

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 24-2630-PET

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| Petition pursuant to 30 V.S.A. §§ 208 and 209 for injunctive relief regarding Vermont Gas Systems, Inc.’s operation of the Addison Natural Gas Pipeline | |
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**VERMONT GAS SYSTEMS, INC.’S REPLY
REGARDING MOTIONS TO DISMISS**

Vermont Gas Systems, Inc. (“VGS”) submits the following Reply in response to Petitioners’ opposition¹ to motions to dismiss filed by VGS and the Department of Public Service (“Department”). As discussed in VGS’s Motion to Dismiss, the Petition in this case should be dismissed because the procedural machinations invented by the Petition are neither contemplated by 30 V.S.A. § 30 (governing Certificate of Public Good violations), 30 V.S.A. § 248(k) itself, nor any other legal authority. The relief Petitioners seek has already been denied, the Petition fails to state a claim, and Section 248(k) has no application in this case.

Petitioners’ Opposition also fails to explain why this proceeding is needed even though it is inconsistent with the CPG process contemplated by the Vermont Supreme Court on appeal from the Commission’s Final Order in Case Nos. 17-3550-INV and 18-0395-PET (the “Investigation”). In fact, Petitioners’ Opposition expressly concedes that they seek to litigate the

¹ Hereinafter “Petitioners’ Opposition.”

very same factual issues they intend to litigate in the now-pending CPG amendment proceeding,² which would produce duplicative and inconsistent process.³

Finally, regardless of Petitioners’ technical—and unsupported—procedural claims, which are addressed below, the Commission has broad power to impose conditions upon VGS’s operation of the pipeline or otherwise mandate further legal process. The Commission exercised that power in the Investigation and determined there was no basis for the Petitioners’ safety concerns, many of which are repeated in this Petition, and directed VGS to propose CPG amendments. If the Commission had found the pipeline unsafe, it would have ordered VGS to shut it down,⁴ but it did not, and instead found the pipeline is safe and was adequately installed. Petitioners’ dissatisfaction with that result does not form a basis for allowing their Petition to continue here. Because there is no basis in law or fact for the relief that Petitioners seek in this Petition, it should be dismissed.

A. Dismissal Is Appropriate Because the Commission Has Already Denied Petitioners the Relief They Seek Here.

The Commission addressed the Petitioners’ request to require VGS to seek a Section 248(k) waiver in the Investigation and expressly denied that relief because there was no emergency warranting the use of Section 248(k).⁵ Accordingly, as set forth in VGS’s Motion to

² On September 12, 2024, VGS filed and served 45-day advance notice of its Petition to Amend the Docket 7970 CPG. On October 28, 2024, VGS filed its Petition to Amend the Docket 7970 CPG and the matter was assigned ePUC Case No. 24-3277-PET. After the Commission deems the Petition complete or provides other direction under Rule 5.400, VGS will serve the complete Petition to adjoining landowners, municipalities, parties to Docket No. 7970 and Case Nos. 17-3550-INV and 18-0395-PET.

³ See Petitioners’ Opposition at 9-10 (stating that Petitioners intend to present expert testimony in the CPG amendment proceeding regarding safety criteria); *id.* at 9 (seeking to present evidence about Petitioners’ concerns over the safety of the pipeline”).

⁴ Investigation, Final Order (Issued Apr. 6, 2023) at 20 (“Had the evidence shown that the pipeline was unsafe, we would have ordered the pipeline’s closure.”).

⁵ VGS Motion to Dismiss at 6 (citing Proposal for Decision at 20 (issued Oct. 3, 2022), Case Nos. 17-3550-INV and 18-0395-PET).

Dismiss, the Petition should be dismissed because the Commission is not required under 30 V.S.A. § 208 to reconsider the merits of a prior final order.⁶ Nor can the Commission be compelled by Section 208 to investigate a complaint that is duplicative of other pending litigation and raises the same general question the Commission has already decided.⁷

Because these issues have been decided already, the Petition is also barred by res judicata and collateral estoppel.⁸ Petitioners attempt to avoid preclusion by claiming that Mr. Jeffrey Everest's "claims" cannot be precluded because he was not a party to the Investigation. This argument fails for two reasons. First, Mr. Everest has no standing under 30 V.S.A. § 208 to bring a complaint by himself because the statute requires a pleading to be made by "five or more individuals" or to show that the complainant is "one of fewer than five individuals affected" by the alleged unlawful act.⁹ Because the other Petitioners are precluded by prior litigation over the same exact question and Mr. Everest does not have standing to bring the complaint alone, it must be dismissed.

