

**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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**VERMONT GAS SYSTEMS, INC.’S  
COMMENTS ON PROPOSAL FOR DECISION**

Vermont Gas Systems, Inc. (“VGS”) submits the following comments on the hearing officer’s January 13, 2025 Proposal for Decision recommending dismissal of the Petition. The Petition in this case presents the same allegations about the Addison Natural Gas Project (“Project,” “ANGP,” or “pipeline”) that have been exhaustively litigated and completely debunked over the course of an unprecedented extensive investigation conducted by the Vermont Public Utility Commission (“Commission”) in Case Nos. 17-3550-INV and 18-0395-PET (the “Investigation”). In a Final Order issued April 6, 2023, the Commission conclusively determined that the five substantial changes to the Project (1) did not require a Section 248(k) waiver, (2) nor did those changes warrant closure of the pipeline, and that (3) the Docket No. 7970 Certificate of Public Good (“CPG”) should be amended. The only open question remaining following the Commission’s Final Order is the appropriate process for amending the CPG, which is a new petition now underway in Case No. 25-0055-PET in accordance with the Vermont Supreme Court’s remand order. All other issues regarding allegations about the ANGP were conclusively determined by the Commission in the Investigation.

VGS’s comments on the Proposal for Decision first discuss the primary basis for dismissal of the Petition in this case: 30 V.S.A. § 208 cannot be construed to require the

Commission to relitigate issues that have already been decided or to duplicate the pending proceeding regarding amendments to the Docket 7970 CPG.<sup>1</sup> Thereafter, VGS’s comments address each of the alternative legal holdings proposed by the hearing officer.

**1. The Commission Cannot Be Compelled Under Section 208 To Reconsider The Merits of a Prior Final Order.**

As discussed in VGS’s Motion to Dismiss, the Commission has already decided the issues raised by the Petition in this case. And to the extent additional process is required to amend the Docket No. 7970 CPG, it will be provided in accordance with the Vermont Supreme Court’s Final Opinion<sup>2</sup> in the proceeding pending in Case No. 25-0055-PET. Accordingly, the central basis for the Commission’s dismissal here should rest on the conclusion that 30 V.S.A. § 208 cannot be construed to require—or even permit—the Commission to reconsider the merits of a prior final order or duplicate the Commission’s review of related issues in other pending proceedings.

Section 208 should be construed in the context of the Commission’s primary jurisdiction and mandate under 30 V.S.A. § 209 “to hear, determine, render judgment, and make orders and decrees in all matters” that relate to the public service companies under its supervision. The Commission is primarily an administrative body with “auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly.”<sup>3</sup> The Commission is not a

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<sup>1</sup> See Case No. 24-2630-PET, VGS Motion to Dismiss (filed Sept. 23, 2024) at 6-8 (arguing the Petition should be summarily dismissed because it raises issues the Commission has already decided and the Commission cannot be “required to entertain a Petition that effectively asks it to reconsider the merits of a prior final order”).

<sup>2</sup> *In re Vermont Gas Systems, Inc.*, 2024 VT 19, ¶¶ 30-33, 316 A.3d 231, 248, *reargument denied* (May 3, 2024) (hereinafter “Final Opinion”).

<sup>3</sup> *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 20 A.2d 117, 120 (1941) (“The Public Service Commission is an administrative body, clothed in some respects with quasi judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly.”).

court in the strict sense and cannot be compelled into unwarranted and duplicative process in the manner proposed by the Petition here. “The quasi judicial power with which the [Commission] is clothed has been defined as ‘the power to perform acts administrative in character, but requiring incidentally the trial and determination of questions of law and fact.’”<sup>4</sup> Accordingly, the Commission can only be compelled to make “determinations of law and fact” under Section 208 where an adjudicative process is necessary for the Commission to fulfill its administrative duties and oversight of regulated utilities.<sup>5</sup>

