

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 24-2630-PET

Petition pursuant to 30 V.S.A. §§ 208 and 209 for injunctive relief regarding VGS’s operation of the Addison Natural Gas Pipeline	
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RESPONSE OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE

On July 31, 2024, Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, Rachel Smolker, Ph.D., and Jeffrey Everest (“Petitioners”) filed a petition with the Vermont Public Utility Commission (“Commission”) under 30 V.S.A. §§ 208 and 209, asserting that Vermont Gas Systems, Inc. (“VGS”) is violating §§ 248(a), (b), and (k), and seeking a permanent injunction pursuant to Commission Rules 2.206, 2.406, 5.5401-5.404, and 5.413 to compel VGS to obtain a temporary waiver pursuant to § 248(k) to operate the substantially changed Addison Natural Gas Pipeline (“ANGP” or “the pipeline”) or, in the alternative, to compel VGS to cease operation of the ANGP, unless and until it obtains a new Certificate of Public Good (“CPG”). On August 22, 2024, the hearing officer issued an order (“Procedural Order”) raising threshold legal issues and setting a deadline for any dispositive motions in response to the petition on September 23, 2024. The threshold issues identified in the Procedural Order include whether a waiver pursuant to Section 248(k) is legally required for VGS to continue to operate the pipeline while the Commission reviews any request for an amended CPG, why the requirement that VGS file a new Section 248 application is inadequate, and how the Commission should balance potential harm to Petitioners against the potential harm to VGS and its customers if the pipeline ceases to operate. The Department considers these issues below and recommends that the Commission dismiss the petition.

In Case Nos. 17-3550-INV and 18-0395-PET, the Commission issued a final order on April 6, 2023 (the “2023 Final Order”), in which it concluded that VGS committed five substantial-change violations, and one material-deviation violation, of its CPG to operate the ANGP and imposed a \$150,000 penalty. In the 2023 Final Order, the Commission adopted the hearing officer’s proposal for decision (“PFD”) with the exception of the hearing officer’s recommendations for the procedure VGS should follow to amend its CPG. The Commission agreed with the hearing officer that a CPG amendment was needed but determined that the amendment could be addressed within the penalty investigation proceeding by making supplemental findings based on the existing record.¹

On appeal, the Vermont Supreme Court reversed and remanded the Commission’s decision in the 2023 Final Order to allow VGS to pursue CPG amendments within the penalty investigation proceeding, finding that the approach did not satisfy the requirements of Rule 5.408 and § 248.² Because the Court found that the Commission “improperly resolved factual disputes” as to whether the substantial changes to the pipeline impacted § 248 criteria in the penalty investigation that could “only be rendered in a § 248-like proceeding,” the Court also vacated the supplemental findings that the Commission made in the 2023 Final Order.³ The Court affirmed the 2023 Final Order “in all other respects.”⁴ The Commission subsequently issued a “Post-Appeal Order Outlining Next Steps” on June 25, 2024, directing VGS to comply with the Court’s decision by issuing a 45-day notice and a petition in a new case for amendments to the CPG that reflect the unapproved substantial changes to the pipeline.⁵

¹ Case No. 17-3550-INV, 18-0395-PET, Order of 4/6/2023 at 3 (“2023 Final Order”).

² *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶¶ 34, 55-56.

³ *Id.* at ¶¶ 55.

⁴ *Id.* at ¶¶ 56.

⁵ Case Nos. 7970, 17-3550-INV, 17-4909-PET, and 18-0395-PET, Order of 6/25/24 at 3 (“Post-Appeal Order”).

In the instant petition, Petitioners refer to a requirement that ANGP must now apply for a “new CPG,” while also suggesting that VGS lacks authority to continue operating under the original CPG. To clarify, the Court’s reversal only applied to a portion of the 2023 Final Order, specifically the Commission’s “decision to allow VGS to amend its CPG without first submitting a § 248 petition.”⁶ As a result of the appeal and the Commission’s Post-Appeal Order, VGS must apply to amend its existing CPG by filing a § 248 petition in a new case, but nothing about the Court’s decision provides that VGS must obtain a “new CPG.”⁷ Further, neither the Court nor the Commission revoked or otherwise restricted VGS’s ability to continue operating the pipeline under its existing CPG while it seeks amendments in a manner consistent with the Court’s decision, and the Department is not aware of any authority establishing such a requirement.

As detailed below, there is no legal basis for requiring VGS to obtain temporary authorization to continue operating the as-built ANGP pending the Commission’s review of its application to amend the CPG, nor any basis for the extreme measure of requiring VGS to cease operation of the ANGP. The Department consequently recommends that the petition be dismissed.

