(C) requires a CPG petitioner to provide notice to statutory parties two business days after the Commission deems an application complete. Section 248(a)(4)(D) requires notice of a public hearing where one is requested on a petition. There is no statutory basis for Intervenors' claim that the Commission's legal authority

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31 In particular, Intervenors served discovery on Mr. Byrd and VGS, deposed VGS witnesses, filed their own prefiled testimony, engaged in additional discovery regarding rebuttal testimony filed by VGS, had an opportunity to cross-examine all witness during a three-day evidentiary hearing in September 2020, filed post-hearing briefs, engaged in additional discovery following the Commission's direction to re-open the evidence, participated in another evidentiary hearing, and had another opportunity to brief the issues in the case. There is simply no factual or procedural basis to claim that Intervenors have not had an adequate opportunity to prepare and respond to the proposed remedial measures in this case.

32 Final Order at 21.

33 Intervenors' Motion at 14.

to order remedial measures is limited in any manner by Section 248 in this case. While Intervenors repeatedly refer to the so-called "statutory parties" entitled to notice, their Motion fails to identify any party that failed to receive notice in this case. Accordingly, there is no basis to reconsider the Commission's Final Order on this issue.

3. The Commission's Supplemental Findings Regarding Trenching in the Clay Plains Swamp Should Be Sustained Because They Are Supported By The Evidence.

The Final Order makes supplemental findings regarding the trenching techniques in the Clay Plains Swamp, citing both the Byrd Report and the position of the Agency of Natural Resources ("ANR") as set forth in a filing made in this case by ANR on June 19, 2017.[34] Intervenors object to the admission of this letter into the record.[35] For the reasons set forth below, the Commission's supplemental findings are sound and supported by the evidence.

The principal evidence about the potential impact of the trenching techniques in the Clay Plains Swamp was provided by Mr. Byrd. Mr. Byrd concluded that "[t]he project plans and specifications gave the [construction management team] the authority and responsibility to address site-specific conditions, and they acted appropriately when addressing the conditions in the Clay Plains Swamp (and other swamps)."[36] Mr. Byrd also concluded that "VGS and its contractors addressed the constructability issues in [the Clay Plains Swamp] in a reasonable fashion and with *proper regard for environmental protection and public safety*."[37]

Additionally, environmental impacts and restoration of the project corridor to pre-construction conditions were evaluated by Jeffrey Nelson, then Director of Energy and

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[34] Final Order at 17 (citing Letter from Donald J. Einhorn, Esq,. ANR, to Judith C. Whitney, Clerk of the Commission, dated June 19, 2017).
[35] Intervenors' Motion at 15.
[36] Byrd Report at 70.
[37] *Id.* (emphasis added).

Environmental Services for Vanasse Hangen Brustlin, Inc. ("VHB"), which was the ANR-approved environmental consultant on the project.[38] Mr. Nelson and his team performed an extensive post-construction review of the project to evaluate whether "restoration of the project area to a condition comparable to the pre-construction conditions" had been achieved.[39] Mr. Nelson testified that the project corridor "has been restored to pre-construction conditions."[40]

As it relates specifically to ANR's letter, the letter indicated that the "pipeline burial method" described in VGS's non-substantial change filing "d[id] not raise any significant concerns with regard to impacts to the natural environment." The letter was filed in response to VGS's non-substantial change determination request, which discussed the construction in the Clay Plains Swamp and VGS's inability to achieve four feet of depth of cover there.[41] Notably, the letter references "pipeline burial method" and not just depth of cover.