As argued in VGS’s Motion to Dismiss, Section 208 cannot be used to reconsider the merits of a prior final order because the Commission cannot be required to re-adjudicate determinations of law and fact that are generally applicable to a utility and have already been decided by the Commission. This principle was addressed in *Carpenter v. Home Telephone Company*, where the Vermont Supreme Court reversed the Commission’s decision that a utility’s existing rate schedules were unlawful and unreasonable.<sup>6</sup> In that case, a complaint had been filed against a utility under 30 V.S.A. § 208. The Court held that the Commission could not declare previously approved rate schedules unlawful during the course of a Section 208 investigation. The Court explained that to require a utility “to establish its right to invoke any duly filed and established rate regulation on each occasion of its use . . . would destroy all certainty and stability in filed rate schedules,” “create a situation of endless rate litigation,” and “make responsible management and businesslike operation impossible.”<sup>7</sup>

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<sup>4</sup> *Id.* at 8.

<sup>5</sup> In this way, Section 208 is not akin to a private civil right of action because “where the duty is primarily to decide a question of private right . . . the function is judicial, and, constitutionally is to be performed by the Courts.” *Trybulski*, 112 Vt. at 8.

<sup>6</sup> *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 52, 163 A.2d 838, 841 (1960).

<sup>7</sup> *Id.* at 55.

The same principle applies here. Section 208 cannot be used to force VGS to establish that its operation of the pipeline is lawful when the Commission itself has already expressly decided that the five substantial changes to the Project did not warrant closure of the pipeline.<sup>8</sup> As discussed in *Carpenter*, while the Commission “has authority to review the alleged unlawful or negligent acts of the regulated company . . . [o]therwise permissible actions of a company become unlawful only when they pass the recognized bounds of operational management and overstep the limits of reasonableness.”<sup>9</sup> Clearly, operation of the pipeline cannot exceed the “limits of reasonableness” where (1) VGS holds an existing CPG that mandates operation of the pipeline, (2) VGS has a statutory service obligation under 30 V.S.A. § 231 (which also requires operation of the pipeline), and (3) the Commission’s Final Order in the Investigation expressly—and conclusively—determined that the five substantial changes to the Project did not warrant closure of the pipeline. As in *Carpenter*, the Commission cannot subsequently declare that the same five substantial changes render operation of the pipeline unlawful.

The hearing officer’s Proposal for Decision rests on other sound alternatives for dismissal of the Petition, which VGS addresses below. The Commission’s primary reason for dismissal in this case, however, should be grounded in 30 V.S.A. § 208 itself, which does not require—or even permit—the Commission to reconsider a prior final order that determined that the five substantial changes in the Investigation (1) do not require a Section 248(k) waiver and (2) do not warrant closure of the pipeline. Operation of the pipeline is legal because the Commission has already decided the substantial changes do not justify closure of the pipeline and the CPG should be amended to reflect those changes. There is no sound reason for the Commission to exercise its

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<sup>8</sup> Case Nos. 17-3550-INV and 18-0395-PET, 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.”) (hereinafter the “Investigation”).

<sup>9</sup> *Carpenter v. Home Tel. Co.*, 122 Vt. at 53.

quasi-judicial powers to investigate a claim that has already been decided in a prior final order or to conduct an investigation that duplicates review of issues pending before the Commission in Case No. 25-0055-PET regarding amendment of the CPG.

**2. The Commission Should Modify the Hearing Officer’s Recommendation Regarding The Petition’s Failure to State a Claim Because Operation of the Pipeline is Lawful.**

The Proposal for Decision concludes that the Petition “sufficiently describes an unlawful act for purposes of a Section 208 complaint.”<sup>10</sup> Specifically, the Proposal for Decision agrees with the Petitioners’ argument that “operating a substantially changed pipeline without an amended CPG is unlawful.”<sup>11</sup> This conclusion is inconsistent with the Commission’s Final Order in the Investigation that conclusively determined that the substantial changes did not warrant closure of the pipeline because the project was adequately installed and is safe.<sup>12</sup> That decision was final and VGS and its customers are entitled to the finality of the Commission’s decision in the Investigation. The Commission cannot require closure of the pipeline in this case based on the same five substantial changes the Commission has already considered—and rejected—as a basis for closure of the pipeline. That is exactly what the Petition attempts to do here: proffer a basis for shutting down the pipeline based on the same five substantial changes and same general claims expressed in the Investigation.

