

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	Evidentiary hearings conducted September 1-3, 2020 and December 8, 2021
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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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Order entered: 06/30/2023

**ORDER DENYING MOTION FOR RECONSIDERATION**

**I. INTRODUCTION**

On April 6, 2023, the Vermont Public Utility Commission (“Commission”) issued a final order in this proceeding that did four things (“Final Order”). First, the Commission determined that Vermont Gas Systems, Inc. (“Vermont Gas”) violated the terms and conditions of the 2013 Final Order<sup>1</sup> and certificate of public good issued in Docket 7970 (the “CPG”) and the requirements of Commission Rule 5.408 when it made six changes to the approved Project without first seeking Commission review and approval. Second, the Commission imposed on Vermont Gas a combined civil penalty totaling \$150,000 for those six violations. Third, the Commission determined that the record in this proceeding was sufficient to direct Vermont Gas to propose amendments to the CPG to ensure that the as-built pipeline remains in the public good. And fourth, the Commission determined that the pipeline is safe, and that subject to the

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<sup>1</sup> *Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of the “Addison Natural Gas Pipeline” consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven, and Middlebury, Vermont, Docket 7970, Order of 12/23/13 (the “2013 Final Order”).*

amendment of the CPG reflecting specified remedial actions, would continue to be safe in its future operations.<sup>2</sup>

On April 10, 2023, the Intervenors<sup>3</sup> filed objections to certain findings and a motion requesting that the Commission reconsider the Final Order (together the “Reconsideration Motion”).

In this order, the Commission overrules the Intervenors’ objections and denies the Reconsideration Motion.

## II. BACKGROUND<sup>4</sup>

On December 23, 2013, the Commission issued the 2013 Final Order and CPG in Docket 7970.

On July 14, 2017, the Commission initiated the investigation in Case No. 17-3550-INV.

On February 16, 2018, the Vermont Department of Public Service (the “Department”) filed a Notice of Proposed Violation that resulted in the opening of Case No. 18-0395-PET, which was consolidated with Case No. 17-3550-INV.

On October 3, 2022, the hearing officer issued a proposal for decision (“Proposal for Decision”) recommending that the Commission:

(1) conclude that Vermont Gas committed six violations of the terms of the 2013 Final Order and CPG by failing to install the pipeline as required by the Commission’s order;

(2) conclude that Vermont Gas violated Commission Rule 5.408 by failing to seek Commission approval before implementing five substantial changes to the Project;

(3) direct Vermont Gas to petition for an amendment to the CPG reflecting the five unauthorized substantial changes made to the Project in violation of the 2013 Final Order and CPG; and

(4) impose on Vermont Gas a civil penalty totaling \$150,000 for its violations of the 2013 Final Order, the CPG, and Commission Rule 5.408.<sup>5</sup>

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<sup>2</sup> Final Order at 9, 12, 17, and 22.

<sup>3</sup> Rachel Smolker, Lawrence Shelton, Kristin Lyons, Jane Palmer, and Nathan Palmer

<sup>4</sup> For a detailed discussion of events in these cases, please see pages 6-9 of the Liability Order portion of the Final Order. The “Liability Order” was separately issued in this case by the hearing officer on 1/29/21 and is an attachment to the Final Order.

<sup>5</sup> Proposal for Decision at 1-2.

On April 6, 2023, the Commission issued its Final Order in the consolidated cases adopting in part the Proposal for Decision. Specifically, the Commission adopted recommendations 1, 2, and 4, and modified recommendation 3, above, as follows:

Lastly, we modify the recommendations of the hearing officer with respect to the third question addressed by the [P]roposal for [D]ecision. While we agree with the hearing officer that an amendment to the CPG issued in Docket 7970 is required to conclude this case, we modify his recommendation on the process needed to reach that conclusion. We do not believe that a new case is needed to produce the information necessary to amend the CPG and impose any additional conditions necessary to ensure the pipeline remains in the public interest going forward. We conclude that such steps are appropriately made through a compliance proceeding in this case.<sup>6</sup>

On April 10, 2023, the Intervenors filed the Reconsideration Motion.<sup>7</sup>

On May 1, 2023, Vermont Gas and the Department each filed responses to the Reconsideration Motion. Both parties recommended that the Commission deny the motion.

On May 24, 2023, the Intervenors filed a reply to the Vermont Gas and Department responses.