Intervenors claim that ANR was unaware of the construction methods in the Clay Plains Swamp when it submitted the June 2017 letter, citing only the timing of the Bubolz deposition in support of their eleventh hour assertion.[42] But the record shows that as early as October 2016, Intervenors had complained to federal and state regulators about the Clay Plains Swamp construction, shared Mr. Lawrence Shelton's photographs of the construction, and participated in public meetings about their concerns.[43] At that time, Intervenors were already claiming that the pipeline had been improperly installed by sinking it into the swamp using the force of an excavator. Accordingly, Intervenors' suggestion that ANR and others were "unaware" of these

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38 Byrd Report at 10, 29 (explain the Erosion Prevention and Sediment Control ("EPSC") specialist was approved in advance by ANR and identifying Jeff Nelson as the supervisor of the EPSC specialist on the project).

39 Exhibit VGS-JAN-3.

40 *Id.* at 2 -3 (describing an extensive review of post-construction conditions).

41 VGS June 2, 2017 Request for Non-Substantial Change Determination (filed in Docket No. 7970).

42 Intervenors' Motion at 15. Additionally, Intervenors' assertion that Mr. Bubolz's deposition "revealed" use of the sink-in-swamp method is also false. Intervenors coined that term themselves.

43 See Affidavit of Lawrence Shelton (filed as Exhibit 10 to Intervenors' June 23, 2017 filing).

allegations "before Mr. Shelton's photographs and testimony were submitted" in this case is inaccurate.[44] The Commission's reliance on ANR's general evaluation of potential impacts in the Clay Plains Swamp was both reasonable and consistent with other evidence demonstrating that there have been no undue adverse impacts.

Finally, Intervenors' objection to consideration of ANR's position in this case is untimely. The fact that ANR took that position in June 2017 is already in evidence.[45] Not only was the letter filed in this case almost six years ago, without objection by Intervenors, Intervenors also failed to object to the hearing officer's verbatim quotation from the letter in the January 2021 Liability Order, where it was also noted that ANR had not filed any further comments about the Clay Plains Swamp construction in this case.[46] Intervenors have had an extensive opportunity for discovery since ANR's 2017 filing: they have compelled the production of thousands of documents and sworn deposition testimony from multiple witnesses. They have also had multiple opportunities to submit their own evidence and cross-examine other witnesses on this issue. To suggest that they be given the opportunity to depose ANR at this stage in the proceeding is unreasonable and inappropriate. Intervenors' Motion cannot be a "vehicle to introduce new evidence or advance arguments that could have been made

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[44] Intervenors' Motion at 16. Additionally, on March 18, 2018, ANR filed a response to Intervenors' Motion to Broaden the Scope of the Investigation, which included 900 pages of material filed by Intervenors, including allegations about the sink-in-swamp method and Mr. Bubolz's testimony. While Intervenors raised seven additional allegations, ANR wrote on March 22 that it had identified only "one item which it believes has the potential for significant impact to natural resources, and thus warrants investigation." That issue was the trench breaker installation—not the burial methods in the Clay Plains Swamp.

[45] See Byrd Report at 77 ("The ANR submitted a letter noting that the change did not change the disturbance footprint, did not raise any significant concerns about impacts to the environment, and did not require any Agency permit amendments.").

[46] Liability Order at 20.

previously," when they have had ample opportunity to litigate the issues they raise in their Motion today.[47]

The Commission's supplemental findings regarding impacts in the Clay Plains Swamp of the sink-in-swamp method are supported by the record. Accordingly, the Commission should deny Intervenors' Motion on this issue.

4. The Commission Should Reject Intervenors' Additional Objections To Supplemental Findings Because Those Findings Are All Amply Supported By the Evidence.

In addition to the AC mitigation issue and ANR letter discussed above, Intervenors challenge a series of other findings. These objections should be rejected for the following reasons.