Moreover, in the absence of an express order from the Commission requiring VGS to terminate its service obligation under 30 V.S.A. § 231 to Addison County or an amendment to the existing Docket No. 7970 CPG regarding VGS’s service obligation, VGS is legally mandated to continue operation of the pipeline. Operation of the pipeline cannot be legally required by both

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<sup>10</sup> Case No. 24-2630-PET, Proposal for Decision (Jan. 13, 2025) at 8 (“Proposal for Decision”).

<sup>11</sup> *Id.*

<sup>12</sup> 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.”).

statute and order of the Commission in Docket No. 7970 on the one hand and also unlawful for purposes of pleading a Section 208 complaint as proposed by the hearing officer here. The Petition, therefore, fails to state a claim under 30 V.S.A. § 208 because operation of the pipeline is not an “unlawful act”—VGS is both authorized and obligated to provide service to customers in Addison County.

The Proposal for Decision’s reliance on the Vermont Supreme Court’s recent order in *In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209*, 2024 VT 58, ¶ 1, 2024 WL 4009708, at \*1 (Vt. Aug. 30, 2024), conflates the Commission’s *ability* to issue an injunction for violation of Section 248 with the existence of an unlawful act for purposes of pleading a Section 208 complaint. In the case cited by the hearing officer, the Court held that development without a CPG under Section 248 was sufficient grounds for the Commission to issue an injunction without balancing the equities. But unlike the developer in that case who had yet to obtain a CPG, VGS holds a valid CPG that requires operation of the pipeline. Further, the Commission has already expressly decided that the five substantial changes do not warrant closure of the pipeline and issued an order requiring VGS to amend its existing CPG. Accordingly, that case provides no guidance here because VGS has a valid CPG and a statutory mandate to provide service, and the Commission has already expressly decided that operation of the pipeline should continue pending review of CPG amendments.

**3. The Commission Should Adopt the Hearing Officer’s Recommendation Regarding Res Judicata As An Alternative to the Above Basis for Dismissal.**

The Proposal for Decision recommends that the Commission conclude that five of the six Petitioners are barred by res judicata from relitigating over the “appropriate remedy for VGS’s

violations of the CPG.”<sup>13</sup> The hearing officer explained that “*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.’”<sup>14</sup> There is only one Petitioner in this case that is not barred from relitigating the Investigation and he cannot bring a complaint under Section 208 on his own. VGS agrees that the Petition may be dismissed because it is barred by *res judicata*. As discussed above, however, this Petition must be dismissed because—regardless of who files it or whether Petitioners are barred by *res judicata*—the Petition raises issues regarding the Commission’s general oversight of a regulated utility that the Commission has already ruled upon.

**4. The Commission Should Modify the Hearing Officer’s Recommendation Regarding Collateral Estoppel Because Whether the Commission Should Order the Closure of the Pipeline Was Actually Litigated in the Investigation.**

The Proposal for Decision recommends that the Commission conclude that five of the six Petitioners in this case “are precluded from raising the applicability of Section 248(k) in this proceeding,” but that 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.”<sup>15</sup> VGS disagrees. The record in the Investigation is that both Intervenors advocated for, and the Commission adjudicated and considered, whether changes to the pipeline during construction warranted its closure. Indeed, closure of the pipeline was the singular objective of Intervenors throughout the Investigation, and the Commission expressly put the burden on VGS to demonstrate why it should not be closed.

On November 18, 2018, the Intervenors in the Investigation moved to broaden the scope of the Investigation asking the Commission to evaluate whether closure of the pipeline was

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<sup>13</sup> Proposal for Decision at 6.

<sup>14</sup> *Id.* at 4 (citing *In Re Green Mountain Power Corp.*, Docket No. 5983, Order of 2/27/98 at n.29).

