

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NUMBER 20-2369-RULE

RE: PROPOSED REVISIONS TO VERMONT
PUBLIC UTILITY COMMISSION RULE 2

January 21, 2021
9:30 a.m.

Workshop held before the Vermont Public Utility
Commission via GoToMeeting video conference on
January 21, 2020, beginning at 9:30 a.m.

P R E S E N T

Staff: Kyle Landis-Marinello, General Counsel
John Cotter, Deputy General Counsel
Mike Tousley, Staff Attorney
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1 P A R T I C I P A N T S

2 Dan Burke, DPS
3 Aaron Kisicki, ANR
4 Gerald Tarrant, Comcast
5 David Mullett, AllEarth Renewables
6 Nancy Malmquist, Downs Rachlin Martin, PLLC
7 Owen McClain, Sheehey, Furlong & Behm
8 Geoffrey Hand, Dunkiel Saunders
9 Malachi Brennan, Dunkiel Saunders
10 Annette Smith, Vermonters for a Clean Environment
11 Paul Brouha
12 Cindy Ellen Hill, Hill Attorney, PLLC
13 Michael Melone, Allco Renewable Energy Limited
14 Denise Anderson, Esq.

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1 HEARING OFFICER LANDIS-MARINELLO: All right.
2 Good morning, everyone. This is a workshop in Case
3 Number 20-2369-RULE, which addresses proposed revisions
4 to Vermont Public Utility Commission Rule 2. My name
5 is Kyle Landis-Marinello. I'm the general counsel for
6 the Vermont Public Utility Commission and have been
7 appointed to serve as hearing officer in this matter.
8 Also attending the workshop today our Deputy General
9 Counsel, John Cotter; our Operations Director, Ann
10 Bishop; and Staff Attorney, Mike Tousley.

11 If anyone has technical difficulties, Ms. Bishop
12 will also be our GoToMeeting platform manager for this
13 workshop. If a party or a participant intends to
14 record the workshop via video or audio, please indicate
15 that when you provide your name for the court reporter.
16 So now I'll start by taking appearances, starting with
17 the Department of Public Service.

18 MR. BURKE: Dan Burke from the Department of
19 Public Service.

20 HEARING OFFICER LANDIS-MARINELLO: Thanks.
21 And then I'll just, I'll call people on the order I
22 happen to see them on my screen. Attorney Tarrant?
23 Well, we'll come back to Attorney Tarrant. Attorney
24 McClain?

25 MR. McCLAIN: Good morning. Owen McClain

1 from Sheehey, Furlong & Behm on behalf of the firm and
2 Vermont Gas Systems.

3 HEARING OFFICER LANDIS-MARINELLO: Thanks.
4 Attorney Brennan?

5 MR. BRENNAN: Good morning. Malachi Brennan
6 on behalf of Dunkiel Saunders appearing on behalf the
7 firm, and Geoff Hand's appearing along with me.

8 HEARING OFFICER LANDIS-MARINELLO: Okay,
9 great. Looks like we have Attorney Tarrant now. Do
10 you want to introduce yourself and who you're on behalf
11 of?

12 MR. TARRANT: Yes. Can you hear me now?

13 HEARING OFFICER LANDIS-MARINELLO: Yes.

14 MR. TARRANT: Okay. I'm appearing on behalf
15 of Comcast this morning.

16 HEARING OFFICER LANDIS-MARINELLO: Thanks.
17 Attorney Melone?

18 MR. MELONE: Good morning. Michael Melone on
19 behalf of Allco Renewable Energy.

20 HEARING OFFICER LANDIS-MARINELLO: Thanks.
21 Attorney Mullett?

22 MR. MULLETT: Good morning. David Mullett,
23 general counsel All Earth Renewables.

24 HEARING OFFICER LANDIS-MARINELLO: Do we have
25 Paul Brouha on?

1 MR. BROUHA: Yes, I'm here.

2 HEARING OFFICER LANDIS-MARINELLO: All right.
3 And Attorney Hill?

4 MS. HILL: Cindy Hill, just appearing on
5 behalf of the firm Hill Attorney, PLLC.

6 HEARING OFFICER LANDIS-MARINELLO: Thanks.
7 And Annette Smith?

8 MS. SMITH: Annette Smith, Vermonters for a
9 Clean Environment, and I will be audio recording.

10 HEARING OFFICER LANDIS-MARINELLO: Okay,
11 thanks. All right. So bear with me. I know most, if
12 not all, of you have heard this script before, but, at
13 the beginning of every proceeding, we do go over just
14 the basic procedures for the workshop, so I'll hop into
15 that now.

16 Due to the COVID-19 pandemic, the Commission is
17 limiting in-person contact. As a result, this workshop
18 is being conducted remotely. We're using the web-based
19 platform GoToMeeting. During this workshop, we'll use
20 some special procedures uniquely related to a web-based
21 platform. I'll read them now for the benefit of the
22 parties and to ensure we have them on the record.

23 Participants may raise concerns about these
24 procedures either now or at any point during the
25 workshop if the platform is not performing as expected

1 or if you are having difficulties. We expect this
2 workshop will proceed more slowly than usual, and we
3 may need to stop along the way to resolve technical
4 issues. We also recognize that, because we're all in
5 remote locations, such as our homes, there may be
6 unexpected interruptions at those locations.

7 Anyone who anticipates speaking during the
8 workshop should keep their cameras on during the entire
9 workshop. It is very helpful for us to see you,
10 particularly when you are speaking. If you plan just
11 to listen throughout the workshop, it's helpful if you
12 turn your camera off. Even with your own camera turned
13 off, you'll be able to see everyone who has their
14 camera turned on. Commission staff may choose whether
15 to leave their cameras on or off. My preference is
16 that people who are not actively participating leave
17 their cameras off so the pictures of active
18 participants are larger.

19 Commission staff will not mute anyone's
20 microphone, whether a participant or a member of the
21 public. This means you should keep yourself on mute,
22 unless you are speaking. That way, we can minimize
23 background noises. We have fewer than 25 participants
24 at the moment. So, unless a lot more join, the
25 procedure we'll be using throughout this workshop is,

1 if you wish to speak, you can unmute your microphone,
2 and I'll then be able to see that you're hoping to
3 speak, and I'll call on you, and, if we have anyone
4 participating by phone, I'll periodically ask if those
5 participants wish to speak.

6 It's very important we avoid talking over one
7 another. Each time you begin talking, please identify
8 yourself by name for the court reporter. If your
9 internet connection cuts out, please try to rejoin the
10 GoToMeeting or call in to the workshop using the
11 telephone number that was provided in the notice. If
12 the audio or video from the workshop cuts out, let me
13 know when you are able to rejoin, and I will summarize
14 what happened.

15 If you're unable to call in or rejoin, notify the
16 platform manager -- that's Ms. Bishop today --
17 immediately via email or the clerk's office immediately
18 via email or phone, and we'll pause the workshop to try
19 to resolve the issue. Ms. Bishop's email address for
20 anyone who doesn't have it is ann.bishop@vermont.gov.

21 Similarly, if, at any point, any of you becomes
22 aware of another participant or a member of the public
23 having trouble accessing the video or audio feeds of
24 this workshop, please let us know immediately. We'll
25 pause the workshop to try to resolve the issue.

1 Although I do not anticipate anyone else will be a
2 presenter during today's workshop, if someone does wish
3 to present slides, let us know so we can make you a
4 presenter and enable screen-sharing. If you share your
5 screen, you should close out of any unnecessary
6 applications, such as email, to avoid notifications
7 being visible to others in the workshop. Does anyone
8 have any questions or concerns about these procedures?

9 Okay. With that covered, we'll now begin the
10 substantive portion of the workshop. As you all know,
11 the primary purpose of this workshop today is to
12 discuss the proposal to incorporate the Vermont Rules
13 of Civil Procedure directly into Rule 2. Before we
14 jump into that discussion, I want to offer the
15 opportunity for public comment by anyone who cannot
16 stay for the workshop.

17 (Brief pause.)

18 Okay. And, just to give folks a brief agenda, and
19 anyone's free to propose changes to this, my thought is
20 to start off the workshop with just taking general
21 comments from everyone who wants to chime in on the
22 proposal that's on the table of whether to incorporate
23 the Vermont Rules of Civil Procedure into our rules,
24 and then after that I'd like to go through Attorney
25 Hill's specific proposal of which rules would be

1 incorporated and which ones wouldn't, and then I'd like
2 to have a discussion about, if we went down this road,
3 how we would handle updates to the Vermont Rules of
4 Civil Procedure.

5 As you know, the Vermont Supreme Court routinely
6 updates those rules, and so, if we're no longer
7 incorporating the rules by reference but instead have
8 them as in our rules directly, I'd like to discuss how
9 it would work when the Vermont Rules of Civil Procedure
10 are updated. And then, finally, we can talk about next
11 steps in this proceeding before we end the workshop.

12 If anyone has any changes, proposed changes, to
13 that agenda, feel free to chime in. Otherwise, I think
14 we can jump into the discussion and take some general
15 comments on the proposal, and I think probably what
16 would make the most sense is, Attorney Hill, since
17 you're here, if you wouldn't mind just speaking for a
18 few minutes. We've all read your comments, but, if you
19 want to add to that or give a brief overview of the
20 proposal and why you think it would be beneficial to do
21 this.

