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October 16, 2020

Via ePUC

Ms. Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: Case No. 20-2369-RULE – Proposed revisions to Vermont Public Utility Commission Rule 2

Dear Ms. Whitney:

Dunkiel Saunders Elliott Raubvogel & Hand, PLLC ("Dunkiel Saunders") provides the following comments on the proposed changes to Vermont Public Utility Commission Rule 2 ("Rule 2"), shared by the Commission with its August 27, 2020 Order Opening Rulemaking in the above-referenced proceeding. Dunkiel Saunders is providing these comments on behalf of the firm, based on our experience as practitioners before the Commission, and not on behalf of any specific clients we represent before the Commission.

Overall, we appreciate the Commission's proposed revisions to Rule 2, and believe the revisions will help to clarify, streamline, and improve practice before the Commission. The proposed revisions largely codify and confirm certain practices the Commission has adopted and implemented through various orders over the past several years. The development and implementation of ePUC, in particular, has led to a significant improvement in the management of cases before the Commission, standardizing the process and reducing the cost and burden associated with paper filings, all while increasing the transparency and accessibility of Commission proceedings, for those who regularly appear as well as the general public. The Commission and its staff should be commended for this transition to ePUC, and we view the proposed changes to Rule 2 as an important step in consolidating the requirements for use of ePUC. Other proposed changes will also meaningfully improve public accessibility to the Commission process.

Given our general support for the Commission's proposed changes, we have focused our comments below on a few proposed changes that may call for clarification or further discussion during this proceeding.

1. **Effect of Rule 2.109's Immediate Applicability Provision**

We support and encourage the migration of cases to ePUC where applicable, but are interested in how the Commission proposes to handle legacy cases with parties that currently receive paper service. As Rule 2.109 provides for immediate applicability of the proposed rules to pending proceedings, would parties who are currently receiving paper service be required to seek a waiver of the rules, under Rules 2.110 and 2.107, or will they retain paper-only status without any further action required?

Although this issue would only remain to the extent pre-amendment legacy cases persist, clarity on the operation of these rules could save some confusion and expense for larger filings or extensive service lists, and avoid a scenario in which a party is inadvertently not served.

2. **Page Limits under Rule 2.204(E)(1)**

We appreciate and support the Commission's proposed page limits for motions, briefs, and responsive filings. The proposed limits appear reasonable for the vast majority of cases and are likely to result in more efficient practice for all parties and a concise presentation of issues to the Commission. The Commission may wish to consider including a standard for when waivers of the limits would be considered, or whether any waiver should be handled under the general provisions of Rule 2.107.

3. **Review of Submissions under Rule 2.204(E)(6)**

Currently, Rule 2.204(E)(6) provides that the Commission will notify a filer if its initial filing has not been accepted after an ePUC submission. We recommend that the Commission also consider notifying the filer that the submission has been accepted at the completion of the Commission's initial review. This could reduce some uncertainty for parties as to the status of a filing. We would also respectfully suggest that the term "initial filing" be defined in the rule. It is not clear if this provision is intended to just apply to initial filings that are used to commence proceedings (e.g., a petition, or tariff filing, for example), or if it applies to any filing submitted to ePUC.

4. **Amendments under Rule 2.204(G)**

This proposed change alters the current practice, where amendments are effective unless objected to, and instead requires Commission approval for all amendments. This change raises some potential concerns that warrant further discussion in our view.

First, the proposal to require Commission approval of all amendments, even those that are not disputed between the parties, will likely increase the burden on both the Commission and the parties. Contested case proceedings before the Commission are adversarial in nature, and in the context of a contested case, we believe the most efficient use of the Commission resources would be to focus on deciding disputed issues. Allowing amendments to go into effect absent objection promotes administrative efficiency and ensures both the parties and the Commission are able to rely on the most accurate information provided by amendments and only need to expend resources resolving actual disputes.