⁶ *Id.* at 7 (explaining "the Commission is not required to entertain a Petition that effectively asks it to reconsider the merits of a prior final order"). It makes no difference whether Petitioners call their request a Petition under Section 208 or a Motion for Reconsideration. The Commission will construe the filing based on the relief it seeks. Because the Petition seeks the very same relief the same Petitioners sought in the Investigation, it is an untimely Motion to Reconsider. *Petition of Otter Creek Solar*, Case No. 20-0253-PET, 2020 WL 7682684, at *1 (Vt. P.S.B. Dec. 18, 2020) (construing filing as a motion to reconsider regardless of its title because "it seeks the very same relief [movant] sought in its first motion for reconsideration"); *see also*, *Petition of New Cingular Wireless*, Case No. 22-3182-PET, 2022 WL 16949198, at *1 (Vt. P.S.B. Nov. 3, 2022) ("Granting reconsideration is an extraordinary remedy to be used with great caution. Rule 59 does not permit parties to relitigate issues or correct previous tactical decisions. It is not a vehicle to introduce new evidence or advance arguments that could have been made previously.").

⁷ There may be some circumstances—like a billing dispute between customer and utility—where the Commission has a duty to investigate, *see, e.g.*, *North v. City of Burlington-Electric Light Dept.*, 125 Vt. 240, 242, 214 A.2d 82, 84 (1965) (stating the Commission has the "authority and the duty to investigate any claimed unlawful act adversely affecting a consumer served by a utility subject to its supervision"), but individuals cannot compel the Commission to investigate a complaint that does not even allege a private right of action.

⁸ VGS Motion to Dismiss at 7-8.

⁹ 30 V.S.A. § 208; *Investigation into the Complaint of Mark Tucker*, Docket No. 7701, 2012 WL 582927, at *3 (Vt. P.S.B. Feb. 16, 2012) (dismissing general complaint about unfairness of terms and conditions for lack of standing under Section 208 and explaining that however "onerous the standing elements of Section 208 may seem . . . [the] requirements are statutorily mandated and cannot be suspended at our discretion").

Additionally, Mr. Everest’s alleged “lack of privity” with the other Petitioners does not matter for purposes of applying issue and claim preclusion regarding a legal question of general public interest, namely, a public utility’s compliance with a Certificate of Public Good. Preclusion requires privity to protect the “rights of strangers” to prior litigation.¹⁰ But where litigation involves a question of public law rather than the private rights of individuals, the Commission is free to limit repetitive litigation through nonparty preclusion.¹¹ In the Investigation, Intervenor expressly sought the same remedy Mr. Everest seeks here. Moreover, the general public’s interest in VGS’s compliance with Section 248 was also adequately represented by the Department of Public Service, which by statute, “represent[s] the interest of the people of the State” and opposes the Petition here.¹² Accordingly, the Petition is barred by preclusion regardless of whether or not Mr. Everest was in privity with the Intervenor in the Investigation.

Petitioners’ argument that “preclusion does not apply where there has been no opportunity for appellate review”¹³ also fails because Petitioners *did* have an opportunity to appeal the Commission’s decision not to require a Section 248(k) petition or shut down the pipeline. Consistent with the authority cited by Petitioners, “A party who elects to appeal on one

¹⁰ *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798 (1996).

¹¹ *Id.* at 794, 803 (discussing nonparty preclusion in the context of public law questions and explaining that state courts are more free to apply preclusion based on adequate representation and other nonparty exceptions in cases involving alleged misuse of public funds or “other public action having only an indirect impact” on a party’s interest).

¹² 30 V.S.A. § 2. *See also*, Response of the Vermont Department of Public Service (filed Sept. 23, 2024) (recommending dismissal of the Petition).