First, Finding 5 on Page 18 concludes that the depth of cover will not have any undue adverse impacts as long as VGS adheres to Mr. Byrd's recommendations. Intervenors argue this contradicts the evidence, citing VELCO's witness Mr. Kevin Bodenhammer, Mott MacDonald, and Mr. Byrd's conclusion that more depth is better.[48] All of these witnesses clearly concluded that the pipeline was safe as constructed,[49] notwithstanding that there was no dispute that more

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[47] *Pet. of Vermont Gas Sys., Inc., Pursuant to 30 V.S.A. Section 248(i), for Approval of an Out-of-State Renewable Gas Purchase Contract with A Term Exceeding Five Years*, Case No. 22-2230-PET, 2023 WL 1815671, at *1 (Vt. Pub. Util. Comm'n Jan. 30, 2023). Notwithstanding all these opportunities through six years of litigation, Intervenors never called upon ANR to testify about its 2017 position, did not submit any evidence contradicting the letter, and have not submitted any evidence that ANR permits were required. Intervenors never sought information from ANR about its *subsequent* filings in this case either, which focused on other issues and did not raise any further concerns about the burial methods in the Clay Plains Swamp. See ANR comments filed August 4, 2017, September 8, 2017, October 12, 2017, May 4, 2018, and March 22, 2018. ANR approved an on-site environmental specialist, VHB, which submitted weekly reports to ANR. Byrd Report at 29–30. ANR also received bi-weekly reports during construction of the pipeline, including one describing the pipe installation in the Clay Plains Swamp as "extremely challenging" and explaining crews were working "off timber mats." Byrd Report at 58. Intervenors' speculation that ANR was "unaware" of the construction challenges in the Clay Plains Swamp when it submitted its letter is not supported by any evidence.

[48] Intervenors' Motion at 16.

[49] See Byrd Report at 67 (stating that "loading under any anticipated scenario isn't a concern for ANGP"); Bodenhammer pf. at 5 (stating the "pipe has been designed and installed to safely accept the HS-20+15% loading at all locations"); Chaves pf. at 3; Exhibit VGS.CC-2 (providing detailed assessment of the loading calauctions); Chaves pf. rb. at 3-20 (thoroughly rebutting all claims that the pipeline does not meet the loading standard).

depth would be better. Accordingly, Intervenors' claim that this finding is "contradicted by the record" is incorrect.

Second, Finding 6 on Page 18 concludes there were no deleterious effects on corrosion control. Intervenors' challenge to the finding does not even relate to the corrosion issue. Rather, they raise an entirely different "abrasion issue."[50] There is no evidence of abrasion in this case. Mr. Byrd testified that the pipeline was protected with "abrasion-resistant overlay" to protect coating, and was also coated in concrete in some areas, like the Clay Plains Swamp.[51] Mr. Byrd also evaluated subsequent coating inspections and found there was no gradable indication that "indicated problems with the pipeline coating or cathodic protection system"[52] and stated that "the coating and cathodic protection for ANGP is in excellent condition."[53] There is no factual basis for Intervenors' objection to Finding 6 or their untimely attempt to raise concerns about abrasion.

Third, Finding 7 on Page 18 concludes that there have been no adverse impacts on wetlands, citing Mr. Byrd's Report at 47, 68, and Attachment 70. VGS agrees with Intervenors that the June 19, 2017 letter from ANR does not appear to specifically address trench breakers. The remainder of the investigation conducted by Mr. Byrd, however, clearly demonstrates there were no impacts.[54] VHB conducted a thorough investigation of potential impacts specifically relating to the trench breakers at five wetlands and concluded the project "did not observably or significantly alter the wetland hydrology to the extent that any Class II wetland boundaries or

50 Intervernors' Motion at 17.
51 Byrd Report at 23.
52 *Id.*at 26
53 *Id.* at 66.
54 *Id.*, Attachment #70.

functions were impacted beyond what was permitted."[55] The evidence therefore clearly supports the conclusion that there were no impacts.

Conclusion

For the reasons discussed above, the Commission should deny Intervenors' Motion in its entirety. Intervenors fail to identify any mistake or inadvertence in the Final Order that would merit reconsideration. Rather, they attempt to call into question findings that are amply supported by the evidence. Their Motion should be denied.

DATED at Burlington, Vermont, on this 1st day of May, 2023.

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[55] Byrd Report at 50.