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September 17, 2021

Holly Anderson, Clerk
Vermont Public Utility Commission
EPUC

RE: Case No. 20-2369: Vermont Electric Cooperative, Inc.'s Comments to Public Utility Commission's Proposed Rule 2.200.

Dear Clerk Anderson:

Vermont Electric Cooperative, Inc. (VEC), hereby submits additional comments on the Public Utility Commission's (PUC) proposed Rule 2.200.

Proposed Rule 2.209-Intervention. The proposed Rule 2.209 continues to propose removing important thresholds for intervention, which VEC believes will unnecessarily increase costs for VEC's members and unduly delay proceedings. The proposed rule removes the requirements that would-be intervenors demonstrate (1) a "substantial" interest in the proceeding under the statutory criteria; and (2) the PUC proceeding is the exclusive means to protect that interest. VEC requests that the PUC maintain the current standards for intervention and the discretion they afford the PUC when acting in its quasi-judicial case-deciding function under the Administrative Procedures Act.

The PUC's reason for proposing to substantially relax the intervention threshold is to allow PUC proceedings to be more open to the public compared to court proceedings in the judicial branch, and that utilities should bear that expense.¹ VEC has two concerns with this rationale for increasing the universe of potential parties in formal PUC contested case proceedings.

First, the rationale does not appropriately credit the extent to which PUC proceedings are already extensively more open to public participation than is the case in judicial branch proceedings, nor

¹ *Procedural Order Publishing Latest Proposed Changes to Rule 2 and Requesting Comments*, Case No. 20-2369, Order of 8/12/21 (PUC explains that "as an administrative agency, the Commission's proceedings should, if anything, be more open to public participation than court proceedings are," and stating that "any increased costs of litigation are warranted.").

the fact that a “public advocate” with substantial technical and legal resources and a public-interest mandate is a built-in feature in PUC litigation with no analogy in judicial branch proceedings. The Department of Public Service represents the public, and the Legislature gave it broad powers to “supervise and direct the execution of laws relating to public service corporations and firms and individuals engaged in such business,” including the comprehensive ability to review proposed rate change schedules, proposed mergers, and financing requests. 30 V.S.A. § 2. VEC’s experience over many years is that the Department is a zealous advocate for the ratepayers that it represents. Its advocacy has caused VEC to increase its own rigor in presenting and supporting requests for regulatory action, knowing that its requests will be closely scrutinized.

The PUC’s proposal to allow more individual public members to participate in PUC proceedings subverts the Title 30 legislative framework and potentially dilutes the Department’s role in representing the collective public interest in statutory schemes that focus on the public good, rather than individual good. Rather than one state entity representing the public in an efficient and cost-sensitive manner with a focus being on compliance with state-wide goals, policies, and standards (Title 30’s structure), the PUC’s proposed intervention rule will make PUC proceedings more about narrow individual issues.

Second, the PUC’s proceedings—while “administrative” in nature—are still formal contested cases with expensive and time-consuming procedures. Just like litigation in the judicial branch, contested cases only become more expensive and time-consuming as you add more parties who are granted full legal rights as participants, including appeals of right to the Vermont Supreme Court that often take more than a year to resolve. Given that the PUC process already includes public participation opportunities and taxpayer/utility-funded public-interest representation that goes well beyond what is provided in the judicial branch, it makes sense to afford access to the more formal suite of legal and procedural rights arising from intervention only to those members of the public who can show a “substantial” interest in the proceeding under the statutory criteria, and have no alternative means to protect such interest.

The PUC process has robust notice and comment requirements found nowhere in contested cases within the judicial branch. For example, the PUC (and certain sections of Title 30) oftentimes requires petitioners to respond to public comments received in response to a petition or pre-application notice. The PUC itself acknowledges and responds to public comments received throughout the proceeding either at public hearings or through the ePUC website. These existing, robust public participation opportunities can and often do shape the litigation actions of the Department and of the PUC, which unlike judicial branch judges, routinely issue formal information requests to Petitioners in response to public comments.

Under existing practice, the Department in many cases conducts information sessions that are open to the public and at which the public is allowed to ask questions of the Department, to provide the Department information, and to make requests that the Department pursue certain issues or outcomes as part of the proceeding. These sessions are then typically followed by a public hearing where members of the Commission or their hearing officers also gather input and information from the public.

There is no analogy to this level of public participation in the judicial branch courts, even in cases before the Vermont Superior Court, Environmental Division. When sitting in its de novo capacity in ANR, municipal zoning, and Act 250 permitting cases, the Environmental Division is essentially acting as an administrative agency like the PUC in a contested case. Those administrative permitting cases still require a showing by would-be intervenors of a concrete and particularized interest in the case under the regulatory permitting standards the court must apply before would-be intervenors are granted rights that enable substantial increases in costs and delays.

As VEC commented in its October 2, 2020 filing, the PUC has the responsibility to protect state ratepayers and it should exercise a gate-keeping authority to ensure that unnecessary litigation costs are not passed on to ratepayers and that PUC proceedings are not unduly delayed.

