STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-2369-RULE

Paul Brouha's Comments to Proposed Revisions to Vermont Public Utility Commission Rule 2	

PAUL BROUHA'S COMMENTS TO PROPOSED REVISIONS TO VERMONT PUBLIC UTILITY COMMISSION RULE 2

Introductory Remarks

On August 27, 2020, the PUC opened a proceeding to update and revise its formal rules for Commission cases and hearings. The PUC seeks to make it easier for the public to participate in its proceedings so that Commission proceedings work better for all Vermonters. The proposed revisions to Commission Rule 2 fall far short of addressing the failings of the current process and much more will be needed and considered to provide Vermonters with meaningful access to ensure enforcement and compliance with a CPG.

My comments to the proposed revisions to Commission Rule 2 address the fundamental question whether the current legal process is capable of harnessing the developer. The key to effective change is to consider whether the current rules provide adequate enforcement power to the PUC to ensure the developer operates within the CPG and yet provide a straightforward and uncomplicated process to allow the public to partner with the PUC in fulfilling its duty to protect the environment.

The developer is sophisticated and well-versed in the technical aspects of noise and monitoring. A community member is not able to compete with the developer's resources, particularly when the developer has prepared its submission for years with expert and technical resources beyond the reach of an average citizen. The community may turn to the DPS, but experience reveals it is not an office of public advocacy but rather an institution governed by politics. The tragedy is the current process and rules encourage the PUC to listen to the developer instead of a complainant and leave the public without an advocate.

I appreciate the opportunity to provide feedback on the proposed update and revisions to Commission Rule 2. My commentary addresses what I feel are the larger problems with the Section 248 process. From a broad perspective, Section 248 and Commission Rule 2 are written for contested utility cases where litigation is necessary. The PUC's work has changed in the last decade to include merchant and utility electric generation cases, involving land use siting issues that require public involvement, which are cases where litigation is not necessary. The proposed update and revisions attempt to support public participation in these new types of cases, but not *enough to ensure meaningful participation. I recommend the Commission continue to follow Commission Rule 2 for traditional utility cases, such as rate cases, but consider a new approach for merchant and utility electric generation cases that involve land use siting.*

My commentary begins with my experience as a participant in the Rule 2 process and discusses alternative requests to improve public participation in the process. My intention is to pursue a strategy whereby a rule for merchant and utility electric generation cases is transparent, easy to use and understand, and welcoming to the public. I will discuss the following topics:

- The background of my particular experience in the Sheffield Project, which is near my home;
- The lack of enforcement against the developer;
- The legal process encourages litigation tactics and discourages public participation;
- The lack of money to participate in a litigious process;
- The discovery rules are used as weapons against seeking information and data; and
- The environmental injustice of the current process.

How Did We Get Here?

My story begins in 2002, when Vermont Wind, LLC ("Vermont Wind") filed its application for the Sheffield Wind Project ("Project"). In hindsight, from the moment the meteorologic monitoring tower for the Project was first erected across the valley on Hardscrabble Mountain, without a permit, the Rule 2 process governing the Commission and its approval of a Certificate of Public Good ("CPG") were broken. Rule 2 does not serve the public interest and it does not protect individual rights. In reality, Rule 2 serves the interest of the developer and sets up barriers for public participation. Since my original attempt to participate from 2002 until this year, I have experienced the failings of the Rule 2 process and, as I said then, I say yet today, "It's as if we weren't even there."

Despite public protests, the Commission issued a CPG to Vermont Wind to operate the Project for 20 years. The CPG contained three conditions related to noise associated with the Project:

- Vermont Wind shall construct and operate the Project so that it emits no prominent discrete tones pursuant to the American National Standards Institute (ANSI) standards at the receptor locations, and indoor sound levels at any King George School structure and any surrounding residences do not exceed 30 (Ldn).

- In the event noise from operation of the Project exceeds the maximum allowable levels, Vermont Wind shall take all remedial steps necessary to bring the sound levels produced by the turbine(s) into compliance with allowable levels, including modification or cessation of turbine(s) operation.

