

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition Pursuant to 30 V.S.A. §§ 208 & 209)
regarding the operation of the substantially)
changed Addison Natural Gas Pipeline without)
either a Certificate of Public Good or a waiver)
pursuant to 30 V.S.A. § 248(k))

PETITION PURSUANT TO 30 VSA §§ 208, 209

Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, Rachel Smolker, Ph.D., and Jeffrey Everest (“Petitioners”) hereby complain pursuant to 30 V.S.A. §§ 208 and 209 that Vermont Gas Systems, Inc., is violating § 248(a), (b) and (k). Vermont law requires that all natural gas pipelines be authorized by a Certificate of Public Good (CPG) prior to construction and operation—unless the Commission grants the operator a temporary waiver under § 248(k) based upon proof that satisfies specific statutory criteria. VGS obtained a CPG in 2013 for the Addison Natural Gas Pipeline (ANGP) but later substantially changed the project. VGS was granted an amended CPG for the substantially changed ANGP by this Commission in 2023. On April 12, 2024, the Supreme Court of Vermont overturned the Commission’s amended CPG and vacated the Commission’s findings. Since the Supreme Court ruling, Vermont Gas Systems (VGS) has continued to operate the substantially changed, permit-less ANGP—and has refused to seek a waiver under § 248(k).

Petitioners seek, pursuant to Commission Rules 2.206, 2.406, 5.5401-5.404, and 5.413, a permanent injunction compelling Vermont Gas Systems to either: *a)* apply for and obtain a temporary waiver pursuant to § 248(k) of the requirement that it hold a Certificate of Public Good (CPG) to operate the substantially changed version of the Addison Natural Gas Pipeline

(ANGP) while VGS applies for a new CPG; or *b*) cease operation of the substantially changed ANGP unless and until it obtains a new CPG.

ALLEGATIONS PURSUANT TO RULES 2.202(B)(1), 2.202(b)(3) & 2.206(K)

1. In December 2012, VGS petitioned for a CPG under 30 V.S.A. § 248(a) and (b) to construct a natural gas pipeline from Williston to Middlebury, the Addison Natural Gas Pipeline (ANGP). The petition was assigned Docket No. 7970.
2. In December 2013, the Commission found that the construction and operation of the project would promote the general good under § 248(a) and satisfied the criteria of § 248(b), and issued a CPG to VGS.
3. The ruling relied upon numerous findings about how the pipeline would be constructed and also how it would be operated after construction was complete.
4. The findings about operation included findings on post-construction safety procedures that would be in effect throughout the life of the pipeline (see, e.g., findings 262, 272, 274, 276, 277, and 278).
5. One of the Commission's key conclusions was the following:

The evidence in this proceeding persuasively demonstrates that public health and safety will not be adversely affected by the design, construction and **operation** of the Project. Vermont Gas has designed and **will construct and operate** the Project in a manner which meets or exceeds all applicable state and federal codes and standards.

Final Order, Petition of Vt. Gas Systems, Inc., Docket No. 7970 (Vt.P.S.B. Dec. 23, 2013 at 64 (emphasis added)).

6. Ms. Lyons, Ms. Palmer and Mr. Palmer were parties in Docket No. 7970.

7. Mr. Palmer and Ms. Palmer reside less than 300 feet of the pipeline, and therefore they reside within the zone of catastrophic danger in the event of a pipeline leak and explosion during operation. Docket No. 7970, Finding of Fact 120. (“The impact radius, or the area subject to catastrophic harm to both property and person, caused by a catastrophic breach of the transmission pipeline as designed by VGS is approximately 320 feet.”)
8. Mr. and Ms. Palmer’s lives and their property are at risk of catastrophic harm during operation of the pipeline.
9. During construction of the ANGP, a blasting accident within the VGS easement, adjacent to Ms. Lyons’ land, caused her to suffer substantial property damage.
10. If Ms. Lyons or a family member had been using the affected part of her property at the time of the construction accident, she or they could have been severely wounded or killed.
11. Ms. Lyons filed a complaint with the Commission, alleging that the blasting accident resulted from VGS’s violation of its CPG. This was Docket No. 17-4630-INV.
12. The Commission agreed with Ms. Lyons and imposed penalties on VGS, by order dated July 31, 2020.
13. The danger to Ms. Lyons, her family and her property from a pipeline leak and explosion during operation is greater than the harm she has already suffered.
14. Ms. Lyons’ life and her property, too, are at risk of catastrophic danger in the event of a pipeline leak and explosion during operation.