22 And I'll just add one more quick thing, which is,
23 as you all know, this, we have, including myself, four
24 Commission staff here. Ultimately, this is a big
25 decision to rewrite Rule 2 this way, so it's obviously

1 going to be made, as with all the decisions like this,
2 by the commissioners, but my hope for today is that Ms.
3 Bishop, Mr. Cotter, Mr. Tousley, and I will gather as
4 much information possible from this group we have
5 gathered so we can provide that to the commissioners
6 while they figure out what they want to do with this.

7 All right. With that, I think we had one more
8 person just join. Mr. Kisicki, do you want to just
9 introduce yourself and who you're appearing on behalf
10 of?

11 MR. KISICKI: Good morning, everybody. This
12 is Aaron Kisicki on behalf of the Agency of Natural
13 Resources. Thanks.

14 HEARING OFFICER LANDIS-MARINELLO: Great.
15 All right. So, with that, I'll turn it over to
16 Attorney Hill.

17 MS. HILL: Thank you so much, and thank you
18 for the opportunity to address this workshop and to
19 take a, and to be able to comment on these rules. I
20 would say that, for myself, I've been a litigator for
21 many decades in a bunch of different jurisdictions,
22 state and federal, civil and criminal and
23 administrative.

24 And so the rules, wherever I go, you pull up your
25 rules, and you pull, you know, you pull up your Rules

1 of Civil Procedure, but you pull up your local rules or
2 the rules of the agency, and, in theory, you should be
3 able to read those rules and practice by them and be
4 correct, and my, my concern is that the PUC rules as
5 present written, presently written, regarding procedure
6 do not reflect how the practice happens at the PUC.

7 And, if you are coming in from another
8 jurisdiction or it's your first time appearing in this,
9 even if you're a skilled and experienced litigator
10 elsewhere, if you followed the PUC rules and, for
11 example, looked to the Rules of Civil Procedure for
12 discovery, you would swiftly discover that that's not
13 how it works at the PUC.

14 So there's this involved practice at the PUC, and
15 I would very much like the PUC rules to be
16 self-contained so that, if you read them, you know how
17 practice works at the PUC and, if you follow them, you
18 will have practiced appropriately and submitted the
19 appropriate documents and followed the appropriate
20 discovery procedures.

21 I have noted that the present system of saying
22 that the rules of procedure apply unless otherwise, you
23 know, unless something says otherwise in the PUC rules
24 has led to things like practitioners filing an offer of
25 judgment, which is in the Rules of Civil Procedure but

1 not addressed in the PUC rules. I, myself, have filed
2 the requests for mediation under Rule 16.3 of the Rules
3 of Civil Procedure and then been told that they don't
4 apply.

5 So, by leaving it open and saying they apply,
6 unless we say otherwise, you're always going to get
7 practitioners attempting to use those rules and then
8 being told, Oh, we didn't mean that one. So it's far
9 better if you say in the rules, the PUC rules, exactly
10 what you mean, and that was the gist of my, my comments
11 here was, instead of dovetailing, when you don't really
12 mean that, be specific. What is the process at the
13 PUC?

14 You did ask the question about what happens then
15 if the Rules of Civil Procedure are updated so then you
16 have a situation where the PUC rules as written
17 conflict, potentially conflict with the Rules of Civil
18 Procedure. You already have that situation in that the
19 PUC rules now already address or incorporate
20 specifically some provisions like time, and yet what
21 happens if they change in the Rules of Civil Procedure?
22 So you're already in that position.

23 And I would suggest that just a mechanism be
24 instituted for an annual review of the PUC, of the
25 civil procedure rules as they apply, you know, as they

1 dovetail with the PUC rules, and, if there is. Those
2 Rules of Civil Procedure, the Rules of Civil Procedure
3 that are relevant to PUC proceedings, in my long
4 experience, aren't updated all that often.

5 We just had this big change in how time is
6 computed, but that, the rules as they apply here are
7 not changed that often. Things like family court
8 proceeding rules or criminal proceeding rules change a
9 lot, but these, the fundamental civil procedure rules
10 that would be incorporated here, I don't think, change
11 that drastically that often that an annual, you know,
12 review when a notice comes that there were changes in
13 case updates are needed would, would be sufficient. I
14 don't think that would be any more onerous than it
15 presently is, and I don't think it would create any
16 more problems than it presently does.

17 So, that said, you've seen my, my comments. I
18 went through the Rules of Civil Procedure one by one,
19 and you may or, you know, agree or disagree as to which
20 ones are relevant or not relevant, but we have those
21 that are, that I believe are irrelevant to the PUC
22 proceedings, we have those that may or may not be and
23 that I noted in that I don't think are, and then I
24 noted in a blue font those which will be already
25 either addressed or partially addressed or already have

1 more specific PUC rules. So, hopefully, I charted that
2 out in an understandable fashion.

3 And, of course, my suggestion would be that, by
4 simply by not, no longer saying the VRCP rules also
5 apply, that what you would do is everything that's
6 irrelevant, you know, would be taken out of the, taken
7 out of the equation, and people like me or other
8 practitioners would not be filing motions on things
9 that everybody then looks at and says, Wait a minute.
10 I know that's in the rules, but we're not going to use
11 that one here. That would be clear, which ones were
12 applying and which ones weren't.

13 So, with that, I'm happy to answer any other
14 questions about my comments or turn it over to others
15 to discuss.

16 HEARING OFFICER LANDIS-MARINELLO: Yeah,
17 that's very helpful. Thank you, Attorney Hill, and
18 thank you for the work you did putting together the
19 comments and having the color-coding. That's very
20 helpful for us. I, I do think there's agreement at the
21 Commission that, at a minimum, we should be clearer
22 about which rules don't apply.

23 And I think your example of an offer of judgment
24 is a very good example, and I think, for those who
25 aren't aware of the offer of judgments in the civil

1 rules and it comes up in civil proceedings where one
2 party can propose a settlement and, if the other party
3 doesn't accept it and then the ultimate judgment ends
4 up being higher, there's basically a penalty for not
5 accepting a judgment like that, and it really doesn't
6 have any application in what we do at the Public
7 Utility Commission, because it's ultimately the
8 Commission that's deciding matters. It's not what the
9 two parties agree on, as it is in the civil context.

10 And I think that particular issue has come up
11 before, that someone has used that and the Commission
12 has ruled, No, that doesn't apply here. But I think
13 the idea we should be clear in the rules that there are
14 some provisions that just don't apply at all, I think
15 that that definitely makes sense, and that's something
16 I think staff is going to certainly propose to the
17 commissioners and then the, the broader question of, Do
18 we really winnow it down to let's just pull in the ones
19 that apply? That would be a much larger rewrite, but
20 it does have some of the benefits you've discussed.

21 MS. HILL: If I may just follow up very
22 briefly, I did want to say that I think what was
23 initially proposed here, I recognize that doing what
24 I've suggested here is a fairly substantial, is a
25 substantial rewrite that then involves a lot of, you

1 know, cross-checking and time and, and fiddly little
2 bits to make sure that it's correct, but I think that
3 it would be a very big mistake to continue to patch the
4 present system rather than doing the rewrite.

5 And I believe that now is a very appropriate time
6 to do this full rewrite, because, as you've seen, you
7 know, over the last five years, ten years, with the,
8 there's been quite an explosion of your caseload with
9 new technology development and distributed generation
10 and telecommunications, so which also means that there
11 are practitioners coming in from all over or that are
12 new, and so clearer rules will really be helpful to
13 everyone, and, just a, going forward, that will --

14 And, and, you know, we went through this massive
15 transition from paper to a, you know, an online filing
16 format, which was enormous. So you've been through
17 some huge changes, and now is a good moment to do the
18 full rewrite of the rules so that the rules actually
19 reflect the practice and, for all this explosion of
20 cases, you know, that have come in, it will be clearer
21 to everybody. So, while it is a bunch of front-loaded
22 work, I think it would be a big mistake to try to keep
23 patching and not just go ahead and clear the decks and
24 be a, and do a substantial rewrite.

25

1 HEARING OFFICER LANDIS-MARINELLO: Okay,
2 thanks. And it looks like we have someone else who's
3 joined. Ms. Malmquist, if you could just introduce
4 yourself and who you're here on behalf of?

5 MS. MALMQUIST: Thank you. Nancy Malmquist,
6 Downs Rachlin Martin, PLLC, appearing on behalf of
7 Charter Communications to listen today.

8 HEARING OFFICER LANDIS-MARINELLO: Okay,
9 thanks. And then I think we should get others'
10 thoughts on this proposal that we're discussing of
11 incorporating the Rules of Civil Procedure. I, I think
12 probably everyone has some initial thoughts they can
13 share, but, if you don't, feel free to just say "pass"
14 when I call on you, but probably the easiest way is
15 just to go in order. So, Attorney Tarrant, if you're
16 available.

17 MR. TARRANT: I have no comments at this
18 time.

19 HEARING OFFICER LANDIS-MARINELLO: Okay,
20 thanks. Attorney McClain?

21 MR. McCLAIN: I guess my only comment is, is
22 with respect to the updating. I, I think it's really
23 helpful for us not to have to revisit Rule 2 every
24 year. I, I agree with Attorney Hill that there are
25 clearly some rules that don't apply, and, and that

1 would be okay. I think we have to be very careful
2 about the extent to which we decide they don't apply.

