2024 VT 19

No. 23-AP-244

In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209 Regarding the Alleged Failure of Vermont Gas Systems, Inc. In re Notice of Probable Violations of Vermont Gas Systems, Inc. (Rachel Smolker et al., Appellants)	Supreme Court On Appeal from Public Utility Commission November Term, 2023

Anthony Z. Roisman, Chair

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Eric B. Guzman, Special Counsel, Montpelier, for Appellee Department of Public Service.

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PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **COHEN, J.** This appeal is part of a decade-long series of proceedings involving Vermont Gas Systems, Inc. (VGS) and its construction of a natural gas pipeline pursuant to a certificate of public good (CPG). In the investigative proceedings below, the Vermont Public Utility Commission issued a decision finding that VGS made unsanctioned "substantial changes" to the approved proposal underlying VGS's CPG while constructing the pipeline. The Commission nevertheless found that those substantial changes did not undermine the pipeline's consistency with 30 V.S.A. § 248, and that VGS's CPG could be amended in the investigative

proceedings to reflect the changes. The Commission ordered VGS to pay a fine and to submit proposed amendments to its CPG.

¶ 2. Intervenors Kristin Lyons, Nathan Palmer, Jane Palmer, Lawrence Shelton, and Rachel Smolker appeal the Commission's decision. They argue that the Commission improperly interpreted its own rule to permit VGS to amend amendment of the CPG in the context of the investigative proceeding. Intervenors additionally argue the Commission failed to give them adequate notice that it would make findings that the substantial changes did not actually impact certain § 248 criteria, thereby allowing the Commission to amend the CPG to accommodate those changes. Finally, they claim the Commission erred in declining to find that VGS violated the CPG by failing to obtain an engineer's signature on a component of the project plans. For the reasons that follow, we reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶ 3. The following facts are drawn from the record and the Commission's decision. In December 2012, VGS petitioned for a CPG under § 248 to construct a natural gas pipeline. In December 2013, the Commission granted that petition in a final order (2013 Final Order) and issued VGS a CPG to construct the proposed pipeline. The 2013 Final Order and the CPG set forth certain conditions and specifications that controlled how VGS was to carry out its construction of the pipeline.

¶ 4. Among those conditions, VGS was required to construct the pipeline in strict adherence to the plans and evidence that it submitted to the Commission in obtaining the CPG. Any changes to those approved plans required the Commission's preapproval. The 2013 Final Order and CPG also obligated VGS to construct the pipeline in a manner that met or exceeded applicable safety codes and industry standards. Additionally, the 2013 Final Order and the CPG adopted a memorandum of understanding between VGS and Vermont Electric Power Company,

Inc./Vermont Transco LLC (together VELCO). That memorandum of understanding required VGS to bury the pipeline at least four feet deep in eighteen locations in New Haven, all of which were within an electrical transmission right-of-way held by VELCO.

¶ 5. From 2015 to 2017, the Commission fined VGS three times for failing to timely report cost estimate increases of the project, failing to observe federal safety regulations, and taking plants without a permit.

¶ 6. In June 2017, VGS submitted a request to the Commission for a determination that its failure to bury the pipeline four feet deep within the VELCO right-of-way constituted a "non-substantial change." VGS asserted that this deviation was minor and non-substantial because it would not have the potential to significantly impact any of the criteria set forth in 30 V.S.A. § 248. Therefore, VGS argued, it would not need to amend the CPG under the 2013 Final Order, the CPG, and Commission Rule 5.408.

¶ 7. In response to VGS's request, the Commission initiated investigative proceedings pursuant to 30 V.S.A. §§ 30 and 209 and appointed a hearing officer. The stated purpose of the investigation was to determine whether VGS violated the 2013 Final Order and the CPG in burying the pipeline at a depth of less than four feet within the VELCO right-of-way. The investigation's scope was initially limited to whether VGS's deviations from the project plans were material or constituted a "substantial change" and, if so, whether remedial action, penalties, or "any other steps authorized by law" were necessary.

¶ 8. After the Commission held a public hearing and received public comments, the Department filed with the Commission a notice of probable violations against VGS (NOPV proceeding). The Department sought to examine the extent to which VGS's construction of the pipeline deviated from the project specifications set forth in the 2013 Final Order and the CPG. The NOPV proceeding was consolidated with the Commission's investigation, allowing the Commission to investigate all potential violations in a single proceeding.

¶ 9. During the proceedings, the Commission hired an independent expert to verify the pipeline's burial depth. In April 2018, the hearing officer notified the parties that the Commission had additionally tasked the expert to review the pipeline's overall construction, performance, and safety. The hearing officer subsequently expanded the scope of the investigation at intervenors' request and asked the independent expert to determine whether VGS improperly used documents without a Vermont-licensed professional engineer's signature and seal during the construction pipeline process. He also ordered VGS to show cause why the Commission should not order the pipeline to cease operation. In January 2020, the independent expert submitted a final report after completing his review of the pipeline.

¶ 10. The hearing officer held a multi-day evidentiary hearing in September 2020. In addition to taking evidence proffered by the parties, the hearing officer took administrative notice of the evidence presented in the original CPG proceeding and the filings in the NOPV proceeding.

¶ 11. In January 2021, the hearing officer issued an interim order finding that VGS committed five separate violations of the 2013 Final Order, the CPG, and Commission Rule 5.408. The hearing officer concluded that each of the five violations constituted a "substantial change" to the pipeline construction project that required the Commission's preapproval, which VGS failed to obtain. According to the hearing officer, the five changes were substantial because each had the potential to significantly impact the criteria set forth in 30 V.S.A. § 248.

¶ 12. Specifically, the hearing officer found with regard to the first violation that the project plans contemplated only two types of burial methods, yet VGS employed a third, "sink-in-the-swamp" method when installing the pipeline in a rare and irreplaceable natural area. This change had the potential to significantly impact, "at a minimum," the natural resources criteria set forth in § 248(b)(5).