<sup>15</sup> *Id.* at 7.

appropriate by requesting that the Commission “issue an order that the company show cause why it should not cease operating the pipeline.”<sup>16</sup> In response, the Commission broadened the scope of the Investigation and expressly directed “the Company during the investigation to show cause why the Commission should not order that the pipeline cease operation.”<sup>17</sup> Intervenors’ request, and the Commission’s order granting that request, put the burden on VGS to demonstrate why the changes investigated in that case were not cause to cease operation of the pipeline. VGS met that burden and the Commission ultimately concluded that the pipeline is safe and the five substantial changes to the Project did not warrant closure of the pipeline.<sup>18</sup> Accordingly, re-litigation of the question of whether the five substantial changes in the Investigation warrant closure of the pipeline is not only impermissible under Section 208 and barred by res judicata, as discussed above, it is also barred by collateral estoppel because that issue was actually litigated. The five Intervenors from the Investigation cannot avoid issue preclusion in this case by reframing their prior request to litigate whether there is good cause to close the pipeline as “injunctive” relief in this Petition.

**5. The Commission Should Conclude That None Of The Petitioners Alleges Facts Sufficient to Establish Standing.**

VGS generally agrees with the Proposal for Decision’s overall recommendation regarding standing. To the extent the lack of Petitioners’ standing is relied upon as an alternative basis for dismissal of the Petition, VGS recommends that the hearing officer’s proposal be modified in the following ways.

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<sup>16</sup> Investigation, Intervenors’ Motion to Broaden the Scope (filed Nov. 20, 2018) at 12.

<sup>17</sup> Investigation, Order re Scope of Investigation (issued Jan. 10, 2019) at 1.

<sup>18</sup> Investigation, Final Order at 20.

First, the Proposal for Decision suggests that the Petitioners’ alleged “adverse impacts” effectively give them standing to assert a private right of action under 30 V.S.A. § 208 for a CPG violation—even where the Commission has already exhaustively investigated their concerns and issued a conclusive final order regarding appropriate remedies and additional process. As discussed above, Section 208 does not entitle a complainant to adjudication of a private right of action separate from the Commission’s general supervision of a regulated utility. Accordingly, even if a petitioner adequately alleges they are adversely affected by a CPG violation, they may not use Section 208 to relitigate the proper remedies for a CPG violation after the Commission has already investigated that violation and issued a final order. As in the *Carpenter* case discussed above, Section 208 cannot be used to subject a regulated utility to endless repetitive litigation.<sup>19</sup>

Second, and as discussed in VGS’s prior briefing, the allegations in the Petition are too generalized to establish that Petitioners are adversely affected by operation of the pipeline for purposes of a Section 208 complaint. “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.”<sup>20</sup> The allegations in this Petition offer no nexus between the alleged unlawful act (operating the pipeline in accordance with VGS’s existing CPG pending necessary amendment proceedings) and the Petitioners’ personal interests. The allegations rely entirely upon speculation about a theoretical pipeline explosion without alleging any factual basis for such risk.<sup>21</sup> Again, the

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<sup>19</sup> *Carpenter*, 122 Vt. at 55 (explaining that putting the burden on a utility to “to establish its right to invoke any duly filed and established rate regulation on each occasion of its use would be to nullify the notice protection now in the law and set the statutory procedures at naught, or would destroy all certainty and stability in filed rate schedules and create a situation of endless rate litigation”).

<sup>20</sup> *Brod v. Agency of Nat. Resources*, 2007 VT 87, ¶ 9, 182 Vt. 234, 239, 936 A.2d 1286.

<sup>21</sup> The hearing officer erroneously concludes that the Palmers, Mr. Everest, and Ms. Lyons have established standing based on the fact that (1) the CPG violation regarding licensed engineering had “the potential to affect the

Commission did not conclude that any substantial changes warranted closure of the pipeline or had the potential to increase the risk of a pipeline explosion.<sup>22</sup> It is not sufficient for a Section 208 pleading to speculate about potential risks without offering any basis upon which the Commission could conclude there is a threat of actual injury.

Third, the hearing officer’s conclusion that some Petitioners are “adversely affected” because “the failure to staff the Project with a Vermont-licensed professional engineer to serve as the responsible charge engineer for the Project . . . had the potential to affect the safety of the pipeline” is not sufficient to establish a threat of actual injury. This conclusion contradicts the Commission’s determinative findings in the Investigation. The Commission found that the pipeline was adequately installed, safe, and should continue operation, findings that the Petitioners attempt to undermine through this Petition.<sup>23</sup> Accordingly, Petitioners’ allegations here cannot establish a threat of actual injury based on this substantial change because the Commission has already decided the pipeline was adequately installed and is safe notwithstanding this change.

