

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition Pursuant to 30 V.S.A. §§ 208 & 209)
regarding the operation of the substantially) Docket No.24-2630-PET
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 (Corrected)

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. (VGS), 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.

Petitioners seek, pursuant to Commission Rules 2.206, 2.406, 5.5401-5.404, and 5.413, a permanent injunction compelling 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 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. The Hearing Officer issued a Proposal for Decision that found five substantial changes and proposed an order that VGS apply for an amended permit.
39. 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.
40. The Supreme Court of Vermont reversed in part, by ruling issued April 12, 2024. The Court's decision concluded:

The portion of the decision of the Commission directing VGS to pursue CPG amendments in the investigatory proceeding is reversed and remanded for further proceedings consistent with this opinion.

The Commission's supplemental findings of fact concerning whether the substantial changes actually affected the substantive criteria of 30 V.S.A. § 248 are vacated and remanded for further proceedings consistent with this opinion. In all other respects, the decision of the Commission is affirmed.

41. 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."
42. Petitioners' counsel agreed to meet.
43. On May 9, 2024, Petitioners' counsel met with VGS's counsel over the internet.
44. 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.
45. Petitioners' counsel stated that Petitioners agree to incorporate the existing record into the new proceeding.
46. Petitioners' counsel asked VGS's counsel whether VGS will apply for a temporary waiver pursuant to § 248(k).
47. VGS's counsel responded that VGS will not file an application for a waiver under § 248(k).
48. VGS's counsel's position, articulated most recently on August 7, 2024 by email, is that VGS will not file a § 248(k) application because "it already has a CPG," and that "§ 248(k) only applies where there is a need for emergency construction, and there is no emergency construction needed on the pipeline."
49. On May 28, 2024, VGS filed a motion seeking a status conference.
50. 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.
51. The Commission possessed jurisdiction over issues pertaining to the ANGP, including the issues addressed in the July 3, 2024 ruling because of the Court's remand for "further proceedings consistent with this opinion."
 52. 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.
 53. On July 1, 2024, Intervenors filed a motion for injunction in Docket No. 17-3550-INV.
 54. On July 2, 2024, VGS informed the Commission and the parties that it had already paid the penalties.
 55. Until the July 2, 2024, filing, neither the Commission nor the Intervenors had been informed that the penalties had been paid.
 56. The Commission, as of July 2, 2024, had not issued any order closing Docket No. 17-3550-INV.
 57. On July 3, 2024, the Commission issued a ruling closing Docket No. 17-3550-INV and rejecting Intervenors' July 1, 2024, Motion for Injunction in Docket No. 17-3550-INV on the grounds that that docket had been closed. The order states that Intervenors had improperly filed the motion in the closed case, contrary to the June 25, 2024, order.
 58. The order instructed Intervenors to file a petition, initiating a new docket. This filing does so.

59. Petitioners filed an earlier version of this Petition on July 30, 2024.
60. The July 30, 2024, petition is being withdrawn and is superseded by the present Petition.
61. On July 17, 2024, Petitioners 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.
62. 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.
63. However, the Supreme Court vacated the findings and reversed the conclusions of law regarding the safety of the ANGP. The Commission cannot rely on findings that have been overturned. The Court ruled that: "in its haste to resolve amendments without subjecting the substantial changes to a § 248 proceeding, the Commission found, based on the existing record, that the changes did not actually impact the identified § 248 criteria." In re Vermont Gas Systems, 2024 VT 19, ¶ 53. The Court further stated that "findings are especially problematic because the Commission has itself stated that it cannot determine whether substantial changes actually affect § 248 criteria, or amend a CPG, outside of a § 248 proceeding." *Id.* at ¶ 54.
64. VGS moved for re-argument in the Vermont Supreme Court on this very issue. It argued that "the Court should reconsider vacating the Commission's supplemental findings because no party challenged the Commission's legal authority to resolve factual disputes about whether the violations had an actual impact on safety or other

- Section 30 factors in this appeal.” VGS Motion for Reargument, April 24, 2024, p.3.
- The Supreme Court denied the Motion for re-argument on this issue, and all other issues raised by VGS. Entry Order, May 3, 2024.
65. There is no legitimate dispute that the factual findings underpinning the Department and VGS’s assertions of safety have been struck down. The Supreme Court stated as much *three separate times* in its 2024 opinion. This is the law of case. *See Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶ 30, 208 Vt. 578, 201 A.3d 326 (Courts generally apply the doctrine in two scenarios: “(1) where a case is in front of the trial court on remand for readjudication after appellate review; and (2) where a trial court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court.”) (citation and quotation omitted). Under the law of the case doctrine, the Commission cannot continue to rely on findings that have been reversed and vacated by a higher court in this very same dispute.
66. Meanwhile, 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.
67. The Commission must also address criteria other than safety, such as impact on wetlands.
68. The Department’s and VGS continuing belief that the pipeline is safe is not relevant to the instant analysis. Their belief, based on vacated findings 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).

69. 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.

70. An affidavit is attached that supports the above allegations.

APPLICABLE LAW PURSUANT TO RULE 2.202(B2)

71. 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.¹

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 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.

¹ “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.

72. 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.² 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 and operation.³ Act 250, upon which the Commission based its substantial change doctrine, uses

²The 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.

³Section 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*

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.

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.

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.

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

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. Any prior findings of the pipeline’s current safety were struck down by a unanimous Vermont Supreme Court, which called them “especially problematic.” *In re Vermont Gas Systems*, 2024 VT 19, ¶ 55. The impacted 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: August 12, 2024

JEFFREY EVEREST, KRISTIN LYONS,
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Attachments:

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

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

Affidavit of Counsel