- Vermont Wind shall submit to the Commission for review and approval a noise monitoring plan to be implemented during the first full year of operation. The Plan shall establish a monitoring program to confirm under a variety of seasonal and climactic conditions compliance with the maximum allowable sound levels described above.

With regard to the Project, the Commission assured the public that wind energy in Vermont would be safe for its citizens by utilizing an interior sound level requirement of 30 dBA. The problem, however, was the Commission relied upon Vermont Wind to adopt a Noise Monitoring Plan to report quarterly accurate and reliable testing results to ensure compliance with the interior sound level. The Commission's accountability to the public, which included me and my neighbors, was dependent upon the veracity of Vermont Wind's testing and reporting and its compliance with the Noise Monitoring Plan. The public's participation in the process is complaint-driven. Therefore, if the Commission received a complaint from the public, Rule 2 triggered public participation. If Rule 2 was intended to level the playing field, it failed me and many others who complained.

As in intervenor living next to the Project, I was forced to participate in 17 years of litigation in a process that no citizen should have had to endure. The idea of public participation in the Rule 2 process is unrealistic and the proposed update and revisions will not remedy the reality that the Rule 2 process favors litigation, gamesmanship, technical acumen and financial backing. In my case, despite my participation, the Commission and the Department of Public Service ("DPS") failed to acknowledge the developer's deviations from the original promise of compliance with the Project's CPG.

As early as October 4, 2010, on behalf of a community group of concerned citizens, I filed my first motion with the Commission, pointing out the ways that Vermont Wind's Noise Monitoring Plan failed to demonstrate compliance with the Project's CPG. Essentially, our major concern was that Vermont Wind controlled the measurements and thus could easily misrepresent or omit facts to avoid further inspection of its protocol. We also were concerned that the Commission effectively deferred to Vermont Wind the handling of resident complaints. Vermont Wind strongly opposed our effort, arguing our concerns were precluded on technical and legal grounds. The Commission sided with Vermont Wind, rather than listening to me and the residents near the Project.

After the Project began operations in late October 2011, I filed my first noise complaint on December 24, 2011. Under the Noise Monitoring Plan, Vermont Wind was required to investigate my complaint, because it was within 1.5 miles of the nearest turbine, and to evaluate and then report compliance to the Commission. The trigger to further action was based on Vermont Wind's assessment whether there was a reasonable possibility the Project sound level was within 3 dBA of the CPG noise limit.

As we now know, the Commission and the DPS failed to listen to me or to my neighbors' challenge to Vermont Wind's testing and reporting its compliance with the interior sound level requirement of 30 dBA. The Noise Monitoring Plan the Commission put in place to assure public confidence in the CPG was ineffective, due to the Commission's failure to enforce its terms or to question Vermont Wind's interpretation of those terms. Despite my efforts to notify the Commission through its process, the Commission unquestionably accepted Vermont Wind's selfcertified testing protocol. The Commission effectively closed the door on my complaint when it delivered its May 1, 2013 Order, siding with Vermont Wind and its experts, without any independent investigation or independent review of my complaint. The DPS was equally ineffective in that it argued the Commission had no power under the Noise Monitoring Plan to order additional testing to ensure the public's safety and well-being.

From my personal experience, I felt the cards were stacked against me from the beginning and Rule 2 was not an avenue for me to be heard. As an individual with a complaint, I was no match against Vermont Wind's expertise in navigating the Rule 2 process, its discovery mechanism, and its legal thresholds. Vermont Wind controlled the testing, the expert reports and the timing of the results. With nothing more than a nod, the Commission accepted Vermont Wind's representation that it was not conceivable the Project could be out of compliance and no further testing was required.

I had no recourse but to pursue an independent remedy, spending my own money to hire two experts to represent the public's interest and lawyers to advocate on my behalf within the Rule 2 litigation process. Since I filed my complaint in 2011, I have spent over $600,000.00 and lost nine years of my retirement to try to protect myself and my wife from the harm of the Project and to single-handedly pursue justice and fairness in our regulatory and legislative process.