Section 248(k) Waiver

The Department maintains that VGS is not legally required to obtain a Section 248(k) waiver in order to operate the ANGP while the Commission reviews any request VGS submits for CPG amendments. Section 248(k) allows the Commission to temporarily waive the prohibitions in Section 248 against “site preparation for or construction of an electric transmission facility, a generation facility, or an energy storage facility as necessary to ensure the stability and reliability

⁶ *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶ 34.

⁷ The Court addressed the issue with Petitioner’s phrasing in the context of the Commission’s decision in the 2023 Final Order, explaining that the “record establishes that the Commission sought to amend the existing CPG, not award a new CPG.” *Id.* ¶ 34, n. 5.

of the electric system or a natural gas facility, pending full review under this section.”⁸ A waiver is only appropriate if the statutory criteria listed in §248(k)(4) are met, including the requirement that “good cause exists because an emergency situation has occurred.”⁹ In this matter, however, there is no emergency and no need for site preparation or construction.

The Commission established the absence of emergency circumstances in the 2023 Final Order when it adopted the hearing officer’s findings from the PFD that the pipeline is safe.¹⁰ The hearing officer reached that conclusion based on the extensive evidentiary record developed in the penalty investigation proceeding on the issue of safety, including a report by the Commission’s independent expert that was subject to discovery and cross-examination by the parties.¹¹ There is no good cause to require VGS to seek the emergency authorization that a Section 248(k) waiver would provide in order to continue operating the pipeline pending the Commission’s review of its CPG amendments because there is no emergency. While the ANGP “does not achieve the extra margin of safety called for in the 2013 Final Order, the pipeline meets minimum federal standards, is safe, and was adequately constructed.”¹²

The Section 248(k) argument that Petitioners advance in this docket is the same one that the hearing officer addressed in the PFD with the conclusion that “there is no emergency prompting the use of Section 248(k).”¹³ The hearing officer recommended that the Commission not require VGS to obtain a waiver,¹⁴ and the Commission adopted that recommendation when it adopted the

⁸ 30 V.S.A. § 248(k)(1).

⁹ 30 V.S.A. § 248(k)(4)(A).

¹⁰ *E.g.* 2023 Final Order at 2 (“Having reviewed the evidentiary record for this case, the hearing officer’s proposal for decision (including the Liability Order), and the parties’ written briefs and proposed findings, we adopt the hearing officer’s recommendations with respect to the first two questions and find that, while the pipeline as constructed is safe, Vermont Gas violated its CPG and must pay a penalty”).

¹¹ *Id.* at 4, 20.

¹² *Id.* at 45 (PFD page 20).

¹³ *Id.* at 45 (PFD page 20).

¹⁴ *Id.* at 46 (PFD page 21).

PFD in the 2023 Final Order. The Commission additionally considered, and declined to adopt, the Intervenor's request for a modification to the PFD that removes the conclusion that the pipeline is safe in the 2023 Final Order.¹⁵ Petitioners appear to be advancing the same Section 248(k) argument in the instant petition on the grounds that the Vermont Supreme Court vacated all findings as to the pipeline's safety in its remand order.

Petitioners allege that the "Supreme Court vacated the findings and reversed the conclusions of law regarding the safety of the ANGP" to the degree that "any prior findings of the pipeline's current safety were struck down."¹⁶ Such arguments misrepresent the Vermont Supreme Court's holding, which vacated "the Commission's supplemental findings of fact concerning whether the substantial changes actually affected the substantive criteria of 30 V.S.A. § 248."¹⁷ In the appeal, the Court found that the Commission had improperly construed Commission Rule 5.408 and the requirements of Section 248 by allowing VGS to amend its CPG within the penalty investigation, and it reversed only that portion of the 2023 Final Order.¹⁸ The Court then explicitly tied the vacatur order to its decision to reverse the Commission's review of VGS's CPG amendments in the investigation proceeding.¹⁹ The Court did not vacate all findings related to the safety of the ANGP, as Petitioners assert. It specifically vacated the supplemental findings - the findings the Commission made in order to support of the portion of the 2023 Final Order that the Court reversed.²⁰ The findings that the hearing officer made in the PFD as to the pipeline's safety,

¹⁵ *Id.* at 11.

¹⁶ Petition at 9, 15.

¹⁷ *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶ 56.

¹⁸ *Id.* at ¶¶ 34, 56.

¹⁹ *Id.* at ¶¶ 34, n.7 ("Because we determine that the Commission improperly interpreted Rule 5.408 to proceed with amending VGS's CPG under the instant circumstances, and because the Commission's supplemental findings were made pursuant to that erroneous interpretation, those supplemental findings must also fall.")

²⁰ *Id.*; *Id.* at ¶ 56 ("[W]e vacate the Commission's supplemental findings that VGS's unauthorized substantial changes did not actually impact the implicated § 248 criteria").

which the Commission adopted in the context of the penalty investigation,²¹ were not part of the supplemental findings and would not have been disturbed.

