

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 Vermont Gas Systems, Inc.'s operation of the Addison Natural Gas Pipeline	
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Order entered:

PROPOSAL FOR DECISION

I. INTRODUCTION

This case concerns a petition filed by Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, Rachel Smolker, and Jeffrey Everest (“Petitioners”) pursuant to 30 V.S.A. §§ 208 and 209 asserting that Vermont Gas Systems, Inc. (“VGS”) is violating 30 V.S.A. §§ 248(a), (b), and (k). The Petitioners request a permanent injunction to compel VGS to either obtain a temporary waiver under Section 248(k) or cease operation of the Addison Natural Gas Pipeline (the “Project” or “ANGP”) unless and until it obtains a new certificate of public good (“CPG”).

VGS moves to dismiss the petition on the grounds that the claims and issues raised in the petition are precluded by previous litigation. VGS also moves to dismiss the petition for failure to state a claim upon which relief may be granted. The Vermont Department of Public Service (“Department”) argues that VGS is not legally required to obtain a Section 248(k) waiver to operate the Project while the Commission reviews VGS’s request for a CPG amendment.

In this proposal for decision, I recommend that the Vermont Public Utility Commission (“Commission”) dismiss the petition. First, I recommend that the Commission find that several of the Petitioners are precluded by *res judicata* from relitigating their claims; dismissal on this basis would eliminate all claims as to five of the six Petitioners. Second, I recommend that the Commission find that certain issues are barred by collateral estoppel; this would eliminate one claim as to five of the six Petitioners. Third, I recommend that the Commission dismiss the petition because the Petitioners lack standing to bring a complaint under Section 208. Finally, I recommend that the Commission grant summary judgment in favor of VGS and the Department on the issue of whether VGS must obtain a Section 248(k) waiver.

II. PROCEDURAL HISTORY

In Case Nos. 17-3550-INV and 18-0395-PET, the Commission determined that VGS made substantial changes to the approved Project in violation of the Project's CPG (the "Investigation Case").¹ The Commission assessed a penalty of \$150,000 and determined that VGS must obtain an amended CPG. The Commission further determined that an adequate record existed in the Investigation Case to authorize the changes and ordered VGS to submit a compliance filing that included proposed language for amendments to the CPG.

On appeal, the Vermont Supreme Court affirmed the Commission's findings of CPG violations and the monetary penalty. However, the Court reversed the Commission's determination that a CPG amendment could be issued in the investigation proceeding. The Court held that "the Commission may effectuate amendments to a CPG only in a manner that satisfies the requirements of a § 248 proceeding."² Accordingly, the Court vacated the Commission's supplemental findings regarding the revised Project's impacts under the Section 248 criteria. The Court remanded the matter to the Commission for further proceedings consistent with the Court's decision.

In an order dated, June 25, 2024, the Commission directed VGS to file a Section 248 petition for the amended Project.³

On July 31, 2024, the Petitioners filed a petition, accompanying exhibits, and an affidavit.

On August 13, 2024, the Petitioners filed a corrected petition (the "Petition").

On August 22, 2024, I issued a scheduling order setting deadlines for motions in response to the Petition.

On September 23, 2024, the Department and VGS filed motions to dismiss the Petition ("Department Motion to Dismiss" and "VGS Motion to Dismiss").

On October 23, 2024, the Petitioners filed a response to the motions to dismiss ("Petitioners' Response").

On October 28, 2024, VGS filed a petition, pursuant to 30 V.S.A. § 248 to amend the Project's CPG.⁴

¹ The CPG was issued on December 23, 2013, in Docket 7970.

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

³ Case Nos. 17-3550-INV and 18-0395-PET, Order of 6/25/2024.

On November 6, 2024, the Department and VGS filed replies (“Department Reply” and “VGS Reply”).

No other filings were received.

