

**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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**THE VERMONT DEPARTMENT OF PUBLIC SERVICE’S RESPONSE TO
INTERVENORS’ MOTION TO ALTER OR AMEND THE COMMISSION’S FINAL ORDER**

The Vermont Department of Public Service (the “Department”) provides the following response to the Intervenor’s April 9, 2023 Motion to Alter or Amend (the “Motion”) the Vermont Public Utility Commission’s (the “Commission”) April 6, 2023 Final Order Approving Proposal for Decision (the “Final Order”), pursuant to Commission Rule 2.221. As detailed below, the Motion should be denied because it does not meet the high standard for granting reconsideration of the Final Order. The Motion’s arguments regarding the Vermont Gas Systems, Inc.’s (“VGS”) AC mitigation plan identifies no mistake or inadvertent omission within the Final Order and the Motion’s argument regarding fair notice of necessary amendments to VGS’s CPG was appropriately addressed by the Commission in its Final Order.

Pursuant to the revised Commission Rule 2.000, effective January 18, 2023, motions to reconsider are subject to Commission Rule. 2.221, which incorporates the language of V.R.C.P. 59 without modification. The Commission’s Rule 2.221 is identical to the current V.R.C.P. 59,

and as such, any precedent interpretation V.R.C.P 59 would apply equally to motions filed under Commission Rule 2.221.

Reconsideration under Commission Rule 2.221 is appropriate only to avoid an unjust result due to the “mistake or inadvertence of the [Commission], and not the fault or neglect of a party.”¹ The disposition of a reconsideration motion rests with the discretion of the Commission.² Granting reconsideration is an extraordinary remedy to be used with great caution.³ Commission Rule 2.221 does not permit parties to relitigate issues or correct previous tactical decisions.⁴

I. THE INTERVENORS’ FAIL TO DEMONSTRATE A MISTAKE OR INADVERTENCE OF THE COMMISSION CONTAINED IN THE FINAL ORDER’S FINDINGS AND CONCLUSIONS WITH RESPECT TO THE AC MITIGATION PLAN

In the Motion, the Intervenor first argue that the Final Order “incorrectly cited Mr. Byrd’s statement about Corrosion Engineering to excuse the lack of a licensed engineer’s signature on the Issued for Construction Plans for AC Mitigation.”⁵ The Intervenor further argue that “Mr. Liebert’s testimony was uncontradicted regarding the Issued for Construction AC Mitigation Plan – AC mitigation is pure Electric Engineering, a recognized Vermont engineering specialty.”⁶ In support of these arguments, the Intervenor cite to three “principal electrical risks” that are addressed by the Issued for Construction AC Mitigation Plan: capacitive coupling, inductive coupling, and conductive coupling. The Intervenor assert that because the AC Mitigation Plan involves mitigation of risks that are “electrical in nature,” the plan necessitates the approval and

¹ *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588, 674 A.2d 782 (1996) (citing *In re Kostenblatt*, 161 Vt. 292, 302, 640 A.2d 39, 45 (1994)).

² *Iden v. Alden*, 2010 VT 3, ¶ 7, 187 Vt. 591, 592, 992 A.2d 298 (2010)).

³ *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 8643, Order of 11/3/16 at 2.*

⁴ *Id.*

⁵ Intervenor’s Motion for Reconsideration at 4.

⁶ *Id.*

signature of a Vermont-licensed engineer. Consequently, the Intervenor's dispute the Final Order's conclusions found on page 10 and the Commission's Supplemental Findings 12-13.

