STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION

Proposed revisions to Vermont Public Utility Commission Rule 2	)))	**Case No. 20-2369-RULE**

COMMENTS OF ALLCO RENEWABLE ENERGY LIMITED ON THE VERMONT PUBLIC UTILITY COMMISSION'S PROPOSED CHANGES TO RULE 2

In response to the Commission's order of October 2, 2020, Allco Renewable Energy Limited ("Allco") submit the following comments on the proposed changes to Rule 2.

I. 2.201(E)(2) – ex parte communications in emergency situations.

"(2) ~~Where~~ Allowed communications. Non-substantive ex parte communications regarding procedural, scheduling, technological, or administrative matters are allowed, even in contested cases, and no disclosure to other parties is required. Also, when circumstances require, in a contested case, ex parte communications for ~~scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits~~ emergency situations are authorized, provided:"

This proposed change opens the door to substantive *ex parte* communications in contested cases during "emergency situations" with certain conditions where previously none were allowed. "Emergency situations" is not defined and is vague. Nor are the requirements for substantive *ex parte* communications sufficient to protect the parties. Notice to all parties of the substantive *ex parte* communications after the fact is inherently meaningless as the procedural/tactical advantage of the communicator has already been gained. Nor is the Commission's reasonable belief that no procedural/tactical advantage will be gained sufficient protection to the parties not in attendance. The Commission is not equipped to put itself in the shoes of each party to a contested case to determine how it may be affected by such communications. Allco recommends the American Bar Association Model be adapted which prohibits substantive *ex parte* communications, even in emergencies.[1]

II. 2.202(B) – enforcement proceedings

"(B) Enforcement proceedings and referrals of enforcement proceedings. For enforcement proceedings, whether initiated by a member of the public, a party, or the Commission, the Commission may at any time refer the matter to the Department of Public Service in accordance with applicable statutory provisions. Although not required, it is preferable that any filing that seeks to initiate an enforcement proceeding at the Commission include, at a minimum, the following:

• A statement of whether the matter has been brought to the Department of Public Service for evaluation of an administrative citation under 30 V.S.A. § 30(h) and, if so, what the Department concluded (to the extent that the conclusion is public and not a matter of confidential negotiations). If the matter was not brought to the Department's attention, the statement should explain why it was not brought to the Department.

• Reference to any applicable statutes, rules, Commission orders, or certificates of public good that are alleged to have been violated.

• The factual bases, preferably in the form of one or more signed affidavits, for each alleged violation."

The proposed rule runs afoul of 30 V.S.A. §30(h) by granting the Commission discretion to refer certain investigations to the Department when such referral is mandatory. §30(h) requires that alleged violations by a "person" be brought exclusively by the Department after an investigation. Section 30(h) provides: "In accordance with the process set forth in this subsection, the Department may issue an administrative citation to a person the Department believes after investigation violated section 246, 248, 248a, or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections." In other words, the Commission does not always have the discretion to refer investigations to the Department, in some instances it must. As such, Allco recommends rewriting the first sentence as follows: "For

[1] https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications/

enforcement proceedings, whether initiated by a member of the public, a party, or the Commission, the Commission (i) shall refer the matter to the Department of Public Service when required in accordance with applicable statutory provisions (e.g. 30 V.S.A. §30(h)) or (ii) may refer the matter to the Department of Public Service at any time in accordance with applicable statutory provisions."

In addition, Allco recommends that any filing that seeks to initiate an enforcement proceeding should be required to be brought to the Department of Public Service ("DPS") for evaluation prior to filing with the Commission. Also, any such filing should be supported by signed affidavits. The proposed rule "prefers" that these actions are taken but does not require them. Allowing DPS to serve as a gatekeeper and requiring sworn affidavits will ensure that only legitimate proceedings are ultimately commenced before the Commission.

III. 2.204(E)(1) - page limits.

"• All ~~filings shall~~ motions and briefs must be ~~endorsed~~ no more than 25 pages in length (excluding exhibits), all responses to motions and briefs must be no more 15 pages in length (excluding exhibits), and all reply filings must be no more than 10 pages in length (excluding exhibits)."

This proposed rule seeks to impose page limitations on motions, briefs, responses and replies. With the understanding that the Commission has limited resources, the number of issues can vary greatly from case to case. As such, the page limitations (if any) should be determined at the prehearing conference and response briefs should be afforded an equal number of pages as the opening briefs. Alternatively, Allco recommends that the PUC adopt the Vermont Supreme Court rules concerning word limitations.

