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)	)))))	Case #24-2630-PET

REPLY TO MOTIONS TO DISMISS PETITION PURSUANT TO 30 VSA §§ 208, 209

Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, Rachel Smolker, Ph.D., and Jeffrey Everest ("Petitioners") reply to the motions to dismiss filed by Vermont Gas Systems (VGS) and the Department of Public Service.

VGS moves to dismiss on the grounds that: (1) the Petition is barred by res judicata; (2) the Petition is barred by collateral estoppel; (3) the Petition fails to state a claim because it fails to allege an unlawful act; and (4) the Petition fails to allege harm to the Petitioners.

The Department moves to dismiss on the grounds that: (1) a waiver pursuant to § 248(k) is not legally required because no emergency has been alleged and no site preparation or construction is ongoing or imminent; (2) the requirement that VGS file a new § 248 application suffices; and (3) the balancing of the equities does not justify issuance of an injunction

1. Res Judicata and Collateral Estoppel

A. Mr. Everest Is Not the Same Party or a Party in Privity.

Res judicata bars the litigation of a claim was raised or should have been raised in former litigation that resulted in a final judgment where the issues are the same or substantially similar and where the parties are either the same or the new party was in privity with the former party. *In re M.V.*, 2022 VT 31 ¶ 26, 216 Vt. 91, 282 A.3d 941. Collateral estoppel bars re-litigation of issues by persons who were parties to the earlier litigation, who raised the same issue in the

earlier litigation, and the issue was resolved by final judgment, after full and fair opportunity to litigate the issue, and where preclusion would be fair. *In re Tariff Filing of C. Vt. Pub. Serv. Corp.*, 172 Vt. 14, 20, 769 A.2d. 668 (2001). Privity means that the new party actually participated in the prior litigation without formally becoming a party, or was represented by a person such as a trustee or a guardian in the prior litigation, or is a successor in interest to the property rights of a person who participated in the prior litigation. 18A Wright, Miller & Cooper, Fed. Prac & Proc. Juris. § 4448 (3d ed.) (West 2024).

Mr. Everest was not a party and was not in privity with a party. Res judicata and collateral estoppel do not bar his claims.

B. No Preclusion for Any Party – the 248(k) Issue Was Not Appealable

Nor are any of the other Petitioners barred by res judicata or collateral estoppel, because preclusion does not apply where there has been no opportunity for appellate review. 18A Fed. Prac & Proc. Juris. *Id*. at § 4433.

There was no opportunity here. Where a legal dispute is not necessary to a tribunal's final judgment, litigants are precluded from appealing that issue. *Wood v. Wood*, 135 Vt. 119, 121, 370 A2d 191, 192 (1977); *Avery v. Bender*, 126 Vt. 342, 347, 230 A.2d 786 (1967).[1] The Commission's ruling on the § 248(k) issue was not necessary, or even relevant, to its final judgment. Its final judgment was that no new permit needed to be applied for. Only if that decision were reversed, and VGS were to begin the permit application process, would the § 248

[1] If a disputed issue was not necessary to the final disposition of a case, it cannot be appealed because an appellate ruling would be an advisory opinion. *Wood v. Wood*, *Id.*, *Avery v. Bender*, *Id.*

issue become relevant. Intervenors' disagreement with the Commission about § 248(k) was not appealable.

C. Interlocutory Relief and Preclusion

None of the Petitioners are bound by res judicata or collateral estoppel for another reason—when interlocutory discretionary relief has been sought, the movants are not precluded from trying again later unless the second request is "presented in the very same posture" as the first request. Fed. Prac. & Proc., *Id.* at 4445.

At the time when Intervenors sought an order that VGS obtain temporary authorization in January of 2022, it was unknown whether the Hearing Officer would change any of his earlier findings, what remedies he would propose, whether the Commission would adopt any of the Hearing Officer's findings, and what remedies the Commission would adopt, if any. Now, Petitioners know that the Commission adopted all of the Hearing Officer's findings on the merits, that the Commission adopted a remedy different from what the Hearing Officer proposed, and that the Supreme Court overruled the Commission and remanded for VGS to file an application, with notice to the public, opportunity to intervene, and hearing on the application. Petitioners now know there will be a new permit proceeding, and that it will take many months. This is a different posture than existed on January 10, 2022. Now the question of the applicability of § 248(k) is ripe and urgent.

2. An Unlawful Act; the Petition States a Claim

VGS is committing an unlawful act. It is operating a substantially changed pipeline without an amended or new CPG. Those parts of the pipeline that were not authorized by the original CPG are in use right now, without either an amended or a new CPG.

A substantial change to a permitted jurisdictional facility 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.