III. DISCUSSION

VGS and the Department have advanced several arguments, each of which could be determinative of the outcome of this case. Although I conclude that the Petition fails, in whole or in part, on the bases of *res judicata*, collateral estoppel, and standing, I analyze each of them for completeness because this is a proposal for decision. I also address the merits of the Petitioners’ Section 248(k) argument

A. Res Judicata

Before I analyze the application of *res judicata*, or claim preclusion, I must resolve a dispute between the parties about what findings were left in place by the Vermont Supreme Court’s remand.⁵ The Vermont Supreme Court vacated “the Commission’s supplemental findings of fact concerning whether the substantial changes actually affected the substantive criteria of 30 V.S.A. § 248.”⁶ This statement applies to Section C.3.ii., titled “Supplemental Findings,” which begins on page 17 and ends on page 23 of the Commission’s final order.⁷ Therefore, those findings and accompanying discussion should not be considered when assessing preclusion. The remainder of the Commission’s final order, including the hearing officer’s findings and recommendations that were adopted by the Commission, were affirmed by the Vermont Supreme Court.

With this context in mind, I turn to the question of whether the Petitioners’ claims are barred by *res judicata*. *Res judicata* applies to administrative decisions when an administrative

⁴ This filing was assigned Case No. 24-3277-PET. The Commission found the petition incomplete and directed VGS to file a complete Section 248 petition. *Petition of Vermont Gas Systems, Inc. to amend certificate of public good No. 7970*, Case No. 24-3277-PET, Order of 11/27/24.

⁵ VGS and the Department view the Court’s holding narrowly as vacating only “the Commission’s supplemental findings of fact concerning whether the substantial changes actually affected the substantive criteria of 30 V.S.A. § 248” while affirming the Commission’s decision “in all other respects.” VGS Motion to Dismiss at n. 10 (quoting 2024 VT 19, ¶ 56). In contrast, the Petitioners assert “the factual findings underpinning the Department and VGS’s assertions of safety have been struck down.” Petition at ¶ 65.

⁶ *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶ 56.

⁷ Case Nos. 17-3550-INV and 18-0395-PET, Order of 4/6/23 at 17-23.

agency is acting in a judicial capacity.⁸ *Res judicata* bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter, and causes of action are identical or substantially identical.⁹ *Res judicata* bars litigation of claims or causes of action that were actually litigated and those “which should have been raised in the former litigation.”¹⁰

Whether an agency is acting in a judicial capacity depends on whether the proceedings resulting in the determination were adjudicative, as distinguished from legislative or policymaking in nature; and whether the determination made in an adjudicative type of proceeding entailed the essential elements of adjudication.¹¹ The Investigation Case was opened pursuant to 30 V.S.A. §§ 30 and 209 to determine whether VGS’s deviation from the Project plan is material or a substantial change to the Project plan, and, if so, whether it is appropriate to order any remedial action, impose a penalty, or take any other steps authorized by law.¹² After lengthy proceedings that included discovery, prefiled testimony, and evidentiary hearings, the hearing officer found that VGS had made unauthorized substantial changes in violation of its CPG, and recommended the imposition of a \$150,000 penalty.¹³ The hearing officer declined to order VGS to file a Section 248(k) waiver petition¹⁴ and found that it was not necessary to “shut down” the pipeline because “experts agreed that the pipeline is safe and meets industry standards.”¹⁵ After opportunity for further briefs and oral argument, the Commission adopted these findings, and the Vermont Supreme Court affirmed that portion of the final order.¹⁶

Based on the foregoing, I conclude that the nature of the Investigation Case was adjudicatory because the matter dealt with the conduct of an individual company, as opposed to

⁸ *In Re Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 7-8.

⁹ *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20 (2001) (quoting *Berlin Convalescent Ctr. v. Stoneman*, 159 Vt. 53, 56 (1992) and *Berisha v. Hardy*, 144 Vt. 136, 138, (1984)).

¹⁰ *In Re Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at n.29

¹¹ *Delozier v. State*, 160 Vt. 426, 429, (1993) (“[A]dministrative decisions that do not entail the essential elements of adjudication will not have res judicata effect.”).

¹² Case No. 17-3550-INV, Order of 7/14/17 at 3 (emphasis added).

¹³ Case No. 17-3550-INV, Order of 4/06/23, Proposal for Decision at 26.

¹⁴ *Id.* Proposal for Decision at 21.