3 I think even some of the rules that don't apply
4 frequently can sometimes provide a helpful framework
5 for addressing issues before the PUC that perhaps we
6 don't have a rule for or, or hasn't been addressed. So
7 I guess my only comment would be to maintain some level
8 of automatic update that tracks the rules and, and for
9 us to be very careful and thoughtful about which rules
10 we exclude.

11 HEARING OFFICER LANDIS-MARINELLO: Okay,
12 thanks. Attorney Brennan?

13 MR. BRENNAN: Yeah, thanks. I mostly would
14 refer to the comments we filed just, you know, at a
15 high level. We have some concerns similar to Attorney
16 McClain's. You know, the precedent out there and kind
17 of the framework for assisting parties is really
18 helpful, and that shouldn't necessarily be cast aside
19 without consideration of those impacts. And I'll leave
20 it at that.

21 I would say we do support finding rules that could
22 be carved out of the rules. There seems to be some
23 precedent for that, especially like the Rules of Family
24 Procedure or other procedural rules that do carve-outs
25 when they adopt other sets of rules.

1 HEARING OFFICER LANDIS-MARINELLO: Okay,
2 thanks. Attorney Melone?

3 MR. MELONE: I'll just echo what Attorney
4 Hill said. There is a substantial benefit to having it
5 all self-contained in one set of rules rather than
6 constantly having to flip-flop back and forth. That's
7 all.

8 HEARING OFFICER LANDIS-MARINELLO: Okay,
9 thanks. Attorney Mullett?

10 MR. MULLETT: Yes, I would echo Attorney
11 Hill's comments as well, having also practiced in many
12 jurisdictions and many different contexts over longer
13 than I care to recall sometimes. That one-stop
14 shopping sense, I think, is really helpful and really
15 essential. The challenge that that presents is, is
16 that you have rules that become very lengthy and very
17 dense quite easily, and I think that you have to do
18 something in conjunction with a one-stop shopping rule
19 that makes it understandable to members of the public,
20 to casual participants, and beyond, beyond
21 sophisticated kind of full-time practitioners. So I
22 don't think you can take on one without taking on the
23 other to everybody's benefit.

24 HEARING OFFICER LANDIS-MARINELLO: Okay,
25 thank you. Attorney Hand?

1 MR. HAND: I think Malachi's already provided
2 comments I'd provide.

3 HEARING OFFICER LANDIS-MARINELLO: Okay,
4 thanks. Mr. Brouha?

5 MR. BROUHA: I would echo Attorney Mullett's
6 comments and especially also note that Attorney Hill
7 has, I think, laid the stage that you've had an
8 explosion of cases and, in that context, more people
9 that are unfamiliar with the process and that are, in
10 fact, representing pro se, parties representing
11 themselves.

12 HEARING OFFICER LANDIS-MARINELLO: Okay,
13 thank you. Annette Smith?

14 MS. SMITH: I first want to thank Attorney
15 Hill for what she did. I really so appreciate her
16 going through each rule and identifying which ones are
17 relevant and which ones aren't. I do have a question
18 for other attorneys, and that is, Have you looked at
19 those, and do you agree with her analysis? That's
20 important.

21 I'll also just point out the numbers that she
22 identified. Only 41 out of over 100 of the Vermont
23 Rules of Civil Procedure are even slightly relevant to
24 PUC proceedings. At least half of those 41 do not
25 dovetail neatly with PUC process as written in the

1 Vermont Rules of Civil Procedure. 27 of the 41 are
2 already addressed in and superseded by PUC rules, and
3 several Vermont Rules of Civil Procedure rules have
4 already specifically been incorporated into the PUC
5 rules, but others have not been and are less open to
6 general incorporation.

7 So the, the word "dense" is an accurate one when
8 it comes to the average citizen trying to understand
9 the rules of the PUC when we have to grapple with also,
10 not just the PUC's rules, but the Vermont Rules of
11 Civil Procedure, as I've said before. I have witnessed
12 numerous times in hearings where an attorney who is
13 representing a petitioner will pull out a rule and just
14 give the rule number, and a pro se party is just,
15 they're, they're dead in the water. They just have no
16 idea what the rule is or what it's about, where it
17 apparently is sort of common vernacular for practicing
18 attorneys.

19 And so, in the interests of the citizens of
20 Vermont who have no other option but the PUC to have
21 their interests that are affected by petitions at the
22 PUC for especially land use projects, this process
23 needs to be made much more accessible, and
24 incorporating the relevant rules, I think, is a, is a
25 good first step.

1 On the idea of updating, I wonder, for instance,
2 how that change in page numbers happened. I mean, is
3 it something that requires a whole workshop and
4 investigation, or can the PUC just look at it and do
5 it?

6 And I've heard some, I think, at the last
7 workshops and in filings, some reference to, well, this
8 wouldn't be a good thing, because we would lose all
9 that precedent, and I think that, if the rules are
10 incorporated in a way that does reference the existing
11 Rules of Civil Procedure number, then I would think
12 that would take care of it. I don't see there's any
13 real risk of losing the precedent. It's just a matter
14 of making it clear what the PUC's rules are and that we
15 have one place to look at those and not overcomplicate
16 it with this other massive set of rules, the majority
17 of which don't apply.

18 HEARING OFFICER LANDIS-MARINELLO: Okay,
19 thanks. Mr. Burke?

20 MR. BURKE: I think the Department is
21 generally supportive of the approach outlined in the
22 red-line version that we have that the Commission's
23 proposed for the changes to Rule 2, and one thing that
24 gives me pause, and I think it might have been Mr.
25 Hand's comments that were filed in this case referring

1 to the Act 250 rules. When you try to get so specific
2 to your own proceedings, you end up with a really
3 highly unwieldy document.

4 You know, if you've ever seen those, those are
5 incredibly extensive, and it kind of runs to the
6 principle of the perfect being the enemy of the good,
7 and the way the Commission's used the Rules of Civil
8 Procedure is effectively a backstop for when sometimes
9 unusual circumstances arise in litigation has worked
10 pretty well. I think situations where there's been an
11 obscure rule that comes up and it's determined that
12 it's not applicable is very much so the exception, and
13 I think it's helpful to have those there, because you
14 can't foresee everything that would happen.

15 I know you talked about offer of judgment earlier,
16 but I could foresee a situation maybe in a condemnation
17 case, which the Commission has jurisdiction over, where
18 maybe it would be helpful to have that available. And
19 so having those there, I think, is really helpful as a
20 backstop, because there's so many situations that you
21 cannot envision happening in litigation, and having
22 some sort of structured rule there to at least provide
23 some semblance of guidance for all the parties is
24 helpful.

25 I also worry about, you know, trying to carve out

1 some rules, you end up with something that's really
2 unwieldy, really unuseful for new practitioners that
3 are coming in.

4 HEARING OFFICER LANDIS-MARINELLO: Okay,
5 thanks. Mr. Kisicki?

6 MR. KISICKI: Thank you. Not surprisingly, I
7 largely echo Mr. Burke's comments. With that said, I
8 think the Commission is, there's a lot of good
9 perspectives here, and I don't envy the Commission, you
10 know, having to sort of weigh those different
11 considerations here.

12 With that said, I think I would just follow up on
13 a couple of things. One, I am sensitive to what Mr.
14 Mullett and Mr. Burke point out is potentially creating
15 an unwieldy one-stop shopping kind of document. They
16 do tend to become pretty unwieldy.

17 I think that the other concern has to do with Mr.
18 McClain's concern, which is I think, once you, if you
19 were to create a single document, it sort of creates a
20 snapshot in time, and updating the rules when there
21 are, you know, changes to the Rules of Civil Procedure,
22 that would be helpful to be reflected in the
23 Commission's rules, you know, I don't think it's, I
24 don't think it's a good use of the Commission's time to
25 engage in a rulemaking every one to three years to

1 update its rules to reflect any changes, well
2 thought-out changes, to the Rules of Civil Procedure.

3 The other thing I would just put on the table
4 really quickly is I have practiced before some other
5 administrative boards whose rules simply list out the
6 Rules of Civil Procedure that it has deemed to be
7 inapplicable to its process, and so, you know, to the
8 extent that the Commission is interested in doing a
9 deep dive in the, with the existing Rules of Civil
10 Procedure, determining which ones apply or don't apply,
11 that might be sufficient. In my experience with those
12 other boards, you know, practice is pretty well laid
13 out when it specifically enumerates which rules are
14 inapplicable. So thank you.

15 HEARING OFFICER LANDIS-MARINELLO: Okay,
16 thanks. And, Ms. Malmquist, I think you said you were
17 just listening, but, if you did want to chime in,
18 you're free to.

19 MS. MALMQUIST: Thank you. I have no further
20 comments on this topic.

21 HEARING OFFICER LANDIS-MARINELLO: Okay,
22 thanks. And then it looks we do have one more person
23 who's joined, Denise Anderson. Do you want to
24 introduce yourself? And, if you want to say anything
25 on this topic, you're welcome to.