The Intervenor's do not satisfy the high standard for granting reconsideration of the Final Order in this case. The Intervenor's argument on this issue restates identical arguments and proposed findings of fact that have already been considered by the Commission on at least two separate occasions – the Intervenor's initial October 2, 2020 brief⁷ and again within the Intervenor's November 4, 2022 comments on the Hearing Officer's Second Proposal for Decision.⁸ The Final Order specifically addressed the Intervenor's concerns with respect to AC mitigation plans, stating, “there was no finding that the failure to have a Vermont-licensed engineer sign the AC mitigation construction plans was a violation of the CPG or Order because the evidence did not conclusively support a finding that the Vermont-engineer requirement was applicable to the AC mitigation plan.”⁹ The Intervenor's assertions that Mr. Liebert's testimony was “uncontradicted” on this point or that the Commission's Final Order incorrectly cited Mr. Byrd's statements regarding the AC mitigation plan are patently incorrect. The Intervenor's reliance on and reiteration of Mr. Liebert's testimony in the Motion does not alter the Commission's ample consideration of the record evidence and conclusion with respect to the AC mitigation plan.

The Commission properly considered Mr. Byrd's response to the Intervenor's on this issue where Mr. Byrd states, “I disagree with Mr. Liebert's opinion that cathodic protection *and* AC mitigation system designs were required to have a PE stamp. The Vermont Office of Professional Regulation licenses engineers by discipline (Chemical, Structural, etc.). The practice of corrosion

⁷ Intervenor's Proposed Findings of Fact and Conclusions of Law at 66-9 (Oct. 2, 2020).

⁸ Intervenor's Response to Proposal for Decision at 12-8 (Nov. 4, 2022).

⁹ Final Order at 10.

engineering has been recognized at least since 1943 when the National Association of Corrosion Engineers (NACE) was established, but Vermont has no classification for professional Corrosion engineers and does not license them.”¹⁰ When cross-examined by the Intervenors’ counsel on this issue at the September 1, 2020 Evidentiary Hearing, Mr. Byrd definitively stated that he did not agree with the Intervenors’ assertion that AC mitigation plans are signed by electrical engineers.¹¹ Mr. Byrd explained his disagreement with Mr. Liebert’s assertions, stating that “the National Association of Corrosion Engineers, NACE, does have certifications that they issue, and the person who signed off on the AC mitigation program has high levels of certification through NACE. So that’s the appropriate organization if you are looking for a license, not from [a state-licensed professional engineer].”¹² Mr. Byrd further states that “AC mitigation and cathodic protection design is not typically considered the practice of professional engineering. . . you couldn’t get a license in that if you wanted to.” Mr. Byrd’s report and testimony on this issue is clear – the proper certification and expertise to design and review AC mitigation plans does not come from a professional electric engineer as the Intervenors suggest but through certification in corrosion control programs through the National Association of Corrosion Engineers. To the contrary, Mr. Byrd concluded that the AC mitigation system was thoroughly designed by VGS’s consultant, ARK Engineering and Technical Services.¹³

The Intervenors also argue that the Final Order’s Supplemental Findings 12-13 improperly suggest that the AC mitigation plan was signed by a licensed engineer. Additionally, the Intervenors argue that the Final Order erred in stating that the Hearing Officer’s found the AC

¹⁰ Byrd Report at 63 [emphasis added].

¹¹ Tr. 09/01/2020 at 142.

¹² *Id.*

¹³ Byrd Report at 26.

Mitigation Plan was “effectively accomplished.” The Department disagrees on both counts. The Final Order’s Supplemental Findings 12-13 clearly refer to work performed by CHA, VGS’s contracted engineering and consulting firm. The findings do not suggest that the AC mitigation plan falls within CHA’s review nor suggest that they require amendment. The Final Order’s conclusion that the AC mitigation plan was effectively accomplished properly relies upon the Hearing Officer’s findings, specifically Finding 103 citing the Byrd Report.¹⁴

The Commission did not err in its consideration of the record evidence and its reliance on the testimony offered by its independent expert when it declined to find that a failure to have a Vermont-licensed engineer sign the AC mitigation construction plans was a violation of the CPG or Order. The Intervenors’ argument on this topic does not sufficiently identify any mistake or inadvertence of the Commission and attempts to relitigate issues that were previously presented to the Commission within the Intervenors’ briefing.

