

VERMONT PUBLIC UTILITIES COMMISSION

Case No. 20-2369-RULE

COMMENTS OF HILL ATTORNEY PLLC
ON PROPOSED CHANGES TO PUC RULE 2.200

Introduction:

I thank the Vermont Public Utility Commission for the opportunity to comment on its proposed changes to Rule 2.200, its rules of practice and procedure.

In my practice, I have represented numerous municipalities and project neighbors before the PUC. In the course of this representation, I have observed that there are points of disconnect and divergence between the PUC Rules, or the applicable portions of the Vermont Rules of Civil Procedure, and the actual course of practice before the PUC. I have practiced in numerous jurisdictions, both state and federal, in civil and criminal trial and appellate courts, for well over 30 years. I am accustomed to the fact that "local rules" such as the PUC Rules may be at variance from the general jurisdictional Rules of Civil Procedure and Evidence. The presumption is that if a legal practitioner or pro se party reads the local rules, he or she should be able to accurately discern the process of an action in that jurisdiction.

However, with the PUC Rules, that is simply not the case. For example, VRCP Rule 26 applies to discovery at the PUC. Under that Rule, Interrogatories to be answered by the opposing party's expert witness are very narrowly limited; all other discovery inquiries to be answered by an expert are to be conducted by deposition (at which, of course, the person calling the deposition would be responsible for paying for the expert's time).

In practice, nearly every witness in every PUC case is an expert witness, and the case opens with those experts having already testified, by means of prefiled testimony filed

by the Applicant. In practice, the non-Applicant parties then engage in extensive discovery on the Applicant, asking questions to be answered by their experts which exceed the narrow list of three questions prescribed by the VRCP Rule 26. As a further point of practice, fees for the time taken by those experts to answer those interrogatories are never charged to the non-Applicant parties.

The way this works in practice is a practical and useful system, but it should be embodied in the Rule. The ambiguity created by the divergence of the Rule and practice on this point has led to frequent instances where Applicants or their legal counsel have pointed to the Rules of Civil Procedure and threatened pro se or public interest parties to charge exorbitant expert witness if those parties engaged in discovery that needed to be answered by experts. Even a skilled litigation attorney, coming before the PUC for the first time, would assume from a careful reading the PUC Rules that discovery on expert witnesses needed to follow the usual patterns of Civil and Criminal practice. In short, the Rules should at the least reflect the expectations of actual practice before the PUC.

2.100

2.102 Definitions

The proposed change to the definition of "Commission" is appropriate; 30 VSA §8 refers to a "hearing officer" rather than "hearing examiner".

I find the definition of "Filing" -- both its original form and the proposed change -- to be a point of deep confusion; the addition here of a definition for "Proceeding" only exacerbates the problem, which is this: There is, or seems to be, a distinction in practice between "filings" which are "on the record" of a particular case/matter/proceeding, that is, the documents which form the record on which the Commission's decision may be based, and those "filings" which are submitted in a case/matter/proceeding, but which are NOT considered part of the decision record. The latter may include public

comments, responses to 45 day notices, and communications regarding insufficiency of an application.

Take for example a typical wind project. A municipality which is short on funds and intimidated by the PUC process might file extensive comments on a 45 day notice, and assume that the PUC will take those comments into consideration in the course of the CPG proceedings. Similarly, someone in the viewshed may send in public comments voicing their unique perspective and concerns.

A reasonable reading of this Rule as proposed is that these municipal and public comments are "filings" in a "proceeding" and thus will be acknowledged and responded to by the PUC in its CPG consideration, findings and decisions. Instead, an awkward virtual duplex architecture has arisen in PUC practice which places some "filings" -- like those municipal and public comments -- into a room labeled the "administrative case"; however, no decision or response from the PUC ever comes out of that room. In reality, there is no "administrative case", as there is no "administrative decision" separate from the CPG and Final Order decision in a CPG case.

The other room of that duplex is then the "contested case"(though it is again unclear whether it is a "contested case") or hearing process, and only the "filings" made in that particular process are considered to be the evidentiary record on which the PUC issues its decision.

The public and municipalities surely have a right to comment on PUC proceedings. To ignore those comments in the only decision that comes out of a PUC proceeding -- that is, issuance of a CPG and Final Order -- renders that right to comment meaningless unless those comments are acknowledged and considered. Yet, if they are to be considered in the context of what amounts to a contested case, Parties should have the ability to, at the least, provide responsive comments that would help shape the Commission's responses.

The problem with the proposed definitions of "Filing" and "Proceeding" is that they do not change the awkward underlying architecture. This Rules change should, in the first instance, present a clear structure for how filings are to be considered. If this Commission is going to continue with this two-room system of filings that are on or off the decision record (which I urge you not to do), then I would suggest distinguishing between and defining "Comments" versus "Filings".