¹⁵ *Id.* Contrary to the Petitioners’ argument that all findings concerning safety have been vacated, the hearing officer’s proposal for decision considered safety in the context of determining the appropriate penalty and remedies for VGS’s violations of its CPG as opposed to making findings related to the Section 248 criteria.

¹⁶ *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶ 56; Case No. 17-3550-INV, Order of 7/14/17 at 3.

general legislative or policy matters.¹⁷ The proceeding included all of the procedural elements of litigation and the Commission order issued on July 14, 2017, constitutes a final judgment.¹⁸ Accordingly, the Investigation Case may have preclusive effect if the other elements of claim or issue preclusion are met (*i.e.*, identical or substantially identical parties, subject matter, and causes of action).

Turning to the identities of the parties involved, five of the six Petitioners were parties to the Investigation Case.¹⁹ Therefore, these parties should be precluded from raising claims that were actually litigated or should have been litigated in the Investigation Case. The Petitioners assert that Mr. Everest is not the same party or a party in privity with the Investigation Case parties. The Vermont Supreme Court has held that “[a] privity relationship generally involves a party so identified in interest with the other party that they represent one single legal right.”²⁰ Mr. Everest’s interests arise out of his property that abuts the ANGP, and this interest is sufficiently distinct from the other parties to avoid claim preclusion.

Five of the Petitioners seek to relitigate the same subject matter and claims. Specifically, the Investigation Case and this case involve a determination of the appropriate remedy for VGS’s unauthorized changes to the ANGP. The Petitioners do not argue that they have raised different subjects or claims from the Investigation Case. Instead, the Petitioners argue that the “Commission’s ruling on the § 248(k) issue was not necessary, or even relevant, to its final judgment” and, therefore, was not an appealable issue.²¹ However, the “necessary to the resolution of the action” standard applies to issue preclusion and not claim preclusion.²²

Furthermore, the resolution of the § 248(k) issue was necessary to the Commission’s resolution of the Investigation Case. The Commission’s decision to issue an amended CPG in the Investigation Case contemplated further proceedings and a period of time when the ANGP

¹⁷ See *In re SolarCity Corp.*, 2019 VT 23, ¶ 13 (recognizing the Commission’s enforcement proceedings involve a combination of “administrative and adjudicative responsibilities”).

¹⁸ *Lamb v. Geovjian*, 165 Vt. 375, 381 (1996) (“An administrative enforcement action becomes an adjudicatory proceeding when a matter proceeds to the prosecutorial stage through the filing of a charge.”).

¹⁹ These parties are Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, and Rachel Smolker,

²⁰ *Lamb*, 165 Vt. 375, 381 (quotation omitted)

²¹ Petitioners’ Response at 2.

²² *In Re Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 8.

would have continued to operate before it received an amended CPG.²³ Therefore, it was necessary for the Commission to adopt the hearing officer's determination that § 248(k) is not applicable to the ANGP in this situation. The Petitioners could have appealed this aspect of the Commission's decision but did not. A ruling on this issue by the Supreme Court would not have been advisory because the Petitioners were successful in arguing that the Commission could not amend VGS's CPG without conducting a Section 248 proceeding and there was a live dispute about whether a Section 248(k) waiver is necessary to continue to operate the Project. Therefore, claim preclusion bars this claim even though this particular aspect of the Commission's decision was not appealed.²⁴

In conclusion, this Petition addresses the same fundamental question as the Investigation Case: the appropriate remedy for VGS's violations of the CPG. I recommend that the Commission find that five of the six Petitioners are barred by *res judicata* because they were parties to the Investigation Case and, therefore, should be dismissed from this proceeding. Mr. Everest was not a party to the Investigation Case and is not precluded from proceeding on these claims. However, as discussed further below, a single person lacks standing to bring a complaint under Section 208. Therefore, I recommend that the Commission dismiss the Petition.

B. Collateral Estoppel

Collateral estoppel is also known as issue preclusion and “prevents a party from relitigating an issue that was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.”²⁵ Collateral estoppel only precludes issues that were “actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.”²⁶

Collateral estoppel can only apply to a party that participated in the actual litigation of an issue. Therefore, collateral estoppel does not apply to Mr. Everest but could apply to the

²³ The Commission directed VGS to make compliance filings and provided an opportunity for the parties to make responsive filings before any amended CPG would issue. Therefore, the period of time that the ANGP would have operated without an amended CPG would have been at least two months, if not longer. Case No. 17-3550-INV, Order of 4/06/23 at 25.