While it is the Department's position that the Court did not vacate the findings regarding pipeline safety that the Commission adopted when it adopted the PFD in the 2023 Final Order, the scope of the vacatur is not an issue that needs to be resolved in this docket. Regardless of the extent of the vacatur, even without any of the Commission's findings, the evidentiary record from which the Commission made them would remain. That record is sufficient to establish the absence of emergency circumstances that would be necessary to justify a requirement that VGS obtain a Section 248(k) waiver for the operation of the as-built ANGP.

An additional reason that a Section 248(k) waiver is not appropriate in this context is that there is no "site preparation or construction" as specified in the statutory language. The pipeline is already built and operational, and the substantial change determinations made by the Commission do not require reconstruction of the ANGP.²² Petitioners do not appear to dispute this finding, instead arguing that the language of Section 248(k) should be understood to include a project's operation. The distinction Petitioners seek to make here is not clear, however, as each of the Section 248(k) cases they cite in support of their position involve emergency circumstances causing a need to reconstruct a significant element of a facility, such as the replacement of transformers, in a manner that would take the facility out of compliance with its CPG.²³ Unlike in

²¹ See e.g. 2023 Final Order at 2 ("We agree with the hearing officer that the record in this case supports the conclusion that the pipeline is, in fact, safe").

²² 2023 Final Order at 45 (PFD page 20) ("While an amended CPG is needed to reflect the substantial changes already made by Vermont Gas and the remedial measures recommended by the experts, none of the substantial change determinations calls for reconstruction of any elements of the pipeline").

²³ *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 of 9/17/2020 at 6-7; *Petition of Town of Stowe Electric Department for a waiver, pursuant to 30 V.S.A. §*

those cases, where a waiver was “necessary to provide adequate and efficient service,”²⁴ the as-built pipeline is safe and adequately constructed, with no need to undertake the replacement of significant equipment on an emergency basis in order to provide service to customers.

In the absence of emergency circumstances, of an imminent public safety concern or need for reconstruction, there is no basis for requiring temporary emergency authorization for VGS to continue operating the as-built ANGP under its existing CPG pending the Commission’s review of the Section 248 petition VGS will file for its CPG amendments. The Department maintains that review of VGS’s unapproved substantial changes to the ANGP should proceed in accordance with the process set out by the Vermont Supreme Court, which the Commission ordered VGS to follow in its Post-Appeal Order of June 25, 2024.

Alternative Relief

The Petitioners alternatively request that the Commission issue an injunction ceasing operation of the ANGP pipeline unless and until VGS obtains an amended CPG. According to the Vermont Supreme Court, “an injunction is an extraordinary remedy, the right to which must be clear.”²⁵ To determine whether an injunction is appropriate, the Vermont Supreme Court has directed courts to perform a balancing test: “the court must weigh the relative hardships on the parties, looking at ‘the relative convenience or inconvenience, the relative injury sought to be cured as compared with the hardship of injunctive relief.’”²⁶ The Court has further stated that “[e]ven

248(k), authorizing emergency replacement of two transformers at its Houston Substation, Docket No. 8386, Order of 12/12/2014 at 5; 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 of 9/25/2002 at 7 – 8.

²⁴ Case No. 20-2252-PET, Order of 9/17/2020 at 8; Docket No. 8386, Order of 12/12/2014 at 5; Docket No. 6757, Order of 9/25/2002 at 8.

²⁵ *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000).

²⁶ *Id.*, citing *Fenwick v. City of Burlington*, 167 Vt. 425, 431 (1997) (quoting *Thompson v. Smith*, 119 Vt. 488, 509 (1957)).

where the right to an injunction is otherwise clear, it may be more appropriate to award damages than to issue a mandatory injunction.”²⁷

The Commission applies a four-part test when considering whether to issue an injunction:

- “(1) the likelihood of success upon the merits;
- (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted;
- (3) whether the issuance of an injunction will substantially harm other parties; and
- (4) the location of the best interests of the public.”²⁸

Commission Rule 2.406(D)(2)²⁹ states that, “[n]o preliminary injunction may issue unless the petitioner establishes that the irreparable injury that will be caused to the petitioner if a preliminary injunction is denied... will be greater than any injury that the granting of the preliminary injunction will cause to the respondent.”³⁰

As the hearing officer points out in the Procedural Order, even though the Commission has the power to restrain the operation of facilities, it does not often take such an extraordinary action.³¹ Commission precedent favors the imposition of a financial penalty over an injunction. For example, the Commission determined that over many years, Citizens Utilities Company, had “demonstrated a persistent pattern of misconduct, violations of law, failure to comply with

²⁷ *Id.*

²⁸ *In re Chandler Elec. Co.*, Docket No. 6775, Order of 2/21/2003 at 15, citing Docket No. 6545, Order of 7/26/02 at 4. *See also*, *Taylor v. Town of Cabot*, 205 Vt. 586, 596 (2017).

