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 . Good or a waiver pursuant to 30 V.S.A. § 248(k)	)))))	Case #24-2630-PET

PETITIONERS' REPLY TO VGS OBJECTION

Petitioners submit, pursuant to Commission Rule 2.206, this reply to Vermont Gas System's (VGS) objection to the motion to withdraw the petition. Counsel here explains why the motion to withdraw was filed, when the decision was reached, and how it was communicated to Vermont Gas Systems and the Department of Public Service.

Upon reading the Hearing Officer's PFD, Intervenors' counsel initially concluded that the PFD was comprehensive and well-reasoned, but was incorrect in two, possibly three, areas. First, the PFD incorrectly stated (p. 5) that the requirement that an issue be necessary to the final judgment was limited to issue preclusion. It is correct, as the PFD states, that that explicit standard (necessary to the final judgment) is one of the criteria for issue preclusion, and is not commonly listed as a criterion for claim preclusion. However, Wright & Miller's discussion of *claim* preclusion explains that claim preclusion may not apply to an *issue* that was not necessary to the judgment. This is because one cannot appeal an issue that was not necessary to the judgment, and preclusion generally does not apply to issues that could not be appealed. 8A Fed. Prac & Proc. Juris. § 4433.

Second, the PFD rejected Petitioners' argument that the applicability of § 248(k) had become moot and therefore was not appealable. The PFD, in footnote 23, stated that there was at least a two-month period in which the issue was still alive. The PFD did not specify when this two-month time period would arise. The relevant question was whether the issue would become

moot at any time before the issuance of an appellate court's ruling. *Lowell v. Dept. of Children and Families*, 2024 VT 46 ¶¶ 13-23, 325 A.3d 42. The Supreme Court's ruling would not have been issued for well after two months. There seemed to be no reasonable possibility that the Supreme Court would issue a ruling in less than two months, and therefore the issue was not appealable.

The third apparent error in the PFD was its treatment of Mr. Shelton and Dr. Smolker's standing. The PFD recommended dismissal or, in the alternative, that the issue be addressed through summary judgment. However, the question of whether Mr. Shelton and Dr. Smolker qualified as intervenors to raise § 248(k) issues had been determined in the former litigation. The intervention standard is the same or more restrictive than the § 208 standard. The issue of the applicability of § 248(k) was litigated by these intervenors in that proceeding. Therefore, either claim preclusion or issue preclusion bars challenges to their standing to raise this issue

After reading closely the PFD, counsel re-read the legal research he had conducted before filing the memorandum in opposition to the motion to dismiss, conducted further research, and re-read the memorandum in opposition. In doing so, counsel became convinced that the carefully reasoned PFD had reached the correct result. This was for several reasons. First, the legal question of whether an issue must be necessary to the final judgment for claim preclusion to apply becomes irrelevant if the issue in fact was necessary. Counsel was convinced by the reasoning of the PFD on pages 5-6 that the issue, in fact, was necessary to the final judgment. The legal dispute about whether an issue must be necessary to the final judgment, therefore, was no longer relevant.

Second, counsel decided that the PFD was correct about mootness. Once one determines that the § 248(k) issue was necessary to the decision, as explained on pages 5-6 of the PFD, it

follows that the two-month period must commence *after* the Supreme Court ruling. This is because upon filing of the notice of appeal the Commission lost jurisdiction over all issues decided in the final judgment on appeal. *In re Vermont Gas Systems*, *Inc., for a certificate of public good pursuant to 30 V.S.A. § 248 authorizing construction of the Addison Natural Gas Project*, Docket 7970, Order re Decision to Seek Remand (9/2/14) at 5[1]. Because the issue was necessary to the final judgment, the two-month period necessarily had to occur after the Supreme Court ruling, and the issue did not become moot during the appellate process.

Third, the question of whether Mr. Shelton's and Dr. Smolker are adversely affected persons under § 208 becomes irrelevant if their claims are barred by claim preclusion or issue preclusion. Counsel was convinced by the PFD that their claims are precluded, because resolution of the § 248(k) issue had been necessary for the final judgment.

Upon reaching this decision, counsel immediately sent the following email to counsel for VGS and the Department:

> Counsel -- In light of Hearing Officer Marren's well-written Proposal for Decision, my clients have decided to withdraw the Petition. I would like to inform the Commission that all parties consent to withdrawal of the Petition. Please let me know! Thanks.

This email was sent at 10:18 am on February 13., 2025. VGS replied at 12:05 pm: "We are currently occupied with finalizing filings that are due with the Commission tomorrow. We will consider your request and get back to you."

---

[1] "The Board has determined that the issues raised by the VGS Cost Update and the responsive filings of the parties relate directly to our December 23rd Order and therefore may only be considered after a limited remand is granted. Depending upon the evidence developed after remand, if any, the Board may, among other things, need to directly re-address the bases for the December 23rd Order. The Board has therefore concluded that it has no jurisdiction to develop that evidence without a limited remand from the Vermont Supreme Court."

No further response from VGS or the Department was received, so counsel read the rule, saw that it did not refer to filing of a motion, but to be safe filed a motion. The motion stated that Petitioners wished to withdraw the Petition because they had been convinced by the reasoning of the Hearing Officer's Proposal for Decision.

The Commission has not required a motion when a petitioner seeks to withdraw a petition under Rule 2.220(C). In *Investigation into whether Crystal Springs Water Co. violated Public Utility Commission Rule 3.300 and Emergency Rule 2.600 for disconnection of an essential service without sufficient process,* Case No. 22-5094-PET, Order Closing Case (1/3/24), the Petitioner filed a letter stating that it wished to withdraw the petition pursuant to Rule 2.220(C) because the issues had been resolved. No motion was filed. The Commission issued an order approving of the withdrawal.

Similarly, in *Consumer Complaint of J.G. re WEC storm response*, Case No. 23-4071-CC, Order Closing Case (2/5/24), a petition was filed, comments were then filed, WEC filed a letter seeking dismissal of the petition, and then the petitioner filed a letter seeking to withdraw the petition. Neither WEC nor the petitioner filed a motion or a memorandum of law. The Commission decided to dismiss the petition. Its order stated that WEC's "motion for dismissal" was granted, even though there had been no motion.

Counsel is fully aware of his obligations to the tribunal, the other parties and his clients, under Rule of Professional Conduct 3.1 and Commission Rule 2.203. These require a basis in law and fact for filings, including a good faith argument for extension, modification or reversal of existing law. Counsel is particularly aware of the two Comments to Rule of Professional Conduct 3.1:

> [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
>
> [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Counsel has complied the Federal Advisory Committee's Notes to Rule 11, quoted in *In Re Entergy Nuclear Vermont Yankee LLC*, Docket No. 6812, Order re NEC Motion for Sanctions (10/7/03), that counsel has a duty to reconsider their positions during the course of the litigation. Counsel did just that. He reconsidered his position in light of the Hearing Officer's carefully written PFD, and agreed that the conclusions reached in the PFD are correct. He immediately notified opposing counsel.

Date: March 4, 2025

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

/s/ James A. Dumont
James A. Dumont, Esq.
Law Office of James A. Dumont, Esq. PC
15 Main St., PO Box 229
Bristol, VT 05443
(802) 453-7011 office

(802) 349-7342 cell
dumont@gmavt.net
dumont.vt@gmail.com