²⁴ 165 Vt. at 381.

²⁵ *In Re Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at 8.

²⁶ *Id.*

Palmers, Ms. Lyons, Mr. Shelton, and Ms. Smolker because they were parties in the Investigation Case.

The issue of the applicability of Section 248(k) was actually litigated and decided.²⁷ The purpose of the Investigation Case was to determine what remedies were appropriate to respond to VGS's potential violations of its CPG.²⁸ While the Commission's final order was reversed concerning the required procedures for amending VGS's CPG, the final order nonetheless conclusively and necessarily determined the full scope of remedies for the violations identified in the final order. The Petitioners unpersuasively argue that the determination on the applicability of Section 248(k) was not necessary or relevant to the Commission's decision to issue an amended CPG in the Investigation Case. As discussed above, the Commission's determination regarding the applicability of Section 248(k) was an appealable decision.²⁹

The Petitioners also argue that preclusion does not apply to "interlocutory discretionary relief," but this argument runs counter to the "permanent injunction" relief sought by the Petitioners, rather than temporary or interim relief.³⁰ The Commission's final order in the Investigation case was a final determination about the applicability of Section 248(k) to VGS's unauthorized changes to the ANGP. In conclusion, I recommend that the Commission find that the five Petitioners who were parties to the Investigation Case are precluded from raising the applicability of Section 248(k) in this proceeding.

It is less clear that the issue of whether the Commission should enjoin the operation of the Project until VGS obtains an amended CPG was fully litigated. The Commission's orders addressing the scope of the Investigation Case and the invocation of the Commission's Section 209 authority demonstrate that injunctive relief was a potential remedy to be considered. The Commission also addressed public comments urging the Commission to shut down the pipeline. However, my review of the record in the Investigation Case leads me to conclude that the Petitioners did not specifically request an injunction and, therefore, I do not recommend that the Commission find that issue preclusion bars this question.

²⁷ Case No. 17-3550-INV, Order of 7/14/17, Proposal for Decision at 21.

²⁸ Case No. 17-3550-INV, Order of 7/14/17 at 3.

²⁹ Pages 5-6, *supra*.

³⁰ Petitioners' Response at 3 and 10.

C. Failure to State a Claim

In 2023, the Commission adopted significant changes to its rules of practice. Commission Rule 2.103 states that the Commission’s “rules [of practice] are comprehensive” and that “where applicable, specific provisions of the Vermont Rules of Civil Procedure . . . have been adopted and written into” the Commission’s rules. “The Vermont Rules of Civil Procedure therefore do not apply to Commission proceedings.”³¹

The Commission’s rules of practice contemplate the filing of “motions to dismiss” but do not include a provision comparable to V.R.C.P. Rule 12.³² Therefore, it is not clear what standard the Commission should apply to VGS’s motion. In the absence of a rule-based standard, I recommend that the Commission apply the same standard it has used in past cases to evaluate motions to dismiss. The Commission should “[a]ssume that all factual allegations pleaded in the complaint are true . . . accept as true all reasonable inferences that may be derived from [the movant]’s pleadings and assume that all contravening assertions in [respondent]’s pleadings are false.”³³

VGS moves for the Commission to dismiss the Petition for failure to state a claim upon which relief may be granted. VGS states that a successful Section 208 petition must identify an unlawful act or neglect and must be brought by at least five complainants who are adversely affected by the alleged unlawful act or neglect. VGS asserts that the Petition fails both standards.

The Petitioners counter that operating a substantially changed pipeline without an amended CPG is unlawful. I agree. VGS argues that Section 30 provides the proper remedy for violations of Section 248, but this argument is contrary to the Vermont Supreme Court’s recent holding that commencing site preparation in violation of Section 248 is sufficient grounds for the Commission to issue an injunction.³⁴ Therefore, the Petition sufficiently describes an unlawful act for purposes of a Section 208 complaint.