1 MS. ANDERSON: Thank you very much. I am
2 here on behalf of Paul Brouha, so I'm going to listen
3 for now. Thank you.

4 HEARING OFFICER LANDIS-MARINELLO: Okay,
5 thanks. So that was very helpful. I appreciate
6 everyone providing those opening comments. Does anyone
7 want to chime in in response to some of what you heard
8 from others? There are a few themes that are coming
9 up. One is it does become a much longer document. Our
10 Rule 2, if we actually put the text of parts of the
11 VRCP in there, the document itself becomes longer.
12 That can make it more difficult for people to digest.
13 At the same time, it does seem more user-friendly than
14 having to have our rules and the Vermont Rules of Civil
15 Procedure, and it's certainly shorter than the two of
16 those combined. Attorney Hill, do you want to chime
17 in?

18 MS. HILL: Sure, yeah. Thank you. One, as
19 to the length, I'd echo what you just said, which is
20 that it already is that long, because you have to read
21 both the Rules of Civil Procedure and all of its notes
22 and the PUC rules. So, despite the fact that the PUC
23 rules may be longer with incorporation, they're not
24 going to be as long as having to read through the
25 entire civil procedure rules and its notes and then try

1 to figure out what applies and what doesn't. So,
2 despite the fact that the PUC rules may be a little
3 longer, it's still going to be a more concise document
4 than the two of them read together, which is the
5 present rule.

6 Also, just to bear in mind big picture, you know,
7 we're sort of talking small picture about, like, the
8 updating and so on. Big picture is that PUC process is
9 not the process the Rules of Civil Procedure
10 anticipate. The Rules of Civil Procedure address a
11 civil trial process, and particularly in the realms of
12 pretrial procedure and discovery, the PUC process is
13 inverted. You have all of the petitioners, the person
14 in the position of a plaintiff's, case and testimony
15 already laid out when you start, and so there is a lot
16 of the Rules of Civil Procedure that are just, they
17 were never built for this pretrial testimony process.

18 And then the Rules of Civil Procedure, again,
19 specifically with discovery, which is a big chunk of
20 the rules, is not how it works at the PUC. You already
21 have testimony by experts, but, under the Rules of
22 Civil Procedure, you can't ask interrogatories of
23 experts. You have to depose them, and that's not how
24 it's done at the PUC, because it's this different
25 process, and those, those rules, particularly in the

1 discovery proceedings, really need to reflect how the
2 PUC process actually works.

3 Also, in terms of it being longer, as Annette read
4 out, Annette Smith, read out the count, the head count
5 of the rules that I had put in, there already are a
6 substantial amount of the relevant rules that already
7 are incorporated, many with changes, into the PUC
8 rules. So I think the actual amount that you're adding
9 in is not that relevant.

10 And, of course, in terms of updates, it certainly
11 would be possible on the ones you incorporate in. For
12 example, the rule about time and how time is counted,
13 you know, you can have the PUC rule that says, you
14 know, time shall be counted as follows or as otherwise
15 prescribed by VRCP Rule 6.1 as may be updated from time
16 to time, and then at least you've got a rule there and
17 people can look at the specific VRCP rule and not have
18 to read the entire VRCPs to figure out where you're,
19 you're going with that, and that, you know, covers you
20 in case there is an update to those rules before,
21 before you get to doing a PUC rules update.

22 HEARING OFFICER LANDIS-MARINELLO: Okay,
23 thanks. Anyone else have further general thoughts on
24 this proposal? Yeah, Ms. Smith.

25 MS. SMITH: So I, I appreciate that I'm, I'm

1 here, with the exception of Paul Brouha, with a lot of
2 lawyers who have legal training, and so I guess what
3 I'd like to see is some sort of acknowledgement that
4 this process needs to work for people who aren't
5 lawyers, and I don't know when lawyers are required to
6 learn the Rules of Civil Procedure, if this is
7 something that you have to know to pass the bar in
8 Vermont.

9 But the idea of the way the system works right
10 now, when you are having to deal with a case that
11 affects your interests and you are told in your motion
12 to intervene form that, or, you know, in the process,
13 that you must comply with all these rules, there's
14 absolutely no way that anyone who isn't trained as a
15 lawyer knows what of the Rules of Civil Procedure apply
16 and which ones don't. That's why I'm so grateful to
17 Attorney Hill for doing that analysis.

18 I mean, you could just incorporate her analysis or
19 use it as an appendix if that was something that would
20 make it easier. But, right now, we're, citizens are
21 flying completely blind, and it's really unfair to the
22 average Vermonter to expect them to absorb all of this
23 material, in addition to the information that they
24 don't have a lot of time to respond to.

25 So I support changing the system in a way that

1 makes it more accessible to the average Vermonter, and
2 I appreciate that the lawyers don't really want the
3 average Vermonter to participate in these processes and
4 that most always object to motions to intervene, but I
5 think that we all need to recognize the landscape has
6 changed. The PUC is doing land use issues that affect
7 people from across the, the demographics of the state,
8 and these rules need to be written in a way that
9 addresses their interests and not just the lawyers'
10 interests.

11 HEARING OFFICER LANDIS-MARINELLO: Thanks,
12 Ms. Smith. And I will echo what we put in the order
13 that opened this proceeding, and that was a commission
14 order signed by all three of the commissioners that
15 made clear a major impetus for looking at Rule 2 is we
16 want to make our process more open and easier for
17 members of the public to participate in. So that's
18 definitely a, a goal of what we're trying to do here, a
19 primary goal. All right. So --

20 MS. BISHOP: Mr. Landis-Marinello, could I
21 ask a question?

22 HEARING OFFICER LANDIS-MARINELLO: Yes,
23 absolutely.

24 MS. BISHOP: So this is Ann Bishop, and, for
25 those of you who don't know, I am also not an attorney,

1 and I have a question about sort of the intersection of
2 PUC rules and how that might be affected or not
3 affected by the incorporation of portions of the Rules
4 of Civil Procedure into Rule 2.

5 And I'm thinking, particularly, this is following
6 up on a comment that Ms. Smith made about we have a lot
7 more participation by members of the public in siting
8 cases before the Commission than we do in the kind of
9 what I'll call traditional economic regulation type
10 cases. And, back when the Commission redid the net
11 metering rule in 2017, one of the things it did was try
12 to put more process and description of the procedures
13 that would be followed into the net metering rule
14 precisely to make it clearer for people who were
15 participating in those, those particular kind of siting
16 cases.

17 And I'm wondering whether putting our, if the
18 Commission puts specific Rules of Civil Procedure in
19 Rule 2, does that complicate matters in those kind of
20 siting cases where there are specific provisions in
21 other Commission rules? And, again, I'm asking this
22 question as a nonlawyer.

23 HEARING OFFICER LANDIS-MARINELLO: You've
24 stumped everyone.

25 MR. COTTER: I'll take a shot at it. I think

1 the general rule of statutory construction hopefully
2 would apply and that would be that the more specific
3 procedure would hold sway over the more general
4 procedure. I was looking for a word that didn't say
5 "trump" in it. But so I would think that the
6 procedures in a net metering rule describing how that,
7 those particular types of projects would work would
8 hold sway over more general provisions in Rule 2, but I
9 could be wrong.

10 One thing that I was thinking about, people have,
11 have been expressing concern about updates to rules.
12 So, if we took a particular civil procedure rule and
13 said, yeah, this is good, this one definitely applies
14 in commission proceedings, and so we actually wrote it
15 out and we gave it a number -- it was 2.200-something
16 -- and then the Supreme Court changed the, that
17 specific Rule of Civil Procedure and we thought, hey,
18 that's a good idea, but then people are expressing
19 concerns that it might be too unwieldy for us to be
20 responding to that by going through the Administrative
21 Procedures Act process for rulemaking, and I was
22 curious if anybody gave any thought to the idea that
23 the Supreme Court can change the Vermont Rules of Civil
24 Procedure without going through the Administrative
25 Procedures Act.

1 The Commission has the powers of a court of
2 record. Can the Commission change its procedural
3 rules, not substantive rules, but procedural rules in
4 the same way that the Supreme Court does, and, if so,
5 could we avoid some degree of that concern? Stumping
6 question number two. I was hoping everybody would say
7 "yes".

8 HEARING OFFICER LANDIS-MARINELLO: Attorney
9 Hill, did you want to --

10 MS. HILL: I won't say "yes", but I will
11 boot-strap onto that question by pointing out that one
12 of the things that has often troubled me is the PUC
13 has, in fact, announced different rules or policies in
14 cases such as in standard offer cases where then
15 there's some new protocol. I'll call them protocols
16 instead of rules, because I'm not sure what to call
17 them.

18 But so, not only as a practitioner, not only do
19 you have to look to the PUC rules and the Rules of
20 Civil Procedure, but you also have to know which, which
21 case numbers have made determinations that also apply
22 to your process, and that, for me, is particularly
23 troubling, because I've had no way to find them, and
24 even, even though with the cases now in this online
25 system they are far more searchable than they used to

1 be, you, you can't find those decisions without -- you
2 can't find those policy statements as to, you know,
3 this is how we're going to look at this without knowing
4 which cases they're in. So, again, having the rules
5 have everything in them that relates to the process is,
6 to me, extremely, extremely important.

7 And, again, in terms of updates, you already have
8 incorporated a substantial number of the rules that do
9 apply, so you're already facing that same question. I
10 think the number of additional Rules of Civil Procedure
11 that you would incorporate isn't going to change that,
12 that equation.