What I propose instead is that the Department of Public Service, through its Director for Public Advocacy, fulfill its statutory mission of representing the interests of the public, in this instance by providing a witness tasked with entering all off-evidentiary-record Comments into the evidentiary record, and of responding to those comments and presenting on the record a summation of that response and any resultant recommendations, or alternatively by appointing counsel to represent the interests of those members of the public who have commented on a proceeding.

The relevant statute, 30 VSA §2(b), makes clear that the Department has duties to represent "the people of the State":

(b) In cases requiring hearings by the Commission, the Department, through the Director for Public Advocacy, shall represent the interests of the people of the State, unless otherwise specified by law. In any hearing, the Commission may, if it determines that the public interest would be served, request the Attorney General or a member of the Vermont bar to represent the public or the State. In addition, the Department may intervene, appear, and participate in Federal Energy Regulatory Commission proceedings, Federal Communications Commission proceedings, or other federal administrative proceedings on behalf of the Vermont public.

Municipalities, adjoining neighbors, other affected members of a community, and relevant nonprofit organizations, all comprise that "public" which the Department is charged with representing. However, this statutory section provides a mechanism by which the Commission may appoint an advocate in cases where the interests of "the public" and "the State" may not be in alignment: It may appoint outside counsel to represent either the public or the State, while the Department continues its representation of the other entity. In cases where a substantial volume of Comment has

been filed, the public interest would clearly be served by utilizing this mechanism. In such cases, the appointed advocate for the public could then be tasked with presenting the Comments into the evidentiary record.

Such a procedure, whether fulfilled by the Department or appointed counsel, would allow Comments to be clearly brought into the record, through a witness subject to discovery and cross-examination, and thus bring those Comments firmly into the Commission's decision-making process.

2.103 Vermont Rules of Civil Procedure

As a starting point, I concur that the proposed changes to this section clarify the language regarding applicability of the Vermont Rules of Civil Procedure. If this Commission is not willing to make a more substantial rewrite to its Rules, then the VRCP should continue to apply as a baseline where PUC Rules do not specifically mandate alternative procedures. The applicable editions of the VRCP and VRE, and relevant AOs as they are issued, should be posted or at least linked and easily accessible on the PUC's website.

However, much of the content of the VRCP is inapplicable to PUC proceedings. The wholesale importing of the VRCP when most of it does not apply is quite confusing--even to a legal practitioner like myself with well over 30 years of litigation experience in numerous jurisdictions. This confusion is exacerbated by the fact that there is both this wholesale importation of the VRCP, and then numerous PUC rules that state that specific sections of the VRCP are incorporated. Either those aren't necessary, or on plain reading they raise the implication that sections of the VRCP not specifically mentioned aren't incorporated, which is befuddling.

It would make things much clearer to all participants if the PUC imported into the PUC Rules those relevant and applicable sections of the VRCP, amending those where necessary, instead of referencing the VRCP wholesale and then diverting from it.

Taking the VRCP one at a time, noting in red font those VRCP Rules which are to some degree relevant to PUC proceedings, while noting in blue font those VRCP Rules which are already either addressed with more specific PUC Rules:

VRCP Rules 1 through 4.3 are irrelevant to PUC proceedings.

VRCP Rule 5 is mostly irrelevant, other than to the extent that serving all filings on all parties is required, but this is already addressed in PUC Rule 2.204.

VRCP Rule 6 regarding computation of time is relevant and critical to PUC proceedings; including it replicated in the PUC rules--with amended language that indicates clearly what a 'day' is for purposes of ePUC filings-- would be invaluable to participants.

VRCP Rule 7(a) is irrelevant to PUC proceedings.

VRCP Rule 7(b) regarding motions required to be in writing is relevant to PUC practice but is already addressed in PUC Rule 2.206. PUC rules have also helpful included in 2.206 the timelines for memorandums in opposition to motions, and replies, along with requests for hearing, which are found in VRCP Rule 78(b). While practicing attorneys (usually) know that the Motions requirements are contained in these two separate rules, it is admittedly confusing, and the PUC could resolve that confusion by clarifying it in the PUC Rules.

VRCP Rules 8, 9, and 9.1 regarding Pleadings are all irrelevant to PUC practice. There is no complaint and answer at the PUC.

VRCP Rule 10 regarding Forms of Pleadings is useful, but could be recast as Forms of Filings, mandating headings, numbered paragraphs etc. This is effectively a formatting rule, and the PUC already has (and could expand upon) its own formatting rules. The PUC has addressed this in PUC Rule 2.204.

VRCP Rule 11 regarding signatures is relevant but is already addressed in PUC Rule 2.203.

VRCP Rules 12, 13, 14, and 15 are irrelevant to PUC practice.

VRCP Rule 16 establishes a pretrial conference for scheduling and engaging in pretrial discussions about narrowing issues, limiting the number of experts etc. Scheduling conferences are already addressed in PUC Rule 2.212.

