

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-2369-RULE

Proposed Revisions to Vermont Public Utility Commission Rule 2	
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**DEPARTMENT OF PUBLIC SERVICE COMMENTS ON PROPOSED REVISIONS TO
RULE 2**

On August 27, 2020, the Public Utility Commission (Commission) opened this proceeding to review proposed revisions to Commission Rule 2, which establishes general procedures for matters before the Commission and governs consumer complaints and several other specific types of cases. The Department of Public Service (Department) supports the Commission's proposed overhaul of Rule 2. Most of the proposed revisions should result in more streamlined proceedings that better protect the interests and rights of all parties to matters before the Commission. The Department recognizes that these proposed revisions are the result of a significant undertaking by the Commission and its staff and should yield substantial benefits for the litigation process before the Commission. There are, however, several proposed revisions that the Department recommends that the Commission reconsider. Each of these recommendations is briefly discussed separately below.

First, as a non-substantive matter, the proposed revisions include numerous lists that are set out using bullet points. The Department recommends that the Commission replace these bulleted lists with specific identifiers (e.g. lowercase letters or Roman numerals) before each paragraph or sub-paragraph within the rule. This change will ensure that parties are able to cite to specific sections of the rule in any written materials filed with the Commission.

Second, with respect to proposed changes to Rule 2.201(E)(2), the Department agrees that parties should be permitted to have *ex parte* communications regarding procedural,

technological, or administrative matters with the Commission. However, the Department maintains that these communications should be allowed only if a disclosure requirement is included within the rule. The Department is concerned that undisclosed *ex parte* communications could result in conflict among parties, especially for intervenors and other parties that do not routinely practice before the Commission. Requiring disclosure will impose minimal, if any, burden on parties and substantially reduce the risk for unnecessary conflict among parties.

Third, for the proposed changes to Rule 2.204(E), the Department does not support the Commission's proposed page limitation requirements for motions and briefs. The Department recognizes that this proposed change is consistent with Vermont Supreme Court practice, but it is important to consider that appeals typically address several discrete issues from broader cases. The Department is concerned that a blanket page limitation will limit parties from adequately addressing all legal and factual issues that may arise in a case, especially in complex cases. Indeed, it may not be feasible to prepare a summary judgment motion or post-hearing brief in a case with numerous litigated issues among the parties within the proposed limitations. Instead of the proposed blanket prescription, the Department recommends that the rule be modified to allow for the Commission or a Hearing Officer to impose page limitations in cases if appropriate depending on the complexity of the case and scope of disagreement among the parties. If the Commission decides to maintain the page limitations, the Department respectfully requests that the Commission clarify whether proposed findings of fact or proposals for decision would be subject to the page limitation.

Fourth, the Department recommends that the Commission eliminate the proposed language from Rule 2.206 that would allow the Commission "to decline to consider a motion not

made within 30 days after the facts form the basis for the for the motion first arose.” This requirement will likely lead to considerable confusion and will potentially prejudice *pro se* litigants and parties that do not frequently appear before the Commission. Though well intentioned, the Commission retains considerable authority to ensure that parties are not abusing motion practice to gain unfair tactical advantage, cause unnecessary delay, or impose unwarranted burdens on opposing parties. To the extent that limitations on or deadlines for filing motions are warranted for a particular case, it would be more appropriate to include those deadlines within a scheduling order for that particular case than impose this broader, overarching requirement that would apply to all proceedings.

Fifth, the Department recommends that the Commission reconsider the proposed written discovery limitations included in Rule.2.214(A). Although this proposal mirrors limitations included in the federal rules of civil procedure, litigation before the Commission differs significantly from civil litigation in the courts. Cases before the Commission generally rely on pre-filed testimony to develop the evidentiary record. One significant benefit of this approach is that it usually eliminates the need for parties to take depositions of witnesses, which in turn allows for more expeditious resolution of cases. Civil litigation in the courts, on the other hand, often relies heavily on depositions and much lengthier discovery timeframes. The Department is concerned that a firm limitation on written interrogatories may have the unintended effect of requiring parties to take more depositions (especially in cases with numerous statutory criteria, such as Section 248 reviews), which will result in more extensive discovery schedules, more litigation expense, and generally longer docket schedules. Additionally, the existing rules of Civil Procedure and the Commission’s broader authority as a court of record overseeing the

discovery process establish meaningful safeguards against abusive discovery practices among litigating parties. However, if the Commission decides to maintain a firm limit on written discovery, the Department recommends that the Commission include a provision that allows parties to stipulate to a waiver of the limit.

Sixth, the Department recommends that the Commission revise the requirements for filing confidential information under proposed Rule 2.226. As an initial matter, proposed Rule 2.226(B) appears to presuppose to existence of a confidentiality agreement among the parties. Oftentimes confidential materials are filed with the Commission before parties have an opportunity to execute and file a confidentiality agreement with the Commission, such as when an initial petition filing includes confidential materials. Accordingly, the Department recommends that the Commission modify this section to require that confidential materials be served on all parties to a contested case only after the parties have entered into a confidentiality agreement with the disclosing party. Also, it has been the Department's experience that many parties are reticent or unwilling to exchange allegedly confidential materials or documents by email due to security concerns. While the exchange of confidential materials by email has at times been necessary during the pandemic, the Department recommends that the Commission modify the proposed rule to allow for physical filing and exchange of confidential materials (such as under seal or an electronic media) as an alternative to email filing and/or service to mitigate any security concerns related to electronic correspondence.

Lastly, for the proposed emergency procedures set out in Rule 2.408, the Department recommends that the Commission include an additional notice requirement. As drafted, the emergency rules only require that a petitioner provide notice by filing a petition to ePUC. The

Department understands that automated ePUC notices are not sent to other parties (such as state agencies or other automatic parties) until after Commission staff have deemed the application complete, which in some instances may take several days. Additionally, most state agencies receive substantial volumes of automated ePUC notices on a daily basis and may not immediately take notice of emergency filing, especially if it is received outside of normal business hours. To ensure that all affected parties have as immediate notice as possible of an emergency filing, the Department recommends that the Commission require that petitioners be required to make a good faith effort to provide direct notice of an emergency petition filed under these procedures to statutory parties and any affected individuals as promptly as possible through electronic or telephonic communications. Additionally, the Department recommends that the Commission require that petitioners proceeding under the emergency procedures be required to include any statutory party and any affected individuals in any electronic correspondence to the Commission or the Clerk's office regarding an emergency petition.

The Department appreciates the Commission's diligence in preparing a comprehensive and necessary update to Rule 2. The Department agrees with the Commission's general objective to improve access to Commission proceedings and streamline the litigation process in a manner that adequately protects all parties' rights. Overall, the Department finds that the proposed revisions will be successful in improving the litigation process before the Commission. The Department looks forward to continuing to work with the Commission and other interested parties as this process continues.

Dated at Montpelier, Vermont, this 16th day of October, 2020.

Vermont Department of Public Service

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