13 Like, you have a time rule, and, if they change
14 the time rule in the Rules of Civil Procedure again
15 dramatically, you're probably going to revisit it in,
16 you know, the, the new -- I'll call it new because I'm
17 an old person -- you know, day as a day time-counting
18 rule, you know, is now in the PUC rules, but if, if
19 they go back and change that again in terms of how they
20 count it, you're going, you're probably going to update
21 the PUC rule to reflect that.

22 There, also, I don't think there's anything that
23 mandates -- you know, if you've adopted your own rules
24 of procedure, I don't think you necessarily have to
25 adopt the updates of the Rules of Civil Procedure,

1 unless they work for you, because your rules will be
2 your own rules of procedure for the PUC. So, although
3 it's nice to have them reflect those Rules of Civil
4 Procedure, there may be some changes to the Rules of
5 Civil Procedure that don't work for PUC practice.

6 HEARING OFFICER LANDIS-MARINELLO: Thanks.
7 Mr. Brouha, did you want to say something?

8 MR. BROUHA: Well, I would only note that, in
9 support of John Cotter's idea, is that having rule
10 changes subject to the review by LCAR, often, you're
11 not having learned attorneys in that process either,
12 and, if the procedures that you're talking about are
13 largely ministerial, it doesn't seem appropriate to
14 involve them as we have in the past.

15 HEARING OFFICER LANDIS-MARINELLO: Okay,
16 thank you. Mr. Hand?

17 MR. HAND: Yeah. I think a couple of points,
18 maybe, to Mr. Cotter's question. Certainly, it's an
19 intriguing concept. I do think the PUC's rules are
20 administrative rules, so I, I think we're probably
21 still under that process, regardless of whether or not
22 they describe substantive or procedural aspects. But
23 it's an interesting question. I haven't researched it,
24 but that's my gut.

25 And I think, to Ms. Bishop's point, we've had a

1 lot of comment about how these rules might apply to
2 siting projects, but it is important to keep in mind
3 that Rule 2 is the general rule that applies to a wide
4 range of things the PUC does. And so I don't have a
5 specific point to make other than that to make sure we
6 keep in mind that this applies, not only to Section 248
7 petitions, but a wide range of other petitions,
8 condemnation actions, rate proceedings.

9 So, while there could be some tweaks that make
10 sense and I think we all support the rules being as
11 clear as possible so that anyone can pick them up and
12 understand them, we need to keep in mind that it
13 applies pretty broadly. So there are some rules that
14 maybe don't apply in siting proceedings that we
15 wouldn't want to just carve out, because they are
16 important in other settings.

17 HEARING OFFICER LANDIS-MARINELLO: Okay,
18 thanks. Ms. Smith?

19 MS. SMITH: In response to Mr. Cotter's
20 comment, I'm wondering how Act 250 does this, because I
21 don't think they use the Vermont Rules of Civil
22 Procedure, and they have their own rules, and is that
23 an equivalent process that could be looked at?

24 HEARING OFFICER LANDIS-MARINELLO: Yeah, we
25 can take a look at that. I mean, there are, there are

1 kind of, I guess, three possible ways that I can think
2 of where we would be able to make changes to update our
3 rules. One is, as Mr. Cotter said, under the Supreme
4 Court precedent and statute that says we're a court of
5 record, maybe that means we can do what the Vermont
6 Supreme Court does with its rules, but, as Mr. Hand
7 noted, the rules traditionally have gone through
8 Administrative Procedure Act rulemaking.

9 The other two ways, and this may be how Act 250 is
10 done. I don't know offhand, but I'll look into that.
11 There could be a statutory authorization to do
12 rulemaking outside the Administrative Procedure Act.
13 If the legislature gives that authority, that then that
14 takes precedent over what the Administrative Procedure
15 Act requires.

16 A third way I can think of is in the rule itself
17 we could have a provision that would allow for updates
18 through orders of the Commission, and then that
19 provision would go through administrative rulemaking.
20 If LCAR doesn't object to it, it survives the
21 rulemaking process. We then have in our rules an
22 authority to update the rules, and it could be broad
23 authority to just update them however a majority of the
24 commissioners want them updated at any time, or it
25 could be much more limited. It could just be an

1 authority to incorporate Vermont Supreme Court updates
2 to the Rules of Civil Procedure where applicable.
3 Yeah, Attorney Hill.

4 MS. HILL: If I may, a couple people have now
5 mentioned, you know, that there, of course, were, many
6 of us are focusing on siting cases as being the types
7 of cases we've most predominantly been involved with,
8 but I know I've been involved with at least a couple
9 other kinds, a couple other matters related to that
10 where then the procedure has been very baffling under
11 PUC rules. One was amendment of a standard offer
12 contract, and the other is, in fact, very recently
13 filed by Downs Rachlin Martin in some case as a motion,
14 you know, to amend a CPG that's already in place.

15 And you look at the rules, and for amendments it
16 just says, if you're going to amend after a CPG, you
17 need to get an amendment, but no process, you know, and
18 the rule that comes out from the PUC is, Oh, we'd like
19 comments on what process we should follow. Like, what
20 are you supposed to do?

21 And, when a standard offer contract is, you know,
22 there's a request to amend it, I, I, and, I believe,
23 Annette Smith has attempted at different times to
24 participate in those matters and been told, Oh, well,
25 those procedural rules don't apply in these cases,

1 because they're different.

2 And so, when you step outside of the siting cases,
3 the question of what procedure applies, what's going to
4 happen, who gets to be a party, how do you intervene,
5 is there going to be hearings or not, is very unclear
6 and, again, always worked in the past, because there
7 were only a very small number of specialized
8 practitioners at the PUC who did it the way they did it
9 the last time, but now that has opened up
10 significantly, and it would make a lot more sense to
11 have those rules be clear.

12 And perhaps it would be of great benefit to have
13 everyone here sort of brainstorm about what types of
14 matters these rules apply to and submit some additional
15 comments of saying, hey, what, you know, these are
16 other types of matters, nonsiting matters, where these
17 rules either fit very neatly or are a totally, you
18 know, disengaged fit, you know, totally awkward fit and
19 don't really work and aren't really applied, because,
20 although they're supposed to be the general rules that
21 apply to everything, again, they don't fit neatly with
22 a number of different proceedings that you, that you
23 have.

24 HEARING OFFICER LANDIS-MARINELLO: Okay,
25 thanks. I saw Attorney McClain and then Attorney

1 Burke. Let's start with Mr. McClain.

2 MR. McCLAIN: Yeah, thanks. I guess, I guess
3 one, one point I'd like to make about the civil rules,
4 I think, generally is that I, I appreciate that there
5 is far more public participation in PUC proceedings
6 and, and support every effort we can make to make that
7 easy. The, the rules, I think, support, support that
8 process, because, although they may be hard to
9 understand in some circumstances, the purpose of the
10 rules is to make it fair for the parties and to make it
11 expeditious and to make it just and speedy and, and
12 inexpensive.

13 And so I think the complication derives from the
14 very challenging dynamics that are involved in weighing
15 the parties', various parties' interests, and they're
16 not necessarily derivative of the rule trying to make
17 the situation complex. It's the situation and the
18 rights of the parties that are hard to balance, and the
19 benefit of the rules is that there is a significant
20 amount of experience trying to balance those interests.

21 And, and so I guess I'd just propose that people
22 consider the, the concept that these rules, I think,
23 are, are intended for to facilitate fairness, and, and
24 so I fear that making specific procedural rules for the
25 PUC will have the actual, actually the opposite

1 consequence than, than might be foreseen here, which
2 is, and Act 250 is a great example.

3 You have to be an Act 250 lawyer to understand the
4 Act 250 rules, and, and, if you're not, you have a lot
5 of studying to do to get up to speed, and if we do the
6 same thing here, I think the, the general applicability
7 of some of the rules and some of the general tenets of
8 fairness that are built throughout the rules over time
9 could be lost and will be lost, and it will become,
10 actually, I think, more particularized, or the fear, I
11 think, that's a legitimate fear, than, than what we
12 intend, which is to try to simplify and make it easy.

13 I think, when you start crafting more and more and
14 more specific rules for more and more specific
15 situations, you end up with a very, very sophisticated
16 and expert type of set of rules that honestly you have
17 to be an expert to understand, and so, if we go down
18 that road, I guess, I think that's a, there are, that's
19 a real fear for, in my view.

20 The rules, the simplicity, the simplicity,
21 fairness, and general applicability is an aspiration of
22 the rules, and a lot of effort goes into making and
23 improving and moving toward that aspiration, and, in my
24 experience, the PUC practice sometimes itself is trying
25 to move closer toward the rule, even if practice has

1 been, has been different in the past, and, and, you
2 know, so some of these things, I think, are, are
3 legitimate concerns, but, you know, I, I do think that
4 the rules at the end are fair and, and are intended to
5 be fair and are intended to be easy to understand, too,
6 notwithstanding the fact that sometimes it's
7 challenging.

8 And so, you know, I guess, I guess I'd just
9 caution against trying to rewrite what has been 100 or
10 so years of folks sort of thinking about fairness and
11 equity in proceedings and how to, and how to employ it
12 in the PUC. I think, a lot of these general rules, we
13 should just stick with them and reference them by the
14 way that we do now and, and let, and let a lot of the
15 hard work that folks that specialize in civil
16 rulemaking and, and the fairness and equity issues that
17 go into that get incorporated over time so that we
18 don't have to kind of be writing our own book on what
19 is ultimately a procedural fairness question that, that
20 a lot of folks put a lot of time into on the civil
21 rules side.