I would prefer to see the PUC rules clearly establish both an initial scheduling conference, a discovery conference (discussed below) and then a later at least one pre-technical-hearing conference--preferably more than one, including at least

one aimed at attempting to secure resolution of issues. A large number of civil court cases settle in good part because the Judge either sends the parties to mandatory mediation, or calls counsel to chambers and applies pressure to encourage resolution. This typically involves a "judicial weather report" along the lines of, "look, I can't tell you now how I would rule because I haven't heard the evidence, but from what I see you have a real problem with X part of your case, so I'd suggest that you plant those bushes Mrs. Y is asking for and save your client a lot of money..."

VRCP Rule 16.1 regarding Complex Actions, and its companion, **VRCP Rule 42**, regarding consolidation and separate trials, require substantive consideration by this Commission. There are many cases in PUC practice where the hearing of one particular issue will clearly be decisive; yet applying the VRCP to effect bifurcation of PUC hearings to hear, for example, just one criteria, has proven a very sticky wicket. VRCP 16 and 42 are valuable concepts but are an ungainly fit with PUC cases. I would recommend, instead, that this Commission write its own specific, clear rules regarding when and on what basis the Commission will consolidate cases or sever specific issues for separate hearing. I note that the PUC addressed Rule 42

VRCP Rule 16.2 regarding Scheduling Orders is relevant and applicable to PUC Cases, and is already addressed in PUC Rule 2.212.

VRCP Rule 16.3 pertains to Mediation, which is just emerging in PUC practice. This is an instance in which the existing PUC practice and the VRCP diverge. Until the very recent, still developing mediation program was initiated at the PUC, this VRCP Rule was not employed by the PUC. Requests for mandatory mediation were denied in the past, despite the apparent applicability of the Rule. PUC Rules should reflect the actual state of Mediation or other ADR procedures, availability and mandates; if VRCP Rule 16.3 is not part of PUC practice, then the PUC Rules should not imply that it is.

VRCP Rules 17 (Parties) and 18 (Joinder of Claims) are not relevant to PUC practice.

VRCP Rule 19, Joinder of Persons Needed for Just Adjudication, **VRCP Rule 20**, Permissive Joinder, and **VRCP Rule 21**, Misjoinder and Nonjoinder, are relevant to PUC practice. These rules are, however, already specifically incorporated into PUC practice by PUC Rule 2.210. This Commission has entertained motions for joinder of, for example, the host utility when interconnection or capacity issues are presented in a CPG case. It would be more helpful if the PUC instead had its own Rule that set out when Joinder would be considered, including when it might be mandatory (such as when interconnection is an issue at technical

hearing and the host utility has not already entered the case as a party), and when it might be at the discretion of the Commission.

VRCP Rules 22 Interpleader, 23 Class Actions, and 23.1 Derivative Actions, are irrelevant to PUC practice.

VRCP Rule 23.2, Actions Relating to Unincorporated Associations, is relevant only to the extent of the PUC's consideration of whether self-identified groups (whether informal industry coalitions -- who are more commonly represented by formal entities -- or clusters of neighbors or affected members of the public) can share representation in a PUC proceeding. The VRCP Rule, however, is aimed more at class-action type litigation and so does not squarely apply to PUC practice. The PUC's own Rule regarding shared representation, and its practice of limiting testimony when, for example, a group of neighbors share similar concerns about noise or aesthetics, more appropriately address this issue, rendering VRCP Rule 23.2 irrelevant to PUC practice.

VRCP Rule 24 regarding Intervention is already more specifically addressed in PUC Rules, so it is not relevant.

VRCP Rule 25 regarding Substitution of Parties is perhaps marginally relevant and could easily be addressed directly in the PUC Rules by noting that if a party dies in the course of a PUC action that their estate may continue as a party. This seems so well-established a principle at this point however that I am not sure it needs a specific rule to address it.

VRCP Rules 26 through 37 are the rules pertaining to discovery. The problem with the wholesale incorporation of the remainder of the VRCP discovery rules is, as stated in my introductory remarks, that they do not reflect actual PUC practice. These discovery rules are already addressed in PUC Rule 2.214.

Regarding **VRCP Rule 26**, PUC Rules should instead clarify that Interrogatories may be served on any party to be answered by that party's expert witnesses, irrespective of the provisions of VRCP Rule 26(b)(5), and furthermore that each party shall bear its own costs of such Interrogatories, or of Depositions, irrespective of VRCP Rule 26(b)(5)(E).

VRCP Rule 27(a) regarding discovery before action is irrelevant to PUC proceedings; **VRCP Rule 27(b)** pertaining to discovery pending appeal, however, is relevant in PUC matters.

VRCP Rules 28, 29, 30, 31 and 32 regarding Depositions are relevant and addressed in existing PUC Rules.