VGS argues (p.11) that the law requires only a new or amended CPG for that "portion" of its pipeline that was not authorized by the CPG. VGS's argument does not advance its cause; VGS is using that "portion" to transmit gas, without a new or amended CPG for that portion.

Commission Rule 5.413, effective March 1, 2024, reinforces *Re: Vermont Electric Power Company, Inc.*. It states that a permittee must apply for a <u>new</u> permit when there has been a substantial change to a commissioned project.[2] An application for a new permit triggers the public notice and hearing procedures of the statute and the rules. The Supreme Court reversed and remanded so that VGS could file that application, with notice to landowners, towns, planning commissions and state agencies, an opportunity for them to intervene, and then an evidentiary hearing on the application.

If one were to read the precedents and the rule as authorizing operation of a substantially changed facility without a new CPG, that would mean that one can operate a substantially changed electrical generating station, high-voltage line, natural gas transmission line, or other

[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.,

facility that falls under § 248 **without the public process** required by statute and by rule that the Supreme Court has already held must occur for a substantially changed facility. It is no defense (as the Hearing Officer appears to have suggested in his Order of 8/22/24, at p.2-3) that the Commission will have the authority to impose penalties and/or to impose conditions as it did here and as it has done in some other cases. The precedents in which the public process did not occur are no longer valid precedent governing substantially changed facilities. The prospect of Commission review of a substantially changed project, without the required public process, is now clearly unlawful under the Supreme Court's decision.

The only path for lawfully operating without the required public process is by way of § 248(k). Subsection 248(k) created a limited, temporary, exception to the requirement that a new CPG be obtained for a substantially changed facility after notice to and opportunity to participate by the public. The adoption of § 248(k) created a means for a utility to quickly come into compliance with § 248, without the full public process, temporarily, during an emergency.

VGS and the Department's view of § 248(k) is reminiscent of Alice's looking glass. They argue that the adoption of § 248(k) created the obligation to obtain Commission approval during emergencies and only during emergencies. But the obligation to operate only under a CPG granted after public participation was created by §§ 248(a) and (b), not by subsection (k); § 248(k) created a means for temporary exception to that obligation during emergencies. Under VGS' and the Department's looking-glass approach, the obligation to obtain temporary approval arises at just the wrong moment—when the utility is coping with an emergency—and does not arise when a utility wishes to construct and operate a substantially changed project at its leisure. The legislature could not have intended such an absurd result. *Crogan v. Pine Bluff Estates*, so 2021 VT 42, ¶ 22, 215 Vt. 50, 257 A.3d 247. It would serve no imaginable public purpose.

Although subsection (k) refers to site preparation or construction, so does subsection (a) ("begin site preparation or commence construction"). The legislature could not have intended that § 248(k) would apply only to the construction phase of jurisdictional facilities and not operation because, in 2004, when natural gas facilities were added to subsection (k),[3] section 248(a) had long been interpreted as requiring a CPG for both the construction phase and the operation phase of a facility. *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 (**use** of gas will provide an economic benefit to the state), 101 (leakage of gas **during operation** 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 **after construction** later will harm farmers). In Docket No. 7970 the Commission based its issuance of a CPG in this case on its extensive assessment of how the pipeline would be operated, and the risks and benefits of operation, not just how it would be constructed.

[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.

Consistent interpretation Act 250, upon which the Commission based its substantial change doctrine,[4] supports this conclusion. Act 250 uses language that similarly seems to be limited to construction, not operation. By its terms it applies only to "construction of improvements.". But Act 250 has always been interpreted as requiring a new 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).

The Commission itself has 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

[4] *Citizens Utilities Co.*, Docket No. 5841, 5859, Opinion at 224 (6/16/97) (adopting Act 250 substantial change test).

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.

With regard to the Commission's practice of imposing penalties rather than injunctions, a distinction must be drawn between violations of a CPG and substantial changes from the CPG. Violations that are material but not substantial do not require an amended permit or a new permit. Here there were both material changes and substantial changes. As to the material changes, Petitioners have no complaint. As to the substantial changes, prior to adoption of the current rules an amended permit was needed, and now a new permit is needed. VGS is operating without either.

The operation of the substantially changed ANGP without a new or amended CPG, and without temporary authority under § 248(k), is unlawful.