IV. 2.204(G)(1) – amendments.

"(G) Amendments in pending proceedings.
(1) In general. Proposed amendments to any filing may be made at any time~~. If unobjected to by any party within ten days of filing or at the commencement of any hearing in which the amended matter is at issue, whichever is earlier, such amendments shall be deemed effective, except that the Commission may at any time dismiss any proposed amendments which it finds to have the effect of unreasonably delaying any proceeding or unreasonably adversely affecting the rights of any party. Where objection is made,~~

~~amendments shall not be allowed unless the Commission finds (a) that they will not unreasonably delay any proceeding or unreasonably adversely affect the rights of any party and (b) that the requirements of subsection (2), if applicable, are satisfied. The Commission may condition the acceptance of any amendment as justice may require. An amendment which is allowed over objection shall be deemed effective as of the date it is approved, unless for good cause, the Commission orders that it shall be effective as of a different date.~~ before the evidentiary record is closed, but (unless allowed automatically under an applicable statute or rule) require Commission approval. Proposed amendments ~~shall~~ must be clearly identified ~~as such~~ and ~~shall~~ must clearly indicate ~~the~~ what changes ~~they effect.~~ are being made. In the event an amendment makes a substantial change into a filing, the Commission may order such additional notice to other parties and the public as justice may require."

This proposed rule seeks to change the time frame in which proposed amendments may be made from "any time" to "any time before the evidentiary record is closed". The Commission should abandon the "before the evidentiary record is closed" as a qualifier for several reasons. First, it is rarely clear when the evidentiary record is actually closed in PUC proceedings. If this rule change is to be approved, the Commission should be required to indicate in each and every proceeding the exact date that the record is closed. Second, amendments to filings can serve to resolve disputes among the parties and this rule would serve to preclude such resolution and encourage further litigation. A contested case should not require a trip to the Supreme Court when a possible appeal can be resolved by an amendment to a disputed project. Third, it is unnecessary and interjects additional process where none is needed. If a petitioner is precluded from filing an amendment to a project in the original docket, they would be forced to file an entirely new petition and would still maintain vested rights as a continuation of the original project. The additional process wastes resources both at the Commission level as well as for the developers and for no reason. Given the potential impact that this rule has on small businesses, implementation of this rule requires the Commission to analyze the economic impact on small businesses. 3 V.S.A. § 838.

V. 2.206 – timing of motions.

"• The Commission may ~~be rejected~~ decline to consider a motion not made within 30 days after the facts that form the basis for the motion first arose."

The proposed change allows the Commission to decline to consider a motion not made within 30 days after the facts that form the basis for the motion first arose. Jurisdictional motions should be excluded from this proposed rule. In addition, there is a substantive difference between when facts arise and when facts are discovered that could lead to confusion under this proposed rule. The proposed rule raises significant procedural due process issues by precluding motions that may run afoul of this arbitrary and vague timeline.

VI. 2.209(B) – permissive intervention.

"(B) Permissive intervention. Upon timely application, a person may, ~~in the discretion of the Commission,~~ be permitted to intervene in any proceeding ~~when the applicant demonstrates a substantial~~(1) when a statute or Commission rule confers a conditional right to intervene, or (2) when an applicant's claimed interest ~~which may be affected by~~ shares a question of law or fact in common with the ~~outcome~~ subject of the proceeding. In exercising its discretion ~~in this paragraph, the Commission shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3),~~ the Commission must consider whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public."

The proposed change allows for intervention when an applicant's "claimed interest shares a question of law or fact in common with the subject of the proceeding". This is an inherently vague and substantively meaningless standard. As an example, each 248 proceeding requires the Commission to analyze the greenhouse gas impacts of a proposed project. Every human being would be able to intervene under the new proposed rule in any 248 proceeding because they share an interest in the impacts of greenhouse gas. A potential intervenor should be required to show a substantial interest which is particular to them which may be affected by the outcome of the proceeding.

VII. 2.216(C) – objections to prefiled testimony.

"• Objections to the admissibility of prefiled testimony or exhibits ~~shall,~~ including objections to the admissibility of expert opinions, must be filed in writing ~~not more than thirty days after such evidence has been prefiled~~ at least 14 days before the evidentiary hearing (or ~~five,~~ if the evidentiary hearing is cancelled, then at least 14 days before the ~~date on which such evidence is to~~ evidentiary hearing was scheduled to occur under the most recent approved schedule). However, if the prefiled testimony or exhibits are filed in the 21 days directly preceding the evidentiary hearing, then objections must be offeredfiled in writing within seven days of the objected-to filing, or at the hearing, whichever is earlier."

The proposed rule states that objections to prefiled testimony be filed at least 14 days before an evidentiary hearing. The proposed rule is inherently unfair to petitioners who would now be subject to last minute challenges to prefiled testimony that could be established on the record for years. Requiring objections to be made within 30 days of filing of the prefiled testimony forces potential opponents to actually read the testimony and raise any issues in a timely manner at the beginning of a process that could take up to several years. At a minimum, opponents to testimony that has been on the record for more than 30 days should be required to show cause as to why they were unable to object within the 30-day window. The proposed rule as drafted would enable opponents to simply not read the record before them until the weeks leading up the hearing.

Respectfully submitted,

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