The Rule 2 process that we are discussing will not fix what I endured. I think it is important that the Commission understand what it is like for the public to participate in utility regulation in Vermont and how the Rule 2 process forces neighbors of proposed or existing utilities into untenable positions. In the critique that follows, I describe 11 specific failures that are not addressed in the Rule 2 updates and revisions. I am describing my experience to implore the

Commission to adjudicate and bear the burden of compliance with a CPG and to adopt new measures to assure there is a meaningful and effective process for public participation.

Lessons Learned From Rule 2

In response to my December 2011 complaint, Vermont Wind's expert reportedly found no violation, representing the maximum interior sound level inside my home was 18 dBA. As we learned in 2015, Vermont Wind's 18 dBA was unreasonable. The DPS reversed its previous position regarding Vermont Wind's compliance testing in response to my complaint. Through its independent expert, Acentech, the DPS agreed with me and my expert, Les Blomberg of Noise Pollution Clearinghouse, had Vermont Wind tested and reported properly, I would not have been forced to spend years litigating in federal court and before the Commission. In 2020, after nine years of litigious Rule 2 public participation, Vermont Wind finally acknowledged the noise issues that I brought to the attention of the Commission and expressed sincere regret to me and my wife for our changed life and use of our property.

Even though I intervened in the permitting process for the Project, from the first instance of pushing back against Vermont Wind, the process and its procedure and rules that govern the Commission prevented me, residents and other concerned citizens from having a voice. The current Rule 2 process is riddled with bias towards developers and state agency parties, with a dismissive attitude towards intervenors, whether represented by attorneys or participating *pro se*. The complexity of public participation and the accompanying cost to challenge a developer are major roadblocks to the likelihood a complaint will even reach the attention of the Commission. For me, who had the financial means and time to remove those roadblocks, the Commission's ultimate deference to Vermont Wind stifled, obstructed and realistically precluded a just and fair process to protect Vermont, its environment and its citizens.

1. *The Commission's Reliance on Evidence is Selective*: In my experience in Sheffield, and as others experienced in Lowell, the Commission routinely favored and endorsed the developer and its experts during the approval and complaint process and unequivocally relied upon their evidence. The Commission ignored testimony from neighbors and community members that the Sheffield and Lowell projects would be significantly louder than the developers claimed and did not initiate further investigation, as demonstrated in the following examples:

a. *Sheffield Testimony*: The Commission was charged with protecting neighbors' health in homes near the Project by limiting noise exposure to 30 dBA or less, as measured inside a home. The question before the Commission was how to measure and calculate the ultimate noise level inside a home near the Project. On February 8, 2007, during testimony before the Commission, Peter Guldberg testified on behalf of the neighbors that noise reduction due to open windows "would be close to zero, possibly one or two decibels inside," meaning that there was, in fact, no attenuation across the building facade. Vermont Wind predicted the noise level outside would exceed 40 dBA, with a reduction of 10-20 dBA, meaning the interior noise level would be below 30 dBA. In hindsight, the public was right and Vermont Wind was wrong. The Commission favored the developer and granted Vermont Wind its CPG to operate the Project. Had the Commission accepted Mr. Guldberg's testimony as credible and conducted further investigation, it would not have concluded the interior noise would be less than 30 dBA and would not have issued a CPG or, alternatively, would have taken other measures to investigate and monitor Vermont Wind.

b. *Lowell Testimony*: During the Lowell siting, Les Blomberg testified the plus or minus 3 dBA accuracy of noise modeling needed to be taken into account when considering noise predictions. Specifically, the ISO Standard 9613, which is the basis for the modeling states:

Table 5 — Estimated accuracy for broadband noise of L_{AT}(DW) calculated using equations (1) to (10)

Height, h *)	Distance, d *)	
	$0 < d < 100$ m	$100 \text{ m} < d < 1\,000$ m
$0 < h < 5$ m	± 3 dB	± 3 dB
$5 \text{ m} < h < 30$ m	± 1 dB	± 3 dB

*) h is the mean height of the source and receiver.
d is the distance between the source and receiver.