3. Harm, Balancing the Equities and the Four-Factor Test

VGS and the Department's motions to dismiss allege absence of harm. The Commission must accept as true the allegations of the Petition at this stage of the proceedings. *Petition of Boltonville Hydro Associates for approval of a short-term power purchase agreement pursuant to Board Rule 4.100*, Dkt No. 8841, Order Granting Motion to Dismiss, 4/21/17), p.3 ("A motion to dismiss tests the sufficiency of the allegations in the Petition, rather than the sufficiency of the proof," citing *Powers v. Office of Child Support*, 173 Vt. 390, 795 A.2d 1259 [2002].) The Petition alleges, in detail, harm to each Petitioner that the Petition seeks to redress. See ¶¶ 7-10, 13-17, 20-30. 34, 66 and 69; these allegations must be accepted as true. Pursuant to Commission Rule 2.206(D), Petitioners ask for the opportunity to present the evidence summarized in these paragraphs and Petitioners object to dismissal without that opportunity.

VGS (p.12) argues that the Commission has already found the revised ANGP to be safe and rejected Intervenors claims that it is unsafe. Placed in proper context, VGS's argument does not assist it. The Court vacated the Commission's findings that the substantially changed project satisfies the safety criterion of § 248. The only part of the Commission's findings about safety that was not vacated by the Supreme Court was its conclusion that the pipeline was safe enough to avoid the need for immediate shutdown (*In re Vermont Gas Systems, Inc.*, 2024 VT 19 ¶¶ 34, 56). The Petition does not seek immediate shutdown for safety reasons. It seeks an order compelling VGS to comply with the law while it applies for a new CPG by submitting an application under § 248(k). During that CPG application process, there will be discovery and

expert testimony that addresses whether the pipeline satisfies the safety criterion of § 248. Petitioners plan to submit expert testimony showing that it is not.

VGS and the Department are also mistaken in asking that the Commission apply the four-factor test for preliminary injunctions set forth in *Chandler Elec. Co.*, Docket No. 6775, Order of 2/21/03 and modified by Rule 2.406(D). The Petition does not request a preliminary injunction. It explicitly seeks only a permanent injunction. The Petition states: **"**Petitioners seek, pursuant to Commission Rules 2.206, 2.406, 5.5401-5.404, and 5.413, **a permanent injunction** compelling **…"** (Emphasis added.) Rule 2.406 does not apply the four-factor test or the modified two-factor test in Rule 2.406(D) to permanent injunctions.[5]

With respect to permanent injunctions sought from the Commission under the authority of § 209, no irreparable need be shown, and the four-factor test for preliminary injunctions does not apply. *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, 2024 VT 58 ¶¶ 18-21, --Vt – , --A.3d --. A finding that the company is violating the law suffices. A finding of irreparable harm is required only in "very narrow circumstances, namely (1) where the violation is so insubstantial that it would be unjust and inequitable to require injunctive relief, and (2) where the violation is innocent or unknowingly committed." *Id.* at ¶ 20-21. Unless the very narrow circumstances exist, the Commission may, but is not required to, consider balancing of the equities.

Assuming the Commission chooses to balance the equities, notwithstanding *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, the Department and VGS ask the Commission to answer the wrong question. The first form of relief requested by the Petition is **an order compelling VGS to file an application under § 248(k)**. The Petition seeks an order compelling

[5] By its terms, Rule 2.406(D) is inapplicable to permanent injunctions. It requires consideration of the likelihood of success in obtaining a permanent injunction subsequently.

VGS to: "*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…" **No harm to the VGS or the public will arise from an order compelling VGS to file the application**. Neither VGS nor the Department alleges that harm will arise from such an order. No customer will lose their gas supply. But there will be a public benefit. Pursuant to § 248(k), conditions can be imposed to protect Petitioners and the public while the CPG application process is underway, such as prompt reporting to the Commission and the public on the current depth of the pipeline in New Haven wetlands, including Mr. Everest's land.

No amount of money can compensate the Petitioners for the risk and fear of living, working and/or frequenting the vicinity of the pipeline.

Harm will arise if the Commission denies the request—and, therefore, fails to impose protective conditions while the CPG application process is underway.

The balance of the equities weighs heavily in Petitioners' favor. A reasonable balancing of the equities would result in an order that VGS comply with the law by filing a request for temporary authority while it is seeking an amended or new CPG.

Petitioners' second requested remedy was in the alternative. If the Commission were to decide that it would not order VGS to submit an application, the Commission was asked to order that VGS cease operation of the substantially changed ANGP unless and until it obtains a new CPG. In the Commission were to take that course, *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209* would authorize but not compel issuance of the injunction. But that cannot be decided via a motion to dismiss that assumes the facts in the Petition are wrong.

Petitioners also must respond to VGS's tenuous argument (p. 10) that 30 V.S.A. § 30 provides the sole remedy, and that remedy is a civil penalty, not an injunction. The Supreme Court held in *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, supra at ¶ 20, --Vt – , --A.3d – that § 209 authorizes the Commission to issue injunctions to respond to violations of a CPG.

Conclusion

The motions to dismiss should be denied.

Date: October 23, 2024

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