



Case No. 20-2369-RULE

October 16, 2020

VCE Comments on Rule 2.200 Update

Vermonters for a Clean Environment, Inc. appreciates the updates the Public Utility Commission is proposing for Rule 2.200. VCE's comments are submitted on behalf of our members, some of whom have participated *pro se* at the PUC and never want to repeat the experience. These comments are from the perspective of public participation, primarily by *pro se* parties, but also parties represented by attorneys whose sole practice is not at the PUC.

This rule update provides the PUC with an opportunity to improve accessibility to regulatory proceedings that govern energy generation projects, including pipelines, power lines, industrial wind and solar projects, standard offer and net-metering projects. Many of these projects impact neighbors, landowners, and Vermonters whose interests are affected by land use siting issues. The challenges presented by the PUC's litigious process are a tremendous impediment to public participation.

The proposals in the rule update do not fix the basic problems that the public has experienced over the last decade as the PUC has become the venue for deciding land use siting issues in addition to traditional utility regulation. The PUC should be asking why members of the public who previously participated in PUC proceedings have said "never again!" and feel they wasted their time and money. VCE believes that this is the time and place to recognize the distinctly separate roles that the PUC is now playing, and create separate rules to address the necessity of an accessible and meaningful public process that land use siting issues require due to our state's changing energy landscape.

2.102 Definitions

Please clarify if "Filing" includes public comment, or if does not, state it in the Rule.

2.103 Vermont Rules of Civil Procedure

Reliance on VRCP may make sense for traditional utility rate cases. However it is impossible for the average Vermonter to become conversant with this extensive set of rules* given the time frames required for participation in contested cases at the PUC. In addition to having to learn the details of the proposal – which in cases such as pipelines, transmission lines and industrial wind are large and cover an array of different issues – public participants must raise money, group together, learn the PUC's rules, as well as the VRCP. It is an impossible task, especially given the PUC's record of approving almost everything that comes before it, leaving participants with large legal and expert bills and, in most cases, little to show for their participation in the final decision.

* There are 86 rules: <https://casetext.com/rule/vermont-court-rules/vermont-rules-of-civil->

VCE has witnessed the VRCP used effectively in evidentiary hearings to silence *pro se* parties who lack familiarity with a specific rule. All it takes is a skilled attorney to cite to “VRCP Rule 43” to gain advantage over citizen participants who have no idea what that rule number refers to.

VCE recommends that the PUC adopt a separate set of rules exclusive to projects that affect the public’s land use issues, and incorporate specific rules from the VRCP where necessary but otherwise toss the VRCP.

2.105 Proceedings Governed by These Rules

If the PUC insists on keeping VRCP as part of energy generation cases that involve land use siting issues, it would be helpful to *pro se* parties to include a link to the VRCP within this rule, and on the PUC’s website. Currently, the PUC’s web page for Statutes and Rules <https://puc.vermont.gov/about-us/statutes-and-rules> contains “Vermont Rules of Civil Procedure.” That link opens in LexisNexis and goes to Vermont’s Statutes, not the VRCP.

The PUC could highlight in this Rule the specific VRCP rules that are relevant to the PUC’s proceedings to make them more accessible to members of the public, who are faced with a steep learning curve to participate in PUC proceedings.

2.110 Use of ePUC for All Commission Proceedings

While ePUC has been tremendously beneficial in reducing printing and postage costs, and making case files accessible, VCE’s experience is that ePUC poses a threshold obstacle to public participation. Unless the prospective participant’s name is already in the system, there is a cumbersome process for first adding a name, and then the process involves going back to the previous page. VCE has worked with a number of citizens who have been unable to master filing documents in ePUC. The PUC clerks have been helpful to parties who can, instead, send their filings to the clerks for posting in ePUC, but doing so close to the 4:30 deadline risks being late.

It should not be assumed that ePUC has made it easier for the public to participate. For some people, yes, but for many others, the system is very challenging. Law clerks and people who use ePUC on a regular basis gain familiarity and it is relatively easy. Our experience is that the average Vermonter is stumped and intimidated.

2.201 Practice Before the Commission

(A) Notice of appearance.

Regarding the responsibility of all parties to ensure they are familiar with all applicable Commission rules, this is an impossible requirement for *pro se* parties who, through no fault of their own, have found themselves needing to protect their interests by participating in a PUC regulatory process. Learning legal rules is what people go to law school and take the bar exam have to do. The average Vermonter should not and cannot be required to learn all these rules plus the VRCP. By making this a requirement, the PUC is giving lip service to the idea of public participation. In theory, yes, it’s possible. In reality, not.

(B) Pro se appearances.