¹³ Petitioners’ Opposition at 2 (citing § 4433 Finality—Appeals Forgone, Pending, or Unavailable, 18A Fed. Prac. & Proc. Juris. § 4433 (3d ed.)). Petitioners appear to be arguing that the 248(k) decision was somehow not necessary to the Commission’s final decision, and therefore such an appeal would have required the Vermont Supreme Court to issue an advisory opinion. The Commission’s decisions are all subject to appeal, as the Vermont Supreme Court has the power under 30 V.S.A. § 14 to reverse, affirm, or remand any Commission order. With regard to statutory interpretation, the Court has repeatedly said that it will “not abdicate [its] responsibility to examine a disputed statute independently and ultimately determine its meaning. *In re Chelsea Solar LLC*, 2021 VT 27, ¶ 28, 214 Vt. 526, 535. Accordingly, had the Court found either legal or factual error in the Commission’s Section 248(k) determination, its opinion on that issue would not be advisory.

issue, omitting another issue on which it lost, is subject to issue preclusion on the issue not appealed.”¹⁴ Here, Petitioners appealed the process for amending a CPG but omitted the claim that a Section 248(k) waiver or shutting down the pipeline are necessary components of that process. Accordingly, Petitioners have waived those issues.

Finally, Petitioners try to avoid preclusion by claiming that preclusion only applies to “interlocutory discretionary relief,” when the second request is “presented in the very same posture” as the first.¹⁵ The actual text of the cited authority states:

As to interlocutory injunction orders and more limited uses of extraordinary writs, on the other hand, preclusion ordinarily is inappropriate if the first decision was governed by curtailed procedures, discretionary grounds of decision, or special limits. Preclusion may prove appropriate even in this setting, however, if the very same matters are again presented in the very same posture or if the first decision rested on grounds that were not limited by the nature of the proceeding.¹⁶

Petitioners argue elsewhere that Section 248(k) is *required* pending review of CPG amendments, but to avoid preclusion, they appear to claim the Commission has discretion about whether to require a Section 248(k) waiver pending CPG amendment. While Petitioners’ interpretation of Section 248(k) has no application here under any procedural posture, Petitioners cannot have it both ways. If it is legally required—as Petitioners argue elsewhere—then it is precluded. If it is merely discretionary, then the Commission should exercise the same discretion it has already exercised and reject the requested relief once again.

¹⁴ § 4433 Finality—Appeals Forgone, Pending, or Unavailable, 18A Fed. Prac. & Proc. Juris. § 4433 (3d ed.).

¹⁵ Petitioners’ Opposition at 3.

¹⁶ § 4445 “On the Merits”—Discretionary or Limited Remedies, 18A Fed. Prac. & Proc. Juris. § 4445 (3d ed.).

B. The Petition Fails to Allege That Operation of the Pipeline Is “Unlawful” and Fails to Articulate Any Harm.

Petitioners’ Opposition fails to address two fundamental defects in the Petition: that the Petition wholly lacks any allegations of (1) the claimed “unlawful act” and (2) any actual harm to Petitioners. Both are fatal to the Petition under 30 V.S.A. § 208.

First, the Petition fails to state a claim under 30 V.S.A. § 208 because there is no basis for the claim that the ANGP is operating without a CPG.¹⁷ Instead, operation of the pipeline is legally required under both the Docket No. 7970 CPG and VGS’s general service obligation under 30 V.S.A. § 231. Petitioners’ Opposition does not even attempt to address these legal requirements, instead reverting back to its well-worn and unsubstantiated claims that the ANGP is operating without any CPG. Nor does Petitioners’ Opposition explain how operation of the pipeline could possibly be unlawful when neither 30 V.S.A. § 248, Rule 5.413, nor 30 V.S.A. § 30 contemplate the legal effect invented by Petitioners.¹⁸ While VGS does not dispute that the Commission found CPG violations, there is no legal support for the proposition that a Section 248(k) waiver or closure of the pipeline are appropriate remedies for those violations. VGS, having paid its fine in full and filed a Petition to Amend the Docket 7970 CPG, is in full compliance with both the remedy imposed by the Commission in the Investigation and the procedural remedy contemplated by the Vermont Supreme Court on appeal.

