

July 6, 2022

Ms. Holly Anderson, Clerk
Vermont Public Utility Commission
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Re: Case No. 21-0861: Encore Renewable Energy, LLC's Comments on the Public Utility Commission's Proposed Rule 5.400

Dear Clerk:

Encore Renewable Energy, LLC has reviewed the Public Utility Commission's (the "Commission") June 16, 2022 Order on its proposed Rule 5.400 and would like to address the comments contained in this filing to the Commission regarding the proposed changes to the Rule. Encore requests that the Commission withdraw its proposal to eliminate all intervention thresholds for adjoining landowners, which would grant such persons/entities full party status on all Section 248 criteria. Encore also recommends that the Commission not adopt its new proposed requirement for Section 248 petitioners to file as-built plans and provide a narrative description of all non-substantial changes at the time a project is commissioned.

Rule 5.408: The Proposed Rule Eliminates All Intervention Requirements for Adjoining Landowners, and Authorizes Party Status to Adjoining Landowners on All Section 248 Criteria Upon Request, Eliminating the Commission's Important Gate-Keeping Role

Encore takes the position that the Provisions of the current Rule 2.209(A)-(D) are more than sufficient to provide for effective, informed, and influential intervenor status to impacted adjoining landowners. Rule 2.209(A) and (B) provide for intervention as of right, and permissive intervention, respectively. As of now, in order for an adjoining landowner to qualify for intervention as of right, the adjoining landowner must demonstrate a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties. Additionally, Rule 2.209(B) permits the Commission to grant Permissive Intervenor Status to an adjoining landowner in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. Importantly, Rule 2.209 (B) directs the Commission to exercise its discretion by considering (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public, in determining whether and to what extent intervention will be granted to and adjoining landowner.

Finally, and most importantly, Rule 2.209(C) provides the Commission with the authority to limit an adjoining landowner's intervenor status for several reasons. Where a party has been granted intervention, the Commission may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

In parallel with the Commission's proposed changes to rule 5.400, the Commission has also proposed changes to the Commission Rule 2.100 in Case No. 20-2369-RULE. In that Rulemaking Case, the Commission proposes adopting the standard for intervention in Vermont Rule of Civil Procedure 24. This change would eliminate the Commission's discretion under existing Rule 2.209(B) to determine

whether Permissive Intervenor status is warranted; specifically whether alternative means exist by which the applicant's interest can be protected, and whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Furthermore, this change to Rule 2 would eliminate the Commission's authority to limit an adjoining landowner intervenor's participation to only those issues in which the party has demonstrated a unique interest, eliminates the Commission's authority to cause adjoining landowner intervenor's to join with other adjoining landowners, and eliminates the Commission's authority to consider the interests of justice and economy of adjudication.

Together, these proposed changes to Rule 5.408 and Rule 2.100 would be destructive to the crucial gate-keeping authority which the Commission currently exercises in order to balance potentially legitimate adjoining landowner intervenors' interests against several critically important other needs. These countervailing interests include the following:

- Maintaining a fair and efficient process for both Section 248 Petitioners and Adjoining Landowners
- Providing for an efficient and cost effective process for Section 248 Proceedings
- Ensuring that the State of Vermont will be able to realize its statutorily mandated renewable energy goals, and that the state will be able to respond to the climate crisis by building out renewable energy (section 248 generation) projects in the near term
- Adhering to the Legislative intent of Section 248, which vests the authority for determining whether electric generation facilities are in the Public Good according to the Section 248 Criteria with the State, rather than with local authorities.

The elimination of the Commission's gate-keeping authority over adjoining landowner intervenor requests would convert the state-level authority over Section 248 Projects, which is vested with the Commission to a local matter. This will prevent the Commission from having the ability to effectively manage Section 248 proceedings to provide for the public good.

Encore has built its reputation in Vermont by working with project neighbors, Towns, and Communities to resolve conflicts, mitigate concerns, and eliminate falsehoods from public discourse when they arise. The Commission cannot be unaware of the risk of harm that misinformation can cause, and the potential for abuse of process which is present in the context of granting automatic intervenor status in Section 248 proceedings. These proposed changes would cause the Section 248 process, which is well balanced by the Commission under current rules, to be completely unbalanced. The Commission currently exercises its expertise in Section 248 proceedings by weighing state interests, climate change interests, petitioner interests, and local interests. The proposed changes would skew that balance away from a thoughtful and guided process.

“Material Deviation” and Proposed Changes to Rule 5.412: Encore Advocates that the Commission Not Adopt its Proposed Change to Require Petitioners to File “As-Built” Plans with a Narrative Description of Non-Substantial Changes

The Commission's June 22, 2022 Procedural Order states that participants observers of these proposed rule changes have sought clarity on the standard CPG Condition 1, which requires the CPG Recipient to seek Commission approval for substantial changes and any material deviation from approved plans. In response to this request for clarity, the Commission proposes to require petitioners to file “as-built” plans with the Commission along with a narrative description of any non-substantial changes to the Project which have not been approved by the Commission at the time the Project is Commissioned. Encore respects that substantial changes to approved projects require Commission Approval. Additionally,

Encore has no objection to the continued inclusion of the standard “Condition 1” language in CPGs which addresses “Material Deviations” from approved project plans. However, for several reasons which are discussed below, Encore is opposed to the proposed rule change.

First, in any construction project, there are minor deviations from project plans, which are necessitated by a number of factors. A minor change can be necessary to accommodate for unanticipated factors, such as: undetected subsurface conditions requiring the slight relocation of a post which supports module racking; trenching, which is necessary for underground wiring, may need to be slightly relocated to accommodate an unknown subsurface soil condition; or a junction box for connecting separate runs of underground conduit may need to be slightly relocated to resolve a problem with wiring getting stuck in conduit. An unforeseen issue with sequencing separate scopes of work or changing sequencing of operations to accommodate variable contractor availability could result in a slight relocation of a project component to allow for operations to continue in parallel. Any one of these slight changes could have a cascading effect, causing other subsequently installed project components to be installed in a manner which slightly deviates from the project plans. Some of these deviations might be reported up to project managers and these changes would likely be included in project documentation. Many others may not rise to the level of importance to be reported to project managers, and these might never be captured in project documentation. Such changes are certainly not substantial changes, and would not rise to the level of being material deviations, and yet the Commission’s proposed rule would require for them to be documented in as-built drawings and filed with the commission. Encore advocates that this level of documentation is overly burdensome not only on the petitioner but the Commission and other parties, for adjustments that do not materially or substantially impact criteria.

Creating as-builts which are intended to capture non-substantial changes, and further capture changes which do not rise to the level of material deviations would be expensive and time consuming to create. There would also be an additional administrative burden in filing these as-built drawings. The Development community does not see the value to the regulatory community, to the public good, or indeed to the realization of Vermont’s clean energy goals in requiring the documentation and reporting of such non-substantial and non-material changes.

Encore reiterates that the minor construction changes targeted by the proposed rule change would not rise to the level of substantial changes, or material deviations. This new requirement would create an environment where the level of documentation of field changes or equipment identification and verification would overwhelm even the best project manager, as well as the Commission and other parties.

Encore Thanks the Commission for the opportunity to comment, and respectfully submits these comments for the Commission’s consideration.