## **6. Summary Judgment**

The hearing officer recommends that, to the extent the Petition is not otherwise dismissed, the Commission should address the Section 248(k) remedy on summary judgment.

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safety of the pipeline,” and (2) each of these individuals own land that is less than 320 feet from the Project and within the “area subject to catastrophic harm to both property and person” in the event of a “pipeline leak and explosion.” Even if these allegations were accepted as true, the Petition draws no connection between the substantial changes and a catastrophic explosion anywhere along the pipeline and certainly draws no connection to any of Petitioners’ properties to constitute a threat of actual injury.

<sup>22</sup> While the Commission concluded that some of the changes had the potential for impacts on public safety, that conclusion was grounded in specific findings about potential safety issues. For example, the Commission found that the depth of cover in the Clay Plains Swamp was a change that could *potentially* have impacted compliance with the surface loading standard. There were no findings—or indeed any evidence—that the change had potential impacts that would involve a pipeline explosion.

<sup>23</sup> Petitioners cannot avoid the preclusive effect of the Commission’s final order in the Investigation by reframing their claims to attempt to make them “new” claims in this Petition, nor by adding one new person.

The hearing officer also requested that the parties comment on whether the Commission should grant summary judgment in this case.

First, this Petition can be dismissed on the grounds discussed above without reaching the summary judgment question. As discussed above, 30 V.S.A. § 208 does not compel the Commission to exercise quasi-judicial powers that do not advance the Commission's statutory and administrative duty to regulate public utilities. There is no basis to entertain a Section 208 complaint that seeks relief the Commission has already considered and rejected. Accordingly, it is not necessary for the Commission to apply a summary judgment standard to dismiss the Petition in this case.

Second, to the extent the Commission evaluates the Petition under a summary judgment standard, it should grant summary judgment in favor of VGS. Under Rule 2.219, "The 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." None of the material facts are disputed in this case. Nearly all the allegations in the Petition itself simply state procedural history from the Investigation or assert conclusions of law. It is not material that certain Petitioners own property adjacent to the pipeline right-of-way or that Dr. Smolker or Mr. Shelton might travel along the pipeline corridor in Hinesburg or St. George. Even if all the facts in the Petition are assumed to be true, for the reasons stated above, VGS is entitled to summary judgment because the Petition has no basis in law.

Furthermore, there is no basis for the Section 248(k) remedy for the reasons discussed in the Proposal for Decision and for the same reasons the Commission rejected that remedy in the Investigation. Section 248(k) does not apply to a project that is already constructed. Because it is undisputed that the Project is already constructed, Section 248(k) does not apply. Even if Section

248(k) did apply to a project that has already been constructed, there is no emergency warranting the use of Section 248(k), as the Commission found in the Investigation. Notably here, the Petition does not even allege any sort of emergency.

Similarly, while the hearing officer does not address the request for an injunction under the summary judgment standard, the Petition does not warrant an injunction even if all of the material allegations therein are accepted as true. The facts in the Petition are effectively that the Commission found VGS had made five substantial changes and that the Petitioners live or travel near the pipeline. There is no allegation in the Petition that raises any concern about safety or demonstrates that there is good cause to enjoin operation of the pipeline pending review of proposed CPG amendments. The Petition therefore does not justify terminating service to thousands of customers during the winter. Accordingly, to the extent the Commission assesses the merits of the Petition under a summary judgment standard, the entire Petition should be dismissed and summary judgment granted in VGS's favor.

### **Conclusion**

For the foregoing reasons, the Commission should (1) dismiss the Petition in this case because Section 208 does not permit reconsideration of a prior final order, and (2) adopt the recommendations of the hearing officer with modifications discussed herein.

DATED at Burlington, Vermont, on this 14<sup>th</sup> day of February 2025.

VERMONT GAS SYSTEMS, INC.

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