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State of Vermont
Public Utility Commission

December 11, 2023

Rep. Trevor Squirrell, Chair
Sen. Mark A. MacDonald, Vice Chair
Sen. Christopher Bray
Sen. Virginia "Ginny" Lyons
Sen. David Weeks
Rep. Seth Bongartz
Rep. Mark Higley
Rep. Carol Ode
Charlene Dindo, Committee Assistant

Dear LCAR members:

The Vermont Public Utility Commission ("Commission") is submitting these supplemental comments in response to comments made by Jonathan Dowds, Renewable Energy Vermont; Jake Clark, Encore Renewable Energy; and Andrea Cohen, Vermont Electric Cooperative, Inc., during the November 30, 2023, meeting of the Legislative Committee on Administrative Rules ("LCAR" or "Committee") addressing the Commission's proposed amendments to its existing Rule 5.400.

Based on the comments offered to the Committee on November 30, it appears that three of the proposed amendments have given rise to four concerns from commenters. Specifically, the commenters raised concerns about: (1) the addition of adjoining landowners and the Natural Resources Board to the list of persons entitled to receive a notice of a utility's or developer's intent to file a Section 248 petition at least 45 days before the petition is filed (Rule 5.402); (2) the addition of adjoining landowners and the Natural Resources Board to the list of persons entitled to receive notice that a Section 248 petition has been filed (Rule 5.407); (3) allowing intervention by notice rather than motion for adjoining landowners and the Natural Resources Board (Rule 5.409); and (4) the Commission's authority to adopt the amendments to each of these rule sections.

While most of the comments in opposition to the proposed amendments focused on the changes to Rule 5.409 that allow intervention by notice, as opposed to motion, by adjoining landowners, the Commission would like to address each area briefly in these supplemental comments.

1. The Commission's authority to adopt the proposed amendments.

For a detailed discussion of the Commission's legislative authority to adopt the proposed amendments, the Commission respectfully refers the Committee to the Commission's Responsiveness Summary submitted to LCAR as part of the Final Proposed Rule materials on November 1, 2023. Specifically, the Commission refers the Committee to pages 2 and 3 of the Responsiveness Summary for a discussion of its general authority to adopt the amendments; pages 9 and 10 for a discussion of its authority to expand the list of persons entitled to receive advance notice that a petition will be filed; pages 12 and 13 for a discussion of its authority to expand the list of persons entitled to notice that a petition has been filed; and pages 14 through 20 for a discussion of its authority to expand the list of persons entitled to intervene by a notice process rather than a motion process.

In addition to referring the Committee to the Responsiveness Summary, the Commission would like to take this opportunity to address concerns raised by the Committee's Vice Chair, Senator MacDonald, during the meeting of November 30. Senator MacDonald expressed concern that the amendments in question amounted to the Commission writing its own policy with respect to Section 248, a responsibility reserved to the Legislature.

The Commission agrees with Senator MacDonald that it is not the province of the Commission, or any administrative agency, to use the rulemaking process to create new policy on behalf of the State of Vermont. That authority is reserved to the Legislature. What is permissible in administrative rulemaking is for an agency to use its delegated authority to adopt rules that implement policy already enacted by the Legislature. This is what the proposed amendments achieve.

a. The delegated authority

The Legislature has expressly delegated statutory authority to the Commission to adopt rules of procedure in three separate statutory sections. First, 3 V.S.A. § 831(d) directs the Commission to adopt rules of procedure for contested cases that are subject to hearings. Second, 30 V.S.A. § 11(a) states that "[t]he forms, pleadings, and rules of practice and procedure before the Commission shall be prescribed by it." And third, 30 V.S.A. § 2(c) states that the Commission may initiate rulemaking proceedings on any matter within its jurisdiction. As discussed in the Responsiveness Summary, the proposed amendments fall within these grants of authority because they are procedural amendments, not substantive amendments. They define how a petitioner obtains Section 248 review, not what a petitioner must demonstrate to obtain a certificate of public good as the result of that review.

b. The legislated policy to be implemented

In 2016, the Legislature passed Act 174. Act 174 created the Access to Public Service Board Working Group to "review the current processes for citizen participation in PSB proceedings" and "make recommendations to promote increased ease of citizen participation in

those proceedings."[1] The three amendments at issue do not create policy. Rather, they are part of an ongoing series of steps taken by the Commission to implement the policy directive given to the Commission by the Legislature in Act 174. Further, the ultimate question to be answered in any Section 248 proceeding is whether a proposal under review will promote the general good of the State. Increasing the transparency of and ease of access to Section 248 proceedings through improved notice requirements and a simplified intervention procedure, available only to specified persons and entities who have a unique interest in the proposed action, is consistent with the public good determination required by Section 248.