“For purposes of these rules a person who is not an attorney and is representing themselves or representing a party is known as a pro se representative.” Does this mean that a person who is not an attorney can represent a party (aside from a partnership, corporation, cooperative or association)? Act 250 allows non-parties to be represented by non-attorneys in district commission cases. The PUC is not a “court” but a quasi-judicial body that can reduce costs for the public by making the process accessible without the need to hire a lawyer.

The state of New Hampshire’s PUC has a rule that enables “any person the commission authorizes... to act as a representative of the person before the commission.”

Puc 203.16 Appearance Before the Commission.

(a) Any person may appear before the commission: (1) In one's own behalf; (2) By an attorney authorized to practice in any state or the District of Columbia and in good standing; (3) By an employee or authorized agent; or (4) By any person the commission authorizes, pursuant to RSA 365:10-a, to act as a representative of the person before the commission.

(b) Any person appearing before the commission shall adhere to: (1) Puc 200; and (2) Any orders of the commission or agreements between the parties in the docket, including orders or agreements addressing confidentiality.

(c) The commission shall prohibit the appearance of any person described in (a) above if it finds that person to have demonstrated a disregard for commission practices and procedures or otherwise disrupted commission proceedings.

RSA 365:10-a Appearance. – Notwithstanding any other provision of law to the contrary, the commission may in its discretion determine who, in addition to those lawyers licensed in the state of New Hampshire to do so, may appear before the commission on behalf of any party, provided, however, that the discretion shall not be exercised unreasonably or in a discriminatory manner. All parties will be required to adhere to the commission's rules of practice and procedure in addition to any orders of the commission or agreements between the parties, including but not limited to those concerning confidentiality.

Source. 1993, 330:1, eff. Aug. 28, 1993.

This section of Rule 2 recites the requirement that you have to have all the skills and knowledge of “an attorney admitted to practice in this state” in order to participate in PUC proceedings. The average Vermonter does not have those skills or knowledge, and when faced with an industrial wind project, a standard offer solar project or a gas pipeline proposed for their neighborhood, they will not be able to acquire the required skills and knowledge in the time frame allotted, or in any time frame unless they pursue a law school education.

Vermont citizens who have attempted to participate in PUC proceedings have asked VCE: “What is pre-filed testimony?” “What is discovery?” “What is a brief?” One citizen described their experience participating at the PUC this way: “It’s like being in Oz – a totally different language and process.”

(E) Ex parte communications.

(2) Please provide examples of “allowed communications”. Does this mean that a merchant generator’s attorney can talk to a PUC Commissioner or Hearing Officer about scheduling, excluding other parties? Can’t parties contact the PUC Clerk and relay details through the clerk when necessary? Why is this new language necessary? Needs more/better explanation.

(3) Participation in decision.

as with (2), please provide an example of how this would apply.

(4) Improper communication by parties.

We have witnessed a Hearing Officer walk into the woods with an applicant’s expert on a site visit, leaving the rest of the participants behind. We have heard an applicant speak to a Hearing Officer after a public hearing about how much of a threat a neighbor to the project poses. How does a party to a case who experiences that type of potential for ex parte communication bring this to the attention of the PUC? How would one prove that an ex parte communication took place? Wouldn’t it be “he said, she said” unless there was a recording? What is the remedy?

(6) Facilitation and mediation.

We appreciate the Commission’s addition of the opportunity for facilitation and mediation. However, *pro se* parties who agree to mediation are disadvantaged by not having their own legal representation, while the applicant’s attorney and other attorneys are present. Some mediators pressure parties to enter into an agreement that day, leaving the *pro se* parties with a “take it or leave it” option and no time to consult with an attorney or consider what is being offered in settlement discussions. *Pro se* parties must be assigned a lawyer to protect their rights if they go into mediation.

2.202. Initiation of Proceedings

(B) Enforcement proceedings and referrals of enforcement proceedings.

VCE does not agree with asking the public to include a statement of whether the matter has been brought to the Department of Public Service and if not, why not. VCE’s experience with bringing complaints first to DPS is that it adds unnecessary delay, as it is often weeks or months before DPS sends someone out to investigate, and if someone does investigate they do not necessarily let anyone know when they’re coming, or they don’t go out at all. VCE has brought legitimate issues to the PUC, which then asks DPS to investigate, resulting in DPS deciding to dismiss several of the issues at the outset. These decisions should be made by the PUC, not DPS. The PUC is the regulatory body that issues CPGs, and if a party is violating that CPG, it is up to the PUC to enforce the permits it issues. If the PUC lacks enforcement capability, the PUC needs to make its case to the legislature to provide the PUC with more enforcement capacity. Regulation

of land use siting issues requires enforcement.

It is not reasonable to ask people who bring enforcement issues to the attention of the PUC to provide signed affidavits at the outset of the complaint. Most Vermonters have no idea how to prepare an affidavit.

(E) Form of filings.