NOTE — These estimates have been made from situations where there are no effects due to reflection or attenuation due to screening.

Mr. Blomberg also testified that the accuracy range of the Concawe model used in the prediction of noise levels in Docket 7268 was even larger than the IS0 9613 range. Had the Commission not dismissed Mr. Blomberg's evidence, the Lowell project would not have been granted a CPG as designed. Mr. Blomberg testified the noise at the Nelson's home would exceed the CPG limit, yet the Commission defaulted to the developer. The result that the noise levels at the Nelson home did indeed exceed the CPG limit would have been known had the Commission conducted a thorough investigation instead of instantly dismissing the neighbors.

c. *Sheffield Complaint*: Had the Commission fairly considered my December 2011 complaint and undertaken an unbiased investigation, the noise issue would likely have been resolved in 2012. Instead, the Commission hastily favored the developer who, unsurprisingly, reported there was no merit to my complaint and the Project couldn't possibly be in violation of the Docket 7156 CPG. The Commission Rule 2 process failed, because the Commission thereafter accepted without question the developer's interpretation of monitoring and testing under the Noise Monitoring Plan.

At my financial burden, Les Blomberg of Noise Pollution Clearinghouse, conducted on-site monitoring and testing and his reported violations were eventually confirmed by the DPS, through its independent expert, Acentech. Despite the Commission Rule 2 process that presumably promotes public attention to complaints and an interactive exchange of information, it took 15 months and prodding by two state senators before the Commission seriously considered my complaint legitimate and worth further inspection.

Dangerously, the ability of the developer to litigate technical issues against me in the Commission Rule 2 process postponed any public relief or remedy. Over the next four years, the developer continued to operate the Project, despite public comment and participation before the Commission. A new Docket 8653 was opened, a Hearing Officer was appointed, and another independent expert was hired by the DPS to further question the original promise of an interior sound level requirement of 30 dBA. The Rule 2 process launched a contested hearing to determine whether Vermont Wind violated the CPG, which we now know settled with an apology from Vermont Wind.

The winner, here, was Vermont Wind, because it was allowed to operate during this time, unchecked and able to generate considerable profit. The Rule 2 process failed in all material aspects of regulation. As history demonstrates, the Commission approved a Noise Monitoring Plan that promised to operate as a safeguard, whereby the public was able to file a complaint and Rule 2 would determine a fair and just outcome, with appropriate accountability on the developer. I bought into that part of the process, along with others who protested against the CPG, and I can attest to its failure. I was placed in the position of battling not just the developer's expert but also two experts controlled by the DPS, all of whom had a track record of working for the wind industry. The Commission did not use its authority to hire its own expert, one that would independently assist and defend the interests of the complainant. The Commission's decision to initially and repeatedly believe and give deference to the developer cost the State and me more than a million dollars combined. The Commission's disregard to exercise its regulatory duty and responsibility to the public and the broken Rule 2 process prolonged what should have been a short and simple CPG violation into nearly a decade long nightmare.

ASK: These instances demonstrate the biased attitude of the Commission toward the developer at critical junctures in the Rule 2 process. The public may not be as sophisticated and well-versed in the litigation aspects of the Rule 2 process, sometimes resulting in clumsy, inartful or long-winded submissions. The Commission must acknowledge complaints, investigate the merits of a complaint, and hire experts to determine the legitimacy of the public positions, with all costs to be billed back to the developer.

2. *The Commission Treated Noise Pollution Levels as Proprietary Information:* In each of the instances discussed above, the noise emissions of the turbines were subject to confidentiality agreements and secrecy. Allowing pollutant emissions to be secret sets a dangerous precedent. Had the Commission not been so deferential to the developers, pollution would not be a secret. By allowing confidentiality of the data and information relating to the noise emissions of the turbines, the Commission failed in its basic role to inform and protect the public.

ASK: The Commission should treat pollution emissions as public data and all such proprietary information should be disclosed in the Rule 2 process and become part of the public record. Without complete transparency, the Commission is not able to ensure meaningful public participation and, of course, not able to fully protect Vermont, its environment and its citizens.