c. State policy on renewable energy

The proposed amendments are also consistent with the State's legislated policy in support of the deployment of in-state renewable energy. The Commission believes that one of the most effective ways for the State to meet its renewable energy goals is to site and construct projects in a manner that is supported by the public. Growing and maintaining public support is best achieved through a process that is transparent and open, one that encourages early engagement and opportunity for resolution of concerns, between developers and those who are potentially most affected by a proposed project – most typically, adjoining landowners. A process that limits information and opportunities to engage and participate will only sow seeds of distrust in the Section 248 process and increase opposition to proposed projects, potentially even those that would otherwise be considered well sited with few impacts.

2. Expansion of the list of persons entitled to receive notice at least 45 days before the petition is filed (Rule 5.402).

The comments made during the November 30 meeting were generally supportive of expanding the list of persons entitled to receive the 45-day advance notice of intent to file a Section 248 petition. All commenters seemed to view the advance notice, in particular to adjoining landowners, as an opportunity to engage potentially concerned citizens early in the process and to seek avenues for resolving any concerns.

However, VEC expressed a related concern that an increase in the number of persons entitled to receive this notice will make it more difficult for petitioners to obtain waivers of the notice period as permitted by 30 V.S.A. § 248(f).[2]

The Commission has three responses to VEC's concern. First, provision of the notice is the statutory default and there is no substantive right to obtain a waiver of that notice requirement. The notice requirement is a procedural mechanism that is followed as part of the review of a Section 248 petition. While a petitioner can request a waiver of that requirement from a notice recipient, the notice recipient can decline to provide the requested waiver for any

[1] Act 174, § 15. At that time, the Public Utility Commission was known as the Public Service Board, or "PSB."

[2] Section 248(f) allows petitioners to request waivers of the notice period from municipal and regional planning commissions. The current version of Rule 5.400 allows petitioners to also request a waiver from a municipal legislative body, which is entitled to receive 45-day notice under Commission Rule 5.402(A). The proposed amendments allow petitioners to request waivers from all recipients of the 45-day notice. *See* proposed Rule 5.402.

reason, or even no reason at all. In short, there is no substantive statutory right to receive a waiver, only an opportunity to request one.

Second, while the Commission acknowledges that obtaining waivers from a larger group of persons may prove more difficult, the vast majority of Section 248 cases are filed following the notice process.[3] Use of the waiver provisions in Section 248(f) is very rare and typically is used only for small, non-controversial projects.[4] It is evident from the comments made at the November 30 meeting and a review of the list of persons entitled to receive the notice under the proposed amendment that the commenters concerns are largely directed at adjoining landowners. However, because the waiver provisions of Section 248(f) are used almost exclusively for small projects, the number of adjoining landowners is naturally limited in those cases, further reducing the asserted burden of seeking waivers.

Third, the worst-case scenario that VEC or another petitioner would face without a waiver of the notice requirement, would be to wait 45 days to file their petition after providing the required notice. In fact, in the significant majority of cases, the petition is typically not even filed on the 46th day after the notice was provided. Rather, it is filed weeks, and in some cases months, after the notice period has run.[5] In short, the notice period does not cause any significant delays in the filing and review of Section 248 petitions, and the benefits that arise from providing that notice that were recognized by all the commenters at the November 30 meeting outweigh any brief delays that might occur in the filing of a petition. The Committee should also keep in mind that in those cases where there is an urgent need for a petition to be filed, petitioners can use the provisions of 30 V.S.A. § 248(k), which allows for the filing of emergency petitions outside of the normal requirements of Section 248.

3. Expansion of the list of persons entitled to receive notice that a Section 248 petition has been filed (Rule 5.407).

Discussion of this particular amendment was limited at the November 30 meeting. However, the Commission remains concerned that written comments opposed to this amendment do not accurately reflect the language of Section 248. Commenters opposed to this amendment contend that the Commission cannot expand the list of persons or entities entitled to receive service or notice of a Section 248 petition beyond the service requirements set forth in Section 248(a)(4)(C), asserting that the requirements of that section are exclusive and exhaustive.