15. Dr. Smolker and Mr. Shelton routinely travel over or alongside the portions of the VELCO ROW and through the residential parts of Hinesburg and St. George, where the pipeline has been buried.
16. Dr. Smolker's and Mr. Shelton's personal safety and the safety of their families are directly affected by whether Vermont Gas Systems, Inc., has complied with the safety commitments the company made to the Commission.
17. Mr. Shelton, Dr. Smolker, Ms. Lyons, Ms. Palmer and Mr. Palmer enjoy and benefit from the streams and wetlands in Chittenden and Addison counties.
18. Mr. Shelton is the member of the public who first learned of and photographed the "sink in swamp" method being employed in the Red Maple Green Ash wetlands in New Haven, in September of 2016 (nine months before the company filed a nonsubstantial change request).
19. Ms. Lyons, Mr. Palmer and Ms. Palmer, Dr. Smolker and Mr. Shelton were granted intervenor status in Case No. 17-3550-INV.
20. Ms. Lyons, Mr. Palmer and Ms. Palmer, Dr. Smolker and Mr. Shelton were the successful appellants before the Supreme Court, obtaining a ruling that their rights had been violated by the Commission's ruling Docket No. 17-3550-INV.
21. The final route for the ANGP, approved of by the Commission, crossed the lands of Mr. Everest in New Haven.
22. The VELCO right-of-way also crosses Mr. Everest's land.
23. Mr. Everest and his family use this land for recreation, including hunting.
24. The 2013 CPG required that the ANGP be buried at least 4 feet deep within the VELCO right-of-way, including Mr. Everest's land, to protect public safety.

25. Mr. Everest executed an easement deed to VGS to allow the pipeline. This is Exhibit A.
26. The Everest Easement Deed stated that the pipeline would be buried at least 36 inches deep on Mr. Everest's land.
27. The pipeline was constructed on Mr. Everest's land.
28. Unknown to Mr. Everest, the ANGP was constructed less than 36 inches deep, in violation of both the CPG and the terms of the easement deed.
29. Mr. Everest and his family's use of the land occurs within the zone of catastrophic danger in the event of a leak and explosion during operation.
30. Mr. Everest's life and property, too, are at risk of catastrophic danger in the event of a pipeline leak and explosion during operation.
31. Five substantial changes occurred during the construction process:
 - a. In New Haven, including land that is owned by Mr. Everest or is adjacent to his land, VGS employed a burial method (the sink-in-swamp method) that substantially differed from the two authorized methods (the trench method and the horizontal directional drilling method).
 - b. In New Haven, VGS failed to bury the pipeline at least four feet deep as required by the CPG at 18 locations in the VELCO right-of-way, including on Mr. Everest's land or adjacent to Mr. Everest's land; in some locations the ANGP is less than three feet deep and in others it is less than two and a half feet deep.