¶ 13. The second violation—failing to bury the pipeline at least four feet in the VELCO right-of-way locations—had the potential to affect the safety of the pipeline and limit the use of

the VELCO right-of-way. The hearing officer found that this could impact public safety under § 248(b)(5) and could further impact meeting future electrical needs under § 248(b)(2), maintaining reliable and stable electric transmission under § 248(b)(3), and the economy of the state under § 248(b)(4).

¶ 14. The hearing officer found that the third and fourth violations—VGS's failure to comply with its own specifications regarding pipeline burial and installation of trench breakers or to comply with soil compaction requirements—had the potential to severely impact public health and safety under § 248(b)(5). Specific to the third violation, VGS's failure to abide by the trench breaker specifications risked the pipeline's trench becoming a conduit for the movement of water. That would, in turn, increase the likelihood of soil erosion around the pipeline and endanger its integrity. The fourth violation also potentially impacted public safety because improper soil compaction could undermine the safety of road and driveway crossings as well as the protection of the natural environment.

¶ 15. As for the fifth violation, the hearing officer determined that VGS's failure to staff the project with a Vermont-licensed professional engineer as the responsible charge engineer may have led to the other four violations. The hearing officer did not draw a connection between this violation and any particular § 248 provision.

¶ 16. The hearing officer also determined that VGS was not liable for other conduct related to the pipeline's construction. Relevant to this appeal, the hearing officer concluded that VGS's plan to mitigate against erosion caused by alternating current (AC mitigation plan) was consistent with appropriate specifications and was an adequate corrosion-protection system.[1]

[1] The concern involving the pipeline's potential erosion arose from its proximity to electrical lines along the VELCO right-of-way, as alternating electrical currents could stray into the ground and cause the pipeline to erode.

¶ 17. The hearing officer stated in the interim order that penalties would be determined in a subsequent order.[2] The hearing officer indicated that he would consider recommendations about any proposed penalties and whether VGS would be required to seek an amendment to the CPG or be required to undertake additional remedies.

¶ 18. In February 2021, VGS sought the Commission's interlocutory review of the interim order. The Commission denied review but directed the hearing officer to reopen the record. According to the Commission, further evidence was necessary to determine whether VGS's failure to meet the four-foot burial depth loading standard limited VELCO's ability to repair or construct transmission infrastructure, which could affect the legal analysis for the penalty phase.

¶ 19. In December 2021, the hearing officer conducted another evidentiary hearing. The hearing was limited to the penalty criteria set forth in 30 V.S.A. § 30 and whether VGS's failure to achieve the four-foot burial depth requirement affected VELCO's ability to use the VELCO right-of-way.[3] VGS and intervenors then filed proposed findings of fact and post-hearing memoranda. The Department also filed proposed findings of fact and a penalty recommendation.

¶ 20. In October 2022, the hearing officer issued a proposal for decision which incorporated the findings, conclusions, and recommendations contained in the interim order. The hearing officer reaffirmed the previous determinations that VGS committed five "substantial change" violations of the 2013 Final Order, the CPG, and Commission Rule 5.408.

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[2] In addition to the five substantial-change violations, the hearing officer also concluded that VGS violated the 2013 Final Order in a sixth manner. According to the hearing officer, VGS failed to achieve a seven-foot burial depth in eight nonjurisdictional streams, which was a material deviation from the original project plans. Although that material deviation violated the 2013 Final Order, it did not amount to a substantial-change violation because the deviation did not have the potential to significantly impact § 248 criteria.

[3] After reopening the record and receiving evidence from VELCO, the hearing officer ultimately concluded that VGS's failure to achieve the four-foot burial depth nevertheless met the loading standard required by VELCO and considered this finding when recommending an appropriate remedy.

¶ 21. The hearing officer concluded that VGS was required to amend the CPG. He accordingly considered what procedure was required. The Department and VGS sought for the Commission to amend the CPG as part of the investigatory proceedings, whereas intervenors asked that VGS be required to initiate separate amendment proceedings. Agreeing with intervenors, the hearing officer listed several reasons why VGS should be required to file a separate petition to amend its CPG: neither VGS nor the Department proposed specific language for any amendments; VGS's substantial changes went beyond the scope of the investigatory proceedings; merely authorizing the change in burial depth would not address the scope of the potential adverse effects; and, because VGS agreed to implement additional safety measures in response to issues raised during the course of the investigation, those measures needed to be evaluated to determine if they would sufficiently mitigate VGS's violations. The hearing officer thus recommended that, pursuant to Commission Rule 5.408, the Commission direct VGS to file a separate petition to amend the CPG.

¶ 22. The hearing officer also analyzed each violation under the penalty criteria contained in 30 V.S.A. § 30. For the five substantial-change violations, the hearing officer recommended a penalty of $140,000. The hearing officer recommended an additional $10,000 penalty for the single material-deviation violation.

¶ 23. In April 2023, the Commission issued a final order adopting the hearing officer's proposal for decision with some modifications (the 2023 Final Order). The Commission adopted the hearing officer's findings that VGS committed five substantial-change violations and one material-deviation violation. The Commission also adopted the recommended penalty.

¶ 24. The Commission further agreed that an amendment to the CPG was needed, but concluded that VGS did not need to initiate a new proceeding to obtain an amendment. According to the Commission, the record contained all the information required to make those necessary amendments. Relying on the "uniquely extensive evidentiary record in this [investigatory

proceeding]," the Commission found that the five substantial changes did not actually impact the substantive criteria under § 248. The Commission found that the pipeline was safe, and therefore it could properly move forward to amend the CPG within the context of the investigatory proceeding. It directed VGS to propose amendments to the CPG that reflected the five substantial changes and accounted for the independent expert's remedial recommendations.