3. *Utility Self-Certification Does Not Work*: The most obvious and perhaps most egregious case of listening to the developer was the compliance certification and complaint

processes in the Sheffield Dockets. The processes were essentially a compliance self-certification and complaint self-resolution process that had Vermont Wind acting in the regulatory role the State should have taken. Allowing the fox to guard the hen house has been known to be a bad idea for as long as there have been hen houses (harken to Boeing's current Max 8 fiasco), yet this is exactly what the Commission ordered. The Commission should never have deferred its responsibility to protect the public by allowing Vermont Wind to self-certify the compliance and complaint processes. The developer with financial motives is uniquely unsuited for the task of policing itself.

The Project demonstrates specific examples where the Commission failed to enforce the Noise Monitoring Plan and summarily accepted Vermont Wind's expert report that "[b]ecause these already conservative values [of 8 to 20 dBA] are so far below the permissible limit of 30 dBA it is not conceivable that the project could be out of compliance with its permissible sound level at the complainant [Brouha] location and no further testing is required." Vermont Wind had a vested interest in the results, and the lack of oversight by the Commission produced exactly the results almost anyone could predict.

ASK: The Commission is appointed as the gatekeeper for the public and can no longer allow developers to self-certify compliance with the conditions of a CPG. The Commission should exercise its authority and hire an independent expert that reports directly to the Commission, without a middleman to massage or pre-interpret the results. Costs associated with compliance should be billed back to the developer.

4. *The Commission Did Not Require an Adequate Margin of Safety*: The Commission's poor decisions in oversight and enforcement in both the Sheffield and Lowell projects could have been avoided had it required projects to be designed with an adequate margin of safety. The Commission's decision-making process did not adopt this basic engineering and

public policy tenet, forcing a Rule 2 process that effectively precluded meaningful public participation. Had the Commission included a 3-6 dBA margin of safety, the outcomes in the Sheffield and Lowell projects would have been markedly different. Deferring to the developers "conservative assumptions," as was the case in Sheffield, is not a substitute for an adequate margin of safety.

ASK: The Commission should apply a 6 dBA margin of safety to all wind turbine projects.

5. *The Commission Can't Say "No"*: Hindsight in the Rule 2 process demonstrates the Commission should not have granted CPGs in the Sheffield and Lowell cases for the projects as built. The evidence for rejection before the Commission during the hearings was ignored, suggesting the Commission was pre-disposed to approve the projects. During the Shumlin and Douglas administrations, there was significant political pressure on the Commission to ignore science for ideological reasons.

ASK: The Commission must ensure that it operates as an independent, objective entity obligated to fulfill its existing mandate separate from political expediency and influence. It must say "No" to proposed projects that are not likely to meet CPG criteria and, at the outset, must avoid being led down the primrose path by developers

6. *The Commission Has Done a Disservice to Wind Power and Neighbors*: The most generous reading of the Commission's inability to say "No" to the Sheffield and Lowell projects was that it was trying to advance the goals of renewable energy and those goals took precedence over any evidence the projects could not comply with the CPG criteria.

The Commission's poor wind turbine siting criteria (more fully critiqued below) and poor evaluation process lead to poorly sited turbines. Poorly sited wind project developments predictably result in bad publicity for renewable energy and significant, well-placed mistrust of the Commission. Consequently, any future proposed wind development in Vermont will likely face stiff community resistance because neighbors and neighboring communities do not trust the Commission to protect their interests and public health. It follows that the Commission's decisions have unnecessarily damaged the reputation of renewable energy in Vermont and made achieving climate change goals more difficult.

ASK: To rebuild public trust and achieve effective public participation, the Commission must adopt and sponsor a community-based stakeholder process that begins early in the process, before experts are hired. An example of such a process was taught to the wind industry at a forum held at Harvard Law School: https://sitingcommission.vermont.gov/sites/vegspc/files/documents/publications/VCE-Presentation-11113.pdf.