II. THE INTERVENORS’ FAIL TO DEMONSTRATE A MISTAKE OR INADVERTENCE OF THE COMMISSION CONTAINED IN THE FINAL ORDER’S FINDINGS AND CONCLUSIONS WITH RESPECT TO THE CPG AMENDMENT PROCESS

Intervenors argue that the Final Order violates their right to notice of a controlling issue in this case – amendments to VGS’s CPG approving construction and operation of the ANGP. Notwithstanding the Commission’s opening order stating this investigation would determine “whether it is appropriate to order any remedial action, impose a penalty, or take any other steps authorized by law,” the Intervenors assert that they properly relied upon the Hearing Officer’s interim liability orders and proposal for decisions as determinative of the scope of the investigation. The Department disagrees.

¹⁴ “Inspection readings from the solid state decouplers installed on the pipelines indicated that the AC mitigation was properly installed and functioning.” Final Order at 128, Finding 103.

As noted in the Final Order, the Commission's July 14, 2017 order noticed all parties of the Commission's intent to order remedial action, impose a penalty, or take any other steps authorized by law.¹⁵ The Hearing Officer's subsequent April 5, 2018 order informed the parties of the broadened scope of the investigation to include a third-party expert to conduct a "thorough review of the construction, performance, and safety of the Addison natural gas pipeline authorized in Docket 7970."¹⁶ The Commission's orders regarding the scope of this proceeding and the following six-year investigation resulted in an extensive and comprehensive record that provided the parties sufficient notice that remedial measures authorized by law, including CPG amendments, may be included within this proceeding. The Intervenors were aware of the potential for addressing CPG amendments within this proceeding from the outset of the investigation and throughout the development of the extensive evidentiary record. The Intervenors were provided multiple opportunities to present testimony, cross-examine witnesses, including the Commission's independent expert, and offer arguments in support of their positions.

The Final Order notes that this investigation has produced a substantial evidentiary record capable of supporting not only findings on the potential for significant impact on the relevant criteria contained in Section 248(b) but on the actual impact to those criteria resulting from the ANGP's as-built construction. The parties and expert witnesses in this proceeding presented several remedial actions necessary to prevent undue impacts on the ANGP in the future, including those measures contained in the Byrd Report and the Department and VGS's stipulation in Case No. 18-0395-PET. The Intervenors were provided an opportunity throughout

¹⁵ Case No. 17-3550-INV, Order at 3 (Aug. 14, 2017).

¹⁶ Case No. 17-3550-INV, Order at 2 (April 5, 2018).

this investigation to challenge the recommended remedial measures and the witnesses' findings regarding actual impacts resulting from the as-built construction of the ANGP. Reconsideration under Commission Rule 2.221 does not permit the Intervenors to now attempt to correct a previous tactical decision or address any shortcomings in their opposition to those remedial measures presented within this case. Given the unique circumstance of an extensive record in this proceeding and the Commission's previously outlined scope of the investigation, the Commission's Final Order directing VGS to propose amendments to its CPG is appropriate and does not curtail the Intervenors' right to notice and due process. Additionally, the Intervenors' assertion that the Final Order incentivizes violation of the Section 248 process is misplaced and does not consider the substantial penalty assessed against VGS in the Final Order and the extensive six-year investigation resulting from VGS's violations of the CPG and 2013 Final Order.

The Final Order appropriately addressed the Intervenors' arguments regarding notice of the scope of this proceeding and does not identify any mistake or inadvertence of the Commission that satisfies the standard for reconsideration.

III. CONCLUSION

The Department concludes that the Intervenors' Motion does not sufficiently demonstrate a mistake or inadvertence within the Final Order respectfully recommends that the Intervenors' Motion be denied.

[SIGNATURE ON NEXT PAGE]

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

Respectfully Submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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