¶ 25. The Commission rejected intervenors' arguments, raised in their response to the hearing officer's proposal for decision, that permitting VGS to amend the CPG in the context of the investigatory proceeding would violate their rights to due process and the notice requirements of the Vermont Administrative Procedure Act. The Commission concluded that the parties were sufficiently on notice that the investigatory proceedings would address the safety of the pipeline and could result in amending the CPG.

¶ 26. Relevant to this appeal, the Commission also rejected intervenors' request for supplemental findings on the adequacy of VGS's AC mitigation plan. Intervenors contended that VGS improperly failed to ensure that the AC mitigation plan was signed by a Vermont-licensed professional electrical engineer. That failure, according to intervenors, threatened public safety and violated 26 V.S.A. § 1188. The Commission declined to make additional findings because the evidence showed that VGS's AC mitigation plan was effective in ensuring public safety, there was insufficient evidence to find that the Vermont-engineer-signature requirement applied to that plan, and the alleged violation of 26 V.S.A. § 1188 was not a per se threat to public safety.

¶ 27. Intervenors moved for reconsideration on the issues they now raise in this appeal. In June 2023, the Commission issued an order denying that motion. This appeal followed.

II. Analysis

¶ 28. As a general matter, we review decisions of the Commission with deference and accord "a strong presumption of validity to the Commission's orders." In re Stowe Cady Hill Solar, LLC, 2018 VT 3, ¶ 15, 206 Vt. 430, 182 A.3d 53 (alteration omitted and quotation omitted).

We do so "[o]ut of respect for the expertise and informed judgment of agencies[] and in recognition of the Court's proper role in the separation of powers." In re Vt. Gas Sys., 2024 VT 2, ¶ 15, __ Vt. __, __ A.3d __ (quotation omitted). Consistent with that deference, we will uphold the Commission's findings of fact absent clear error. Id. ¶ 17.

¶ 29. The Commission's interpretation of a statute enjoys deference so long as the statute is one that the Commission is tasked by the Legislature to implement. See Shires Housing, Inc. v. Brown, 2017 VT 60, ¶ 9, 205 Vt. 186, 172 A.3d 1215. However, this does not mean that we "abdicate our responsibility to examine a disputed statute independently and ultimately determine its meaning." Stowe Cady Hill Solar, 2018 VT 3, ¶ 20 (quotation omitted). We employ a similar approach when reviewing an agency's interpretation of one of its own rules or regulations. Id. As with statutory interpretations, the deference we give to an agency does not mean that the agency has "carte blanche in interpreting a regulation." In re Conservation Law Found., 2018 VT 42, ¶ 16, 207 Vt. 309, 188 A.3d 667. We conduct our own independent inquiry and will reverse an agency's rule interpretation "that exceeds the authority granted under the state enabling statute; that conflicts with past agency interpretations of the same rule; that results in unjust, unreasonable, or absurd consequences; or that demonstrates compelling indications of error." Id. (citations omitted and quotations omitted).

A. Failure to Obtain Engineer's Approval

¶ 30. We begin with intervenors' challenge to the Commission's factual finding that VGS's failure to obtain a Vermont-licensed professional engineer's signature on its AC mitigation plan did not violate the 2013 Final Order. According to intervenors, the Commission incorrectly found that the evidence failed to establish that 26 V.S.A. § 1188, which contains the signature requirement, applied to such plans. Intervenors essentially argue that since the record "was not sufficiently clear to make a conclusive finding" on whether § 1188 applied to the AC mitigation

plan, the Commission should have credited their evidence to answer that question in the affirmative. We disagree.

¶ 31. As previously noted, we review an agency's finding of fact under the clearly erroneous standard. Vt. Gas Sys., Inc., 2024 VT 2, ¶ 17. This "highly deferential standard of review" places a heavy burden on intervenors. In re Rutland Renewable Energy, LLC, 2016 VT 50, ¶ 8, 202 Vt. 59, 147 A.3d 621. "[S]o long as the Commission's factual findings are supported in the evidentiary record, those findings will not be overturned for clear error." Vt. Gas Sys., Inc., 2024 VT 2, ¶ 17.

¶ 32. In the proceedings below, intervenors argued that VGS's AC mitigation plan required the signature and seal of a Vermont-licensed professional electrical engineer because that plan was electrical in nature. See 26 V.S.A. §§ 1161(2), 1162(a), 1188(b) (requiring person engaging in professional engineering, which includes planning and design of "systems of a mechanical, electrical, hydraulic, pneumatic, chemical, or thermal nature," to be licensed by state and for plans issued by licensed engineer to be signed by the licensee). They pointed to testimony from their own expert witness who stated that AC mitigation is a form of electrical engineering that is specialized and therefore would require a Vermont-licensed electrical engineer's signature. That testimony stood in contrast to the opinion of the independent expert, who stated in his report that AC mitigation plans are not required to bear a professional engineer's signature pursuant to Vermont statute. He elaborated on that point during his testimony, stating that AC mitigation plans are not typically signed and sealed by electrical engineers. According to him, the National Association of Corrosion Engineers issues certifications to individuals who can ensure that AC mitigation systems are competently planned and operational. The independent expert explained "that ninety-nine percent of licensed electrical engineers have absolutely no idea how to design an AC mitigation system for a buried steel pipeline, and with good reason. They never do it. That's not their job."

¶ 33. Faced with conflicting evidence, the Commission concluded that it "could not find that the failure to have a Vermont-licensed engineer sign the AC mitigation [plan]" violated any statutory requirement in contravention of the 2013 Final Order and the CPG.[4] This conclusion resolved a question of fact. See In re Investigation into Regulation of Voice Over Internet Protocol Serv., 2013 VT 23, ¶ 22, 193 Vt. 439, 70 A.3d 997 (holding that whether VoIP telephony could be regulated by Commission under 30 V.S.A. § 203(5) was factual question); cf. In re Korrow Real Estate, LLC Act 250 Permit Amended Application, 2018 VT 39, ¶ 33, 207 Vt. 274, 187 A.3d 1125 ("Whether the Korrow project is on a 'shoreline' [as defined under 10 V.S.A. § 6086(a)(1)(F)] is a finding of fact that this Court reviews for clear error."). To resolve that factual question, the Commission necessarily carried out its designated role by weighing the conflicting evidence. Vt. Gas Sys., 2024 VT 2, ¶ 41. And with the record containing evidence that supports the Commission's finding, we can discern no clear error. Id. ¶ 17.

