

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-2369-RULE

Proposed revisions to Vermont Public Utility)
Commission Rule 2)

**VERMONT AGENCY OF NATURAL RESOURCES’S
COMMENTS IN RESPONSE TO ORDER OPENING RULEMAKING**

NOW COMES the Vermont Agency of Natural Resources (“Agency”) and submits the following comments in response to the Vermont Public Utility Commission’s (“Commission”) Order Opening Rulemaking (“Order”) and companion proposed rule revisions documents, entered on August 27, 2020. The Agency’s comments are divided into three sections: comments that apply generally to proposed rule changes, those that apply to specific proposed revisions, and input regarding the remainder of this rulemaking process.

General Comments

The Agency recognizes the substantial thought and effort that the Commission has put forward into drafting the proposed Rule 2 revisions and appreciates the opportunity to engage in this rulemaking process. The Agency looks forward to working collaboratively with the Commission and all other stakeholders in an effort to craft more efficient and equitable practices before the Commission.

The Agency welcomes most of the revisions outlined in the proposed rule. The revisions make appropriate updates to the rule; recognizing the primacy of electronic filing and case management in Commission practice, and increased practice efficiencies.

The Agency recommends that the bullet point format used in the proposed rule be changed to include an appropriate letter or number designation for each bullet point subsection in the rule.

Letter and number designations allow for more efficient navigation of the rule, and specific citation to an individual subsection when referenced in discussion or briefing.

Comments Related to Specific Proposed Changes

2.201(B): Pro se appearances and appearances by net-metering installers

Under current Agency practice, staff members of the Office of Planning routinely review certain applications and petitions filed with the Commission, and provide comments in response on behalf of the Agency. Office of Planning staff typically represent the Agency in review of §§ 248 and 8010 net-metering applications and § 248a applications for the installation of telecommunication infrastructure. Agency representation in both of these instances is made, at least initially, by non-lawyer members of the Office of Planning Division. An Agency lawyer may be assigned to a case if a risk of litigation surrounding the application is identified after initial comments are filed or a hearing ordered.

This practice has proven to be an effective and efficient approach to Agency review of these applications, and the Commission has historically allowed for non-lawyer staff to represent the Agency in these instances. The addition of language to subsection 2.201(B) to expressly allow for state agency representation by a designated non-attorney employee is consistent with employee representation of a corporation contained in the proposed rule, and recognizes the established and allowed practice of Agency. The Agency suggests the addition of the following language after the corporate officer representation bullet and before the net-metering system installer representation bullet:

- A state agency may be represented by an employee designated in writing by the Secretary or Commissioner, with the designation attached to the notice of appearance filed with the Commission.

2.201(E)(2): Allowed ex-parte communications

The proposed rule includes an allowance for ex parte communications in a contested case in “emergency situations” and “when circumstances require.” Subsections 2.201(E)(2)(a) and (b) provide appropriate protections to other parties not privy to a substantive ex parte communication to ensure no unfair advantage is gained by any one party. However, substantive ex parte communications should be avoided to the greatest extent possible.

To that end, the Agency recommends that the Commission provide a definition or list of specific factors used to determine when an emergency situation has arisen and a substantive ex parte communication is allowed. The Agency understands that the determination of what constitutes an emergency situation will be based on case-specific circumstances. However, guidance and/or examples from the Commission would help parties when determining whether a circumstance rises to the level of an emergency situation generally contemplated in the proposed rule.

2.204(E)(1): General form of filings

The proposed rule imposes 25-page limits on all motions and briefs, 15-page limits on responses, and 10-page limits for replies. Such limits do not appear to be necessary in the context of any Commission proceeding, and risk harming the Commission’s ability to develop a sufficient evidentiary record to draw from when crafting findings and orders. The focus of most filings with the Commission is distinct from federal civil and Vermont appellate practice: Motion practice and briefing at the Commission often aims to develop a robust evidentiary record that allows the Commission to make the necessary findings required under Title 30. Imposing page limitations on motions and briefs may in some instances cut short a party’s ability to develop the necessary

evidentiary record required in a particular case. The Agency therefore recommends that page limits on motions and briefs not be included in the rule.

In the alternative, the Agency recommends that language be added to the subsection allowing for the waiver of page limits when circumstances warrant doing so if the Commission decides to retain page limits in the proposed rule. The Agency recognizes that Rule 2.107 provides parties with the ability to seek waiver of any rule, but specific language attached to Rule 2.204(E)(1) would make clear that waiver of the page limits may be granted by the Commission when good cause is shown. The Agency therefore recommends the addition of the following language in the page limit bullet point in proposed Rule 2.204(E)(1):

- All motions and briefs must be no more than 25 pages in length (excluding exhibits), all responses to motions and briefs must be no more 15 pages in length (excluding exhibits), and all reply filings must be no more than 10 pages in length (excluding exhibits). For good cause, the Commission may waive these page limits upon motion by a party to the ongoing proceeding.