(1) In general.

Is there any penalty for violating these rules? Who enforces font size, double spacing, and 1" margins? Some participants put page numbers at the bottom, not the upper right hand corner, and often do not include the case number or date.

What is the penalty for using inappropriate or derogatory language or making personal accusations that are speculative or are not directly related to the procedural and substantive matters that are before the commission? VCE's executive director has been the subject of several of these types of totally irrelevant but derogatory attacks in filings presented to the PUC where VCE is not a party, and the PUC has not taken any action to penalize the practitioners of this behavior. Telling parties not to do it has had no effect whatsoever. This section needs to contain specific financial penalties for violating these rules, with the potential for being barred from practicing before the PUC. Three strikes and you're out?

VCE does not support the new page limits. Some cases have numerous Findings to recite. 25 pages is an unreasonable limit for a Brief in cases with numerous issues, such as industrial wind projects.

How is a response to a brief different from a reply to a brief? This is confusing to *pro se* parties. Remove the word "brief" from the responses section so it refers only to responses to motion. The page limit for reply briefs may be reasonable but it is unclear to this writer whether a Reply Brief's page limit is 15 pages or 10 pages, as this section is worded.

(4) Time of submission.

VCE supports keeping the 4:30 deadline. At a PUC workshop about ePUC, some attorneys asked for a midnight deadline, and the PUC chose not to adopt that. This is a sensitive issue for *pro se* parties who may find themselves disadvantaged by a midnight deadline. Applicant's attorneys may take advantage of earlier filings and read what was filed by opponents, thereby benefitting from the ability to respond in their filings submitted later. This could lead to people having to stay up until 11:59 p.m. in order to assure a fair process.

What is the penalty for filing after the deadline? DPS often files after the deadline. In one case we observed a party filed two days after the deadline. The PUC seems to accept all late filings. If there is no deterrent to filing late, what is the point of having the deadline? Late filings should be denied unless there is just cause for filing late.

(11) Requirements for electronic documents.

(a) Some law firms and applicants are still submitting scans of documents that are not searchable. Does the PUC check? Is there any penalty for continuing the practice of submitting non-searchable documents?

2.206 Motions, Responses to Motions, and Replies in Support of Motions

Please add how to count the 14 days, and whether it includes weekends. Do you count the date of the motion being responded to, or does the 14 day counting start the next day? Attorneys know this already. Please remember that people who are not practicing attorneys must use this system.

Pro se parties may lack the ability to submit a memorandum of law in support of a motion.

2.209 Intervention

Public participation at the PUC is low. These rules do not invite participation by the public. An applicant could object to any public participation as unduly delaying the proceeding. When considering whether to move to intervene, any member of the public reading these rules will see the potential to restrict or limit participation in the interests of issuing a speedy decision for the applicant. Not much of a welcome mat.

Chairman Volz used to say “anyone can intervene at any time.” Please put that in writing. There are reasons why members of the public might need to intervene after the noticed deadline.

We understand that developers and their attorneys would prefer that public participation remains low.

2.213 Prefiled Testimony

Form of prefiled testimony.

Does a signed affidavit have to be notarized? Are there cases where affidavits must be notarized and instances where they do not have to be notarized?

2.214 Discovery

(A) In general.

Discovery is the place for skilled attorneys to abuse *pro se* parties. The PUC should adopt its own rules for discovery and not use the VRCP’s discovery rules.

Depositions should be limited to expert witnesses.

Pro se representatives should not be subject to depositions. It is like deposing the applicant’s attorney. Is that allowed? When a *pro se* party is acting as his/her own representative/attorney, that role should be respected. Depositions of *pro se* representatives should only be allowed if the applicant can show cause why it is necessary.

Pro se parties who are subject to depositions must be provided with an attorney.

The PUC must respond in a timely manner to parties who are experiencing abusive discovery practice by applicants. In one case, depositions for *pro se* parties were scheduled to be held more than 50 miles from the location of the case and the parties, in clear violation of the rules. Timely requests to the PUC to quash the depositions were not responded to until the day of the scheduled depositions, resulting in the withdrawal of parties rather than risking contempt sanctions. This is unacceptable and is hostile to the public.

Pro se parties who submit pre-filed testimony for the purpose of identifying the issues they have with the project as it affects their particularized interests are not offering expert witness testimony. Discovery served on fact witnesses has typically been used to intimidate and badger citizen participants rather than to gather information relevant to the petition. Should fact witnesses be subject to discovery? Instead, should an applicant be required to show cause why it is necessary to serve discovery on a fact witness?

Even though we have witnessed applicant's attorneys abuse the discovery process by inundating *pro se* party fact witnesses with hundreds of discovery questions, we do not agree with the limitation of 25 written interrogatories. Consider an industrial wind project, with numerous issues. Each issue could easily generate 25 questions. It is unreasonable to place such a limit on PUC cases involving land use siting issues. It would be more reasonable to provide an easy, quick process for parties to object to overly burdensome discovery questions.