22 HEARING OFFICER LANDIS-MARINELLO: Okay.
23 Then, Mr. Burke, you were going to add something?

24 MR. BURKE: Yeah. I think I was going to go
25 back to Mr. Cotter's initial question about what

1 process is required to amend procedural rules, and I, I
2 think it goes back to Section 11, which, if I'm reading
3 my statutory book right, actually predates the
4 Administrative Procedure Act, so I don't know how
5 helpful it is. But that gives the Commission very
6 broad latitude to set its own rules of practice, but it
7 does use the words "shall adopt rules". So I would
8 interpret that to mean you have to go through the
9 rulemaking process. I would want to do research on
10 that to see how it interplays with the Administrative
11 Procedures Act.

12 And then, to Ms. Hill's point about different
13 proceedings having different procedures, there are
14 statutory provisions within different sections of Title
15 30 that give the Commission express authority to
16 establish procedures by a general order. I know 248a
17 has one of those where the Commission has a general
18 procedures order that sets out the requirements for
19 application materials, timelines, et cetera, but
20 there's a clear legislative authorization to do that
21 for those types of proceedings, and there are other
22 examples of that throughout Title 30.

23 So I think, to the extent that there's confusion
24 there, I think that's as a result of the legislative
25 process that has led to some of the Commission's

1 broader jurisdiction in adopting some of these new
2 proceedings. So I don't know if that's helpful
3 commentary or not, but it always goes back to what the
4 statutory authority of the Commission is.

5 HEARING OFFICER LANDIS-MARINELLO: Okay. Mr.
6 Cotter, do you want to say something?

7 MR. COTTER: Yeah, just a follow-up to Dan
8 Burke. I also landed on Section 11 of Title 30, and
9 the, the very first part of the sentence gave me a
10 glimmer of hope, and then the "shall adopt rules" part
11 tempered that somewhat, but I also landed on Section 2,
12 which sort of buried in Section 2 is the description of
13 the Commission has the authority to engage in
14 rulemaking processes, and so that, that kind of
15 suggests Administrative Procedure Act as well, but I
16 did not catch that Section 11 predated the
17 Administrative Procedure Act, so perhaps there is
18 something there.

19 And then, lastly, I just, I wanted to offer an
20 apology to everybody for my awkward and inappropriate
21 attempt at political humor a few minutes ago. I hope
22 nobody was offended by it. I certainly didn't mean to.

23 HEARING OFFICER LANDIS-MARINELLO: All right,
24 thanks. Yeah, you know, it's interesting, because I
25 think of the state of the rules right now. Our rules

1 say we follow the Vermont Rules of Civil Procedure. So
2 we basically already have authority through the
3 Administrative Procedure Act for our rules to change at
4 any moment based on what the Vermont Supreme Court
5 decides. So I think what we're talking about here
6 would be the, the same thing, only it would allow the
7 commissioners to look at what the Vermont Supreme Court
8 has decided on changing a Rule of Civil Procedure and
9 determine whether that actually makes sense for our
10 process.

11 Because, as it stands now, theoretically, the
12 Vermont Supreme Court could amend a Rule of Civil
13 Procedure to mandate offers of judgment in every single
14 case, something like that, and, suddenly, we would be
15 struggling with, Well, wait, maybe there's a situation,
16 as Mr. Burke hypothesized, where an offer of judgment
17 could come into play, but in 99 percent of our cases,
18 it would make no sense to have offers of judgment, and,
19 suddenly, the Vermont Supreme Court has said, You can't
20 go forward with any case until a plaintiff has made an
21 offer of judgment, and we would really be struggling
22 with how to incorporate that change into our
23 proceedings.

24 So I think there is a lot of common sense to us
25 looking at those rules and seeing if they actually

1 should be incorporated when there are those changes,
2 but it, it is a little trickier how that would happen.
3 Yes, Ms. Malmquist?

4 MS. MALMQUIST: The current rules and the
5 rules and Rule 2 as changed already do provide the PUC,
6 and they have always provided the PUC, with general
7 authority to waive the application of a rule, you know,
8 to prevent injustice and for other good cause, and
9 there's been -- and that has not changed, and that
10 appears in the rule for the PUC to use in specific
11 circumstances where applicable.

12 HEARING OFFICER LANDIS-MARINELLO: Yeah,
13 yeah, that's a good point. We do have the waiver of
14 provisions, and we also, in every proceeding, the
15 hearing officer or the commissioners, if they're in it
16 directly, have the authority to set different rules by
17 order for that proceeding. Okay. Well, this is a, a
18 helpful discussion. Yeah, Ms. Smith.

19 MS. SMITH: Well, I want to get back to what
20 I have witnessed in the hearing room when a
21 petitioner's attorney, all of a sudden, pulls out a
22 rule number and objects based on that or does something
23 to sort of respond to something that the pro se party
24 has done. The Vermont Rules of Civil Procedure are not
25 even on the pro se party's radar. They've never looked

1 at them. They don't know what that number means. And
2 I have not seen a hearing officer stop to address that
3 inequity to say, Let me explain to you what that rule
4 means and give some context for what's being said,
5 because it just, it's a different language, and it's
6 not anything --

7 I mean, when Attorney McClain said that this was,
8 you know, the way it is now and with the Rules of Civil
9 Procedure are sort of make it simplified, not for the
10 average citizen. And, using the Act 250 analysis or
11 the, yes, Act 250 has its own rules, and, if you're
12 going to practice in Act 250, you need to learn the
13 rules. Well, that's the same position that the average
14 Vermonter is put into with the PUC, only you have to
15 learn the PUC rules, and you're told you also must
16 comply with these Rules of Civil Procedure, which are
17 going to come hit you at some point in a situation
18 where you're not prepared to respond to them, because
19 you don't know even what they are.

20 So I think this fundamental inequity is something
21 that we really need to look at. If you're going to
22 keep the existing rules, at least we now have Attorney
23 Hill's analysis of what applies and what doesn't apply,
24 but you have to understand what, what the citizen's
25 faced with. I think, to learn, read a lot of petition

1 materials, try and understand what the process is,
2 learning ePUC, and learning the PUC's rules, it's just,
3 it's a lot from the, from the perspective of one who is
4 not familiar with practicing as a lawyer at the PUC.
5 That's my comment.

6 HEARING OFFICER LANDIS-MARINELLO: Yeah,
7 that's helpful. And, and, you know, some of this, some
8 of those comments, Ms. Smith, could be, could be what
9 we do in Rule 2, or it could be just trainings we do
10 for our hearing officers of how to handle particular
11 situations, and, certainly, if someone is raising an
12 objection and the basis for it is not clear because all
13 they say is the particular rule that they're objecting
14 on, then hearing officers should be explaining that or
15 asking the attorneys to explain it so that all of the
16 parties are aware of what's actually being objected to.

17 And I, I mean, a benefit of the, what we're
18 looking at here if we put the applicable rules into
19 Rule 2 is there would be one document that everyone
20 would probably have with them in the hearing room,
21 including pro se parties, and that they'd all be able
22 to reference, rather than, currently, there's two
23 documents that people would want to bring with them to
24 those proceedings.

25 So we've been talking for a little while now. I

1 think it's probably a good time for a short break. I
2 would like to go into a little more detail when we get
3 back on some of the specific proposals in Attorney
4 Hill's comments from October of last year. I, I don't
5 think it makes sense to go number by number, but I
6 think I just want to make sure everyone has an
7 opportunity to chime in if they see significant
8 differences between what Attorney Hill has identified
9 as applicable and not applicable and what, in your
10 experience, is applicable or not applicable.

11 So, if, if folks have time over the break to look
12 over that set of comments again, and, just, I think
13 what we'll do is we'll break until 11:00 so people do
14 have a little bit of time to take a look at that and
15 just flag anything that should be on our radar screen
16 as staff if we go down this road of looking at what
17 gets incorporated, and we'll obviously take a very
18 careful look at if we agree that certain rules apply or
19 don't apply, but it's also helpful to hear from all the
20 stakeholders if there's a difference of opinion on
21 which ones should apply and which ones wouldn't.

22 So we'll reconvene at 11:00 o'clock. I think
23 we'll go for another hour. I do want to break from
24 noon to 1:00. It may be we're done by noon, or, if we
25 still have more to talk about, then we'll break from

1 noon to 1:00 and then come back at 1:00 for additional
2 discussion. All right. So I'll see everyone at 11:00
3 o'clock. And, when you're back, if you can turn your
4 camera on when you get back so we know you're back,
5 that would be great. Thanks, everyone.

6 (A recess was taken from 10:44 a.m. to 11:00 a.m.)

7 HEARING OFFICER LANDIS-MARINELLO: As I
8 mentioned before, I thought we should just take a
9 little bit of time to go over the specific list that
10 Attorney Hill put together in her comments on which
11 rules would apply, which ones would not apply, and
12 which ones would be tailored or have already been
13 tailored to our proceedings. And, as I mentioned,
14 rather than kind of go through all those numbers, I
15 thought I'd just open it up, and, if anyone has
16 comments, just things that should be on our radar
17 screen on that list, that would be great. Mr. Burke?