B. Requirement to Initiate § 248 Proceeding to Amend CPG & Supplemental Findings

¶ 34. We next turn to intervenors' legal challenge to the Commission's decision to allow VGS to amend its CPG in the context of the investigatory proceeding without first requiring VGS to submit a separate petition pursuant to 30 V.S.A. § 248.[5] According to intervenors, the Commission exceeded its authority and deviated from prior practice when it determined that it could undertake an amendment process within the underlying proceeding. We conclude that the Commission's decision on this issue was improper and its decision to allow VGS to amend its

[4] Intervenors did not, nor do they now, dispute that the AC mitigation system installed pursuant to the plan was competently designed and effective.

[5] Throughout their brief, intervenors describe the Commission's decision as amounting to the issuance of "a new CPG." However, the record establishes that the Commission sought to amend the existing CPG, not award a new CPG. Furthermore, the Commission has not yet issued any amendments to the CPG.

CPG without first submitting a § 248 petition must be reversed.[6] Consequentially, we must also vacate the Commission's supplemental findings on whether VGS's substantial changes actually impacted the cited § 248 criteria.[7]

¶ 35. At the outset, it is not entirely clear what authority the Commission relied upon for amending the CPG within the underlying investigatory proceeding. The Commission agreed that additional process was necessary to amend the CPG but opined, without citation, that a separate proceeding was unnecessary and VGS was not required to file a petition in a new case. It reasoned that this approach was appropriate because of the extensive evidentiary record developed during the investigatory proceedings. The Commission did not address the decisions the hearing officer had cited or the hearing officer's reasoning that VGS was required to submit a § 248 petition to amend the CPG.

[6] We reject VGS's suggestion that intervenors did not raise this issue with the Commission and therefore failed to preserve the argument for appeal. In their response to the hearing officer's proposal for decision, intervenors explicitly argued that if VGS made substantial changes to the project plans in violation of Commission Rule 5.408, "an amended CPG application must be filed" and the Commission must evaluate those amendments in a separate proceeding. And in their motion for reconsideration, they again argued that the Commission must require VGS to initiate § 248 proceedings to properly amend the CPG. Although not presented in the most detailed or structured manner, intervenors raised this issue with sufficient specificity and clarity to give the Commission a fair opportunity to address it. Pratt v. Pallito, 2017 VT 22, ¶ 16, 204 Vt. 313, 167 A.3d 320.

[7] Intervenors argue that the Commission's supplemental findings that the five substantial changes did not actually impact the relevant § 248 criteria for purposes of amending the CPG violated their right to due process. Because we determine that the Commission improperly interpreted Rule 5.408 to proceed with amending VGS's CPG under the instant circumstances, and because the Commission's supplemental findings were made pursuant to that erroneous interpretation, those supplemental findings must also fall. We therefore need not reach intervenors' constitutional claims. See State v. Bauder, 2007 VT 16, ¶ 27, 181 Vt. 392, 924 A.2d 38 ("It is, of course, a fundamental tenet of judicial restraint that courts will not address constitutional claims . . . when adequate lesser grounds are available.").

¶ 36. The parties agree, however, that the Commission was relying on what is now the former version of Commission Rule 5.408.[8] We ordinarily review the Commission's procedural rulings for an abuse of discretion. Stowe Cady Hill Solar, 2018 VT 3, ¶ 17. However, the Commission's decision appears to have been based not just on the language of the procedural rule but also on its own defined "general parameters" for when to initiate separate amendment proceedings. Id. ¶ 19. Accordingly, our review of the decision is less deferential than it would be for a simple procedural ruling. See id. (holding that Commission's determination that application was incomplete pursuant to its own rules was not exclusively procedural and abuse of discretion standard was "as inappropriate . . . as would be the highly deferential standard" applied to merits decisions); see also In re Petition of Otter Creek Solar LLC requesting non-substantial change determination or in the alternative amendments to the certificates of public good, (Otter Creek), No. 19-3031-PET, 2020 WL 1471758, at *27 (Vt. Pub. Util. Comm'n Mar. 19, 2020) ("Rule 5.408 establishes the substantive requirement that a developer obtain a CPG amendment for substantial changes to a previously approved project. It is not a rule of procedure for the determination of a case.").

¶ 37. Thus, our inquiry starts with the plain language of Rule 5.408. See Conservation Law Found., 2018 VT 42, ¶ 15 (explaining that this Court begins by construing agency rules according to plain meaning). The rule provided:

> An amendment to a certificate of public good for construction of generation or transmission facilities, issued under 30 V.S.A. § 248,

[8] After this appeal was taken, Rule 5.408 was superseded by newly promulgated rules which became effective on March 1, 2024. See generally Requirements for Petitions to Construct Electric and Gas Facilities, Code of Vt. Rules 30 000 5400, http://www.lexisnexis.com/hottopics/codeofvtrules (listing new Commission Rules); see also H.R. Anderson, Memorandum on PUC Case Number 21-0861-RULE—Vt. Pub. Util. Comm'n revisions to Rule 5.400 (Jan. 3, 2024) https://epuc.vermont.gov/?q=downloadfile/705916/156798, [https://perma.cc/H27T-KDUA] (stating that new Commission Rules were adopted and have effective date of March 1, 2024, and further attaching copy of new rules). Unless otherwise stated, we refer only to the prior iteration of Rule 5.408, which the Commission applied in the underlying proceedings and which is the subject of this appeal.

