

# A Guide to Evidentiary Hearings

Vermont Public Utility Commission



PUBLIC UTILITY COMMISSION

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## **Introduction**

Most contested cases before the Public Utility Commission include an “evidentiary hearing”, similar to what many people think of as a trial.

It is at the evidentiary hearing that evidence, in the form of testimony and exhibits, is admitted into the evidentiary record and witnesses are cross-examined about their prefiled testimony. The Commission can only base its decisions on information in the evidentiary record.<sup>1</sup> It is therefore important that parties to evidentiary hearings understand how to get information into the evidentiary record so that the Commission can rely on it in making its decision in the case.

This overview will give readers a basic understanding of the structure and process of an evidentiary hearing. While it is not possible to describe all variables that may arise, the goal of this overview is to enable readers to function effectively as parties to our evidentiary hearings.<sup>2</sup> In addition, a helpful glossary of frequently used terms is available on the Commission’s website: [www.puc.vermont.gov/public-participation/frequently-asked-questions/glossary-terms](http://www.puc.vermont.gov/public-participation/frequently-asked-questions/glossary-terms).

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<sup>1</sup> Public comments are not “evidence,” so they are not part of the evidentiary record.

<sup>2</sup> In order to participate formally, you must first apply for (and receive) “intervenor” status.

## **Before the Hearing**

A number of steps occur before an evidentiary hearing to help ensure a smooth and efficient day in the hearing room. They are as follows:

### **Witnesses and Exhibits**

- In contrast to a court, the sworn evidence in a Commission case is prefiled in writing well before the evidentiary hearing takes place, and then sworn to and admitted into evidence at the hearing. The evidentiary hearing is mainly taken up by parties asking questions (cross-examining) about the prefiled testimony.
- The Hearing Officer<sup>3</sup> will often ask the parties to develop a list of witnesses who will testify, the order in which they will appear, and the estimated time the parties will need to cross-examine each witness. The Hearing Officer will then use this information to develop a schedule for the evidentiary hearing. In smaller cases with few witnesses and little expected cross-examination, scheduling will instead be discussed on the day of the evidentiary hearing just before it starts.
- If a party intends to use exhibits during the hearing that were not prefiled, that party must bring enough copies for all other parties as well as copies for the Hearing Officer. These copies must be pre-marked and distributed before the hearing. Pre-marking simply refers to placing a sticker on the exhibit with the name of the party sponsoring the exhibit (e.g., Smith 1, Smith 2). Exhibit stickers can be obtained from the court reporter, who will be at the hearing to transcribe what is said there.
- All paper exhibits, those either not prefiled (e.g., an exhibit to be used in cross-examining a witness) or prefiled by a party participating in hard copy (i.e., not using ePUC, the Commission's online case-management system) must be pre-marked and distributed to all other parties, the witness, and the Hearing Officer. The Hearing Officer will ask if all exhibits have been pre-marked before the hearing begins.
- Testifying witnesses should take with them to the witness stand copies of their prefiled testimony, exhibits, and their responses to any previous discovery requests.

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<sup>3</sup> This overview refers to actions taken by a Hearing Officer. In larger cases heard directly by the Commissioners, any reference to the Hearing Officer would apply to the Commissioners.

### **Preliminary Issues**

1. The Hearing Officer will often ask the parties whether there are any preliminary matters to discuss before the hearing begins, such as availability of witnesses, last-minute scheduling issues, or whether any party anticipates raising an objection or making a motion once the evidentiary hearing starts.

### **Confidential Information**

2. If any testimony or exhibits include confidential information, the Hearing Officer will ask whether the parties anticipate questioning witnesses about the confidential material. If so, there will be a discussion of the most efficient way to address the confidential material – e.g., at the end of each witness’s testimony or grouping the confidential testimony of all witnesses together. This is because that portion of the hearing will be closed to the public and any parties not allowed to hear the confidential information. The Commission strongly prefers to keep as much information public as possible, and only closes hearings when it is necessary. Parties should therefore try to structure their testimony and questioning of witnesses to avoid raising confidential information whenever possible but without compromising their cases.

### **Large Cases**

3. In large cases that the Commissioners are hearing directly, the Commission will ask the parties to attend a prehearing meeting with Commission staff one-half hour before the evidentiary hearing to discuss many of the issues identified above so that the hearing can start without undue delay when the Commissioners arrive in the room.
4. If a case has a large number of “*pro se*” parties (i.e., not represented by an attorney), the Hearing Officer or Commission staff may schedule a status conference approximately one week before the evidentiary hearing to explain the Commission’s hearing process.

### **Starting the Hearing**

1. The Hearing Officer will open the evidentiary hearing by “going on the record.” This simply means that the court reporter will begin creating a transcript of everything

that is said during the hearing. The transcript is the official record of what occurred during the hearing.