- c. VGS failed to comply with pipeline safety specifications required by the CPG regarding pipeline burial on the trench floor, in numerous locations, including laying the pipe directly on the trench bottom without bedding.
 - d. VGS failed to comply with specifications in the CPG regarding the installation of trench breakers and soil compaction in numerous locations.
 - e. No responsible charge engineer approved of the construction plans before construction and supervised implementation of those plans.
32. Despite these changes, and without informing the Commission of the changes, VGS gassed the pipeline up, making the project operational in April of 2017.
33. In June of 2017, two months after it had commenced operation, VGS reported to the Commission that it had failed to bury the pipeline to the required four-foot depth in 18 locations along the VELCO right-of-way and asked that the Commission rule that this change was not substantial.
34. Ms. Lyons, Ms. Palmer, Ms. Palmer, Mr. Shelton and Dr. Smolker moved to intervene because of the particularized harms they alleged that they were exposed to from the substantially changed ANGP. They were granted intervenor status.
35. The Commission responded by ordering an investigation to determine whether VGS violated the Final Order in Docket No. 7970 and if the changes made were substantial.
36. After the evidentiary hearings had concluded, the parties submitted briefing. VGS denied that there had been any substantial changes.
37. Intervenors Lyons, Palmer, Sheldon and Smolker argued and submitted evidence that there had been substantial changes.

38. Intervenors Lyons, Palmer, Sheldon and Smolker also requested that the Commission order VGS to apply for a temporary waiver under § 248(k) while it applies for an amended CPG to address the substantial changes. Intervenors' Corrected Proposed Findings of Fact and Conclusions of Law re: Load-Bearing in VELCO Right-of-Way and Remedies, January 10, 2022, pp. 21-22.
39. The Hearing Officer issued a Proposal for Decision that found five substantial changes and proposed an order that VGS apply for an amended permit.
40. The Hearing Officer rejected Intervenors' request for an order requiring VGS to apply for a temporary waiver while VGS applied for an amended CPG.
41. On April 6th, 2023, the Commission issued a final order finding that there had been five substantial changes and determining that VGS needed to amend the CPG for these changes to be lawful—and then found that the § 248 criteria had been satisfied and granted VGS the amended CPG that it needed.
42. The Commission never addressed whether VGS needed a § 248(k) waiver while VGS was applying for an amended permit. There was no reason for the Commission to address whether a 248(k) waiver was needed while VGS applied for an amended CPG—because the Commission granted VGS the amended CPG.
43. As a result, there was no ruling under § 248)(k) that Intervenors could have appealed.
44. Intervenors appealed the grant of the amended CPG. The Supreme Court of Vermont reversed in part, by ruling issued April 12, 2024. The Court concluded that the Commission had acted unlawfully in issuing an amended CPG for the five substantial changes without notice to the public under then-Rule 5.408 (now Rule 5.402) and

- without notice to Intervenors, vacated all the Commission’s findings about the changes, and remanded this matter to the Commission.
45. On May 6, 2024, VGS’s counsel emailed counsel for Petitioners and asked to meet to discuss the Supreme Court decision and “what’s next for the parties in that case.”
46. Petitioners’ counsel agreed to meet.
47. On May 9, 2024, Petitioners’ counsel met with VGS’s counsel over the internet.
48. During the meeting, VGS’s counsel stated that VGS would file a petition for an amended CPG, and asked whether Petitioners would agree to use of the preexisting record in the new proceeding.
49. Petitioners’ counsel stated that Petitioners agree to incorporate the existing record into the new proceeding.
50. Petitioners’ counsel asked VGS’s counsel whether VGS will apply for a temporary waiver pursuant to § 248(k).
51. VGS’s counsel responded that VGS will not file an application for a waiver under § 248(k).
52. VGS’s counsel articulated two reasons for this position. First, VGS believes that it already possesses a CPG for the ANGP and that the lack of an amended CPG for the substantially changed ANGP differs from lacking a CPG; second, VGS believes that it needs a CPG only for construction, not for operation.¹

¹ VGS’s counsel later filed a memorandum with the Commission stating that the Intervenors cannot raise § 248(k) for a different reason. VGS claims that the Commission already rejected the § 248(k) argument, and the Intervenors did not appeal that ruling. This is incorrect. The Commission never addressed § 248(k). It had no reason to do so. As explained above, the Commission granted VGS an amended CPG, so the § 248(k) waiver issue had become moot.