¹⁷ Petitioners’ Opposition merely repeats the same rhetorical claim that the “substantially changed” ANGP cannot proceed without a CPG amendment. There is no such thing as a “substantially changed” project. A “substantial change” **to a** project is a change that has the potential for a significant impact under any Section 248 criteria. When a substantial change is made, the procedural remedy is to require an amendment under Rule 5.400. There is no legal basis to claim that operation of the entire project is unlawful pending resolution of that process or that the remainder of the CPG is no longer valid.

¹⁸ Petitioners’ Opposition repeats that Rule 5.413 requires a “new permit,” but ignores the plain language of Rule 5.413 as discussed in VGS’s Motion to Dismiss. Rule 5.413 clearly contemplates an amended CPG—not a “new permit.”

Additionally, the Petition fails to state a claim under 30 V.S.A. § 208 because it does not allege any cognizable harm to Petitioners. “The legislature has clothed [the Commission] with judicial power to entertain proceedings and determine the facts upon which the existing laws shall operate in a controversy between consumers and the public service corporation.”¹⁹ But just as a single individual does not have standing under Section 208 to bring a complaint that affects five or more individuals, Petitioners cannot establish a claim under Section 208 without presenting a real—not merely theoretical—controversy that involves actual injury to a protected legal interest.²⁰

While Petitioners’ Opposition asserts that the Petition “alleges, in detail, harm to each Petitioner,”²¹ examination of the actual allegations reveals they are all theoretical—as well as duplicative of the concerns Petitioners expressed in the Investigation. In particular, Paragraphs 7-8 allege that the Palmers live close to the pipeline and their “lives and their property are at risk of catastrophic harm” “**in the event** of a pipeline leak and explosion during operation.” Merely claiming a conjectural harm based on a hypothetical event is not sufficient to plead an injury in fact, which must be “(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”²² Here, the Commission does not need to rely on its prior findings that the pipeline is safe. Even accepting the facts as alleged in the Petition as true, they fail to state a claim that goes beyond mere conjecture.

¹⁹ *North v. City of Burlington-Electric Light Dept.*, 125 Vt. 240, 242, 214 A.2d 82, 84 (1965); 30 V.S.A. § 208.

²⁰ See, e.g., *Brod v. Agency of Nat. Resources*, 2007 VT 87, ¶ 9, 182 Vt. 234, 239, 936 A.2d 1286, 1289, 2007 WL 2404616 (“For standing, plaintiffs must present a real—not merely theoretical—controversy involving “ ‘the threat of actual injury to a protected legal interest’ ” rather than “ ‘merely speculating about the impact of some generalized grievance.’ ”).

²¹ Petitioners’ Opposition at 9 (citing the Petition, ¶¶ 7-10, 13-17, 20-30, 34, 66, 69).

²² *Turner v. Shumlin*, 2017 VT 2, ¶ 11, 204 Vt. 78, 87 (quoting *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 198 (E.D.N.Y. 2015)).

The remainder of the pleadings cited by Petitioners’ Opposition fails to allege any injury in fact for the same or similar reasons. For example, Paragraphs 9-10 regarding Ms. Lyons allege facts that have already occurred and argue that someone “could have been severely wounded or killed.”²³ There is no current, actual, or imminent alleged harm. Similarly, Paragraphs 13-17 repeat the same conjectural harm about a hypothetical pipeline explosion—but offer no alleged facts, which if accepted as true, would demonstrate that such an event is even possible on this pipeline, let alone imminent. Paragraphs 20-30 suffer from the same deficiency. Finally, Paragraphs 34, 66, and 69 fail to even speculate about harm to Petitioners, let alone plead facts that would establish an injury in fact.

Accordingly, the Petition—even if its allegations are accepted as true—fails to state a claim under Section 208 because it neither identifies an unlawful act nor alleges actual harm.

C. The Commission Cannot Grant The Requested Remedy Under Section 248(k) Because That Statutory Provision May Only Be Applied When An Emergency Has Occurred.

