

To: Public Utility Commission
From: Green Lantern Development, LLC
Date: October 16, 2020
Re: Comments on Proposed Revisions to Rule 2.200, Case No. 20-2369-RULE
Filed via ePUC

Green Lantern Development, LLC appreciates the opportunity to review and comment on the Commission's proposed changes to Rule 2.200. It is clear that a great deal of time and effort has gone into this rewrite.

Intervention Threshold

In particular, Green Lantern Development supports the comments from Vermont Electric Cooperative (though perhaps for slightly different reasons) regarding the threshold for intervention.

The demonstration of a substantial and particularized interest is the long-adhered to standard for permissive intervention applied under Commission Rule 2.209 and Commission precedent¹. This standard is based on the same constitutional standing requirement² and the Commission's proposed changes eviscerate the bedrock precept that parties in a contested proceeding "must present a real - not merely theoretical - controversy involving the threat of actual injury to a protected legal interest rather than merely speculating about the impact of some generalized grievance."³

¹ *In re Petition of Green Mountain Power Corp.*, 2018 Vt. 97, ¶ 17, 198 A.3d 36 (Vt. 2018) ("it has been the PUC's consistent position that "[p]ursuant to Board Rule 2.209 in Vermont, . . . a would-be intervenor before the Board must demonstrate a substantial and particularized interest in a Section 248 proceeding to gain party status.") (citing *In re GMPSolar-Williamstown, LLC*, No. 8682, 2016 WL 3549296, at *6 (Vt. Pub. Serv. Bd. June 20,

2016); *In re Seneca Mountain Wind, LLC*, No. 7867, 2012 WL 4846242, at *2, Vt. Pub. Serv. Bd. Oct. 5, 2012) ("Simply raising generalized concerns is not sufficient to support intervention."); *In re Green Mountain Power Corp.*, No. 5532, 1991 WL 736201 (Vt. Pub. Serv. Bd. Nov. 21, 1991) (denying right to intervene because *42 petitioner "had not demonstrated that his interest as a ratepayer differed in any way from the general interests of other retail ratepayers represented by the Department").

² See, e.g., *Petition of Otter Creek Solar LLC, requesting a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of the "Warner Solar Project," a 2.2 MW solar electric generation facility in Bennington, Vermont*, Order re: Motion to Intervene, 7/12/2019 ("allegations regarding adverse economic impacts that will occur as a result of violations of the § 248 criteria are the type of concrete harm that Petitioner asserts is required to establish standing") (emphasis added).

³ *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 9, 182 Vt. 234, 936 A.2d 1286 (quoting *Town of Cavendish v. Vt. Public Power Supply Auth.*, 141 Vt. 144, 147, 446 A.2d 792, 794 (1982)). An injury in fact is defined as an "invasion of a legally protected interest." *Hinesburg Sand & Gravel*, 166 Vt. at 341, 693 A.2d at 1048.

Rooted as it is in the constitutional doctrine of standing⁴, determining the appropriate parties to a specific dispute is an “essential and unchanging part of the case-or-controversy requirement of Article III” of the US Constitution. Article III embodies various doctrines, including standing, mootness, ripeness and political question that “help define and limit the role of courts in a democratic society.”⁵

Section 248 proceedings for renewable energy facility siting already constitute a large portion of the Commission’s current docket. Arbitrarily relaxing the threshold requirement that putative intervenors must demonstrate a substantial and particularized interest not already represented by a party to the case, will invite parties with generalized grievances⁶ and no legally protected interests to impose additional complexity, delay and cost to renewable energy projects by utilities and private parties alike. Such a result is directly counter to the Legislature’s mandate in 30 V.S.A. § 8007 that the Commission shall establish procedures for Section 248 proceedings that “shall simplify the petition and review process as appropriate” (emphasis added).

We support the comments by Vermont Electric Cooperative to the extent that they urge the Commission to abandon its unwarranted relaxation of the intervention requirements.

Pro Se Representation

Another concern relates to the creation of a new class of “pro se representatives” that may represent any party. This eliminates the existing, crucial distinction that an individual may be a pro se representative “in his or her own cause.” Rule 2.201(B). The proposed change basically provides any individual with the authority to represent anyone. This, for all intents and purposes, provides carte blanche for individuals to engage in the unauthorized practice of law, which is clearly prohibited. *Meyer v. Meier*, 2006 Vt. Super. LEXIS 4, *2 (“[A] non-lawyer may not appear in court on behalf of another party. To do so is to engage in the unauthorized practice of law”); *In re Welch*, 123 Vt. 180, 182, 185 A.2d 458 (1962) (“It is essential to the administration of justice

⁴ *In re Apple Hill Solar LLC*, 2019 VT 64, ¶¶ 18-20, 219 A.3d 1295 (explaining similarity between the permissive intervention standard (requirement of showing particularized, substantial interest) and standing). This decision clarifies the Court’s statement in *In re Green Mountain Power* suggesting that the doctrine of standing does not apply in Section 248 cases because they are quasi-legislative in nature. See *In re Petition of Green Mountain Power Corp.*, 2018 VT 97, ¶ 23 (referenced in *Petition of Babcock Solar Farm, LLC*, Case No. 18-2924-PET, Order of 11/8/18). If the doctrine did not apply, the Court would not have addressed it. Moreover, the Court in *Green Mountain Power* upheld a Commission order denying intervention in a Section 248 proceeding. The Court’s decision must be read in the context of its principal ruling that competitive economic interests do not form a basis for intervention in Section 248 proceedings. Importantly, adjoining landowner standing was not at issue. In addition, the Court in *Green Mountain Power* did not discuss, and therefore apparently did not examine or evaluate, the efficacy of whether Section 248 proceedings are today, as to adjoining landowners, simply legislative policy making proceedings. Of course, today, as to landowners, the proceedings are no longer merely a policymaking proceedings and are among the most litigated cases and controversies on the Commission’s docket. Section 248 proceedings are by definition cases and controversies, because they are contested case proceedings under the Vermont Administrative Procedures Act, 3 V.S.A. § 809(c). Section 809(c) expressly provides that “[o]pportunity shall be given all parties to respond and present evidence and argument on all issues involved.”