53. On May 28, 2024, VGS filed a motion seeking a status conference.
54. On June 11, 2024, Intervenor filed a response to VGS's motion, stating that they supported the request for a status conference, and that they intended to file a motion for an injunction compelling VGS to either apply for a waiver under § 248(k) or cease operating the ANGP.
55. The Commission issued a ruling on June 25, 2024, stating that when VGS pays the penalties already assessed, that docket number "will be closed" and all proceedings from that time onward would require a new filing and a new docket number.
56. On July 1, 2024, Intervenor filed a motion for injunction in Docket No. 17-3550-INV.
57. On July 2, 2024, VGS informed the Commission and the parties that it had already paid the penalties.
58. On July 3, 2024, the Commission issued a ruling closing Docket No. 17-3550-INV and rejecting Intervenor's July 1, 2024, Motion for Injunction in Docket No. 17-3550-INV on the grounds that that docket had been closed.
59. The order states that Intervenor had improperly filed the motion in the closed case, contrary to the June 25, 2024, order.
60. The order instructed Intervenor to file a petition, initiating a new docket.
61. This filing does so.
62. On July 17, 2024, Petitioner's counsel sent an email to the Department of Public Service to inquire whether the Department would bring an enforcement action, to obtain the relief sought in the July 1, 2024, motion.

63. On July 23, 2024, the Department replied. The Department's reply is attached to this Complaint as Exhibit B. In brief, the Department's position is that it will not seek enforcement because the investigation conducted in Docket 17-3550-INV had demonstrated that the substantially changed ANGP is safe.
64. The demonstration of safety relied upon by the Department consists of the evidence submitted by William Byrd and by VGS's experts in Docket No. 17-3550-INV.
65. The Supreme Court ruled that the Commission's findings of fact, based on Mr. Byrd's report and the testimony of VGS's engineers, had been reached without lawful notice to Intervenors and without lawful notice to affected landowners and municipalities. The Supreme Court vacated the findings and reversed the conclusions of law.
66. The Commission found that no responsible charge engineer approved of the Issued for Construction plans for the ANGP and then supervised all of the changes from those plans, as required by Vermont statutes governing licensed engineers. VGS did not appeal that finding.
67. The purpose of the statute that requires approval and supervision by a responsible charge engineer is protection of public safety.
68. The Department believes that the substantially changed ANGP is safe, but: a) it is undisputed that the legally required safety supervision by a licensed professional engineer did not occur; b) the Supreme Court held that no intervenor, affected municipality, or affected landowner has yet had the opportunity to address whether the substantially changed ANGP satisfies the § 248 criteria, including safety; and c)

- no lawful proceeding has determined that the substantially changed ANGP satisfies the § 248 criteria, including safety.
69. The Department’s response does not address criteria other than safety, such as impact on wetlands.
70. The Department’s response that the pipeline is safe also does not address whether it is lawful for VGS to operate the substantially changed ANGP without a CPG for the substantially changed version or a temporary waiver pursuant to § 248(k).
71. The relief requested would protect, or would provide the opportunity to protect, the interests and rights of Ms. Lyons, Mr. Palmer, Ms. Palmer, Dr. Smolker, Mr. Shelton and Mr. Everest, while VGS applies for a new CPG.
72. An affidavit is attached that supports the above allegations.

APPLICABLE LAW PURSUANT TO RULE 2.202(B2)

73. Rule 5.413 and the Substantial Change Doctrine

Commission Rule 5.413, effective March 1, 2024, states that when there has been a substantial change to an approved project and the project has been commissioned, the utility must apply for a new permit rather than an amended permit. The utility must follow all the notice requirements pertaining to a new permit.²

A substantial change makes the changed project unauthorized under the original permit. An unauthorized project remains unauthorized until it files an application for an amended permit and obtains that permit after undergoing the permit review process. “If a substantial change has

² “Commissioned” means that a vessel has been made ready for active service (“commissioned,” Merriam-Webster.com); in this context, it means that the pipeline has been made ready for active service.

occurred, without an amended CPG the permittee would not be authorized to proceed with the modified project, regardless of whether the original CPG were on appeal.” Re: Vermont Electric Power Company, Inc., Docket 6860, Order 9/23/05 at 20, n.28.