> shall be required for a substantial change in the approved proposal. For the purpose of this subsection, a substantial change is a change in the approved proposal that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a).

Id. ¶ 7 (restating prior version of Commission Rule 5.408 in full). Rule 5.408 sets forth the substantive criteria that obligate an entity to obtain an amendment to its CPG. But conspicuously missing from the rule is any language concerning how an entity must obtain an amendment. Also absent are any requirements that the Commission must follow to amend a CPG. In other words, Rule 5.408 provides when an amendment to a CPG must take place. It says nothing of how a certificate holder or the Commission must carry out the amendment process.

¶ 38. Given this silence, we venture beyond the plain language to determine what the drafters intended when promulgating Rule 5.408. See id. ¶ 15 (stating that this Court will use other tools of construction if rule language is unclear). This requires us "to look to the subject matter, its effects and consequences, and the reason and spirit of the law." In re Verburg, 159 Vt. 161, 164-65, 616 A.2d 237, 239 (1992) (quotation omitted). Our inquiry leads us to conclude that the Commission's interpretation of Rule 5.408 cannot stand. It conflicts with what the drafters of Rule 5.408 intended, undermines § 248 and other Commission rules, and leads to an inconsistent and standardless application for entities that are subject to the Commission's jurisdiction. In combination, these reasons are compelling indications that the Commission's construction of the rule was wrong. See id. at 166, 616 A.2d at 239-40 (concluding that agency's interpretation of rule was unreasonable and, along with other factors, established compelling indication of error).

¶ 39. Two prior decisions from the Commission shed light on the intent of Rule 5.408. The first is In re Vermont Electric Power Co., No. 6860, 2005 WL 2757324 (Vt. Pub. Serv. Bd. Sept. 23, 2005), which we identified as a source of guidance in Conservation Law Foundation, 2018 VT 42, ¶ 19. Vermont Electric Power Co. involved a CPG authorizing a project to upgrade an electrical transmission system. The issue before the Commission was whether a subsequent

increase in the cost of the project was best addressed by reopening the original § 248 proceeding pursuant to V.R.C.P. 60(b), or classifying the increase as a substantial change to the CPG requiring an amendment.[9] The Commission explained that it "applies Act 250's substantial change test to determine when changes to a certified project require an amended certificate—in other words, to determine whether the modified project that the permittee seeks to construct falls within the scope of the previous [Commission] approval." Vt. Elec. Power Co., 2005 WL 2757324, at *15. The Commission stated the purpose of the substantial-change test is to determine "when changes to a previously approved project are so material that the permittee must apply for an amended CPG." Id. (emphasis omitted). When that is the case, the original CPG remains valid as approved and "the amended application is considered in a new proceeding."[10] Id. The Commission ultimately concluded that no substantial change was at issue, and that Rule 60 was the appropriate test for reopening that proceeding. Id. at *15-16.

¶ 40. In so reasoning, the Commission relied on its earlier decision in In re Investigation into Citizens Utilities Co. (Citizens), which was an investigation into a certificate holder's misconduct and mismanagement. Nos. 5841/5859, slip op. (Vt. Pub. Serv. Bd. June 16, 1997) https://epuc.vermont.gov/?q=downloadfile/150642/52298 [https://perma.cc/9GZN-74GS]. In Citizens, the Commission examined whether a certificate holder implemented unauthorized

[9] At the time Vermont Electric Power Co. was decided, the Commission was known as the Public Service Board. "Effective July 2017, what was the Public Service Board officially became the Public Utility Commission. We refer to this body as the Commission, even when discussing dockets or activities that occurred before the name change." Conservation Law Found., 2018 VT 42, ¶ 2 n.1 (citing 2017, No. 53, §§ 9-13).

[10] Intervenors argue that this Court adopted this language as part of our holding in Conservation Law Foundation. However, our holding in Conservation Law Foundation was limited to the "narrow issue" of whether a drastic increase in a project's estimated cost constitutes a substantial change under Rule 5.408. 2018 VT 42, ¶ 15. As part of our analysis to address that issue and ascertain the intent of the rule's drafters, we looked to the Commission's decision in Vermont Elec. Power Co., and in doing so, merely reproduced this language. Id. ¶ 19. We did not reach the issue that is now before us.

modifications to the project for which it was awarded a CPG and, if so, whether those deviations were substantial changes. It explained that a deviation is a substantial change when the change is "potentially significant" under § 248 criteria. Id. at 132 (quotation omitted). The Commission stated that when a deviation does potentially impact § 248 criteria, the next step is for the Commission to determine whether the change nevertheless meets § 248 standards. This step would require the certificate holder "to file an application for an amended CPG for the revised design." Id. That is so because, in a substantial-change analysis, "the issue is whether the change in the project has the potential for significant impacts, and not whether the change has actual impacts." Id. at 133. If the changes do have that potential, the Commission could determine "whether the changes actually comply with the [§ 248] criteria only in a Section 248 proceeding." Id. (emphasis omitted); see also id. at 134 (observing that Commission "cannot reach any firm conclusions" on changes actually impacting § 248 criteria "until we are presented with a Section 248 application for the revised project and have provided parties with notice and an opportunity for hearing"). Concluding that the certificate holder made substantial changes without Commission approval, the Commission followed previous practice and ordered the certificate holder to apply for an amended CPG pursuant to § 248. Id. at 284.