³¹ Commission Rule 2.103

³² Commission Rules 2.206(K) and 2.225(D)

³³ *Petition of Dep’t of Pub. Serv.* Docket, No. 7513, Order of 10/23/09 at 14.

³⁴ *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, 2024 VT 58.

D. Standing

VGS also argues that the Petition fails to state a claim because the Petitioners are not adversely affected by the operation of the pipeline.³⁵ This argument implicates the Petitioners' standing to bring their complaint.³⁶ The issue is whether the Petitioners have been adversely affected by VGS's unlawful act — the unauthorized substantial changes. VGS asserts that “the Petition merely repeats generalized concerns about any pipeline, such as Petitioners' proximity to the ‘zone of impact’ and the potential effect of a catastrophic event like a pipeline explosion.”³⁷

The Vermont Supreme Court has held that standing to challenge utility actions must be supported by more than “speculative interests” and “generalized grievances.”³⁸ The Commission has previously addressed Section 208's requirement that complaints must be brought by at least five persons “adversely affected” by the claimed unlawful activity unless there are fewer than five persons affected. The Commission has dismissed complaints where the complainant failed to establish that the complainant was adversely affected by a utility's allegedly unlawful act³⁹ and in cases where fewer than five persons attempted to bring claims on behalf of customers generally.⁴⁰

Therefore, I turn to the nature of the harm to each of the complainants alleged in the Petition. The Commission must “accept all uncontroverted factual allegations as true,

³⁵ VGS Motion to Dismiss at 12.

³⁶ Standing is an issue of justiciability that addresses whether a court may grant relief to a party in the plaintiff's position. It is distinct from the issue of subject-matter jurisdiction, which addresses whether a court may grant relief to any plaintiff given the claim asserted. *Rent Stabilization Assoc. of the City of New York v. Dinkins*, 5 F.3d 591, 594 n.2 (2d Cir. 1993)(citing *Baker v. Carr*, 369 U.S. 186, 198-208 (1968) and *Flast v. Cohen*, 392 U.S. 83, 98-99 (1968)). Both subject-matter jurisdiction and standing (as well as other questions of justiciability, such as ripeness and mootness) operate to limit the power of a court to act on a claim. For this reason, courts generally dismiss for lack of standing pursuant to Rule 12(b)(1), though Rule 12(b)(6) has been used for this purpose as well. *Id.*

³⁷ *Id.*

³⁸ *Beaupre v. Green Mountain Power Corp.*, 172 Vt. 583, 586 (2001).

³⁹ *In Re Sprint Commc'ns Co., L.P.*, Docket No. 6373, Order of 12/28/01 at n.54 (“Therefore, because I find that the Petitioner was not a customer of Sprint's and has not shown any harm resulting from Sprint's allegedly ‘unlawful act’ pursuant to 30 V.S.A. § 208, Petitioner does not have standing to raise the claim, and his complaint is dismissed.”).

⁴⁰ *Investigation into the Complaint of Mark Tucker Concerning Cellco P'ship, d/b/a Verizon Wirelless, Inpulse Prepaid Wireless Tel. Serv. Plan*, Docket No. 7701, Order of 8/26/2011 at 11-12 (“[T]he fact remains that [the complainant] is only one individual consumer. As such, he lacks standing as a matter of law to pursue a declaratory ruling from the [Commission]”).

construe those facts in the light most favorable to the nonmoving party, and assume the truth of all reasonable inferences that may be derived from the pleadings.”⁴¹

The Palmers

The Petition states that the Palmers were parties in Docket No. 7970. The Project crosses land owned by the Palmers and is located less than 300 feet from the Palmers’ home.⁴² 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.⁴³

The Palmers have demonstrated that they are adversely affected by VGS’s unauthorized substantial changes, including the failure to staff the Project with a Vermont-licensed professional engineer to serve as the responsible charge engineer for the Project, because these changes had the potential to affect the safety of the pipeline.

Mr. Everest

The Petitioners allege that the Project is in a VELCO right-of-way on Mr. Everest’s land where the Project should have been buried four feet underground instead of three feet.⁴⁴ For the same reason as the Palmers, I conclude that Mr. Everest has been adversely affected by VGS’s unauthorized substantial changes.