VRCP Rule 33 regarding Interrogatories is relevant, as is VRCP Rule 34 regarding document production and entry and inspection. I would recommend, however, that the PUC amend the latter rule to mandate that all requests for entry into land of others be made via motion to the PUC rather than served on the party. It is inevitable that any request to enter onto the land of either an Applicant or a non-Applicant party will result in a motion for a protective order, often under very short-notice conditions. Making the motion in the first instance to the PUC allows such requests to proceed in a more orderly and less threatening fashion.

VRCP Rule 35, Physical and Mental Examination of Persons, is irrelevant to PUC proceedings.

VRCP Rule 36, Request to Admit, and VRCP Rule 37 regarding Sanctions are relevant to PUC proceedings.

VRCP Rules 38 and 39, regarding jury trial, are irrelevant to PUC practice.

VRCP Rule 40 regarding trial calendars is also irrelevant to PUC practice; the scheduling orders address the issue of technical hearing dates. This VRCP Rule was aimed at the difficulties of scheduling trials with jury pools.

VRCP Rule 41, Dismissals, is another awkward fit with PUC matters. Instead, the PUC should, by its own Rules, specify when an Applicant may withdraw their own application and under what circumstances they may be liable for costs to other parties arising from action on that application. Similarly, the PUC should set out the circumstances or criteria by which it may effect an involuntary dismissal of an application or petition. It is important for the PUC to clarify its own procedures for the termination of a case, because appeals rights as well as rights to re-initiate proceedings are dependent upon a clear and definitive determination of whether a case has been ended.

VRCP Rule 42 has been addressed above.

VRCP Rule 43, Evidence, is relevant to PUC proceedings and is already addressed in PUC Rule 2.216.

VRCP Rule 43.1 regarding audio or video conferencing participation in a hearing is relevant to PUC proceedings.

VRCP Rule 44, Official Record, is a rather arcane bit of the VRCP, as it's more artfully addressed in the VRE. This Commission could more effectively address the issue by a rule stating that the PUC can take judicial notice of certified or published copies of official records.

VRCP Rule 45, Subpoena, is relevant to PUC proceedings and is incorporate specifically by PUC Rule 2.218. It would be more effective to state this rule in its entirety in the PUC Rules rather than by incorporation, and to include an specific provisions related to PUC practice for subpoenas. For example, when I have called the PUC clerk's office to obtain subpoena forms, I've been told I need to get them from a Court signed by a court clerk. That process should be clearly explained in PUC Rule 2.218.

VRCP Rule 46 states that it is not necessary to state an exception in order to preserve an ongoing objection. This again is an arcane bit of the VRCP better addressed in the VRE. This is specifically incorporated into PUC Rule 2.217 but could be as easily simply stated in full in that PUC Rule rather than incorporated.

VRCP Rules 47, 48, 49, 50, 51 and 52 are all irrelevant to the PUC, as they address jury trials.

VRCP Rule 53 is irrelevant to PUC matters, as it deals with appointing a special master.

VRCP Rule 54(a), (b) and (c) regarding judgments are irrelevant to PUC proceedings. VRCP Rule 54(d) pertains to costs and attorneys fees; the PUC should instead, by its own Rule, specify when costs and attorneys fees shall be awarded, and against whom.

VRCP Rule 55, Default Judgments, is not relevant to PUC proceedings.

VRCP Rule 56, Summary Judgment, may be relevant and applicable to PUC proceedings and is incorporated by reference in PUC Rule 2.219. However, the Rule should be set out in its entirety in the PUC Rules along with any specific standards utilized by the PUC in its consideration of Summary Judgment motions. The PUC has not generally shown inclination to grant motions for Summary Judgment, and in the context of PUC proceedings, Summary Judgment against non-petitioners is not possible: an applicant or petitioner has the full burden of demonstrating compliance with statutory criteria, and CPG cases are not civil litigation with one party prevailing over the other. The PUC may want to consider instead eliminating Summary Judgment and allowing instead non-petitioner parties to file to Dismiss petitions on the grounds that there is no way that petitioner can demonstrate compliance with particular rules or statutes.

VRCP Rule 57, Declaratory Judgment, is irrelevant to PUC proceedings.

VRCP Rule 58, Entry of Judgement, is another awkward fit for PUC proceedings. The VRCP Rule has specific procedures for entry of a judgement, which are critically important for counting appeals period dates and for other post-

judgement litigation purposes. A PUC Final Order, in any PUC proceeding, serves the same purpose in terms of triggering the count for subsequent actions, but the PUC does not utilize the same judgement-entry process as a court. The PUC should instead, in its own Rules, clarify the process of entry of a Final Order.

VRCP Rule 59 and **VRCP Rule 60**, motions to amend a judgement and for relief from judgement, are relevant and often used in PUC proceedings.