2. The Hearing Officer will read the name of the case and introduce himself or herself and any other Commission staff working on the case and present at the hearing.
3. The Hearing Officer will then ask parties to “offer their appearances.” At this time each party states its presence through its representative. If a party has an attorney, the attorney would state his or her name and the name of the party he or she is representing – for example, “John Smith, on behalf of the Agency of Natural Resources.” If a party is self-represented (i.e., *pro se*) she or he would state their own name and their self-represented status – for example, “Jean Jones, *pro se*.”
4. After appearances have been entered, the parties will discuss any preliminary matters that were raised before the hearing started but that need to be addressed on the record.
5. After any preliminary matters have been addressed, the first witness will be called to the witness stand. The process described below continues for each witness until all witnesses have testified.

### **Calling Witnesses and Admitting Prefiled Testimony and Exhibits**

1. The party presenting the first witness, usually the petitioner, calls its first witness to the witness stand – for example, “Williams Solar calls George Johnson to the witness stand.”
2. Mr. Johnson would sit at the witness stand, bringing with him a copy of his prefiled testimony, exhibits, and any discovery responses. These documents are needed because other parties may refer to them in conducting cross-examination of the witness. *Note:* There may be times when a witness is called to testify who has not prefiled any testimony or exhibits. However, this is the exception in Commission evidentiary hearings, not the rule. Unlike civil and criminal trials, parties in Commission proceedings normally prefile their testimony in written form, with the result that live examination during the hearings is limited to cross-examination about the prefiled testimony, followed by “redirect” examination (explained more below).

3. Each witness must be sworn in or affirmed. The witness will be asked to raise his or her right hand and will be asked, “Do you swear or affirm under penalty of perjury that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?”
  
4. After the witness is sworn in, his or her prefiled testimony and exhibits must be admitted into the evidentiary record. This is done through a series of questions to establish the identity of the witness and the documents to be moved into the evidentiary record. The basic questions are:
  - Please state your name and occupation for the record.
  
  - Do you have a copy with you of a document titled prefiled direct (or rebuttal or surrebuttal) testimony of (witness name) dated (date of testimony)?
  
  - Was this testimony prepared by you or under your direct supervision?
  
  - Do you have any changes to make to this document? **Note:** If a party has prefiled a witness’s testimony and exhibits using ePUC, the witness should carefully review his or her prefiled testimony and exhibits sufficiently in advance of the hearing so that any corrected version can be prefiled using ePUC before the hearing. This eliminates the need to provide hard-copy (paper) corrections to all parties and to the Commission at the hearing. If the witness needs to make corrections to testimony or exhibits at the hearing (e.g., because they were filed in hard copy to begin with or because they did not catch the need for the corrections soon enough to correct them through ePUC), then the witness should make the corrections by hand on a hard copy, identifying for the record the changes that are being made to the document. If the document was originally filed in hard copy, then other parties can make the changes to the copies they were served with. If the document was originally filed in ePUC but changes are being made at the hearing on a hard copy, then hard copies of the corrected pages must be provided to all other parties and to the Commission.
  
  - If the witness is a *pro se* party, the Hearing Officer will assist in asking the appropriate questions for entering the prefiled testimony and exhibits into the record.

- The above process should be used to identify and, if necessary, correct each piece of prefiled testimony and each prefiled exhibit.
  - The attorney will then move for the admission of the prefiled testimony and exhibits. The Hearing Officer will ask whether there are any objections to the admission of the documents. *Note:* Under Commission Rule 2.216(C), objections to prefiled testimony and exhibits must be made either 30 days after the testimony and exhibits are filed or at least five days before the hearing, whichever is sooner. As a result, objections to the admission of prefiled testimony and exhibits may be untimely if they are first made at the hearing. If there are no objections, the material will be admitted into the evidentiary record. If there are objections, the Hearing Officer will rule on them and either admit or exclude the material from the evidentiary record as appropriate.
5. Once a witness's prefiled testimony and exhibits are admitted into the evidentiary record, the witness is made available for cross-examination by the other parties.

### **Cross-Examination of Witnesses**

Cross-examination is when parties question witnesses about their prefiled testimony or exhibits to better understand the witness's position or to call the witness's testimony and exhibits into doubt by asking questions that challenge their credibility or accuracy. However, cross-examination is not an opportunity for a party to harass or argue with a witness. Questions are generally limited to matters contained in the witness's prefiled testimony and exhibits.

Each party with cross-examination questions for the witness will be allowed an opportunity to question the witness. Repetitive questioning should be avoided. If one party has asked a witness a certain question, there is no need for another party to ask the question again.

Cross-examination is not an opportunity for a party with interests that are aligned with the interests of the party whose witness is on the stand to ask questions that allow the witness to bolster his or her testimony. This practice is known as "friendly" cross-examination and is not allowed in Commission proceedings.



## **Questions from the Commission**

Often the Hearing Officer (or Commissioners) will have questions for a witness. Generally, the Hearing Officer will wait until all parties have conducted their cross-examination before asking their questions. However, at times he or she may interrupt a party's cross-examination to ask a clarifying or follow-up question in response to a question asked by a party.

After the Hearing Officer has finished asking questions, he or she will ask the parties if the Hearing Officer's questions raised any issues that the parties need to ask follow-up questions on, provided that the issues could not have been reasonably foreseen by the parties and addressed in their initial cross-examination.