The scope of the amendment rule is also not clear, particularly when read in concert with Rule 2.204(E)(8), which appears to provide for parties to upload corrected copies of materials to ePUC without mention of any required Commission approval. Does the Commission intend the amendment provision to apply to all filings as defined in Rule 2.102(C), which includes all submissions to ePUC, and to all changes to such filings? As drafted, it appears the rule could be read this way—requiring Commission approval to any change to any filing, including technical corrections under Rule 2.204(E)(8), to address clerical errors. We would recommend the Commission distinguish between technical/clerical corrections and substantive amendments (to initial Petitions and the like or other filings) and ensure that the process for submitting both types of changes is clear.

5. Motions under Rule 2.206

With respect to the timing of motions, the proposed rule provides that the Commission can decline to consider motions not made within 30 days after the "facts that form the basis" for the motion arose. We support requiring timely motions, but this proposed standard may prove difficult to implement, particularly if there are disputes over what the factual predicate is and when the factual predicate occurred or became known. It may also make sense to be more specific regarding the types of motions to which this limitation applies. For example, it is not clear that a motion for non-substantial change or amendment of a CPG should be limited by this time period (if in advance of any construction activities). Similarly, the 30-day period would seem to be inconsistent with other, more specific requirements in the proposed rule, such as the time period for moving to strike or object to testimony or evidence under proposed rule 2.216.

With respect to sur-replies, the proposed rule prohibits attaching the proposed substantive reply to the motion. We are interested in the Commission's perspective on this limitation, which differs from the standard civil practice in which the proposed reply is typically attached to the motion.

6. Intervention under Rule 2.209

We understand the Commission is seeking to align its intervention rule with V.R.C.P. 24 and we hope to learn more about the Commission's goal and expected result of this revision. While the current Commission standard has been described by courts to be somewhat more stringent than Rule 24, in our experience intervenors are rarely denied permissive intervention under Rule 2.209's existing standard, and more often simply have the scope of their intervention tailored to the interests they have identified. As a result, it is not clear that there is a compelling need to revise this standard.

That said, the proposed change, as drafted, may make the ultimate intervention standard and applicable case law less clear. To the extent the Commission seeks to adopt V.R.C.P. 24, we note that the proposed rule is not identical to V.R.C.P. 24 and does not expressly state that rule adopts the V.R.C.P. 24 standard for intervention.[1] This could raise concerns regarding which body of law should be applied by the parties or the Commission when interpreting the rule and intervention requests, including any judicially-developed case law defining the scope of interests that provide a basis for intervention as of right or by permission.[2] Conversely, the Commission's existing standard has been well defined in prior Commission decisions and its application has been consistent over time, giving all parties greater certainty.

The one area of the Commission's existing rule that has been somewhat unclear and subject to more interpretation, and which could be clarified, is the timing for filing for intervention. Specifically, the question of when "the right to intervene first accrues" is not well defined. We appreciate the Commission's proposal to set the relevant deadline 30 days after the "right to intervene first accrues." This helps to address some of the timing ambiguity in the existing rule. It would also be beneficial to have that standard 30-day period trigger from a specific event—which could be the date the petition/initial filing is provided to potential parties, the date notice is provided, or the date of a scheduling conference—so that the deadline is as clear as possible to all involved. It is also important in our view for the Commission to have the authority to establish a shorter or longer period for intervention deadlines in any scheduling order, as may be appropriate under the circumstances of any particular case.