VRCP Rule 61, Harmless Error, is applicable to PUC proceedings.

Oddly enough, PUC Rules incorporate VRCP Rule 60 and 61 by PUC Rule 2.220 and 2.221 (inversely, for no apparent reason). However, PUC Rules do NOT incorporate VRCP Rule 59 despite its common usage in PUC proceedings. This is yet another instance where the wholesale incorporation of VRCP into PUC Rules, and then the selective specific incorporation of some of those rules, creates profound confusion.

VRCP Rule 62, Stay of Proceedings, is negated by 30 VSA §12.

VRCP Rule 63, Disability of Judge, is irrelevant to PUC proceedings.

VRCP Rule 64, Replevin, is irrelevant in PUC cases.

VRCP Rule 65, Injunctions, is again an awkward fit with PUC proceedings, and PUC Rule 2.406 has already specifically set out injunction practice at the PUC. The PUC should in its own rules clarify and strengthen the provisions regarding steps interested persons may take when a party is taking actions (engaging in site preparation, for example) without PUC approval. Such provisions should include attorneys fees and costs for non-Applicant parties on a prevailing motion. PUC Rule 2.406

VRCP Rules 65.1, 66, and 67, are all irrelevant to PUC proceedings.

VRCP Rule 68, Offer of Judgement, provides a cautionary tale against continuing this wholesale adoption of the VRCP into PUC Rules rather than carefully picking through and determining which rules are actually relevant. Legal counsel for a CPG applicant filed a purported Offer of Judgement under this Rule of Civil Procedure. The Rule is clearly not intended to apply to PUC proceedings; it allows a person who is defending a claim to effectively make what in contract negotiations would be termed a 'last best offer' to avoid trial. This is wholly inappropriate for utilization by a CPG applicant. Yet because PUC Rules say all VRCP rules apply unless specifically superseded, an attorney took advantage of this obscure Rule, requiring all other parties to scramble to respond, and raising the threat--contained within the Rule--of securing

substantial attorneys fees against the non-Applicant parties. This Rule is irrelevant to PUC proceedings and should not be incorporated into the PUC Rules.

VRCP Rules 69, 70 and 71 are also not relevant to PUC proceedings.

VRCP Rules 72 through 76, regarding appeals to Superior Courts, are not relevant to PUC proceedings.

VRCP Rule 77, Superior Courts and Clerks, is not relevant to PUC proceedings.

VRCP Rule 78, Motion Day, was addressed above.

VRCP Rule 79 regarding clerks' docket keeping is not relevant to PUC proceedings, though the PUC should have its own rule clarifying the form of records to be kept by the Clerk.

VRCP Rule 79.1, Appearances of Attorneys is relevant to PUC cases yet is also already superseded by PUC rules, which have different requirements for appearances.

VRCP Rule 79.2 and 79.3 pertain to recording and transmitting from a court proceeding; these are relevant to the PUC, which can and should clarify in its own rules the permissible scope of audio and video recording.

VRCP Rules 80 through 80.11 are irrelevant to PUC proceedings.

VRCP Rules 81 through 86 are irrelevant to PUC proceedings.

Thus, only 41 out of over 100 of the Vermont Rules of Civil Procedure are even slightly relevant to PUC proceedings. At least half of those 41 do not dovetail neatly with PUC process as written in the VRCP. Twenty-seven of the 41 (indicated in blue font) are already addressed in and superseded by PUC Rules. Several VRCP rules have been specifically incorporated into the PUC Rules, but other VRCP rules are not specifically incorporated and left only to this general incorporation. Although it would be neater to state those Rules in their entirety in the PUC Rules, specific, one-by-one incorporation makes more sense that the wholesale incorporation with a hodgepodge of later references.

Rather than state in the PUC Rules that the VRCP apply, this Commission should fully rewrite its own rules to clearly state PUC practice and procedure. This will greatly simplify and clarify PUC process for all litigants: The PUC Rules will say what they mean and mean what they say, and not leave it to guesswork to patch together which VRCP Rules apply or not. Pro se litigants and attorneys who have not practiced at the PUC before will not be left clawing through the voluminous VRCP to attempt to determine what is applicable and what is not, and no one will be subjected to disconcerting irrelevant filings like the recent Offer of Judgment.

2.104 Conflicting Authority

The wording of this Rule as now proposed is: "In the event of a conflict, any other Rule or General Order of the Commission shall prevail over these Rules and over otherwise applicable provisions of the Vermont Rules of Civil Procedure."

This again raises an architectural problem: This Commission often announces precedential statements regarding future procedure within orders in cases, yet there is no indexing of these and no practical way to search to find them. It is good that the PUC has posted its few General Orders on the ePUC website together with the PUC Rules, but there are many other "rules" that have been announced by way of ordinary orders within cases.