Any changes to the proposed page limit language would also require corresponding changes to the page limits referenced in proposed Rule 2.206.

2.204(E)(4): Time of submission

The proposed rule continues the current requirement that all filings, including those made via ePUC, be submitted to the Commission by 4:30 P.M. to be considered filed on that day. The Agency recommends that the same-day deadline for ePUC filings be moved to midnight. A 4:30 P.M. filing deadline for electronic filings ensured fairness across both electronic and in-person hard copy filings when ePUC was first launched in 2018. Many filings were still required to be filed in hard copy forms at that time. As ePUC's capabilities have since expanded, and as many of the revisions in this proposed rule make clear, almost all filings to the Commission are now made electronically. Therefore, the need to preserve a consistent deadline between electronic and

hard copy filings is no longer necessary. Extending the ePUC filing deadline to midnight is consistent with Vermont Superior Court and federal court electronic filing deadlines, and recognizes the increased shift to non-traditional work hours that has accelerated due to the COVID-19 pandemic.

2.206: Motions, responses to motions, and replies in support of motions

The proposed rule states “[t]he Commission may decline to consider a motion not made within 30 days after the facts that form the basis for the motion first arose.” The Agency recommends that this provision not be included in the rule. The difficulty of determining which fact(s) definitively forms the basis for a specific motion, as well as when a party may become aware of that salient fact makes the 30-day filing window difficult, if not impossible, to identify. These problems are compounded by different parties often being aware of certain information at different times during a proceeding, and an evolving chain of facts that may unfold in some cases. These uncertainties increase the likelihood of unnecessary litigation in an effort to resolve threshold issues before addressing the substance of a motion.

2.214(A): General discovery

The proposed rule generally imposes a limit on written interrogatories of 25 per round of discovery, including subparts. The Agency recommends that the rule not place any limitation on the use of written interrogatories during the course of any Commission proceeding. Again, Commission practice differs greatly in scope and focus when compared to federal civil practice, which employs limits on interrogatories. The Agency is required, pursuant to 30 V.S.A. § 248(a)(4)(E), to provide evidence and recommendations concerning natural environment and natural resource impacts in each proceeding held under § 248. Interrogatories are a critical tool used by the Agency to obtain information necessary to execute its statutory charge in § 248

proceedings. The Agency's scope of review of project impacts under § 248(b)(5) often includes consideration and input from upwards of ten Agency programs or focus areas, requiring more than 25 interrogatories per round in some cases. The Agency also often uses interrogatories as the basis to arrive at a settlement with a petitioner. The Agency's ability to fulfill its statutory duty and efficiently find ways to enter into settlement agreements would potentially be jeopardized in any given case if general limits on interrogatories were put in place.

Vermont Rule of Civil Procedure 26 – which is explicitly adopted in Rule 2.214(A) – provides protection against the harms of a party “overwhelming another party with lengthy depositions and voluminous written interrogatories” cited by the Commission in its Order.¹ VRCP 26(b)(2)(B) allows any party to seek a protective order from the Commission if it feels interrogatories are beyond the scope of discovery permitted by the rule, or are otherwise unreasonably cumulative or duplicative.

A request for a protective order in the rare case where it is warranted is more efficient than the repetitive litigation that a limit on interrogatories may invite in any given case. For instance, the Agency would be forced to seek a waiver from the Commission in every case where it has determined that more than 25 interrogatories are needed in a given round of discovery. The timing of when that waiver would need to be sought is unclear, coupled with the likely motion practice surrounding the waiver request, could result in significant delay in the proceeding that may otherwise have been avoided. A limit on interrogatories may also force parties to hold depositions – which typically require significantly more time, expense, and resources when compared to

¹ Order at 4.

interrogatories – in order to obtain information that could otherwise be gleaned from interrogatories.

Additional Rulemaking Process

The Commission's Order seeks input on additional process for the remainder of this rulemaking. The Agency recommends that interested stakeholders be allowed to file at least one additional round of comments after an opportunity to review any Commission revisions made to the rule in response to initial comments. The Agency also welcomes the opportunity to answer any questions the Commission may have regarding these comments in any venue or format the Commission sees fit.

Dated at Montpelier, Vermont, this 2nd day of October 2020.

Respectfully submitted,

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