Section 248(k) expressly states that a “waiver shall be granted **only** upon a showing that good cause exists because an emergency situation has occurred.”²⁴ Based on this language, VGS and the Department agree that Section 248(k) cannot apply here because there is no emergency. In fact, it appears to be undisputed that there is no emergency.²⁵ Notwithstanding, Petitioners seek an entirely novel application of Section 248(k) to situations where there is no emergency, arguing for their own “absurd” construction of 248(k) while simultaneously alleging that reading the plain language of the statute is absurd.²⁶

²³ Ms. Lyons’s concerns were also previously investigated in Case No. 17-4630-INV and the Commission issued a Final Order in that matter more than four years ago on July 31, 2020.

²⁴ 30 V.S.A. § 248(k) (emphasis added).

²⁵ Petitioners’ Opposition at 9 (“The Petition does not seek immediate shutdown for safety reasons.”).

²⁶ Petitioners’ Opposition at 5.

Regardless of how Petitioners would like to characterize it, the plain language of the statute requires an emergency. The Commission has no statutory authority, nor occasion, to grant a Section 248(k) waiver without an emergency. Accordingly, a Section 248(k) waiver is—by statutory definition—not the appropriate procedural remedy to apply in this case.²⁷

D. The Petition Fails to Allege That Any Type of Injunction Is Warranted.

Finally, Petitioners argue that the Petition does not need to demonstrate irreparable harm and the Commission does not need to balance the equities to issue an injunction. With respect to the remedy of seeking a Section 248(k) waiver, the Commission has broad authority to require VGS to engage in further legal process and impose conditions upon operation of the pipeline.²⁸ It does not need a Section 248(k) proceeding or Section 208 petition to do so. The Commission was empowered to impose further conditions upon VGS's operation of the pipeline at the close of the Investigation. Instead, the Commission found that the pipeline was safe and expressly declined to shut the pipeline down, directing VGS to propose CPG conditions that address the recommendations of pipeline experts in that case. The problem with Petitioners' Section 248(k) request here is not about a balance of equities. There is simply no factual or legal basis to revisit whether Section 248(k) applies.

²⁷ With regard to the requested Section 248(k) relief, the Petitioners also lack standing under Section 208 because they cannot meet their burden—under any facts—to show that the Commission can redress their alleged harm with a Section 248(k) proceeding. To establish standing, a complainant has to show “(1) injury in fact [in the form of an invasion of a legally protected interest], (2) causation, and (3) redressability.” *Turner v. Shumlin*, 2017 VT 2, ¶ 11. The Commission cannot require a Section 248(k) petition here because it cannot grant such a petition without an emergency.

²⁸ *Id.* at 12. Petitioners mischaracterize Page 10 of VGS's Motion to Dismiss, claiming VGS argues the Commission cannot impose injunctive relief. This part of VGS's Motion, however, discusses the fact that the Petitioners' legal theory that operation of the pipeline is unlawful has no support under 30 V.S.A. § 30 or any other statute. The Motion makes no suggestion that the Commission cannot enjoin a utility in connection with a CPG violation.

With respect to the remedy of seeking closure of the pipeline, Petitioners argue the Commission cannot decline to enjoin VGS from operating the pipeline based on an assumption that the facts in the Petition are wrong.²⁹ But it does not matter whether the facts alleged in the petition are right or wrong. Even if Petitioners were permitted to demonstrate all the facts alleged in their Petition are true, those allegations are not sufficient to state a claim under Section 208, let alone terminate natural gas service to thousands of customers at the start of winter. For the reasons set forth in VGS's Motion to Dismiss, the Petition does not support the extraordinary remedy of cessation of operations that Petitioners seek in this case.

Conclusion

For the above reasons, the Commission should dismiss the Petition and proceed with the CPG amendment proceeding now pending in Case No. 24-3277-PET, consistent with the Court's order on remand, the terms of current Commission Rule 5.413, and the Commission's June 25, 2024 Post-Appeal Order Outlining Next Steps.

DATED at Burlington, Vermont, on this 6th day of November 2024.

VERMONT GAS SYSTEMS, INC.

By: /s/ Owen J. McClain
Debra L. Bouffard, Esq.
Owen J. McClain, Esq.
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
P.O. Box 66
Burlington, Vermont 05402-0066
(802) 864-9891
dbouffard@sheeheyvt.com
omclain@sheeheyvt.com

²⁹ Petitioners' Opposition at 11.