Ms. Lyons

Ms. Lyons was a party in Docket 7970. The Project is adjacent to Ms. Lyons’s property, and during construction of the Project, a blasting accident within the VGS easement, adjacent to Ms. Lyons’s land, caused her to suffer substantial property damage.⁴⁵ The Petition alleges that 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.”⁴⁶

⁴¹ *Vasseur v. State*, 2021 VT 53, ¶ 10.

⁴² Petition at ¶ 7.

⁴³ *Id.*

⁴⁴ *Id.* at ¶¶ 21-24.

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶ 14.

For the same reasons as the Palmers and Mr. Everest, I conclude that Ms. Lyons has demonstrated that she is adversely affected by VGS's unauthorized substantial changes.

Dr. Smolker and Mr. Shelton

The Petitioners assert that Dr. Smolker and Mr. Shelton:

- routinely travel over or alongside the portions of the VELCO right-of-way and through the residential parts of Hinesburg and St. George, where the pipeline has been buried;⁴⁷
- “enjoy and benefit from the streams and wetlands in Chittenden and Addison counties;”⁴⁸ and
- are directly affected by whether VGS has complied with the safety commitments VGS made to the Commission;⁴⁹

Mr. Shelton is the member of the public who first learned of and photographed the “sink in swamp” method being employed by the Project. Dr. Smolker and Mr. Shelton were granted intervenor status in Case No. 17-3550-INV.

These allegations are insufficient to demonstrate that VGS's CPG violations have adversely affected Dr. Smolker and Mr. Shelton. The harms alleged due to walking next to the pipeline or visiting streams and wetlands in Addison County are the same as those experienced by any member of the public. The Vermont Supreme Court has recognized that injuries must be “particularized” and distinct from the public generally to confer constitutional standing in other Commission proceedings.⁵⁰

Dr. Smolker's and Mr. Shelton's instigation of and participation in Case No. 17-3550-INV is also insufficient to confer standing to file a complaint. The standard for intervention in Commission proceedings requires that an intervenor demonstrate an interest that “*may* be affected” by the outcome of the proceeding.⁵¹ This is not the same

⁴⁷ *Id.* at ¶ 15.

⁴⁸ *Id.* at ¶ 17.

⁴⁹ *Id.* at ¶ 16.

⁵⁰ *In re Apple Hill Solar LLC*, 2019 VT 64, ¶ 19.

⁵¹ Commission Rule 2.209. At the time of Dr. Smolker's and Mr. Shelton's participation in Case No. 17-3550-INV, the Commission's rules required a showing of a “substantial interest.” The Commission's rules have been amended and no longer require an intervenor's interest to be “substantial.”

as Section 208’s “adversely affected” standard. Further, the scope of Case No. 17-3550-INV was broader than this Section 208 proceeding. In Case No. 17-3550-INV, the Commission investigated a myriad of issues related to the Project. The scope of this Section 208 petition is narrower and is limited to the question of whether a Section 248(k) waiver or a cessation of operations is necessary while the Commission reviews the unauthorized substantial changes to the Project. As described above, Dr. Smolker and Mr. Shelton have failed to show any particularized harm resulting from those changes. Therefore, they do not have standing to bring a Section 208 complaint.

Conclusion Regarding Standing

While four of the Petitioners have demonstrated that they have been adversely affected for purposes of Section 208, two of the Petitioners have not. As a result, the Petition is defective because it must be brought by more than five persons adversely affected.⁵² Additionally, if the Commission adopts my recommendation that the claims of all the Petitioners except for Mr. Everest are barred by *res judicata*, Mr. Everest would similarly lack standing to file the Petition.

E. Summary Judgment

In addition to the reasons given by VGS and the Department for dismissing the petition, the Commission may consider summary judgment on its own after giving notice and a reasonable time to respond and after identifying for the parties material facts that may not be genuinely in dispute.⁵³ If the Commission does not accept my recommendations to dismiss the Petition, I urge the Commission to consider whether any issues raised in the Petition are appropriate for summary judgment. Therefore, in filing comments on this proposal for decision the parties should address whether the Commission should grant summary judgment in favor of VGS on the question of whether VGS is required to obtain a Section 248(k) waiver.