74. 30 V.S.A. § 248(k)

In 1994 and 2004, the legislature added and then amended subsection (k). It explicitly applies to natural gas facilities.³ It authorizes the Commission to waive, for a specified and limited time, the prohibitions in § 248 against site preparation or construction when necessary to assure the stability or reliability of a natural gas facility pending full review of an application for a CPG. A waiver can be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the Board deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b) (5) and (8) of this section; and

(D) taking into account any terms, conditions, and safeguards that the Board may require, the waiver will promote the general good of the State.

Although subsection (k) refers to site preparation or construction, it would be incongruous to interpret § 248(k) as applying only to the construction phase of jurisdictional facilities. Section 248, of which subsection (k) is a subsection, uses nearly identical language (“begin site preparation or commence construction”) and requires a CPG for both construction

³ The version adopted in 1994 did not include natural gas facilities. Public Act 82 of the Laws of 2004 amended the statute to include natural gas facilities.

and operation.⁴ Act 250, upon which the Commission based its substantial change doctrine, uses language that similarly seems to be limited to construction, not operation (“construction of improvements”) but Act 250 clearly requires a permit for the land **use** changes, regardless of whether there is new construction. Citizens Utilities Co., Docket No. 5841, 5859, Opinion at 224 (6/16/97) (adopting Act 250 substantial change test); In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A, 2015 VT 41 ¶ 25, 198 Vt. 510, 117 A.3d 457 (a substantial change or a material change is triggered by either a physical alteration or change in use).

If subsection (k) applied only to site preparation or construction, any utility could unlawfully complete site preparation and construction of a substantially changed gas facility (as VGS did) and the Commission would then be powerless to impose conditions on subsequent operation while a permit application is pending, regardless of the public safety risk or the emission of greenhouse gasses.

⁴Section 248(b) provides that the Commission must find that the project will comply with criteria that pertain to how a natural gas pipeline operates after it has been constructed, such as emission of greenhouse gasses and public safety. Thus, the Commission routinely considers pipeline operation when deciding whether to issue a CPG. *See, e.g.,* Petition of Vermont Gas Systems, Inc., under 30 V.S.A. Section 248, for a certificate of public good authorizing the acquisition of a 9.9-mile natural gas transmission corridor in Highgate and Swanton, Vermont, and the construction of a 3.1-mile pipeline therein from Beebe Road to Frontage Road in Swanton and Highgate, Docket No. 5772 (Vt. P.S.B., June 12, 1995) findings 19 (use of gas will be less polluting than use of other fuels), 38-53 (use of the natural gas will assist economic development), 54-75 (gas will serve future demand), 96 (gas will provide an economic benefit to the state), 101 (leakage of gas will be subject to the company’s leakage standards), 107 (neither construction nor operation will cause discharges into headwaters), 111 (water discharged after use for hydrostatic testing will be acceptable), 112 (operation will not use water), 121 (maintenance of the pipeline will not harm local traffic) and 188 (neither construction period nor temporary access later will harm farmers). As set forth above, in Docket No. 7970 the Commission based its issuance of a CPG in this case on its assessment of how the pipeline would be operated, not just how it would be constructed.