¶ 41. Together, Vt. Elec. Power Co. and Citizens stand for the proposition that an investigatory proceeding concerning whether a "substantial change" has occurred addresses only the change's potential to affect § 248 criteria. Both state that, in order to resolve whether the changes actually affect those criteria, a certificate holder must apply for a CPG amendment in a separate § 248 proceeding. This appears to have been the approach typically followed by the Commission when faced with similar circumstances in the past. See, e.g., In re Petition of Vicon Recovery Sys., Inc., No. 4813-A, 1987 WL 417223, at *1 (Vt. Pub. Serv. Bd. Mar. 23, 1987) (ordering certificate holder to file petition for amended CPG covering substantial changes that described and supported changes "as if an original petition were being filed"). The fact that the

Commission followed this approach before and leading up to the rule's promulgation, and the rule did not explicitly alter the approach, suggests that the rule was intended to incorporate this longstanding procedure. See Petit v. U.S. Dep't of Educ., 675 F.3d 769, 778 (D.C. Cir. 2012) (observing that deference to agency's interpretation is warranted unless alternative reading "is compelled . . . by other indications of the [agency's] intent at the time of the regulation's promulgation" (quotation omitted)); Meinker v. Hoyts Cinemas Corp., 69 Fed. App'x 19, 23 (2d Cir. 2003) (summary order) (same).

¶ 42. Although not dispositive on its own, the regulatory history underlying Rule 5.408's promulgation further confirms our understanding of the intent behind the rule. In responding to comments on Rule 5.408, the Commission stated that "[t]he intent of this section is to ensure that those affected are made aware of substantial changes to a proposed project." Response to Substantive Comments Received Regarding Rule 5.400, by the Vt. Pub. Serv. Bd., No. 06-P03, at 7 (ca. 2006). It further adopted the Department's recommendation that the rule "codif[y] the [Commission's] precedent regarding when an amendment to an approved certificate of public good is required." Id. at 8. This history suggests that the rule was not intended to alter the Commission's prior practice of requiring a certificate holder making substantial changes to file a separate § 248 petition to amend the CPG.[11]

[11] We note that our conclusion is consistent with rules promulgated by the Commission after this appeal was taken, which were approved by the Legislative Committee on Administrative Rules on December 14, 2023, and came into effect on March 1, 2024. See H.R. Anderson, Memorandum on PUC Case Number 21-0861-RULE—Vt. Pub. Util. Comm'n revisions to Rule 5.400 (Jan. 3, 2024), https://epuc.vermont.gov/?q=downloadfile/705916/156798, [https://perma.cc/H27T-KDUA]. Under the new Commission Rule 5.413, a proposed substantial change (as that phrase is defined under the previous version of Rule 5.408) to an already-commissioned project "must be filed as a petition in a new case consistent with the requirements of this rule." Requirements for Petitions to Construct Electric and Gas Facilities § 5.413, Code of Vt. Rules 30 000 5400, http://www.lexisnexis.com/hottopics/codeofvtrules. Under these circumstances, "[a]ll notice and advance notice requirements must be met and must include notice to all parties in the original case as well as all entities entitled to notice under this rule and Section 248, including any newly affected Adjoining Landowners, as defined by this rule." Id. While we

¶ 43. After the rule was promulgated in 2006, the Commission followed this approach in a number of instances. In a 2018 investigatory proceeding, it explained that a certificate holder had to "file for an amendment to its CPG" when substantial changes were made absent the Commission's preapproval. In re Investigation of Dairy Air Wind, LLC for alleged violations of certificate of public good, No. 17-3676-INV, 2018 WL 396600, at *10 (Vt. Pub. Util. Comm'n Jan. 5, 2018). Consistent with that principle, the Commission has issued amendments to a CPG after a certificate holder proactively filed a petition to amend its CPG to accommodate proposed substantial changes under Rule 5.408. See generally In re Petition of GASNA 14, LLC (previously Triland Partners, LP) for an Amended Certificate of Public Good, No. 7632, 2012 WL 2992081 (Vt. Pub. Serv. Bd. July 13, 2012); see also In re Petition of Village of Johnson Water and Light Dep't for an amended Certificate of Public Good, No. 7272, 2009 WL 5052465, at *6 (Vt. Pub. Serv. Bd. Dec. 10, 2009).

¶ 44. Likewise, the Commission stated in another investigatory proceeding that an order issuing a civil penalty was not "the appropriate procedural mechanism to issue a CPG amendment" when the certificate holder made substantial changes without preapproval. Instead, it required the certificate holder to file a separate request under § 248 to amend the CPG. In re Investigation pursuant to 30 V.S.A. §§ 30 and 209 and Pub. Util. Comm'n Rule 5.110(c) into alleged lack of adequate notice and violations of certificate of public good (Guilford), No. 8843, 2018 WL 1686082, at *20, 20 n.41, 23 (Vt. Pub. Util. Comm'n Mar. 27, 2018) (requiring certificate holder to file separate request to amend CPG to ensure that amended CPG satisfies § 248 criteria and noting that this approach "is consistent with PUC Rule 5.408 governing the requirements for post-issuance CPG amendments for substantial changes to projects approved under 30 V.S.A. § 248");

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do not rely on this new rule, our resolution of this issue appears to conform to what is now required of the Commission in future cases involving similar circumstances.

see also In re Investigation pursuant to 30 V.S.A. §§ 30 and 209 into potential violations of Coolidge Solar I, LLC's certificate of public good, No. 19-3671-INV, 2019 WL 6792979, at *1 (Vt. Pub. Util. Comm'n Dec. 3, 2019) (requiring entity wishing to amend its CPG to make appropriate filing by way of "a petition in a new case in ePUC, not filing a motion" within the original CPG proceeding or investigatory proceedings).

¶ 45. That approach, however, has not always been consistent. On at least one occasion, the Commission has issued amendments to a CPG without first requiring the certificate holder to initiate separate amendment proceedings. In a 2016 decision involving a solar farm, the Commission amended a CPG to accommodate substantial changes after completing an investigation and upon receiving stipulated amendments without requiring the certificate holder to take any additional action. See In re Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the 22.5 kW net-metered solar electric generating system owned by Lajeunesse Interiors (Lajeunesse), No. 8446, 2016 WL 302133, at *1, 5, 11 (Vt. Pub. Serv. Bd. Jan. 14, 2016) (conditionally amending CPG pursuant to stipulation between certificate holder and Department and opining that Commission may do so pursuant to Rule 5.408 to correct for noncompliance with original CPG and applicable Commission rules).