7. *The Commission Has Used Noise Standards That Lead to Confusion and Ambiguity:* To encourage public participation in the wind turbine siting process, the Commission must address its failure to develop clear and easily enforced noise standards. Initially, in Sheffield Docket 7156, the Commission accepted a science-based noise criterion of 30 dBA interior. The Commission has, however, been plagued by the problem that the noise metrics used in most scientific health effects studies are not well suited for noise enforcement. The Commission's one-hour Leq standard exhibits this problem, as the Commission has been unable to determine how it should be measured, changing its measurement methodology frequently. The Commission abandoned the original measurement method developed in the Sheffield Project that relied on remote and sheltered background noise measurements. After a long investigation, the "binning method" was settled on, but the DPS discovered that it too was flawed.

The problem is that it is very difficult to determine an accurate one-hour average if either the background or source noise are fluctuating, which is exactly what happens in Vermont. The time period is just too long to filter out contaminating data. So endless arguments about the correct noise level and measure procedure ensue.

ASK: The ambiguity in both noise modeling and noise monitoring will not be settled without a bright line test. Unfortunately, without God's eye, we will never have a decibel-based bright line. The Commission has been reluctant to adopt a bright line test, at a great cost to neighbors and utilities. To regain public confidence in its process, the Commission is urged to adopt prima facie siting criteria that effectively protect the neighbors. In the case of wind energy projects, the primary criterion should be a one and one-half mile setback (or 15 times turbine height) from adjacent property boundaries. Such a standard will not be confusing to anyone!

8. <u>*The Commission Needs to Adopt Property Line Regulations*</u>*:* Because of its past failures, the Commission has doomed every future wind energy project to a contentious, mistrustful fight. One of the greatest failures is not acknowledging that, in Vermont, one's property can be hundreds of feet from a wind facility while one's home is thousands of feet away. We saw this with regard to the Nelson's property in Lowell and, to a similar but lesser extent, my property adjacent to the Sheffield Project. The fundamental problem is the Commission regulates noise only at a residence, without taking into account the enjoyment and use of the rest of one's property.

ASK: If the Commission were to adopt a property line setback standard, the public would have a known outcome. There is Act 250 precedent for considering the property line noise levels and future development. The *Cersosimo* decision #2W0813-3 (Revised) states that, if future residential development were to occur, the residential limit would apply at those locations. The

Commission should use setbacks or adopt the primary criterion of a one- and one-half mile setback (or 15 times turbine height) from adjacent property boundaries to ensure public confidence in future wind energy projects.

9. *The CPG and Complaint Process Raise Significant Environmental Justice Concerns*: As my experience shows, it requires sophisticated legal counsel, subject matter experts, and hundreds of thousands of dollars to get the attention of the Commission and to ensure a complaint is thoroughly reviewed and investigated. This is obscene and creates a significant environment justice issue. If the Commission and the State of Vermont are actually committed to environmental justice, they must not create situations where race, color, national origin, education, expertise, time or income determine whether a neighbor can participate in the Commission Rule 2 process.

Currently, the Commission shows no concern for the environmental injustice it perpetuates. This is a glaring moral failure of the Commission that needs to be addressed. When a developer takes over land to build on it, the community has no effective options or avenues to voice concerns that will be heard. Another neighbor of the Sheffield Project without financial means had to abandon their home ¾ miles from the nearest wind turbine, after receiving no relief from the Commission or the developer. No one other than me has been able to pursue a complaint that brought on accountability or any degree of improvement, which raises the significant systemic environmental justice issue that has been created by the Commission Rule 2 process.

Another barrier is the inadequate time offered to neighbors to comment on a developer's intent to apply for a CPG. The current process provides a 45-day public notice, which is woefully inadequate to review and prepare to contest the developer's plan. The Commission offers no mechanism to level the playing field on behalf of any neighbor or interested person who needs to participate in the process.

The DPS does not effectively represent the public interest in the application process and, because the DPS is an executive branch agency, it represents the political interests of the current Governor and, in practice, has not addressed the inherent environmental injustice in the Commission process. The opportunity for *pro se* representation is meaningless. The current rule-driven process effectively limits access to sophisticated lawyers and expert witnesses.