The Petitioners’ core argument is that VGS must obtain a Section 248(k) waiver to operate the Project while the Commission considers VGS’s petition to amend its CPG. This is a

⁵² 30 V.S.A. § 208.

⁵³ Commission Rule 2.219(A) provides that “[t]he Commission may grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Commission Rule 2.219(F)(3) further establishes that the Commission may “consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.”

purely legal question and there is no dispute over the following material facts: (1) VGS has implemented substantial changes to the Project without Commission approval and (2) it will be some time, up to several months or longer, before the Commission rules on whether VGS's CPG may be amended to reflect those changes.

In my view, Section 248(k) is inapplicable because the Project has already been constructed. Section 248(k) temporarily bypasses the full Section 248 process to give a pathway for prior authorization for construction of facilities only in the case of emergencies.⁵⁴ Examples of cases processed under Section 248(k) include emergency work needed to respond to unexpected substation failures, corrective action necessary to ensure compliance with national safety codes, and repairs from damaging ice storms.⁵⁵

The Petitioners go to great lengths to explain why Section 248(k) should not be limited to "site preparation and construction" and should apply to changes in the operation of an approved facility.⁵⁶ It is plausible that a company might invoke Section 248(k) to implement a substantial change to an approved facility that does not involve site preparation or construction without the full procedures of Section 248 in response to an emergency. But this argument misses the mark because Section 248(k) is not intended to remediate changes (in construction or operation) that have already been undertaken. The Petitioners have not cited any cases where an applicant has invoked Section 248(k) to authorize a substantial change that has already been made or where the Commission has ordered a CPG holder to file a Section 248(k) waiver application to remedy a violation of Section 248.

In cases where a CPG holder has made an unlawful substantial change, the remedies lie in 30 V.S.A. §§ 30 and 209, which allow the Commission to assess penalties and enjoin unlawful acts, and in Commission Rule 5.413, which dictates the procedures for filing a new Section 248 petition to amend the CPG. Therefore, if this case proceeds on the merits, I recommend that the Commission grant summary judgment in favor of VGS on this issue.

⁵⁴ 30 V.S.A. § 248(k)(4)(A).

⁵⁵ See, e.g., *Petition of Green Mountain Power Corp.*, Case No. 23-0300-PET, Order of 1/27/23 (granting waiver to replace failing transformer); *Petition of Vermont Elec. Power Co., Inc. & Vermont Transco LLC*, Case No. 7740, Order of 7/20/11 (granting waiver to bring structures into compliance with safety codes); *In Re Vermont Elec. Power Co., Inc.*, Case No. 6038, Order of 4/2/98 (granting waiver to construct a temporary line to restore power following an ice storm).

⁵⁶ Petition at 12; Petitioners' Response at 6.

IV. CONCLUSION

For the reasons above, I recommend that the Commission:

- Dismiss all of the claims of Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, and Rachel Smolker as barred by *res judicata*. As a result, the Petition must be dismissed because there must be at least five complainants;
- Rule that Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton, and Rachel Smolker are barred from arguing that VGS must obtain a Section 248(k) waiver in this case by collateral estoppel;
- Rule that Lawrence Shelton and Rachel Smolker lack standing to bring a Section 208 complaint. Therefore, the Petition must be dismissed because there must be at least five complainants; and
- In the alternative, after opportunity for the parties to respond, the Commission should grant summary judgment in favor of VGS on the issue of the applicability of Section 248(k).

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Date: January 13, 2025



Jake Marren, Esq.
Hearing Officer

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Utility Commission (“Commission”) that:

1. The findings, conclusions, and recommendations of the Hearing Officer are hereby adopted. All findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.
2. The Petition is dismissed.

Dated at Montpelier, Vermont this _____.

_____)	
Edward McNamara)	PUBLIC UTILITY
)	
)	
_____)	COMMISSION
Margaret Cheney)	
)	
)	OF VERMONT
_____)	
J. Riley Allen)	

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 24-2630-PET - SERVICE LIST

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