7. <u>Limitations on Discovery under Rule 2.214</u>

We support the Commission's proposal to limit discovery in most Commission proceedings, consistent with similar limits in the federal civil rules. The limit of 25 questions (including subparts) per round of discovery makes practical sense in most cases and should help focus discovery and prevent abuse of the process. We also appreciate that the Commission has the flexibility to order otherwise, if and where warranted—which will hopefully be the exception. It may be prudent for the Commission to also consider imposing a general limit on the number of rounds of discovery in the rule. Limiting the number of questions per round may simply encourage requests for multiple rounds of discovery, which will have the effect of unnecessarily extending the length of proceedings. In our experience, and depending on the

[1] *See* PUC Rule 2.103 ("Where less than the whole of any rule of the Vermont Rules of Civil Procedures is specifically adopted by reference, the provisions of the remainder thereof shall not apply.")
[2] *See Investigation of Appropriate Principles for Governing Affiliate Transactions between Central Vermont Public Service Corporation and Its Affiliates*, Docket No. 5797, *Order re: Motion to Intervene* (May 19, 1995) (comparing PSB intervention rule with V.R.C.P. 24 and surveying Vermont cases interpreting and narrowing V.R.C.P. 24).

parties involved, each round of discovery can add four to six weeks to a schedule. It would be better in our view for the parties to have the flexibility to agree to slightly more questions in one round, particularly if that helps to narrow issues and avoids delay caused by multiple rounds of discovery.

8. <u>Objections to Prefiled Testimony and Exhibits under Rule 2.216</u>

This proposal requires admissibility objections to prefiled evidence to be filed at least 14 days prior to the evidentiary hearing (with exceptions for specific scenarios). This is a departure from the current rule, which is tied to the date the prefiled evidence is filed, not the date of the hearing. This change may lead to several potentially significant, unintended consequences, and we urge the Commission to consider alternatives.

There are good reasons to require objections to testimony and exhibits early in the prefiling process. First, as a matter of fairness, it is important for parties—especially the party that carries the burden of proof and persuasion—to know when their opponent objects to the admissibility of evidence with sufficient time to respond and plan the presentation of their case. The proposed rule could unintentionally encourage parties to hold objections to evidence until there is no opportunity in the schedule for addressing concerns. For example, a party could wait to object to the admissibility of direct testimony/exhibits until *after* it files its own responsive testimony/exhibits and the original party/petitioner has filed its rebuttal testimony/exhibits and has no remaining substantive opportunity to address the concern before hearings. One of the benefits of prefiled evidence is that it allows these questions of admissibility to be addressed in a timely manner well before hearings, and the rule should encourage efficient and fair fact-finding, with as few surprises as possible.

The proposed rule also risks generating significant additional litigation immediately prior to the evidentiary hearing, as the parties scramble to respond to the objection(s) and/or file motions to supplement the record with potentially important evidence. This could place a significant burden on the Commission's and the parties' time and resources in a protracted motion in limine battle when at least some of those issues could have been addressed earlier. Given the timeframe of most Commission proceedings, there is no need to compress resolution of these issues into this important two-week period. The Commission and the parties would be better served by having questions on the admissibility of testimony and evidence resolved earlier. That will allow the parties to focus efforts in the last two weeks before the hearing on resolving issues that need not be litigated before the Commission or preparing their case and witnesses, in order to make the best use of the Commission's time during hearings.

Given those concerns, we believe the 30-day deadline for objections in the current rule is both reasonable and advisable. If the Commission views this deadline as too early, an alternative approach would be to require admissibility objections to be filed no later than concurrently with the objecting party's responsive testimony/exhibits, so that the dispute can be resolved as early as possible, and ideally before rebuttal testimony/exhibits (objections to rebuttal testimony would still be required before hearing, but would be more limited in scope). If the Commission is not inclined to revise the proposed rule, we recommend that the rule more clearly provide the Commission authority to approve earlier deadlines, as may be proposed by the parties. These new deadlines could be stipulated to or requested in the parties' joint scheduling order. The Commission's example schedule indicates this is intended by including proposed deadlines for objection to testimony, and the rule could make that option clearer.

Thank you for taking these comments into consideration. We look forward to discussing the proposed rule changes further with the Commission and Commission staff in this proceeding. Please don't hesitate to contact us with any questions.

Sincerely,

Geoffrey H. Hand, Esq.
Malachi Brennan, Esq.
On behalf of Dunkiel Saunders

cc: Service List (via ePUC)