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[3] The amended list of persons entitled to receive the notice consists of: (1) the municipal legislative bodies and municipal and regional planning commissions in the communities where the project will be located; (2) adjoining landowners; (3) the host landowner(s); (4) the Department of Public Service; (5) the Agency of Natural Resources; (6) the Natural Resources Board; (7) the Division for Historic Preservation; (8) the Agency of Agriculture, Food and Markets; and (9) the interconnecting utility.

[4] In emergency situations, the 45-day advance notice provision would not apply. 30 V.S.A. § 248(k).

[5] VEC recognized this fact with respect to its larger projects in earlier comments to the Commission when VEC argued for a longer period of time in which to file petitions once the 45-day notices have been issued. "[For] longer linear projects, the 45-day notice oftentimes is submitted well in advance of a filing so that the utility can reach out from communications from entities that really won't engage you until you send out a 45-day notice." "The reality is, oftentimes the section -- the 45-day notice is what starts a lot of discussions with a variety of stakeholders, and when you have, for example, linear projects, half a year can go by really quickly. And the utility is diligently working on how to work on a variety of issues." Case No. 21-0861-RULE, tr. 9/2/21 at 66, 71.

These comments appear to conflate incorrectly the requirement of service of a complete copy of the petition with the requirement of providing a notice that a petition has been filed. Section 248(a)(4)(C) addresses who must receive a complete copy of a filed petition. It is silent as to the provision of notice that a petition has been filed. Therefore, even if that list could be read as exclusive and exhaustive, the only change that would need to be made to the proposed amendments is removal of the so-called "10-mile towns" from the list of those who must receive a copy of a petition for a wind generation project.[6] Because the remaining amendments only require notice that a petition has been filed – not service of a complete copy of the petition – they are not subject to the alleged limitations of Section 248(a)(4)(C) urged by the commenters. Further, the commenters are not only asking the Committee to object to the amendments before it, they are also asking the Committee to direct the Commission to delete the requirement in the existing rule that adjoining landowners receive notice that a petition has been filed.[7] This provision is not currently before the Committee, and it has previously been voted upon favorably by LCAR.

The Commission would like to reiterate two additional points. First, providing notice that a petition has been filed does not create a material burden or give rise to material expense for petitioners. As noted above, petitioners must already provide the notice to adjoining landowners so the amendment changes little in regard to filing burdens. Second, because the proposed amendments allow a petitioner to file its petition up to one year after a 45-day notice has been issued, it is important for recipients of the 45-day notice to also receive notice that the petition has been filed. A person who receives a 45-day notice who is not familiar with the fact that most Section 248 petitions are not filed immediately after the expiration of the notice period, might reasonably assume that the plans for a project have been abandoned after the passage of several months, only to discover otherwise when construction for an approved project begins.

4. Allowing intervention by notice rather than by motion for newly identified persons (Rule 5.409).

The concerns expressed by some about this particular amendment at the November 30 meeting again focused almost exclusively on adjoining landowners. The Commission would like to respond to four assertions made by some commenters at the November 30 meeting.

a. The Commission's gatekeeping function

Commenters at the November 30 meeting described allowing adjoining landowners to intervene by notice, rather than by a formal motion process, as the Commission abandoning its "gatekeeper" function, allowing persons without legitimate interests to become parties and engage in tactics designed to delay and make reviews more expensive.

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[6] Even this interpretation would run contrary to legislative intent given that many 10-mile towns would be entitled to automatic party status under 30 V.S.A. § 248a(4)(H). It would be an odd result for the Legislature to create a right to intervene for these towns on the one hand yet prohibit a requirement for service of a petition on those same towns on the other.

[7] *See* current Rule 5.402(B).

These concerns overlook the plain language in the proposed amendments on intervention. The amended language requires that any of the new persons with access to intervention by notice include with their notice filing "a list of specific issues on which the intervenor is seeking to participate and an explanation of how the intervenor's interests will be affected by a decision on the petition."[8] This language requires adjoining landowners to identify specific issues that are statutorily relevant to a Section 248 review in which they wish to participate actively. This allows petitioners and other parties an opportunity to respond and to seek limits on intervenor participation so that irrelevant issues are not used to unnecessarily increase the complexity of proceedings. Further, proposed Rule 5.409 expressly incorporates the provisions of Commission Rule 2.209(C) to interventions by notice under the proposed amendments. Rule 2.209(C) preserves the Commission's authority to restrict a party's participation, require a party to join with other parties with respect to appearance by counsel, presentation of evidence, or other matters, and otherwise limit a party's participation, all as the interests of justice and economy of adjudication require.[9] These provisions of the amended rule preserve the Commission's ability to act as "gatekeeper" and ensure that adjoining landowner participation is limited to relevant and legitimate interests while also recognizing that these individuals are often those most likely to have legitimate concerns about proposed projects.