ASK: The Commission needs to be empowered with authority to require the developer to deposit an escrow fund in an amount to permit public participation, suggested at 1% of the expected capital cost of the developer's proposal. This fund could be allocated through the Commission or State ombudsman whose role it is to intervene in regulatory matters on behalf of neighbors of proposed and existing projects, so that their environmental and property rights can be protected. Finally, the time frame for neighbor response for large projects like transmission lines, pipelines and industrial wind turbines should be extended from 45 days to one year to enable expert review of the developer's proposal and studies and for the enlisting and getting up to speed of legal counsel and experts to participate in the application and hearing process before the Commission.

10. *There Is No Need for the Coercive Power of the State to be Used to Impose Generation in Vermont:* The Commission is working under an outdated regulatory model. The historical role of the Commission to site generation within Vermont in the public interest is no longer relevant or necessary. The availability of power on wholesale markets and the sale of power generated by utilities in Vermont to those outside of Vermont means the Commission's coercive power to force generation on communities for the common good is no longer applicable. When

the Commission uses its coercive power today, as in the case of Vermont Wind, it is primarily for private and not public good. This is bad policy and bad governance and needs to be updated.

ASK: For all energy projects, developers must show there is a need in Vermont for the power from the project.

11. *The Commission Must Function as an Objective Regulator in Enforcing the CPG*: After issuing the CPG in Sheffield Docket 7156 and when initially responding to my complaint, the Commission quickly shifted the burden of proof to me, the complainant, by referring the complaint to the developer and then accepting the developer's findings at face value. The rebuttable presumption to show a project is not in violation must remain with the developer and be overseen by a disinterested third party, which is not the DPS.

ASK: Since the Commission has authority to issue a CPG with conditions of operation, the State has a continuing regulatory obligation to monitor and enforce those conditions from the start of construction, through operations, and to completion of site restoration after the project is completed.

The Proposed Revisions to Commission Rule 2 Regarding Procedure and Discovery Are Inadequate to Promote Public Participation

As a general comment, all revisions must apply prospectively and, in some cases, the Commission must consider whether a revision will affect a settled or anticipated outcome. For me and many others, some of the proposed revisions will adversely affect the enforcement of agreements and settlements currently in place.

Section 2.103 Vermont Rules of Civil Procedure: The Commission may adopt and follow civil rules, which makes the "Conflicting Authority" proposed language confusing. Those who practice and appear before the Commission on a daily basis may know how to navigate the process, but the public or civil attorneys are at a disadvantage. The civil legal system and rules governing procedure and discovery are especially challenging for public participants when skilled attorneys familiar with those rules use them to silence and intimidate *pro se* parties. To ensure public participation, the Commission should consider a separate rule for merchant and utility electric generation cases that involve land use siting and not defer to the Vermont Rules of Civil Procedure.

Section 2.104 Conflicting Authority: If there is a conflict of rules, the Commission's rules will prevail. This becomes important when dealing with an interpretation of a civil matter, which would include enforcement of a settlement agreement under the civil rules. In the Sheffield matter, the Commission retains its authority over the operation of the Project and a Commission rule may conflict with the intention of the settlement agreement.

Section 2.201(E) *Ex Parte* Communications: Anyone who causes the disqualification of a Commissioner or an agent of the Commission from participating in a matter will be disqualified from participating and subject to civil contempt. Public participants cannot be expected to understand the difference between a procedural and substantive matter. This section raises questions regarding the relationship the DPS and its employees and staff have with the Commission employees and staff and whether persons would be reprimanded or disqualified when those persons communicate *ex parte* with the Commission. Another consideration is whether a *pro se* complainant would be disqualified for questions to the Commission and its employees and staff. Obviously, even a procedural conversation may affect the merits of an ongoing matter, bringing into question the integrity of the *ex parte* communication.

Section 2.202 (B) Enforcement Proceedings: The Commission may refer an enforcement matter to the DPS. Although not required, it is recommended the enforcement filing include certain threshold items: (i) whether brought to the DPS to evaluate an administrative citation or why not;

(ii) reference to statutes and law that are allegedly violated; and (iii) factual bases, in signed affidavits, for each alleged violation.