### **III. POSITIONS OF THE PARTIES**

#### **A. The Intervenors**

In the Reconsideration Motion the Intervenors raise the following claims:

1. The lack of an engineer's signature on the pipeline's AC Mitigation Plan is a critical public safety issue.<sup>8</sup>
2. The Intervenors were not on notice that the proceeding would address the safety of the pipeline because in the Liability Order the hearing officer stated that the proceeding would only address the potential for harm from the pipeline as built under the Section 248 criteria, not whether the pipeline was safe.<sup>9</sup>

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<sup>6</sup> Final Order at 3.

<sup>7</sup> The Intervenors refiled the Reconsideration Motion on 5/1/23, superseding the 4/10/23 filing, and correcting the signature line.

<sup>8</sup> Reconsideration Motion at 4-9.

<sup>9</sup> *Id.* at 9-15.

3. ANR counsel's letter of June 19, 2017, summarizing ANR's position on the environmental impact of Vermont Gas's failure to properly bury the pipeline in the New Haven swamp, did not address the sink-in-the-swamp burial method.<sup>10</sup>
4. Several supplemental findings in the Final Order do not accurately reflect the record.<sup>11</sup>

**B. Vermont Gas**

Vermont Gas asserts that the "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."<sup>12</sup>

Vermont Gas replied to the Intervenors as follows:

- a) The Commission's conclusions regarding AC Mitigation do not contain any mistake or inadvertence because the evidentiary record demonstrates that AC Mitigation was effectively accomplished, and State engineering licensing was inapplicable to AC Mitigation.<sup>13</sup>
- b) The parties were on notice that the proceeding would consider remedial actions for any actual harm that resulted from the unauthorized changes to the approved pipeline.<sup>14</sup>
- c) The Commission's reliance on ANR counsel's general evaluation of environmental harm in the Clay Plains Swamp was both reasonable and consistent with other evidence demonstrating that there were no undue adverse impacts on the environment.<sup>15</sup>
- d) The Commission should reject the Intervenors' other objections to the supplemental findings because those findings are amply supported by the evidence.<sup>16</sup>

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<sup>10</sup> Reconsideration Motion at 15-16.

<sup>11</sup> *Id.* at 16-18.

<sup>12</sup> Vermont Gas Reply at 13.

<sup>13</sup> *Id.* at 3-5.

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 11-12.

### C. Department

It is the Department's position that "the Motion should be denied because it does not meet the high standard for granting reconsideration of the Final Order."<sup>17</sup>

The Department argues that the Intervenors fail to demonstrate any mistake or inadvertence in the Final Order's findings and conclusion regarding the AC Mitigation Plan.<sup>18</sup> The Department further asserts that:

The Final Order appropriately addressed the Intervenors' arguments regarding notice of the scope of this proceeding and [the Reconsideration Motion] does not identify any mistake or inadvertence of the Commission that satisfies the standard for reconsideration.<sup>19</sup>

### IV. LEGAL STANDARD

Commission Rule 2.221(A) incorporates the language of Vermont Rule of Civil Procedure 59 without modification. Thus, precedent applying Rule 59(e) is relevant to the application of Commission Rule 2.221(A). The purpose of a motion to alter or amend is to avoid an unjust result due to mistake or inadvertence of the Commission, as opposed to that of a party.<sup>20</sup> The disposition of a reconsideration motion rests with the discretion of the Commission.<sup>21</sup> A hearing is not mandatory.<sup>22</sup>

Granting reconsideration is an extraordinary remedy to be used with great caution.<sup>23</sup> Commission Rule 2.221(A) does not permit parties to relitigate issues or correct previous tactical decisions.<sup>24</sup> It is not a vehicle to introduce new evidence or advance arguments that could have

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<sup>17</sup> Department Reply at 1.

<sup>18</sup> *Id.* at 2-5.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Osborn v. Osborn*, 147 Vt. 432, 433, 519 A.2d 1161 (1986); *see also, e.g., Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982); *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

<sup>21</sup> *Alden v. Alden*, 2010 VT 3, ¶ 7, 187 Vt. 591, 592, 992 A.2d 298 (2010).

<sup>22</sup> *Rubin v. Sterling Enterprises*, 164 Vt. 582, at 588, 674 A.2d 782, at 786 (1996).

<sup>23</sup> *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.

<sup>24</sup> *Id.*

been made previously.<sup>25</sup> The Commission also retains “discretion to deny consideration of discrete issues not raised prior to entry of judgment.”<sup>26</sup>

## V. DISCUSSION

The Intervenors argue that the Final Order in this case contains errors that they have not yet had an opportunity to address in this proceeding. However, the Reconsideration Motion does not demonstrate any mistake by the Commission, nor does it present any new factual information that was not previously considered by the Commission. The Reconsideration Motion therefore does not meet the standard for relief under Commission Rule 2.221(A) and is denied.