18 MR. BURKE: Just, before we get started on
19 the actual substantive discussion, I just had a brief
20 conversation with the Director for Public Advocacy, Mr.
21 Porter, who is not able to attend today, and he
22 suggested that, if the Commission is going to consider
23 going down the road of, you know, adopting or not
24 adopting specific rules, making sure that there's at
25 least a written invitation to people who are not able

1 to participate today to also opine on that, since we
2 have a fairly narrow sliver of people that routinely
3 appear before the Commission today. So I was asked to
4 relay that message to you all.

5 HEARING OFFICER LANDIS-MARINELLO: I
6 appreciate that. Yeah, that, and that's a good point,
7 and, yeah, I, I do want to spend some time talking
8 about next steps, and so it may be that we do want
9 another round of comments from others, or it may be
10 that we want to just go to the commissioners, staff
11 would go to the commissioners to find out where do they
12 want to head with this and, and take it from there.

13 So I think it, yeah, so let's jump into next
14 steps, too, and, if we don't have, or we can do it now
15 if people don't have comments on the particular
16 provisions, but I do want to create a little bit of
17 time if anyone wants to chime in on those provisions if
18 there are ones that we should make sure we would
19 include if we were going down this road or ones that
20 Attorney Hill has included but you think wouldn't need
21 to be included. Any other thoughts on that?

22 All right. So, as I mentioned, we'll obviously
23 look more closely if we're, if the commissioners want
24 to do this, about which provisions we'd put forward.
25 Let's have some discussion of next steps along those

1 lines, because, and then we can circle back if others
2 have more thoughts before we conclude today. I'll put
3 out there what staff was thinking in terms of the next
4 steps with this rule.

5 So we've, this is our second workshop, and we've
6 received multiple rounds of comments. As you all know,
7 we're always open to more comments coming in at any
8 time if, if people want to put something in writing
9 that was prompted by this discussion. So staff was
10 thinking that the logical next step is we would take
11 all of the feedback we've received from all of you and
12 others who have filed comments with us, we would put
13 together a revised red-line of the rule.

14 Some of the initial changes we proposed, quite
15 frankly, will come out and revert back to the old rule,
16 because we've received some feedback that people don't
17 want those changes, and then other changes that weren't
18 on our radar screen will go in there, and then we would
19 bring that to the commissioners to look at that
20 proposed draft and find out if that's where they want
21 to go with the rule and then put another draft out for
22 additional comments and additional workshops.

23 And so that's, that's what we were thinking, and
24 that would mean that, essentially, you, you would find
25 out when that draft is released if we're doing a full

1 rewrite in terms of incorporating the Rules of Civil
2 Procedure or if we're not or if we're doing some sort
3 of hybrid in between.

4 So that's a downside to the approach we're talking
5 about, but, at the same time, it would not be a great
6 use of all of our resources to do a full redraft, put
7 that out for comments, get feedback from everyone on
8 that if this is not a route the commissioners want to
9 go. So that's where we were thinking in terms of next
10 steps, but happy to hear from all of you if that is
11 what you were expecting or if you think we should do
12 something different here. Ms. Smith?

13 MS. SMITH: I think that's a good idea, to do
14 another draft, and then we'll get to see what you want
15 to keep and what you want to leave. Ideally, I'd like
16 to see a draft that incorporates the 20-or-so rules and
17 just see what that looks like, I mean, does it make
18 sense or not? It will be a lot easier to look at it
19 and see if it does. So that would be my preference is
20 to see a new draft that contains the incorporation of
21 the relevant Rules of Civil Procedure in some way.

22 HEARING OFFICER LANDIS-MARINELLO: Okay,
23 thanks. Mr. McClain?

24 MR. McCLAIN: Yeah. Thank you. This is just
25 an idea. I know that there's been some desire to have

1 all the rules in one place. If, if the Commission were
2 to decide to incorporate the relevant rules or
3 applicable rules by reference, you know, and maybe the
4 maybe the, the solution on multiple documents could be
5 to have an appendix that simply restated the rules as
6 they currently sit. I think that would make, avoid the
7 complications of, of the legal issues Mr. Cotter raised
8 about the authority to update them.

9 I think, as an administrative matter, you could
10 simply post the current version of the civil rules that
11 are applicable right along with the PUC rules without
12 requiring a rule change if you were to incorporate them
13 by reference rather than incorporate them hard-coded,
14 so to speak.

15 HEARING OFFICER LANDIS-MARINELLO: Okay,
16 thanks. Yeah, I believe that was also identified by
17 Attorney Hill as an alternative approach if we were not
18 incorporating them directly. And I see Attorney Hill
19 has something to add, and I think Mr. Brouha was going
20 to say something as well. Go to Mr. Brouha first.

21 MR. BROUHA: Thank you. On the 2nd of
22 January, I sent you an email, which you then shared
23 with the other participants, and in that I asked you if
24 you might clarify where you were leading us by
25 summarizing which straightforward suggestions you, as

1 staff, and also the Commission, were prepared to
2 address and how you were actually actively reviewing
3 all the comments that you had received.

4 And I would note that we submitted about 21 pages
5 of specifics with individual asks, starting about
6 halfway through, and it would be nice to not have to
7 recapitulate each one of these exhaustively, perhaps
8 taking up a lot of people's time, if that's, in fact,
9 something you're already dealing with. And so I'd
10 invite you to take us down that path with the
11 understanding of where the destination might be.

12 HEARING OFFICER LANDIS-MARINELLO: Okay.
13 Thanks, Mr. Brouha. That's, and that's, that is what
14 we're thinking, that we'd like to get another draft out
15 there, which would show which are the things we think
16 we do want to incorporate and which ones we don't think
17 we want to incorporate, and that would then form the
18 basis for the next round of comments.

19 MR. BROUHA: Yeah. I guess I would follow up
20 by just saying that there's a whole bunch of things
21 that perhaps don't fall within the context of the
22 formal current Rules of Civil Procedure but might be
23 called environmental justice issues, and it's the sort
24 of thing that Annette and I have been discussion about
25 pro se parties and the public involvement here

1 throughout, and, if we're just going to be foreclosed
2 from those, it would be nice to just know ahead of
3 time.

4 HEARING OFFICER LANDIS-MARINELLO: Yeah. I
5 appreciate that, and I should add that, you know, we
6 have four staff engaged deeply in this proceeding and
7 reading all of the comments, and we have discussions at
8 the Commission outside of the context of this
9 proceeding, and so, if comments go to issues that are
10 beyond what we're looking at in Rule 2, they're on our
11 radar screen. It's not like they're just dropped into
12 a void if they don't end up being incorporated into the
13 rule itself. So I do want assure you of you that.
14 Yeah. No problem. Attorney Hill?

15 MS. HILL: Thank you. Just responding to Mr.
16 McClain's comment, I think, earlier I had suggested
17 that, you know, that lawyerly, you know, referring to
18 Rule X, you know, as may be updated from time to time.
19 I actually think Mr. McClain's suggestion is far better
20 than my earlier comment, which is that now
21 technologically with the rules online, you could just,
22 you could have those applicable rules in an appendix or
23 hyperlinked and, by coordination with either the
24 Supreme Court or the judicial administration office,
25 make sure that those links go to the live, current

1 version of that specific rule as it exists, and then
2 that would avoid the updating, the updating issue and
3 would also avoid having to have my, you know, awkward
4 legal language about, you know, Go see the rule as it
5 presently exists. I think that's probably able to be
6 effected.

7 And then, secondly, I would, I would definitely
8 like to see a new proposed draft with whatever that you
9 are, you are considering, and I think that would be
10 very helpful, and I did just want to add. There's been
11 a lot of comments here about, like, pro se, you know,
12 parties or parties who are not, you know, attorneys,
13 and, as a litigator for a lot of decades, for more
14 decades than I care to admit, I've seen a lot of pro se
15 parties, and, of course, in civil court and in criminal
16 court, pro se parties are held to the same rules as
17 practitioners, and, if we were in Superior Court in a
18 civil action or in a criminal case, we certainly would
19 expect those pro se parties or new practitioners to
20 know the rules.

21 The problem here is that you can't know the rules,
22 because the PUC rules say the Rules of Civil Procedure
23 apply, unless they don't, and then doesn't tell you
24 what they are, which ones do and ones don't. So an
25 earnest pro se party doing everything we would expect

1 them to do in Superior Court and reading all of the
2 Rules of Civil Procedure and all of the rules of
3 evidence and the PUC rules would still not know what
4 the rules are, because they would think all of the
5 Rules of Civil Procedure apply when they don't, and
6 therein lies the problem.

7 So, you know, I do expect pro se parties to know
8 the applicable rules. Here, the problem is you can't
9 tell which those rules are, and that's what I would
10 really like to, to clarify for, for everyone involved.
11 Thank you.

12 HEARING OFFICER LANDIS-MARINELLO: Yeah,
13 thanks. And, and that is a correct summation, that we
14 don't have a provision that says, The following rules
15 do not apply, and it sounds like there's general
16 agreement that something like that would be helpful,
17 whether it's clear because we're not, we're
18 incorporating everything that applies and we haven't
19 incorporated other things or whether it is just written
20 exactly how I just said it, that the following Rules of
21 Civil Procedure do not apply to Commission proceedings,
22 and then we'd have a list, and, obviously, we'd want
23 feedback from stakeholders on whether we have that list
24 correct.