This particular proposed rule change will have a dangerous and detrimental effect on the complaint-driven process that allows the Commission to fully protect Vermonters. If a Vermonter with a complaint is expected to meet certain legal and technical standards before having an opportunity to be heard, the Commission is effectively denying Vermonters due process. And, it begs the question of who determines whether a complaint meets the threshold, leading to an adversarial system rife with motions to dismiss, hearings, and excess cost and time. A complaint to the Commission is an entry-level standard, open and available to any Vermonter, regardless of status, ethnicity or power. Imposing threshold items defeats the inherent purpose of a complaint-driven process and will preclude any meaningful review of the developer's compliance with the CPG.

Even if a Vermonter is able to meet the expected threshold to bring a complaint, which is highly doubtful, the Commission has now moved the burden of proof to the complainant rather than remaining on the developer, where it rightfully belongs. This proposed change creates an assumption by the Commission that a developer is presumed in compliance with the CPG until a Vermont citizen, without any or little legal or technical expertise, brings a well-founded complaint to the DPS first, before coming to the Commission, which may be under political influence to deflect the complaint. Further, if a complainant must first lay out its case, the developer's remedy is to rebut those allegations with expert and technical results, experience and reporting. The power of the burden of proof changes the dynamics of the process, which will deter and likely preclude average citizens from filing enforcement proceedings.

Finally, the specifics of the threshold items require a good working knowledge of the law, Commission rules, and the wind and energy industry. If I had not had the personal finances to hire attorneys and experts, I would not have been able to pursue my complaint. Moreover, as we now know, being forced to go to the DPS left me without a voice and adequate public representation. The DPS is a politically-governed entity and the public's concerns may not be the agenda of the DPS. Every Vermonter must be afforded equal opportunity to effectively bring a complaint to the Commission.

Another concern about enforcement proceedings that the proposed change does not address is confidentiality. Once a complainant brings a matter to the Commission, the developer and its attorneys and experts demand that data and testing be held in confidence. Subcontractors of developers are inaccessible, for example blasting in energy projects. All entities and persons involved should be required to make available to the public all records and data. I suggest the Commission adopt a rule that requires all data, testing, results, records, reports and underlying information be public and available to anyone who requests such information. Such a request must not be linked to a complaint, because doing so essentially not only undermines but subverts any progress toward a fair and all-inclusive regulatory process and system.

Section 2.204 (E) Personal Accusations: Filings must address the substantive and procedural matters and not use inappropriate derogatory language or make personal accusations that are speculative or not directly related to the procedural and substantive matters before the PUC. This revision warrants additional discussion, because enforcement will be an issue for all parties. The intent seems clear but the interpretation, application and remedy remain unclear.

Section 2.209 Intervention: A rule that denies an application to intervene if not filed within 30 days after the right to intervene first accrues is unclear, because the public has no understanding of when a right accrues. The Commission should allow a person to intervene at any time, allowing the Commission to question the timing if unreasonable or would delay the matter.

Section 2.214 Discovery and Related Limitations: Filings are limited to 25 pages, excluding exhibits, with responses limited to 15 pages and replies to 10 pages. The Commission may reject a motion if not made within 30 days after the facts first arose that form the basis for the motion. A Memorandum of Law must be included in the same document as the motion. These proposed changes, as examples, and adopting in general the Rules of Civil Procedure governing discovery will adversely affect the public's ability to pursue a complaint with the Commission. The public cannot be expected to compete with attorneys who are well aware of the discovery rules and all the nuances of page limits, deposition rules and motion practice.

Closing Remarks

In closing, our future depends upon whether the Commission can acknowledge and address its failures and put into place new rules, processes and procedures to permit meaningful participation. My experience during the last many years has led me to see and believe the Commission has failed Vermonters, creating a significant environmental injustice. This proceeding to update and revise the formal rules governing Commission cases and hearings cannot succeed in its purpose without addressing environmental justice failures, the noise regulatory failures, the enforcement failures, and the historical deference to utilities and merchant developers over neighbors.

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

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