²⁹ The Department follows the hearing officer’s reasoning in the Procedural Order and understands Petitioners’ request for alternative relief to be one for a preliminary injunction. *See* Case No. 24-2630-PET, Order of 8/22/2024 at 3.

³⁰ Commission Rule 2.406(D)(2).

³¹ Case No. 24-2630-PET, Order of 8/22/2024 at 2-3 (explaining that “the Commission does not routinely enjoin the operation of facilities that are out of Compliance with their CPG, particularly when such facilities are fully operational”), citing *Green Mountain Power Corps. Request for Approval of A Stipulated Memorandum of Understanding Regarding the Certificate of Pub. Good Issued in Docket 8322*, Case No. 19-4929-PET, Order of 8/14/20; *Investigation Pursuant to 30 V.S.A. Ss 30, 209, & 248 Regarding the 2.2 Mw Solar Plant Owned by Charlotte Solar, LLC in Charlotte, Vermont*, Case No. 8638, Order of 10/23/17; *Investigation Pursuant to 30 V.S.A. Ss 30 & 209 Regarding the Alleged Taking of Harsh Sunflower Plants by Vermont Gas Sys., Inc. in Monkton, Vermont*, Case No. 8791, Order of 5/25/2017.

regulatory directives, and disdain for traditional principles of utility accounting and management.”³² Still, the Commission levied financial penalties rather than an injunction because doing so would serve the “ultimate goal” of promoting, “the provision of reliable, least cost, reasonably priced energy services to Citizens’ Vermont ratepayers.”³³

Applying the Commission’s four-part test to this case, the Department maintains that an injunction is not appropriate. While the first element of likelihood of success on the merits is met, as the record is clear that VGS failed to adhere to its CPG with five substantial change violations for which the Commission has already levied fines,³⁴ none of the other elements of the test can be established.

Regarding the second element, the Petitioners have not demonstrated that they will suffer irreparable injury if an injunction is not issued. To the extent the allegations in the petition regarding risk of serious harm from events such as pipeline leaks have weight, they must be considered in context of the findings adopted in the 2023 Final Order, and the supporting evidentiary record, that the “pipeline meets minimum federal standards, is safe, and was adequately constructed.”³⁵ As such, the substantial changes do not create the type of emergency situation, or threat to the safety of Petitioners that an injunction would address.³⁶

On the third element, VGS would be substantially harmed if an injunction were issued. VGS has invested in the infrastructure required to build and operate the ANGP. An injunction

³² *In re Citizens Utilities Co.*, Docket Nos. 5841/5859, Order of 6/16/1997 at pages iii-iiiv (The financial penalties assessed by the Commission were affirmed by the Vermont Supreme Court, *In re Citizens Utilities Co.*, 171 Vt. 447 (Vt. 2000)).

³³ *Id.* at iiiv.

³⁴ 2023 Final Order at 3 (VGS also committed one material deviation from the 2013 Order).

³⁵ *Id.* at 45 (PFD page 20).

³⁶ *Id.* at 2 (“...[an] overriding concern throughout this proceeding is the question of whether the pipeline as constructed is safe. We agree with the hearing officer that the record in this case supports the conclusion that the pipeline is, in fact, safe, and that subject to specified remedial actions discussed below, will continue to be safe in its future operations”).

shutting down delivery would certainly harm VGS's ability to conduct business through the ANGP. The balance of harm, as described by the Vermont Supreme Court, Commission precedent, and Commission Rule 2.406(D)(2), as applied to the current case indicates that more harm would be caused to VGS by an injunction than to the Petitioners if an injunction is not issued.

Fourth, the best interests of the public require that the ANGP remain operational. Shutting down the pipeline, even temporarily, would significantly harm VGS customers. Considering the findings and evidence as to the pipeline's safety, continued operation of the ANGP would further the public interest. In Commission and Vermont Supreme Court precedent, it is often more appropriate to assess financial penalties rather than an injunction, even in the face of misconduct by the CPG holder. Petitioners have failed to demonstrate that the extraordinary remedy of an injunction is necessary to avoid hardship in this case.

Neither the circumstances nor applicable law require further enforcement action or procedural steps beyond the penalty imposed by the Commission and the procedure for consideration of CPG amendments prescribed by the Vermont Supreme Court. There is no need or basis to require VGS to obtain temporary authorization to operate the ANGP, nor to enjoin the operation of the pipeline. The Department recommends that the Commission dismiss the petition.

DATED at Montpelier, Vermont, this 23rd day of September 2024.

Respectfully submitted,
VERMONT DEPARTMENT OF PUBLIC SERVICE

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