

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 20-2369-RULE

Proposed Revisions to Vermont Public Utility
Commission Rule 2

COMMENTS OF ALLEARTH RENEWABLES, INC.

AllEarth Renewables, Inc. (“AER”) offers these comments in accordance with the schedule established by the Vermont Public Utility Commission (“Commission”) in its August 27, 2020 Order Opening Investigation (“Order”) in this matter. AER supports and appreciates the Commission’s efforts to update this important rule given the degree of change in Commission practice, technology and the underlying Vermont Rules of Civil Procedure since the core of the current Rule 2 was adopted many years ago..

The comments below address certain sections of the Commission’s draft rule in order and not priority, for ease of tracking given the relative length of the Rule. Like all parties to this proceeding, AER anticipates that it will gain insights and ideas from the filings of other parties, and would suggest that there be at least one more round of comments and a workshop, at which point the Commission could issue a revised draft. AER would also encourage the Commission to consider adopting a schedule that avoids passage of too much time between events, so that all participants can maintain a steady focus on the adoption of a Rule 2 which, like the current one, may be in place for a long time.

AER offers the following specific comments at this juncture:

1. *Section 2.109.* The language and intent of this section warrant discussion. Review of the Rules of Civil Procedure shows a high frequency of amendments, particularly in recent years. While automatic incorporation of amendments may make sense in many cases, there are material differences between civil practice and Commission practice, and a large number of *de facto* changes to Rule 2 through Section 2.109 as drafted could have unintended consequences, or result in a complex interplay between the two sets of rules. It is also not clear what a midstream change in rules for pending cases would mean for participants. This is a worthy subject for additional comments and clarification by the Commission.

2. *Section 2.201(A).* Under the broad definition of “proceeding” set forth in Section 2.102(D) of the draft Rule, it appears that a notice of appearance would be required for every person in every matter that comes before the Commission. The Commission may wish to consider whether that requirement is necessary or helpful in less formal proceedings (like this one) in which open participation is invited without need to intervene. This could reduce the volume of non-substantive filings in ePUC and could be coupled with a requirement that persons speaking on behalf of a client or larger group indicate in initial filings who they are representing.

3. *Section 2.201(D)*. Attorney withdrawal without permission is allowable under the draft when, among other things, “an attorney from the same law firm” enters an appearance. There does not appear to be good reason to distinguish between this scenario and appearance by a new attorney from a different firm, as in either instance the party will have continuity of representation, the Commission and other parties will be aware of that fact, and the new attorney has an ethical responsibility to understand the case.

4. *Section 2.201(E)(2)*. This is the most problematic component of the draft, as it opens the door to *ex parte* communications based on the myth that there is some bright line distinction between “procedural” and substantive matters. The schedule for a case may be a key factor in determining whether a utility program, a renewable energy project or other proposal goes forward, for Commission proceedings do not take place in a vacuum but in the context of the larger world where interest rates, seasonal construction considerations and a myriad of other things can matter greatly. “Procedural” matters such as motions to dismiss may decide critical questions such as Commission jurisdiction, and the calculation of filing deadlines such as appeal notices may completely decide whose position prevails in a case. Section 2.201(E)(2) as written is almost certain to put the Commission and its staff in the position of giving legal advice, whether intentionally or not, and greatly risks compromising Commission decisions, creating appearances that are contrary to transparency, and creating prospective ethical issues for Commissioners and staff members who are licensed attorneys.

In evaluating these considerations, the Commission should also be mindful of, and take credit for, the extent to which its other suggested changes to Rule 2 obviate any need for the type of inquiries that Section 2.201(E)(2) purports to address. Proposed Section 2.225 sets forth a comprehensive approach to scheduling and the components of it, and the ability of anyone to now access ePUC without an account allows full access to Commission schedules or parties’ scheduling proposals. Proposed Section 2.204 sets forth in great detail how to make filings with the Commission, and nothing precludes the Commission from offering generic tutorials as to how to make filings or do other things in the course of Commission proceedings.¹

Notwithstanding these overall concerns surrounding Section 2.201(E), AER recognizes and agrees with the Commission in two areas, so long as those areas are carefully defined. First, it is inevitable that technical questions surrounding ePUC and its use may arise as parties are in the process of making a filing. It is reasonable and beneficial to all participants that filings can be made in proper time and form, and technical inquiries should be allowed under a carefully crafted rule that limits the scope of those inquiries. Second, inquiries by system installers on registration-level net metering systems facilitate the processing of registrations and CPGs under them, and do not pose the concerns associated with broader litigation. It would be beneficial for Rule 2 to recognize this, again with appropriate limiting language on the scope of inquiry.

5. *Section 2.201(E)(6)*. Discussion would be valuable on the question of whether mediation/facilitation efforts would be better placed elsewhere than with the body that will

¹ The Commission did this in the course of introducing ePUC, and it was very helpful.

ultimately decide the case; alternatives could be that the Department plays a greater role in this realm, or that a list of qualified mediators is maintained in a manner that somewhat parallel the system used in federal district courts. At the very least, the rule should more clearly draw separation between any staff member involved in these activities and the decisional process, by substituting for the word “rendering” something more specific such as “may not participate in any fashion in deliberations, advising the Commission or Commission staff, or preparation or participation in rendered by the Commission or any Hearing Officer in such proceedings.”

6. *Section 2.204(E)(1)*. The proposed changes to this section require that parties refrain from making “personal accusations that are speculative or are not directly related to the procedural and substantive matters before the Commission.” It is unclear in what context such personal accusations would benefit the parties, the Commission or the process, whether or not they are cast as relating to substance or procedure. AER suggests that that sentence be reworked as it may not reflect either the Commission’s intent or a good standard of practice.

7. *Sections 2.210, 2.211, and 2.217 through 2.221*. These sections carry over existing provisions in Rule 2, but it is unclear what they add if in fact the intent is to incorporate the Rules of Civil Procedure essentially wholesale under Section 2.103. The Commission’s broad experience with Rule 2 in a variety of contexts may have yielded insights that suggest benefit to these sections, but it is worth discussing whether they could be removed to produce a shorter and more user friendly rule.

Thank you for this opportunity to comment, and AER looks forward to participating in this process.

Dated this 2nd day of October, 2020.

AllEarth Renewables, Inc.

By: /s/ **David Mullett**

David Mullett, Esq., General Counsel
AllEarth Renewables, Inc.
94 Harvest Lane
Williston, VT 05495
802-872-9600
dmullett@allearthrenewables.com