⁵ *Hinesburg Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 340, 693 A.2d 1045, 1047 (1997) (quoting *Allen*, 468 U.S. 737 at 751, 104 S.Ct. at 3324, 82 L.Ed.2d 556).

⁶ See *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2204 (“When the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”)

and the proper protection of society that only qualified persons duly licensed be permitted to engage in the practice of law”).

This is an overextension of the Commission’s existing rule and precedent, which has in the past allowed, for example, town officials to represent their municipalities⁷ and corporate officials to represent their corporations. These exceptions, however, are consistent with the fundamental concept that these individuals are already representatives of, or extensions of, the party in question, and have a limited vested interest in the outcome.

Additionally, the danger to the orderly administration of Commission proceedings presented by unregulated “advocates” should not be overlooked. As stated by the Vermont Supreme Court in 2016:

The primary purpose of the “lawyer-representation” rule is the protection of the public, not the creation of any private advantage for attorneys. ...[C]ourts generally refuse to permit nonattorneys to represent organizations “because they do not have the ethical responsibilities of attorneys and are not subject to the disciplinary control of the courts.” Nonlawyers often draft inarticulate pleadings and promote needlessly multiplicative proceedings, thereby burdening the parties and the court.

In re Morales, 2016 VT 85, ¶ 13, 202 Vt. 549, 151 A.3d 333 (internal citations removed). Commission proceedings almost always involve complex technical issues, requiring the qualification of experts and likewise, often involve complex legal issues (not the least of which are the reflected in the Rules of Civil Procedure, to which the Commission specifically requires adherence in Rule 2.200). Opening the door to unregulated “representatives” who are not representing their own organizational interests will have negative results far beyond any potential benefit, which the Commission has not attempted to articulate.

If the Commission can point to any sister state commission that allows such unrelated third-party representation, an explanation of the benefits gained and the risks experienced must be examined. These changes were not highlighted in the Commission Order accompanying the draft, but they are significant and fundamental changes and must be scrutinized.

Commencement of Enforcement Actions

With regard to the change in Section 2.02(B) regarding the commencement of enforcement actions, the listed elements to be included in any filing that seeks to initiate a formal enforcement proceeding should be mandatory, not merely “suggested.” This will require the minimum level of factual and legal rigor to be imposed on a process that may subject a party, related agencies and the Commission to weeks, months or years of resource-intensive litigation.

⁷ See, .e.g, *Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont*, Case No 8585, Order Re: Intervention, 11/5/2015.

4:30 PM Filing Deadline

With regard to the 4:30 PM filing deadline in Rule 2.204(E)(4), this restriction should be eliminated. The existence of the ePUC system and the Commission's new emphasis thereon render such a deadline superfluous. Electronic filing systems implemented in the courts allow for filings to be considered "filed" as long as they are submitted before midnight. *See* Vermont Rules of Electronic Filing, Rule 5(c)(1) ("Filing Date. An efile is considered submitted on a date if it is submitted prior to midnight on that date"). The Commission has not articulated a reason why it should retain the 4:30 PM filing deadline.

Extensions of Time

With regard to Rule 2.207 pertaining to extensions of time, the term "extraordinary circumstances" has traditionally been a very high bar reserved for truly unusual circumstances⁸ and is unwarranted here. Current practice provides the Commission with discretion to extend deadlines and the proposed hard and fast requirement seems to be a solution in search of a problem that the Commission currently does not currently recognize as an actual problem.

For instance, in this very case, on October 2, 2020, the deadline set for comments, the Department requested additional time to file comments (followed by "me too" filings by attorney Cindy Hill and Annette Smith of Vermonters for a Clean Environment). The basis for the Department's motion was merely that it "has been consumed with the establishment and oversight of COVID related programs and requires additional time." The Commission conducted no further inquiry, granting the Department's request the same day. Though this reason apparently constitutes "good cause" under the existing rule it is not clear at all whether the Department's explanation would constitute "extraordinary circumstances."

This illustration is not meant to be a comment on the propriety of the Commission's decision in this circumstance, but rather serves to elucidate why the Commission should retain its discretion rather than create bright line rules that may result in inequitable or inconsistent application of the rule.

* * *

We appreciate the opportunity to comment.

Respectfully,

GREEN LANTERN DEVELOPMENT, LLC

A handwritten signature in blue ink, appearing to read "D. G. Carpenter", with a long horizontal flourish extending to the right.

David G. Carpenter, Esq.
General Counsel

⁸ Seeking relief from judgment is an example of relief granted only in "extraordinary circumstances." *See, e.g., Request of Coughlin, Inc. for minor amendment to CPG # 19-2502-NMP*, Case No. 20-0895-PET, Order Denying Motion, 6/25/2020.