¶ 46. As is evident from these decisions, the Commission appears to have taken an ad hoc approach in terms of what is required to amend a CPG when there are substantial changes that could significantly affect substantive components of § 248. We can discern no material distinctions between these cases to warrant such varying treatment. Stowe Cady Hill Solar, 2018 VT 3, ¶ 21 ("We will . . . find error when a regulation is inconsistently applied."); see also Westar Energy, Inc. v. Fed. Energy Regul. Comm'n, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases."). This inconsistent application of the rule undermines the reasonableness of the Commission's interpretation. See Martin v. Am. Cyanamid

Co., 5 F.3d 140, 146 (6th Cir. 1993) ("Whether the [agency] has consistently interpreted a regulation is a factor bearing on the reasonableness of that interpretation."); Nat. Res. Def. Council, Inc. v. U.S. Food and Drug Admin., 760 F.3d 151, 163 (2d Cir. 2014) (refusing to defer to agency interpretations of statute when interpretations represent departure from prior norms).

¶ 47. Endorsing the Commission's chosen interpretation here would undermine the goals of the enabling statute. Section 248's purpose is to ensure that a proposed project will promote the public good. In re UPC Vt. Wind, LLC, No. 7156, 2006 WL 3859108, at *3 (Vt. Pub. Serv. Bd. Nov. 1, 2006). Before the Commission can award a CPG, it must conclude that the proposed project satisfies a set of substantive criteria designed to ensure that energy projects "promote the general good of the State." 30 V.S.A. § 248(a)(3), (b). Because the purpose of the statute is to promote the public good, the Legislature included requirements to make the evaluation process transparent and accessible to the public. See id. § 248(a)(4)(A) (requiring Commission to hold hearing on § 248 proceeding upon request from member of public); id. § 248(a)(4)(C) (requiring petitioner to serve petition on governmental entities); id. § 248(a)(4)(D) (requiring Commission to publish notice of hearing on § 248 petition); id. § 248(f) (requiring § 248 petitioner to provide copy of petition to relevant municipal and regional planning commissions).

¶ 48. The Commission itself has endorsed the proposition that when a project implicates the general good of the state and § 248(b) criteria, the process for evaluating that project must be public-facing. See In re Pet. of Georgia Mountain Cmty. Wind, LLC, No. 7508, 2011 WL 2286423, at *6 (Vt. Pub. Serv. Bd. May 31, 2011) (noting that § 248 analysis involves considering "the cumulative effect of impacts on individual landowners to the extent those impacts are relevant under the [§] 248 criteria"). Indeed, its own rules emphasize the public's role in such a process. See Requirements for Petitions to Construct Electric and Gas Facilities § 5.401, Code of Vt. Rules 30 000 5400, http://www.lexisnexis.com/hottopics/codeofvtrules (providing that rules are intended to establish minimum filing requirements for petitions to construct natural gas facilities

as consistent with § 248); id. § 5.402 (setting forth detailed filing requirements for § 248 petition including providing notice to affected local municipalities and adjoining landowners); id. § 5.409 (encompassing former Commission Rule 5.407's requirement that petitioner who makes substantial change to proposed project before decision on petition must notify parties and entities entitled to notice "under this Rule and Section 248, including any newly affected adjoining property owner").

¶ 49. It is clear that the statute and promulgating regulations require a project implicating the public good and § 248(b) criteria to receive input from various governmental bodies and members of the public to ensure the project complies with § 248's requirements. Therefore, it stands to reason that when a certificate holder makes changes to the project, and those changes are of such significance that they have the potential to impact the public good under § 248(a) and any provisions under § 248(b), that same scrutiny should apply. The Commission's decision to excuse VGS from undergoing a § 248 process effectively shuts out the public's role, which is imperative to awarding a CPG in the first instance. In doing so, the Commission diminishes a core function of § 248. See City of Idaho Falls, Idaho v. Fed. Energy Regul. Comm'n, 629 F.3d 222, 230 (D.C. Cir. 2011) ("[W]e may not defer to an agency interpretation that would cause a regulation to violate the very statute the agency administers.").

¶ 50. The Commission's ad hoc approach risks benefiting certificate holders who violate their CPGs, while disadvantaging those who follow the letter of the law. A certificate holder who seeks permission in advance to make substantial changes and to amend its CPG to reflect those changes must necessarily petition the Commission under § 248. In doing so, that certificate holder appears to effectively subject itself to all the filing and notice requirements set forth in § 248 and Commission Rules. See generally In re Joint Petition of Vt. Transco LLC and Vt. Elec. Power Co., Inc. to amend the certificate of public good, No. 20-1011-PET, (Vt. Pub. Util. Comm'n Apr. 9, 2020) https://epuc.vermont.gov/?q=downloadfile/407567/148846 [https://perma.cc/ASE6-

CPAW] (providing example of process applicable to entity seeking Commission preapproval to make amendments to CPG that might significantly impact § 248 criteria). But a certificate holder that simply makes the changes without preapproval and is subsequently investigated, like VGS, may benefit from its conduct. That is so because, like here, the Commission may choose to amend the CPG without putting that certificate holder through a § 248 process. We cannot imagine that the Legislature, or even the Commission, seriously contemplated this as an acceptable outcome. See Fraser v. Sleeper, 2007 VT 78, ¶ 12, 182 Vt. 206, 933 A.2d 246 (emphasizing rule of statutory interpretation to avoid absurd and illogical results).