25 I think we'd want to lean towards incorporating

1 rules that might be applicable in certain proceedings,
2 while, at the same time, knowing we have flexibility if
3 we have a one-off situation where someone does want to
4 provide an offer of proof or something that really
5 isn't going to apply in 99 percent of cases. There
6 maybe we wouldn't include it. We would just note you
7 can file a motion with the hearing officer to be
8 allowed to use the provisions of Rule 68 or whatever
9 that rule is on that issue.

10 So I, I have the sense there's a general agreement
11 we want more clarity, some disagreement about the best
12 way to get that. I will look into how it would look if
13 we were doing hyperlinks to specific rules. I know the
14 version of the civil rules that I use, I sometimes have
15 trouble, I think, hyperlinking to a specific rule. It
16 tends to take me to all of the rules. But I can dig
17 into that a little more and maybe work with Ann, who's,
18 Ms. Bishop, who is more tech savvy than I am, and maybe
19 we can find ways to have an appendix that would have
20 those hyperlinks to the specific rules as well. So
21 that's something we can look into.

22 Other thoughts on process? Does everyone
23 generally agree with the idea that next steps, next
24 step would be on us to get another draft put out for
25 comment? Ms. Smith?

1 MS. SMITH: Yes. I just wanted to comment on
2 the hyperlinked link, and I did note in my comments at
3 the time that I filed them that the PUC's link to the
4 Vermont Rules of Civil Procedure did not go to the
5 Vermont Rules of Civil Procedure, and I don't know if
6 that's been fixed, but beware. Links change, and so
7 that's always a challenge.

8 MS. BISHOP: Thank you for bringing that to
9 our attention, Ms. Smith. That has been fixed on the
10 Commission's website.

11 HEARING OFFICER LANDIS-MARINELLO: Yeah. Any
12 other thoughts on process? Mr. Burke, just to circle
13 back to the comments you brought us from Mr. Porter,
14 does, would the process we're contemplating suffice
15 that, when the next round of, next red-line comes out
16 from our end, it will either not go rule by rule of
17 what's being incorporated, it will deal with it in a
18 more general way how the rules are currently
19 structured, or, if we go rule by rule, at that point,
20 there would be an opportunity for comments from
21 everyone on whether we've got it right in terms of what
22 we've incorporated? Does that work?

23 MR. BURKE: Yeah. I think the concern was
24 just making sure that people and, you know, entities
25 that are not participating in the workshop today at

1 least have an ability to opine on it.

2 HEARING OFFICER LANDIS-MARINELLO: Yeah,
3 yeah, that's helpful, and it is a good thing to keep in
4 mind. As Mr. Hand mentioned early on in this
5 proceeding, I mean, this is the rule that applies to
6 all of our proceedings, and so there are some things
7 that rarely come up but need to be on our radar screen,
8 and so we'll look at it with an eye towards that as
9 well.

10 All right. And the other thing I just want to
11 circle back to is we've had some discussion about more
12 flexibility for the Commission to be able to adopt rule
13 changes to the rules of procedure without going through
14 the full rulemaking process. During the break, Mr.
15 Cotter sent me a reference to Title 10 in the Act 250
16 provisions, and it does look like in Title 10 the Act
17 250 District Commission does have authority to adopt
18 procedural rules, and then that's followed by a
19 reference to substantive rules go through the
20 Administrative Procedure Act.

21 So it doesn't explicitly say that procedural rules
22 don't, but the contrast between those provisions seems
23 to imply that is how it works. I can certainly get in
24 touch with someone at the Natural Resources Board and
25 find out if that is how it's happened in practice, but

1 we might look at something like that.

2 We've had discussions this morning about whether
3 it is a statutory provision that would do it, whether
4 it's in the rule itself, whether it's just us using our
5 powers as a court of record by statute, or what would
6 do that, but I do want to open it up again to see if
7 that concept raises concerns for anyone, because we
8 don't want to propose a method like that to the
9 commissioners, they sign off, we put it out for
10 comment, and then, and then that's the first time we
11 hear from stakeholders, No, you shouldn't have the
12 ability to change a word in your rules without going
13 through the full Administrative Procedure Act, and
14 that's, that's a reasonable position. Some
15 stakeholders may feel that way. So I want to open it
16 up and see if anyone on this, in this workshop has that
17 feedback for us. Ms. Smith?

18 MS. SMITH: I suppose I should point out
19 that, if the PUC wants to, you can go to the
20 legislature and ask the statute to change based on
21 changing circumstances that you're dealing with now.
22 So I don't know that -- I mean, you're not locked in
23 necessarily if you feel that there is something that
24 needs to change in terms of statute regarding this.

25 HEARING OFFICER LANDIS-MARINELLO: Yeah,

1 thank you. And, Mr. Tarrant, were you going to add
2 something? I saw your microphone come on.

3 MR. TARRANT: Yeah. I was only going to say
4 that I think that question that you posed to everyone
5 really requires a little bit more thought. If the PUC
6 is serious about that approach, then I think we need to
7 digest that and understand it, talk to our clients, and
8 get back to you, rather than the opposite. I can't
9 tell you right now that my client would be okay with
10 that.

11 HEARING OFFICER LANDIS-MARINELLO: Yeah,
12 that's reasonable, yeah. And it would also probably, I
13 imagine it would depend on how it's phrased as well.
14 As I mentioned, it could be very broadly phrased, or it
15 could be limited to adopting the updates the Vermont
16 Supreme Court has adopted, and that would create a
17 check on the process, the same way as the
18 Administrative Procedure Act is meant as a check on
19 agencies and what they're able to do. Attorney Hill?

20 MS. HILL: Yes, thank you. I would
21 definitely echo the comment that I think Attorney
22 Tarrant just made that bears some thought. I, for one,
23 I think I'm comfortable with the, you know, change that
24 says that changes to match or changes to parallel the
25 Rules of Civil Procedure or Rules of Evidence, we

1 should add as well, since they're also incorporated
2 here, would seem to not be problematic, because
3 they're, they're somewhat universal.

4 But other changes to procedure, you know,
5 procedure is the level playing field, and a change in
6 procedure could wind up intentionally or inadvertently
7 excluding parties, excluding claims, and, you know,
8 changing the substance of, of the ability to be heard
9 or proceed, and so I would have to give some thought as
10 to how that was, was phrased beyond, you know, being
11 able to parallel the other rule bodies.

12 HEARING OFFICER LANDIS-MARINELLO: Yeah. No.
13 That's helpful, and, and we can give some thought to,
14 to how, if there is some kind of line of proceeding
15 between procedural and substantive, for instance, of
16 what types of changes were allowed, also giving an
17 opportunity for parties to raise an issue if they think
18 that we've made a procedural change that actually has
19 substantive impacts. So we can give some thought to
20 that as well.

21 All right. I'm looking at Mr. Cotter and Mr.
22 Tousley and Ms. Bishop if there's anything you want to
23 make sure we cover during this workshop that we haven't
24 touched on yet. Okay. And anyone else have anything
25 else they want to add before we end the workshop?

1 MR. TARRANT: Will, will we expect a memo
2 from you as to what the Commission contemplates as a
3 next step?

4 HEARING OFFICER LANDIS-MARINELLO: I wasn't
5 planning on putting a memo out, but we can. That might
6 make sense to do something like that. I, I think that
7 the, if we put something out, it would say what we've
8 discussed, that the next step is we'll, it's, the
9 ball's in our court at this point to get another draft
10 out, and, when we put that draft out, we would set a
11 date for comments on that, as well as schedule another
12 workshop to discuss the next draft. Mr. Melone?

13 MR. MELONE: Yeah, you just answered my
14 question. I just wanted to make sure that there would
15 actually be another workshop that we could discuss
16 additional comments other than the ones that have
17 already been covered.

18 HEARING OFFICER LANDIS-MARINELLO: Yes, yes,
19 definitely. And, Ms. Hill, you have your microphone
20 on.

21 MS. HILL: Yeah. Just, once we end the
22 workshop, I was hoping I could ask a quick question off
23 record that has nothing to do with this workshop, but,
24 while we had all these practitioners here, I have a
25 question regarding the clerk's office and a matter that

1 if I could just ask off record once we close.

2 HEARING OFFICER LANDIS-MARINELLO: Okay, all
3 right. So, with that, I think we'll conclude the, the
4 workshop. As I mentioned at the end of the last
5 workshop, thank you very much to everyone for being
6 here, giving us your time, all the thoughtful comments
7 that people have put in. It really helps us in this
8 difficult task of redoing our rules of procedure and,
9 and doing it in the best way we can. So thank you for
10 being here this morning and, and for your time. With
11 that, we'll end the workshop.

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15 (Whereupon at 11:28 a.m. the hearing was adjourned.)

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1 C E R T I F I C A T E

2 I, Sunnie Donath, RMR, do hereby certify that
3 I recorded by stenographic means the Workshop Re:
4 Proposed revisions to Vermont Public Utility Commission
5 Rule 2, on January 21, 2021, beginning at 9:30 a.m.

6 I further certify that the foregoing testimony was
7 taken by me stenographically and thereafter reduced to
8 typewriting and the foregoing 66 pages are a transcript
9 of the stenographic notes taken by me of the evidence
10 and the proceedings to the best of my ability.

11 I further certify that I am not related to any of
12 the parties thereto or their counsel, and I am in no
13 way interested in the outcome of said cause.

14 Dated at Westminster, Vermont, this 25th day of
15 January, 2021.

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19 //Sunnie Donath, RMR

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