



October 16, 2020

Mrs. Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street, 4th Floor
Montpelier, VT 05602

Re: Proposed Revisions to Rule 2.200 (Case No. 20-2369)

Dear Mrs. Whitney,

REV appreciates the Commission's effort to update Rule 2.200 as necessary to incorporate modern practices. The Commission has made significant changes to utilize transparent technologies such as electronic filings through ePUC and consistent increased consideration of public participation in its proceedings which REV supports.

The numerous and consistently expanding laws and policies of the State established by the Vermont General Assembly direct development of new renewable energy and communications infrastructure in a timely and cost effective manner. REV is concerned that changes to Proposed Rule 2.209 unintentionally counter this legislative intent by significantly lowering the intervention threshold to allow individuals without substantial interest to intervene in certain proceedings. REV urges the Commission to maintain the existing intervention standard in its rule and reconsider the proposed changes.

In order for Commission proceeds to be efficient and fair to applicants and all parties, potential intervenors should show a substantial and particularized interest to appropriately satisfy standing. The Commission has a very important role in evaluating in each case that a potential intervenor demonstrate a legitimate interest. We support comments from Vermont Electric Cooperative regarding the standard for intervention.

The concept of "standing" is crucial to the fair and orderly functioning of any judicial or quasi-judicial system. The Commission's proposed changes to the intervention standard in proposed Rule 2.209 eviscerate the bedrock constitutional 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."¹ An injury in fact is defined as an "invasion of a legally protected interest."² "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."³

¹ *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)).

² *Hinesburg Sand & Gravel*, 166 Vt. at 341, 693 A.2d at 1048.

³ *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2204.



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 precedent⁴. Rooted as it is in the constitutional doctrine of standing, 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

Vermont courts of course are subject to this Constitutional restriction on participation, and have subject matter jurisdiction only over “actual cases or controversies involving litigants with adverse interests” which requires that each participant demonstrate that they have standing.⁶ “In the absence of standing, any judicial decision would be merely advisory, and Vermont courts are without constitutional authority to issue advisory opinions.”⁷

The rationale restriction applies even in cases that implicate the “public trust”. For example, in *Parker v. Town of Milton*, 169 Vt. 74, 726 A.2d 477 (1998), the Town of Milton had applied for an encroachment permit to build a bridge across Arrowhead Mountain Lake that would connect Route 7 with a town highway and an industrial site owned by Husky Injection Moldings, which permit was granted. Certain Town of Milton landowners filed an action in superior court arguing that the lake was a public trust resource and challenged the permit.⁸ The Superior Court dismissed on the grounds the landowners lacked standing, notwithstanding that the resource involved was a public trust resource. Specifically, the Court

⁴ *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.”)).

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 *Bischoff v. Bletz*, 2008 VT 16 ¶ 15 (citing *Brod v. Agency of Nat. Resources*, 2007 VT 87; *Parker v. Town of Milton*, 169 Vt. 74, 77, 726 A.2d 477, 480 (1998)) (equating Court's review of dismissal for lack of standing in declaratory-judgment action with dismissal for lack of subject-matter jurisdiction); *Town of Charlotte v. Richmond*, 158 Vt. 354, 357-58, 609 A.2d 638, 640 (1992) (subject-matter jurisdiction cannot be waived and can be raised at any time); *Harris v. Evans*, 20 F.3d 1118, 1121 n.4 (11th Cir. 1994) (noting that standing cannot be waived and may be asserted at any stage of litigation); *Palmer v. Bahm*, 2006 MT 29, ¶ 16, 331 Mont. 105, 128 P.3d 1031 (stating that standing is “threshold requirement of every case” and may be raised at any time); see also *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) (“The rules of standing . . . are threshold determinants of the propriety of judicial intervention.”)

⁷ *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 8, 182 Vt. 234, 936 A.2d 1286 (quoting *Parker v. Town of Milton*, 169 Vt. 74, 77, 726 A.2d 477, 480 (1998) *Parker v. Town of Milton*, 169 Vt. 74, 77, 726 A.2d 477, 480 (1998)).

⁸ *Id.*, 169 Vt. at 75, 726 A.2d at 479.



found that the grievances they advanced were generalized only and that they failed to establish a legally protected interest in the project to have any standing. On appeal the Supreme Court upheld the dismissal stating: “By requiring plaintiffs to show actual injury to meet the standing requirement, we ensure that the cases before the courts are fully and vigorously litigated in pursuit of genuine interests.”⁹ A decade later in *Brod v Agency of Natural Resources*, 2007 VT 87, ¶ 9, 182 Vt. 234, 936 A.2d 1286, a citizens group was denied standing to challenge an Act 250 land use permit based on this reasoning.¹⁰

The proposed changes in Rule 2.209 invites parties with generalized grievances and no legally protected interests to impose additional complexity, significant delay and cost to necessary renewable energy and communications/connectivity projects. 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” (emphasis added).

The Commission has certainly utilized its established flexible authority by allowing non-traditional parties intervention and also accepting and duly considering public comments on contested cases as a way to enable increased public participation. Further changes to the Commission’s rules as proposed here in 2.209 are unnecessary and unwarranted.

In regards to the proposed 4:30 p.m. filing deadline proposed in 2.204(E)(4), we suggest the artificial and unnecessary time of day be eliminated. Electronic filing systems, such as the Commission as implemented via ePUC, make specific time of day deadlines unnecessary. Electronic filing systems implemented in the courts allow for filings to be considered “filed” as long as they are registered before midnight. See Vermont Rules of Electronic Filing, Rule 5(c)(1) (“Filing Date. An e filing is considered submitted on a date if it is submitted prior to midnight on that date”).

It is clear that a great deal of time and effort has gone into the proposed revisions to Rule 2.200. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in green ink that reads "Olivia Campbell".

Olivia Campbell Andersen
Executive Director

⁹ *Id.*, 169 Vt. at 79, 726 A.2d at 481 (citations omitted)(emphasis added).

¹⁰ *Brod*, 2007 VT 87, ¶¶ 1, 5, 936 A.2d 1286, 1289–90.