As discussed above, the Intervenors claim that the Commission made four errors that require correction in the Final Order. We disagree with this both because the issues raised by the Intervenors have been previously considered and addressed by the Commission and because the Commission’s conclusions regarding these issues are supported by the record. We address each of the Intervenors’ contentions below.

1. The lack of an engineer’s signature on the AC Mitigation Plan is a critical public safety issue.

The Intervenors’ arguments regarding AC Mitigation were already addressed in the Final Order. Our conclusions on those arguments can be found in the Liability Order, and the support for those conclusions is found in the Byrd Report.<sup>27</sup> The record demonstrates that the AC Mitigation system was tested and inspected by an independent expert who determined that the system was properly designed and installed and was functioning properly.<sup>28</sup> Thus, our finding that Vermont Gas complied with the 2013 Final Order and CPG by installing an adequate corrosion protection system that includes an AC Mitigation system is amply supported by the record.

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<sup>25</sup> *In re B.K.*, 2017 VT 105, ¶ 13, 206 Vt. 110, 115, 179 A.3d 758, 762 (2017) (“While the trial court has broad power under Rule 59(e) to reconsider issues previously presented, the rule does not contemplate reopening the evidence or creating a new record.”).

<sup>26</sup> *Everbank v. Marini*, 2015 VT 131, ¶ 34, 200 Vt. 490, 134 A.3d 189 (2015); *see also* 11 C. Wright, Miller & Kane, *Federal Practice and Procedure* § 2810.1 (3d ed.) (2022 Update) (“The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.”).

<sup>27</sup> Liability Order at 42-43; Byrd Report of 1/8/20 at 25-26.

<sup>28</sup> *Id.*

The Intervenors also assert that as a matter of law we must conclude that the AC Mitigation specifications should have been signed by a professional engineer. This argument rests on the Intervenors' factual assertion that the AC Mitigation plan is the product of electrical engineering. However, the record does not support that factual assertion. The Intervenors previously made this argument. However, we concluded that we could not find that the failure to have a Vermont-licensed engineer sign the AC Mitigation construction plans was a violation of the CPG or Order because conflicting record evidence did not support a finding that the AC Mitigation plan was subject to that requirement.<sup>29</sup>

The Intervenors also argue that the corrosion protection consultant who designed the system did not sign the specifications for the AC Mitigation system, rendering it a critical public safety concern. In our Final Order we disagreed with the Intervenors and stated that:

While we take seriously a violation of Vermont's engineering licensing requirements, absent evidence that an individual violation created an actual risk to public health and safety, we are unprepared to conclude that any violation, no matter how uncertain, in and of itself always creates such a risk.<sup>30</sup>

There is substantial evidence that the AC Mitigation system for the pipeline was properly designed and is effectively functioning as approved in the CPG. Therefore, there is no basis to alter our finding that the system is providing its intended safety benefits, even if the AC Mitigation plan was not signed.

2. The Intervenors were not on notice that the proceeding would address the actual safety of the pipeline because in the Liability Order the hearing officer stated that the proceeding would only address the potential for harm under the Section 248 criteria, not whether the pipeline was safe.

The Intervenors' reliance on the hearing officer's discussion of potential harm on pages 10-12 of the Liability Order is misplaced. The hearing officer addressed potential harm in his discussion of the legal standard for a substantial change as defined in Commission Rule 5.408.<sup>31</sup> The discussion did not narrow the overall scope of the investigation or otherwise limit the notice the Intervenors had been provided several times during the almost six-year investigation.

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<sup>29</sup> *Id.* at 10 (citing the Byrd Report at 63 (concluding that corrosion engineering was not an engineering specialty recognized in Vermont); and Liebert pf. 7/31/20 at 1-2 (an electrical engineer should have signed the construction plans)).

<sup>30</sup> Final Order at 9-10.

<sup>31</sup> A substantial change is defined as one "that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a)."