Prominent among these are the "rules" regarding standard offer cases and amendments to standard offer projects. One must read a host of orders in investigative (Docket No. 7533 orders on 10/16/2009 and 7/7/2011), programmatic changes (Dockets No. 7873 and 7874) and individual project (Docket No. 8720, Case No, 18-3996-PET) to determine what the "rule" is for amending standard offer contracts, and what role if any the public or affected parties in the CPG case may have in such an amendment.

Another example is this Commission's determination in Case No. 17-3676-INV that contrary to VRCP Rule 59(a) and caselaw thereunder, for PUC procedural purposes a

motion for reconsideration--while still tolling the time for appeal--does not render the prior order interlocutory rather than final. While Vermont statute states that the appeals period and the filing of an appeal from a PUC decision does not automatically stay the Final Order, the statute does not state that it negates the longstanding law that a timely Motion for Reconsideration renders a decision interlocutory. This Commission's determination on this point is effectively rulemaking--announcing a process different from that in the VRCP and caselaw--yet is hidden away in an individual case decision and not announced as a Rule.

Yet another example is this Commission's Procedural Order of 07-15-2019 in Case No. 19-0516-PET, which appears to state that for PUC purposes, a Town Plan will be considered "law". This is not the case in municipal and environmental law practice; a Town Plan is a policy or guidance document; zoning and subdivision bylaws are "law". Admittedly this has now been muddled by the unprecedented Enhanced Energy Plan statutory scheme which may be construed as giving approved Town Energy Plans the force of law or at least binding policy. If this Commission is going to adopt a new protocol for considering the legal effect of Town Plans, that should be incorporated into Rulemaking regarding implementation of the PUC's statutory obligation to consider municipal recommendations and Town plans, and not in individual orders in individual cases.

I recommend that this Commission take the time to ensure that the full rules of procedure for PUC matters are in fact contained in the PUC Rules, and/or in very clearly labeled and posted General Orders that can be found by anyone participating in a PUC matter.

The language of PUC Rule 1.204 pertaining to the Vermont Rules of Civil Procedure is again confusing. The example of a party's legal counsel filing a VRCP Rule 68 Offer of Judgment serves here: There's no PUC Rule specifically negating VRCP Rule 68, so we are all left to wonder whether that rule is 'applicable' under PUC Rule 1.204 or not. It

would be far better if the PUC Rules said what they meant and meant what they said, but either specifically incorporating the particular Rules of Civil Procedure that are applicable, or better by writing those into the PUC Rules in a way that more neatly applies to PUC proceedings.

2.105 Proceedings Governed By These Rules.

The proposed language of this Rule continues the confusion as to when and whether the PUC Rules, VRCP, or other orders (including those in cases that are not findable unless one happens to know where they are), control any particular issue. This language is effectively at odds with PUC 1.203 and 1.204 above. It seems to say that we'll apply what we apply when we apply it. It muddies the waters rather than clarifying them.

2.107 Waiver of Rules

I applaud and commend the amendment to this PUC Rules provision requiring a Motion or Petition for Waiver of Rules. I request, however, that this Commission go farther and establish clear standards by which it will determine whether a Waiver should be granted, and embody those standards in 2.107, much in the same way that Vermont zoning law contains standards for the grant of zoning variances. Like those zoning variances, the standards for granting waiver should be clear and narrow.

For years, this Commission routinely engaged in effectively granting rules waivers without comment and without labeling them as waivers.

For example, this Commission routinely approved CPG petitions for solar generation facilities that did not comply with PUC Rules regarding Fast Track and interconnection requirements. Although no waiver was requested by numerous applicants, this Commission approved these effective waivers without comment unless someone intervened and objected. Neither the public nor the legislature therefore can look back and see how many CPGs were granted that don't meet the interconnection standards --

a point of profound public interest particularly if and when utilities seek ratemaking rulings predicated on the need for upgrades related to distributed generation interconnections.

The point of a Rule is that it is supposed to be a Rule --that is, an edict applicable in every situation. The ability to grant waivers of those Rules is also logical as there inevitably arises a rare and unusual situation where strict application of Rules would cause a hardship disproportionate to any corresponding public benefit.

However these Rules must establish that Waivers are to be granted only in those rare and unusual circumstances. This Rule should set out the strict standards for granting of waiver.

2.109 Immediate Applicability

The proposed changes to this Rule accurately reflect the maxim of law that while pending cases are not affected by substantive changes in law, procedural changes take effect immediately and apply even to pending cases.

2.200

2.201 Practice Before the Commission

--The statement in section A that "pro se representatives must also file a notice of appearance" is very confusing. Does this mean that all pro se parties must file a notice of their own appearance, or only that a non-lawyer who is representing others -- serving as a pro se representative, such as a neighbor who is going to be the spokesperson for a group of neighbors -- has to file an appearance? This also seems to conflict with section B.