¶ 51. The Department and VGS correctly note that the Commission has broad authority to manage its affairs in carrying out its administrative mandates. See 30 V.S.A. § 9 (providing the Commission with "the powers of court of record in the determination and adjudication of all matters over which it is given jurisdiction . . . by any suitable process issuable by courts in the State"). There is no question that the Commission is vested with a wide grant of authority to regulate utilities such as VGS, including the power to ensure compliance with statutory and regulatory obligations. See 30 V.S.A. § 30 (providing Commission with power to penalize company under its jurisdiction for violating decrees, final orders, or § 248); id. § 203 (granting Commission jurisdiction over, inter alia, any company "engaged in the manufacture, transmission, distribution, storage, or sale of gas"); id. § 209 (granting Commission jurisdiction and powers to "hear, determine, render judgment, and make orders and decrees in all matters provided for" of any company subject to Commission's supervision).

¶ 52. But this general grant of authority is not a license to carry out administrative duties in an unrestrained manner. The deference we normally show to the Commission's interpretation of its own rules has boundaries. Stowe Cady Hill Solar, 2018 VT 3, ¶¶ 20-21; accord Rapoport v. S.E.C., 682 F.3d 98, 104 (D.C. Cir. 2012) (observing that although agencies are "free to fashion [their] own rules of procedure," interpretation and application of rule must be consistently applied

(quotation omitted)); Barnett v. Weinberger, 818 F.2d 953, 964 (D.C. Cir. 1987) ("[W]e would neglect a fundamental responsibility were we to stand aside and rubber-stamp [our] affirmance of administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute." (quotation omitted)). Both Rule 5.408 and § 248 were clearly intended to obligate parties to ask for permission, not forgiveness. The Commission's approach here turns that principle on its head.

¶ 53. The error here is compounded by the fact that, in its haste to resolve amendments without subjecting the substantial changes to a § 248 proceeding, the Commission found, based on the existing record, that the changes did not actually impact the identified § 248 criteria. The Commission reasoned that it could therefore amend the CPG to accommodate those changes and ordered VGS to submit a compliance filing that included proposed language for amendments to the CPG.

¶ 54. Yet intervenors were not given an opportunity to present any evidence on whether the five substantial changes actually impacted the relevant § 248 criteria. See 3 V.S.A. § 809(c) (providing right to parties in administrative proceeding "to respond and present evidence and argument on all issues involved"). Intervenors could not have anticipated that the Commission would make these critical findings for purposes of amending the CPG in a proceeding that had been framed as solely investigatory in nature.[12] In re Soon Kwon, 2011 VT 26, ¶ 8, 189 Vt. 598,

[12] The Department's argument to the contrary, and the Commission's post hoc justification, are unpersuasive. The Department points to the fact that the Commission expanded the role of the independent expert to investigate the construction, performance, and safety of the pipeline as built. But the Commission did so in response to additional safety concerns raised by intervenors in their March 2018 motion. As the Commission later acknowledged, the independent expert's additional task focused on whether the pipeline needed to be immediately shuttered because it was no longer safe to operate. The purpose of the expansion was to assess whether the pipeline's safety was so compromised that it constituted an impending threat to the public's safety, requiring its immediate closure. The order did not expressly or impliedly indicate that the Commission intended to evaluate the pipeline's continued consistency with § 248 within that proceeding. As a result, intervenors could not have "necessarily assumed the possible" resolution of the substantial changes' actual impacts on the § 248 criteria based solely on an inquiry that was

19 A.3d 139 (mem.) (stating that adequate notice under § 809 requires agency to provide "reasonable notice" of the issues it intends to resolve). The supplemental findings are especially problematic because the Commission has itself stated that it cannot determine whether substantial changes actually affect § 248 criteria, or amend a CPG, outside of a § 248 proceeding. See Citizens, Nos. 5841/5859, slip op. at 133 (observing that Commission "can determine whether [substantial] changes actually comply with the [§ 248] criteria only in a [§] 248 proceeding." emphasis omitted).

¶ 55. The Commission failed to give intervenors notice that it would resolve amendment-related issues of fact in the context of the investigatory proceeding. See In re Vt. Health Serv. Corp., 155 Vt. 457, 460, 586 A.2d 1145, 1147 (1990) (observing that adequate notice requires that "parties be sufficiently apprised of the nature of the proceedings so that there is no unfair surprise"). In issuing supplemental findings based on the existing record, it improperly resolved factual disputes reserved for proceedings which, under Rule 5.408, can only be rendered in a § 248-like proceeding—that is, whether the substantial changes actually affected the pipeline's consistency with the relevant § 248 criteria. And for that reason, the supplemental findings must be vacated.

¶ 56. In sum, we conclude that when the Commission determines that a certificate holder has made substantial changes triggering Rule 5.408—changes to project plans that have the potential to significantly impact any of the criteria of § 248(b) or the general good of the state under § 248(a)—the Commission may effectuate amendments to a CPG only in a manner that satisfies the requirements of a § 248 proceeding. Here, the Commission construed Rule 5.408 in a way that did not comply with those requirements. As a result, we reverse the portion of the

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intended to serve a separate purpose. Cf. In re Vt. Health Serv. Corp., 155 Vt. 457, 460, 586 A.2d 1145, 1147 (1990) (holding that party received notice of possible imposition of certain conditions and limitations because its initiation of proceeding included issues "necessarily assumed" that possibility).

Commission's 2023 Final Order directing VGS to pursue CPG amendments in the investigatory proceeding. Additionally, we vacate the Commission's supplemental findings that VGS's unauthorized substantial changes did not actually impact the implicated § 248 criteria. We remand for further proceedings consistent with this opinion.

The portion of the decision of the Commission directing VGS to pursue CPG amendments in the investigatory proceeding is reversed and remanded for further proceedings consistent with this opinion. The Commission's supplemental findings of fact concerning whether the substantial changes actually affected the substantive criteria of 30 V.S.A. § 248 are vacated and remanded for further proceedings consistent with this opinion. In all other respects, the decision of the Commission is affirmed.

FOR THE COURT:

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Associate Justice