b. Intervention by notice is limited by the text of the proposed amendment

Some of the comments at the November 30 meeting seemed to suggest that allowing adjoining landowners to intervene through a simplified notice process would lead to a significant increase in the number of persons seeking to intervene in Section 248 proceedings, as well as others, such as dark-money groups and the fossil fuel industry, seeking to take advantage of a lower intervention threshold to disrupt the deployment of renewable energy resources.[10]

The Commission is again concerned that this assertion is not based on an accurate reading of the proposed amendment to Rule 5.409. The proposed amendment adds the following to the list of those persons already entitled to intervention by notice, all of which are subject to the requirements and restrictions described above: the Natural Resources Board if the project site is subject to an Act 250 permit; the Division for Historic Preservation; any interconnecting utility; adjoining landowners; the host landowner(s); and, in the case of a wind generation project, the municipal planning commissions, municipal governments, and regional planning commissions for all towns wholly or partially within a radius of a minimum of ten miles of each proposed turbine on one or more of the following criteria: (b)(1) orderly development; (b)(4) economic benefit; and (b)(5) aesthetics, transportation, historic sites, and public investments.

The amended rule simply does not allow any person or entity beyond that list to use the simplified notice process to intervene in a Section 248 case.

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[8] Proposed Rule 5.409.

[9] Existing Rule 2.209(C).

[10] *See*, https://www.youtube.com/watch?v=4FQz9oCeDz0 beginning at 38:25.

c. Intervention in Section 248 cases is naturally self-limiting

The Commission disagrees with the premise that allowing intervention by notice to a select group of persons and entities, subject to all the restrictions incorporated into the proposed amendment, will result in a sudden and significant increase in interventions in Section 248 proceedings. This is because intervention decisions are not driven by the *process* that must be followed to intervene. They are driven by the level of interest or concern that one of the listed persons or entities has in a particular project.

Becoming a party to a Section 248 proceeding comes with both rights and responsibilities. The rights include the ability to participate in scheduling matters, to file testimony expressing your positions, to cross-examine other parties' witnesses, to file a post-hearing brief, and to appeal a Commission decision to the Vermont Supreme Court if you are dissatisfied with the outcome of a case. However, all those rights come with significant corresponding responsibilities, not the least of which is the commitment of time required by individuals whose occupation does not include appearing before the Public Utility Commission. Intervenors must respond to discovery requests from other parties, which can often be significant, and if they choose to be a witness, must subject themselves to cross-examination as part of an evidentiary hearing. They may also find themselves having to respond to motions or to file other papers subject to scheduling deadlines. In short, the mere availability of a notice process is highly unlikely to cause someone to intervene who otherwise would not seek intervention under the more formal motion process. The intent of making the notice process available is simply to make access to Section 248 cases less complex to the persons and entities set forth in proposed Rule 5.409, consistent with the intent of Act 174.

d. Intervention in Section 248 cases is unique

In considering other commenters' assertions that the Commission is without authority to allow intervention by notice to the limited list of persons in proposed Rule 5.409, the Committee should keep in mind that the Vermont Supreme Court has already found that Section 248 cases are unique, and that the Commission has discretion in determining who should be a party in those cases. The Vermont Supreme Court has described intervention in Section 248 cases as follows:

> In deciding whether to grant a CPG, the PUC is not deciding a case or controversy but rather "is engaged in a legislative, policy-making process" that requires it to use its "informed judgment." The PUC's procedures on intervention are governed by its own rules, which it must make and apply in pursuit of its mandate under 30 V.S.A. § 248 to ensure that the purchase and construction of new gas and electric facilities serve the general good of the State. It accordingly has flexibility to decide whose presence as a party would productively inform its policy-making.[11]

The proposed amendment to Rule 5.409, including the limiting restrictions described above, is consistent with Vermont Supreme Court precedent on intervention in Section 248

[11] *In re Petition of Green Mountain Power Corp.*, 2018 VT 97, ¶ 23.

proceedings, as well as the analysis presented on the Commission's statutory authority to adopt the proposed amendment.

The Commission thanks the Committee for this opportunity to provide these supplemental comments in response to concerns raised during the November 30 Committee meeting.

Sincerely,

/s/John J. Cotter_____
John J. Cotter, Esq.