--The proposed provision in B that installers must certify that the applicant has authorized the application is to be commended. It is, however, still troubling that the

landowner themselves in any distributed generation project is not mandatorily a party to the proceedings. The fact that the landowner is not at the table precludes other parties from talking to the landowner in an attempt to resolve concerns and conflicts. Moreover, the Statute of Frauds has, since the time of ancient English common law, mandated that burdens can not be placed on real estate without the signed consent of the landowner. It seems exceedingly strange that this Commission could grant a CPG purporting to impose burdens and obligations on a piece of real estate when the owner of that real estate has not appeared before the PUC or submitted anything in writing granting leave for those burdens to be imposed on the property.

--This "practice" provision says it's applicable to all "proceedings" -- is this meant to include when filing a public or municipal comment? This circles back around to my primary point about needing to clarify the architecture of the comment and administrative file process versus contested proceedings.

--The provisions regarding Ex Parte communications are also confusing, and in my opinion, inappropriate. Here the PUC distinguishes between 'contested cases' and other types of proceedings, yet those were never clearly defined anywhere; the proposed language also includes things that the PUC is going to consider to be in the nature of a contested case -- leaving quite a mystery as to how anyone is supposed to determine what that is.

--The "allowed communications" provision is inappropriately broad; it should be limited only to emergency circumstances. It is right and good that the Commission included in this Rule that the other parties will be immediately notified of any such ex parte communication.

This is a good place to raise the issue of communications during site visits. My experience in the course of dozens of PUC site visits is that we see the hearing officer and the legal counsel and witnesses for applicants speaking on a first name basis and

often heading off together to see features or points of interest without letting the rest of the site visit attendees know where they are going. It is hard to see how these do not comprise inappropriate ex parte communications, and they certainly raise an appearance of bias.

Civil and criminal courts handle site visits in a strictly controlled manner. The agenda, locations to be visited, and items to be pointed out are filed on the record ahead of time. The parties are under order not to speak during the site visit other than to point out those items or features listed in the agenda. When the participants return to court, an entry is made on the record reflecting the substance of the site visit.

PUC site visits by contrast are more of a field trip, containing a lot of conversation, dominated by presentation by the applicant and usually demonstrating comraderie between the hearing officer and the applicant's team; that comraderie often includes the Department's staff and counsel as well.

I recommend that either this PUC Rule regarding ex parte communications, or a separate rule regarding communications during site visits, set out the confines of site visit communications. Either the PUC could follow the protocols used by courts in site visits, or given the ease of technology now to record video, the site visit could be fully video recorded and made part of the record. Either approach would halt the present pattern of improper communications during site visits.

2.203, 2.204

I have addressed these in the discussion of the VRCP, noting that due to the existence of these Rules, the relevant portions of the VRCP are null for PUC practice. **Note that I'll address 2.204(E) regarding page limitations below in regard to Briefs.**

Provision 2.204(G) regarding Amendments to filings should reference the PUC Rules regarding CPG project major and minor amendments, and should also reference the

rules regarding amending standard offer projects (which should be set out in Rule form somewhere rather than contained in a thread of case decisions, as stated above), and any other specific amendment provisions. The language of this proposed Rule change indicates that amendments can simply be made to any filing--including a petition or application--and that is absolutely not the case. Other rules set out far more detailed protocols for how filings may be amended

2.206 Motions

As discussed in the section regarding VRCP above, this PUC rule helpfully nullifies VRCP Rules 7(b) and 78(b).

2.207 Time

I recommend that rather than incorporate the VRCP Rule regarding time by reference, that the PUC set out in its Rules the terms for calculating time, including not only the count of days but also the time deadline by which a document filed in ePUC is deemed to be filed on a particular day.

2.210 Joinder and 2.211 Consolidation and Severance

This is another instance where the PUC has incorporated specific VRCP provisions without making any changes, despite the fact that another PUC Rule already imported all of the VRCP. These VRCP rules, however, are an awkward fit with PUC practice. What would be more useful is for the PUC to clearly set out here the standards in the context of PUC practice for when joinder, consolidation, or severance will be granted. I've addressed this at greater length in my comments on the VRCP above.

2.212 Scheduling Orders

This PUC Rule nullifies VRCP Rule 16.2, as stated in the discussion of VRCP above.

I recommend that the PUC add to this Rule a Discovery Conference, early in the proceedings but after interventions, at which the scope and any limitations on discovery be discussed and ruled upon. As I will note below, I strongly recommend this in lieu of blanket limitations on Discovery. PUC cases vary extraordinarily widely, so appropriate realms of discovery also vary proportionately. The issues in a gas pipeline case obviously require different discovery parameters than those in a 150kW solar siting case; and the issues in a 150kW solar case involving blasting, excavation, wetlands, and endangered species habitat vary from those involving an aesthetic concern that can be resolved with screening. A discovery conference would simplify and expedite the process of filing for protective orders or waivers or discovery limitations, and allow adaptation of the discovery rules to each case in an efficient manner.