## **Redirect Examination**

Redirect examination occurs after all cross-examination and Hearing Officer questions are completed. It provides an opportunity for the party sponsoring a witness to ask follow-up questions of the witness in response to questions asked and answers given during cross-examination of that witness. Once redirect examination is complete, the witness is excused from the witness stand.

If a witness is also a *pro se* party, there may not be an attorney or other party representative to conduct redirect examination. In that event, the Hearing Officer will ask the witness if there are any areas of inquiry that came up during cross-examination that the witness would like to address. The Hearing Officer will then allow the witness to identify each area of inquiry and respond.

## **Concluding the Hearing**

After all witnesses have testified and been excused from the witness stand, the evidentiary hearing is essentially complete. However, the Hearing Officer will typically ask the parties if there are any other matters that need to be addressed. This document cannot provide a comprehensive list of what types of issues may be raised by parties at this point in the process. However, if issues are raised, such as a motion or objection, the Hearing Officer will discuss with the parties how to proceed or, if appropriate, rule from the bench. Also, before adjourning, the parties generally try to agree on due dates for post-hearing briefs and reply briefs. If the parties cannot reach agreement on these dates, the Hearing Officer will establish dates after taking input from the parties. At this point, the Hearing Officer will adjourn the evidentiary hearing.

## **After the Hearing**

After the evidentiary hearing is concluded, the parties typically file briefs (documents that contain their proposed findings of fact and arguments why the Commission should decide the case in their favor) and reply briefs (documents that contain their reasons why the Commission should not rely on the briefs filed by other parties).

A party's brief only needs to address the specific issues that are of concern to that party. For example, while a petitioner that is seeking authority to construct a generation project must address in its brief all the criteria applicable to that project, a party that is only concerned with the aesthetic impacts of the proposed project only needs to address aesthetics in its brief. However, it is important for a party to fully address each issue of concern that it has in a case. If the issue is not presented for the Commission's consideration, it is likely that the Commission will have no basis to decide that issue in favor of that party.

In preparing to address an issue in its brief, a party should look to relevant statutes and past Commission and court decisions applying those statutes to develop an understanding of how best to address the issue.

When proposing findings in its brief, a party should draft findings that are based on (and with citations to) the evidence in the case and do so in a manner that they can be readily adopted by the Commission. For example, you will not further your interests if you write proposed findings with argumentative language or personal attacks on opposing parties.

In a case heard by a Hearing Officer, he or she reviews the parties' briefs and reply briefs before issuing a recommended decision, called a proposal for decision, in response to which the parties may file comments for the Commission to consider. Parties may also request to present oral argument to the Commission in response to the proposal for decision. The Commission then issues the final decision.

It is also possible that the Hearing Officer may direct a party or parties to take actions after the evidentiary hearing, such as filing additional information in response to issues that were raised during the hearing. An example of this is when a witness answers a question "subject to check." This means the witness believes he or she has provided an accurate answer to the question but would like an opportunity to confirm it. When that happens, it is common for the Hearing Officer to require the party on whose behalf the witness was testifying to file a confirmation that the answer was accurate, or a correction or clarification of the answer given at the evidentiary hearing.

## **Miscellaneous**

Evidentiary hearings before the Commission are governed by the Vermont Rules of Evidence, which establish whether testimony and exhibits qualify to be admitted into the evidentiary record. However, the Commission has the discretion to admit testimony and exhibits into the evidentiary record that would otherwise be inadmissible under the Rules of Evidence if the facts in question are not reasonably provable under those rules and are the type of facts commonly relied upon by reasonable people in their daily lives.

The Rules of Evidence can be found here:

[www.lexisnexis.com/hottopics/vtstatutesconstctrules/](http://www.lexisnexis.com/hottopics/vtstatutesconstctrules/)

Objections to the admissibility of testimony or exhibits, whether made in advance in writing or made during an evidentiary hearing in response to a question and answer, are based on the rules of evidence. For example, an objection may be made because a question calls for the witness to speculate about a matter that the witness has no personal knowledge of, because the question calls for information that is not relevant to the matter at hand, or because an answer constitutes hearsay.<sup>4</sup> When such objections are made, the Hearing Officer will usually allow the person who asked the question an opportunity to respond before ruling on the objection.

Parties may also ask the Hearing Officer to rule on a request during the evidentiary hearing. These requests are called motions. While most motions are filed in writing outside of the evidentiary hearing, in some cases a party will make a motion orally during the hearing. Depending on the complexity of the issue, the Hearing Officer may ask the other parties to respond orally at the time the motion is made, or may ask for the motion to be submitted in writing and for the other parties to reply in writing. If the motion is addressed by all parties orally at the hearing, the Hearing Officer may grant or deny the motion at that time, or may take it under advisement, meaning that he or she will issue a ruling on the motion at a later time.

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<sup>4</sup> Hearsay and exceptions to it are defined in rules 801 through 807 of the Vermont Rules of Evidence.