Proposed Rule 2.204 (G) Amendments in proceedings

The PUC's proposed Rule 2.204(G) adds the following new language related to when the evidentiary record is closed:

The evidentiary record for a case is closed after the evidence to be considered in deciding a case has been entered into evidence:

- at an evidentiary hearing, or
- in a proposal for decision (if there is no evidentiary hearing), or
- ☐ -in a final order (if there is no evidentiary hearing or proposal for decision).

As an initial matter, VEC was unable to find an explanation of the PUC's rationale for these proposed changes and suggests that the PUC request stakeholders to comment specifically on this section because it is a substantial change from PUC practice. VEC suggests organizational and substantive changes to the proposed language but would appreciate understanding why the PUC seeks to precisely predetermine when the evidentiary record is closed through a rule, rather than on a case-by-case basis.

From an organizational perspective, VEC suggests that the text regarding when the evidentiary record is closed should not go in this section which focuses on amendments to filings in the record. This amendment rule provision should focus on the mechanics of how someone amends the record, assuming it is still open. PUC Rule 2.216 addresses evidentiary issues. If the proposed rule change is even necessary, VEC suggests that it is better located in Rule 2.216.

From a substantive perspective, no statute requires the PUC to adopt this rigid approach to determining when the evidentiary record is closed. The Administrative Procedures Act's contested case provisions do not directly speak to when the evidentiary record closes, but it suggests that administrative agencies should not close the evidentiary record until its members

have reviewed the case and issued a final order.² In addition, the PUC's role as a quasi-judicial body supports maintaining flexibility regarding when the evidentiary record is closed. VEC also understands that regulators and parties may need the PUC to establish a clear date for when it will close an evidentiary record for predictability and fairness purposes in some cases.

If the proposed rule change is necessary, VEC suggests that the PUC modify the proposed language regarding the evidentiary record so it is not unduly rigid and reflects the practical reality of how a PUC proceeding can develop. Four scenarios highlight the need for more flexibility.

Scenario 1: In some evidentiary hearings, a hearing officer asks a party (usually the petitioner) to provide additional evidence after the hearing. This can occur when an evidentiary hearing has brought a new issue to light through questioning of the parties. The proposed rule reads as if once the evidentiary hearing is over on the last day of hearing, the hearing officer and PUC members no longer have the power to request additional evidence even if such evidence would be helpful to resolving the matter.

Scenario 2: An evidentiary hearing can make a solution to a disputed issue clearer than it previously was through eliciting helpful answers on cross examination or answers to questions posed by hearing officers or the PUC members. The petitioner or another party may want to supplement the record after the hearing to propose a solution elucidated by the hearing testimony. The proposed rule creates a disincentive for a petitioner to resolve disputed issues after a hearing because the rule prohibits submission of additional evidence, suggesting that the petitioner would need to start the process all over again thereby losing an opportunity for a more efficient outcome.

Scenario 3: A hearing officer could issue a proposal for decision (PFD) and conclude that a petitioner has not satisfied a criterion/legal standard even when no party opposes a petition/tariff request. In this scenario, the PFD could be the first time a petitioner learns that the hearing officer has concerns with the petition. Under the proposed rule, a petitioner could not seek to resolve the issues in the PFD through the submission of additional evidence. Rather, the petitioner would need to start the process over again.

Scenario 4: A hearing officer issues a PFD, and the PUC on review of the evidence and briefs believe more evidence is necessary for the PUC to rule on the petition. The proposed rule appears to remove the PUC's ability to request more evidence in contradiction to longstanding Vermont Supreme Court precedent under the Administrative Procedures Act.³

² 3 V.S.A. § 811, as interpreted in *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 375 A.2d 975 (1977), explains that when "a majority of the officials of the agency who are to render the final decision" have not "heard the case or read the record", the decision is not final until such members have done so and various additional procedures are followed. Nothing in the APA prevents the PUC members from requesting additional evidence, or a party to submit additional evidence after a hearing or PFD.

³ *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 375 A.2d 975 (1977) (recognizing that even after receiving a hearing officer proposal for decision "it is clear that it is a proper and expected function under its legislative mandate for the [Commission] to examine the record, *take additional evidence* and, where required, rework the findings of a hearing officer in the light of its own special competence.").

VEC offers these suggested changes (underline text is new proposed language):

VEC Proposed change to Rule 2.204(G)

The evidentiary record for a case is closed after the evidence to be considered in deciding a case has been entered into evidence:

- at an evidentiary hearing, unless within 5 days of the hearing: (1) a party moves the PUC to keep the record open to submit additional evidence which is directly related to a relevant legal standard, and the PUC approves the motion; or (2) a hearing officer or PUC member requests additional information for entry into the evidentiary record.

- in a proposal for decision (if there is no evidentiary hearing) unless within 5 days of the proposal for decision: (1) a party moves the PUC to keep the record open to submit additional evidence which is directly related to a relevant legal standard, and the PUC approves the motion; or (2) upon review of the proposal for decision and record, a PUC member requests additional evidence from a party.

☐ -in a final order (if there is no evidentiary hearing or proposal for decision).

VEC greatly appreciates the PUC's time and attention to these issues.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joslyn Wilschek".

Joslyn Wilschek, Esq.