2.214 Discovery

These proposed rules changes do not resolve the disconnect between PUC practice and VRCP Rules regarding discovery posed to expert witnesses. The PUC must amend these Rules to ensure that the Rules reflect actual practice: Interrogatories may be posed to be answered by experts, with each party bearing their own costs.

As stated above, the blanket limitations on discovery are inappropriate. Either a Discovery Conference should be built into the scheduling of a contested case, or case scheduling must include ample time for motions for protective orders to be considered. Twenty-five interrogatories including all subparts in a case of any size that involves multiple criteria, when these cases are entirely expert witness cases often with complex technical, scientific and environmental issues, is an absurd limitation.

2.216 Evidence

I raise again the point that there is a disconnect between things filed with the PUC and things that are considered "record evidence" in a "contested case". These Rules must clarify and define what cases are considered a "contested case" and the difference

between record evidence and non-record-evidence comments or filings in such cases. This is a foundational problem with PUC process that must be resolved in fairness to all parties and the public.

2.217 Objections and Exceptions

As stated above in the discussion of VRCP rules, it would be more efficient to state this substantively in the PUC rules rather than by incorporation -- if indeed it is even necessary to do so.

2.218 Subpoenas

As stated above regarding VRCP Rules, this should be set out in full in the PUC Rules rather than by incorporation, including any specific instructions for obtaining and serving subpoenas relative to PUC practice.

2.219 Summary Judgment, 2.220 Harmless Error, 2.221 Relief from Order

As stated above in the discussion of VRCP Rules, this is another example of selectively incorporating VRCP Rules by reference, but it's oddly at tangents to the statement that all of VRCP applies unless superseded by a PUC Rule. These three PUC Rules incorporate VRCP Rules 56, 60 and 61, but ignore VRCP Rule 59, which is often utilized in PUC proceedings. So we have VRCP Rules 56, 60 and 61 incorporated both generally and specifically, and VRCP Rule 59 only incorporated generally -- with no discernable difference in their utilization in PUC proceedings. It is no wonder that not only pro se litigants but even attorneys with litigation experience quiver at the thought of practicing before the PUC. Again, if the PUC carefully and thoughtfully either adopted in by reference or better yet simply wrote out in full the Rules applicable to PUC practice in one place, it would be far clearer for everyone.

2.222 Proposed Findings of Fact; 2.223 Briefs; 2.204(E) (page limits for briefs)

Proposed Rule 2.204(E) regarding page limits for briefs is inappropriate on many levels. First, the Rule does not distinguish between Proposed Findings of Facts and Briefs. Typically proposed findings of facts filed by non-Petitioners are incorporated into briefs. In a gas pipeline case or a standard offer case involving live issues on numerous criteria and days of technical expert evidence, the notion that proposed findings of facts and briefs could be limited to the page numbers contained in this Rule is not practical.

The PUC process, in which a hearing officer hears a case, proposes a decision, and then the decision is made by the Commission which didn't hear the case, necessarily gives rise to long briefings. The incredibly complex and technical nature of many PUC proceedings also necessarily gives rise to long briefings, as the contested issues must be adequately preserved for appeal on the record.

I recommend that the PUC state in its Rules that it may impose page limits on briefs or other filings in a case, and then leave that decision to be made on a case-by-case basis at either the pre-technical-hearing status conference or after technical hearing, when the issues have finally been fully prescribed.

2.225 Proposed Schedules

I strongly recommend that this proposed Rule be moved up to be part of the PUC Rule regarding scheduling conferences. It's a useful Rule, and reflects the actual practices of the PUC in that parties usually at least come close to agreeing upon a schedule. However, sticking it all the way at the end of the Rules while Scheduling Conferences are up front just adds unnecessary confusion and creates a need to hop around the Rules to figure out what the very first steps are in a case.

2.406 Injunctions

I addressed this in the discussion of the VRCP Rules, above.

Conclusion:

In Conclusion, I applaud the PUC's attempts to undertake a substantial rewrite of its procedural rules. The present proposed changes, however, fail to resolve two underlying foundational architectural problems:

1. The need to squarely address and define what constitutes a "contested case", and the differences between record evidence in a contested case versus filings addressing those projects or matters but which are deemed "comments" and apparently placed in a separate "administrative file" status to which there is no response; and
2. The need to squarely address the jagged intersection between PUC Rules and the VRCP, as well as to address areas like Discovery where PUC practice as it happens on the ground is different from that anticipated by the VRCP.

I strongly recommend a more thorough rewrite of the PUC Rules that does not include a wholesale importation of VRCP, but preferably actually writes out the full content of the PUC practice rules in one place.

Thank you for the opportunity to comment on these proposed changes.

Dated at Middlebury Vermont this 16th day of October 2020.

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