Discovery, scheduling, and stipulations of evidence prior to a hearing are three areas that provide opportunities for applicant attorneys to directly communicate with *pro se* parties who are ill prepared for direct contact with opposing counsel. VCE has been contacted on numerous occasions by citizens who have been told by opposing counsel that they must do something, when in fact what that attorney told them was not at all true. Non-attorney members of the public may do what they are told by opposing counsel, absent someone to vet what is being said. In one case, during discovery, opposing counsel offered to send a forensic computer person to mine the citizen's computer for discovery documents. How is a *pro se* party to know what is acceptable discovery and what is not?

Pro se representatives who find the actual filings and responses to filings to be no obstacle to participation have found the necessary interactions with applicant attorneys to be abusive, hostile, and intolerable. The PUC must provide an ombudsman to serve as an intermediary, similar to the role of a district coordinator in Act 250. If the PUC does not have the authority to create such a position, please ask the legislature to create the position. Something has to change the dynamic that is all too common and is a major deterrent to the public's participation in PUC proceedings where the only alternative is to not participate and give up their rights.

This is an aspect of this Rule that shows that the PUC is not thinking about the average Vermonter who must participate in this process in order to protect their interests. Please

put yourself in the position of a Vermont citizen who is at risk of real harm to themselves and/or their property interests who must navigate this arena. There is nothing in this rule that takes the public's needs into consideration. These rules no longer apply just to utility rate cases. Land use siting issues bring with them the public's right to protect one's interests. Please rethink your approach to updating rules to address this additional role the PUC is now playing. The PUC has years of experience with land use siting and should understand the problems by now.

2.215 Conduct of Hearings

Please add: A *pro se* representative may retain a consultant to provide assistance with the process during scheduling and evidentiary hearings. Such a consultant shall not be subject to allegations of Unlicensed Practice of Law.

(C) Rulings by hearing officers.

Please address when it is appropriate for a Hearing Officer to threaten to remove an attorney, as happened in one case VCE witnessed, in which the attorney was simply trying to preserve an issue discussed off-the-record in the record.[†] If the Hearing Officer's behavior is inappropriate during a hearing, what is the remedy?

2.216 Evidence and Deadlines for Objecting to Prefiled Testimony and Exhibits

(C) Procedure.

VCE supports the change to objections to the admissibility of prefiled testimony or exhibits at least 14 days before the evidentiary hearing. In several cases with *pro se* parties, we have observed the lack of knowledge of the previous rule (not more than thirty days after such evidence has been prefiled) has been detrimental to the rights of the *pro se* parties, as they are overwhelmed with the volume of information they must rapidly absorb and easily miss the Rule requirement to file their objection within 30 days of the pre-filed testimony. The prior rule was unreasonable. The new proposal is realistic.

2.222 Proposed Findings of Fact

2.223 Briefs

Briefs often include Findings of Fact, resulting in a lengthy document that is not appropriate for page limits. If the PUC wishes to make a distinction between Findings of Fact and Briefs, please provide educational material to the public to understand the distinction.

Pro se parties may not have the ability to address each issue of law.

2.224 Sanctions

The Commission should establish penalties for frivolous, repetitive filings such as "after the third instance of filing arguments that repeat prior filings, the party shall be fined \$10,000. A fourth instance where the PUC must reprimand a party for repetitive filings with no new information or arguments shall be referred to the Vermont Bar Association

[†] https://youtu.be/g_rLlvhskNM

and banned from participation at the PUC.”

Has the Commission ever sanctioned an attorney or *pro se* representative? What would it take for that to happen?

Please provide examples of failure to comply with Rule 2.222 or 2.223 that could result in a party being deemed to have withdrawn or waived any claims of law?

2.226 Confidential Information Protocol

In cases involving land use siting and energy generation, all information including data should be public, unless good cause is provided to protect the information.

2.304 Referral to the Department of Public Service

Please see comments, above, at 2.202.

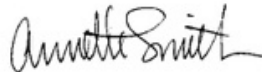
2.406 Injunctions

Please clarify in these rules whether the PUC can issue a Temporary Restraining Order on its own initiative, in response to a public complaint, or whether it requires a motion by anyone other than the PUC.

Summary

The PUC’s process is unfriendly to public participation. This rule maintains the status quo and does not come close to addressing the necessary updates to make it possible for the average Vermonter to effectively participate in the PUC’s proceedings as they relate to energy generation that involve land use siting issues, nor does the Rule address unacceptable behavior occurring in practice before the PUC.

Respectfully submitted this 16th day of October, 2020,



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