As we discussed in the Final Order on pages 19-22, the Intervenor's argument regarding notice "is at odds with significant elements of the extensive record in this case." Because of our paramount concern with the safety of the pipeline, notice was provided that the investigation would assess whether remedial measures were needed to address any actual harm.<sup>32</sup> We found that sufficient evidence was produced during this investigation to conclude that the pipeline was safe. We remain unpersuaded by the Intervenor's argument that they were not on notice of this element of the investigation. Rather, the Intervenor's were active participants in establishing the scope of the investigation, which was broadened twice to address allegations made by the Intervenor's. Finally, any suggestion by the Intervenor's that their due process rights were hindered by our decision to examine amendments to the CPG as part of a compliance phase in this case, rather than requiring Vermont Gas to initiate an entirely new case for that purpose, is refuted not only by the process we adopted, but by the Intervenor's ongoing participation in that process.<sup>33</sup>

3. ANR counsel's letter of June 19, 2017, summarizing ANR's position on the environmental impact of Vermont Gas's failure to properly bury the pipeline in the New Haven swamp did not address the sink-in-the-swamp burial method.

We disagree with the Intervenor's characterization of the ANR letter and overrule their objection to our reliance on its contents in finding that use of the sink-in-the-swamp burial method did not result in undue environmental harm. The letter was written by ANR's counsel in response to Vermont Gas's original filing that sought a non-substantial change determination from the Commission. The letter does address the burial method stating: "[t]he pipeline burial method described in the filing does not raise any significant concerns with regard to impacts to the natural environment."<sup>34</sup> The Intervenor's do not provide any basis to challenge our use of the

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<sup>32</sup> See also Final Order at 21, n. 57. As we noted in the Final Order, by statute a penalty investigation includes an analysis of both potential and actual harms related to, among other things, public safety. See 30 V.S.A. § 30(c)(1) ("In determining the amount of a fine under subsection (a) of this section, the Commission may consider any of the following factors: (1) the extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers.").

<sup>33</sup> See Case Nos. 17-3550-INV and 18-0395-PET, Orders of 4/5/18 and 1/10/19. The process of reviewing Vermont Gas's proposed amendments to the CPG is underway now as part of the compliance phase in this case and the Intervenor's are active participants in that review. See, e.g., the Intervenor's Response to Compliance Filing of 5/24/23.

<sup>34</sup> Letter from Donald J. Einhorn, Esq., ANR, to Judith C. Whitney, Clerk of the Commission date June 19, 2017.

letter's contents to support a supplemental finding in this proceeding.<sup>35</sup> Further, the contents of the letter are consistent with other record evidence that also supports the contested finding.<sup>36</sup> Therefore, we overrule the Intervenor's objection.

4. Several supplemental findings in the Final Order do not accurately reflect the record.<sup>37</sup>

We agree with both Vermont Gas and the Department that the record amply supports the Commission's supplemental findings and conclusions, and the Final Order does not require revision. The Intervenor has not demonstrated that the findings they contest are not supported by credible record evidence. Rather, it appears that they prefer the Commission to have relied on other evidence to make different findings. Their disagreement with the Commission's evaluation of the evidence does not demonstrate any mistake or inadvertence on the part of the Commission. We therefore overrule the Intervenor's objections to the supplemental findings in the Final Order.

## **VI. CONCLUSION**

For the reasons discussed above, the arguments made by the Intervenor do not demonstrate any mistake or inadvertence on the part of the Commission in the Final Order. Therefore, the Reconsideration Motion is denied.

**SO ORDERED.**

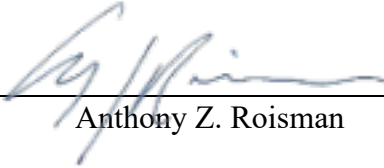
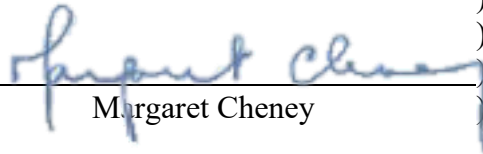
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<sup>35</sup> The Intervenor made no objection to the admissibility of this letter when it was filed in 2017, but only raise their objection now. After this letter was filed ANR remained a party and has not challenged the letter's contents or our reliance on it in issuing a supplemental finding.

<sup>36</sup> See, e.g., Byrd Report at 70 (VGS conducted its construction activities in the Clay Plains Swamp "with proper regard for environmental protection and public safety"); exh. VGS-JAN-3 at 3 (concluding that the pipeline corridor had been restored to pre-construction conditions).

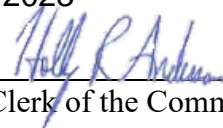
<sup>37</sup> Reconsideration Motion at 16-18.

Dated at Montpelier, Vermont, this 30th day of June, 2023.

	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	COMMISSION
	)	
	)	OF VERMONT
	)	
Margaret Cheney	)	

OFFICE OF THE CLERK

Filed: June 30, 2023

Attest:   
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))*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.*

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

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