Decisions by the Commission have routinely applied § 248(k) to temporarily waive the CPG requirement in order to allow **operation** of a project that lacks a CPG. For example, in Petition of Green Mountain Power Corporation for a waiver, pursuant to 30 V.S.A. § 248(k), for the emergency installation of a 5/7 MVA transformer at the Castleton Substation in Castleton, Vermont, Case No. 20-2252-PET, Order issued 9/17/20, the Commission granted Green Mountain Power's request under subsection (k) to construct and use a transformer. "On August 13, 2020, Green Mountain Power Corporation ("GMP") filed a petition with the Vermont Public Utility Commission ("Commission") for a waiver, pursuant to 30 V.S.A. § 248(k), to allow for the emergency installation **and use** of a 5/7 MVA transformer in GMP's Castleton Substation in Castleton, Vermont." Id. at 1 (emphasis added). Similarly, in Petition of Town of Stowe Electric Department for a waiver, pursuant to 30 V.S.A. s 248(k), authorizing emergency replacement of two transformers at its Houston Substation, Docket No 8386, Order entered 12/12/14, the Board granted authority to construct two transformers and limited their **use** to a 12-month period. "This waiver shall last for 12 months from the date of this Order, unless otherwise extended by the Board for the purpose of completing its examination of SED's request for approval pursuant to 30 V.S.A. § 248 as provided for in paragraph 2, above." Id. at 5. In Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a waiver pursuant to 30 V.S.A. § 248(k) concerning the emergency installation of a new transformer at its nuclear power plant located in Vernon, Vermont, Docket No. 6757, Order entered 9/25/02, the Board granted a waiver for a new transformer. The existing transformer, which provided the main connection between the generating station and the electric grid, was operating poorly on a day-to-day basis. The sole purpose of the waiver was to allow a new transformer to be used to connect with the grid. Because the new transformer had the capacity to increase the station's output, an amended

CPG was needed, but Entergy and the Board agreed that it was prudent to replace the failing transformer before the uprate petition could be acted upon. The Board imposed a condition that the waiver—and thus the use of the new transformer— would expire upon the completion of the Board’s review of Entergy’s petition for an amended CPG to authorize a power uprate.

CONCLUSION

No one is above the law. Trump v. United States, 603 U.S.--, 144 S.Ct. 2312, 2355 (2024) (dissenting opinion of Justices Sotomayor, Kagan and Jackson). Government “acts constitutionally only when it benefits and protects all people equally.” In re Town Highway 20, 2012 VT 17 ¶ 32, 191 Vt. 231, 45 A.3d 54 (applying Chapter 1, Article 7 of the Vermont Constitution).

Municipalities and affected landowners spent countless hours and dollars participating in detailed scrutiny of this pipeline in 2012 and 2013 because of the hazards the pipeline may introduce to their communities, their lands, and their wetlands, rivers, and streams. These communities and landowners are now hosting a substantially changed pipeline that has yet to be subject to that scrutiny. These municipalities and landowners would be astonished were they informed that a substantially changed pipeline is now coursing through their communities and across their lands, wetlands, rivers, and streams—and that the Commission is allowing this to occur without either an amended CPG or a temporary waiver granted by the Commission with appropriate conditions.

Petitioners ask that the Commission order VGS to either: *a*) apply for and obtain a temporary waiver pursuant to § 248(k) of the requirement that it hold a Certificate of Public Good (CPG) to operate the substantially changed Addison Natural Gas Pipeline while VGS applies for a new

CPG; or *b*) cease operation of the substantially changed ANGP unless and until it obtains a new CPG.

Date: July 31, 2024

JEFFREY EVEREST, KRISTIN LYONS,
JANE PALMER, NATHAN PALMER,
LAWRENCE SHELTON and RACHEL
SMOLKER, PH.D.

By:

/s/ James A. Dumont

James A. Dumont, Esq.

Law Office of James A. Dumont, Esq. PC

15 Main St., PO Box 229

Bristol, VT 05443

(802) 453-7011 office

(802) 349-7342 cell

dumont@gmavt.net

dumont.vt@gmail.com

Assisted by Isabella Nangano

VLGS Class of 2026

Attachments:

Exhibit A – Everest Deed to Vermont Gas Systems, Inc.

Exhibit B - Department of Public Service Response to Petitioners re Injunction

Affidavit of Counsel