112 State Street
4th Floor
Montpelier, VT 05620-2701
TEL: 802-828-2358

TTY/TDD (VT: 800-253-0191)
FAX: 802-828-3351
E-mail: puc.clerk@vermont.gov
Internet: http://puc.vermont.gov

State of Vermont
Public Utility Commission

MEMORANDUM

To: Senate Committee on Government Operations

From: Vermont Public Utility Commission

Re: Testimony on H.908

Date: April 9, 2018

The Vermont Public Utility Commission offers the following testimony regarding H.908:

§ 801. Short Title and Definitions

Subsection (b)(13), page 3:

The Commission fully supports the intent of the legislation that rules should be necessary, reasonable, and subject to a thorough regulatory analysis, and we believe that the bill largely achieves those ends. However, we are concerned about the definition of "arbitrary" in subsection (b)(13). We support the first two parts, subsections (A) and (B), as being consistent with Vermont Supreme Court precedent on what constitutes an arbitrary decision in the context of an agency rulemaking. However, we are concerned about subsection (C) because it introduces a new element into the concept of arbitrariness, in a manner that is somewhat vague and potentially standardless and could lead to lengthy and expensive litigation over the validity of rules.

The language in question states that a rule is arbitrary if "[t]he decision made by the agency would not make sense to a *reasonable person*." We all have heard the phrase "reasonable people can disagree," and what they often say is that the other side's position does not make sense to them. The Commission is concerned that the proposed language amounts to an open invitation for an opponent of a rule issued by any state agency to file a lawsuit challenging a rule's validity even when the rule has been through a transparent and public process, is within the authority of the promulgating agency, is consistent with legislative intent, is in fact not arbitrary as that concept has historically been understood, and has met all other APA requirements for a rule.

The Commission supports the goal of having a well-*reasoned* rule but is concerned about the potential litigation impacts and their attendant costs on state agencies and interested stakeholders engaged in rulemakings if that goal is sought to be achieved through the language in subsection (C). We believe the emphasis should be on whether the agency has engaged in a process that fully considers the varying

points of view and facts offered in the rulemaking process. As written, subsection (C) basically substitutes the judgment of a "reasonable person" for the judgment of an agency to which the Legislature has delegated responsibility to develop and apply its expertise in developing regulations, a delegation to which the Vermont Courts have appropriately given deference. Thus, when an agency promulgates a rule, it is necessarily engaged in the role of an expert body and at times must exercise reasoned judgment, based on the facts before it, in reaching a decision.

The Commission suggests that the following proposed amendment strikes the correct balance between H. 908's stated goals of public participation, reasonableness, thorough analysis, and increased efficiency in the rulemaking process (see Section 1). This is especially true if you consider that all three of the tests for non-arbitrariness must be met. First, there must be a factual basis for the agency's decision. Second, the decision made by the agency must be rationally related to the asserted factual basis. And third, as the Commission proposes, the agency must have used a process that fully considered the varying points of view and facts.

Suggested change: Strike the language in subsection (C) in its entirety and replace it with:

(C) The agency failed to utilize a process that fully considered the varying points of view and facts presented during the rulemaking process.

Subsection (b)(14), page 3:

The Commission is concerned that the definition of "guidance document" is overly broad and could be read to include any written order issued in a contested-case proceeding. The definition currently includes any "written record of general applicability" that was not adopted pursuant to the rulemaking process established by Title 3. While an order in a contested case is typically viewed as a document of specific applicability rather than general applicability, such an order can, for example, interpret statutes and establish precedent for how those statutes should be understood and applied in future cases. The Commission suggests the following proposed amendment to eliminate any potential ambiguity and believes it is consistent with the definition of "procedure" found at subsection (b)(8).

Suggested change: Add the following to the end of the definition of "Guidance document" on page 4:

…"Guidance document" does not include a written document issued in a contested case that imposes substantive or procedural requirements on the parties to the case.

§ 836. Procedure for Adoption of Rules

Subsection (b), page 12:

The Commission fully supports the intent of the legislation that information about proposed rules should be accessible to the public online. In fact, the Commission's new online filing and case-management system, known as ePUC, already accomplishes this goal. Each future proposed rulemaking will be a "case" in ePUC, and ePUC will include all the information and documents listed in subsection

(b)(2). As written, however, subsection (b)(2) would require the Commission to post the same information and documents on our website. Because the Commission sometimes receives hundreds of comments on a proposed rule, the duplicative posting of all the documents on our website would require significant staff resources and would not produce a commensurate public benefit.

Suggested change: Add the following new subsection (b)(4) on page 13:

(4) If members of the public can access all of the information required by subsection (2) through an agency's online case-management system, this information need not also be posted on the agency's website. Instead, the list of proposed rules posted on the agency's website shall include the case number for each proposed rule and instructions for accessing all of the information about the proposed rule in the agency's online case-management system.

§ 838. Filing of Proposed Rules

Subsection (d)(2), page 19:

This subsection requires that materials that are incorporated into a rule be readily available to the public. The Commission fully supports this concept so the public can find, read, and understand incorporated materials and thereby better understand the requirements of a rule. However, the Commission is concerned that there is some ambiguity in the way H. 908 defines the phrase "readily available."

First, the list of conditions in (d)(2)(A-C) on page 19 that determine whether materials are "readily available" does not indicate whether it is an additive ("and") or an elective ("or") list. It is key that this ambiguity be resolved.

Second, with respect to the language of (d)(2)(B), the Commission is concerned about the requirement that an adopting agency make incorporated materials available not only for inspection, but also for copying. In some instances, the only way an agency can obtain certain materials is to purchase them subject to a licensing or use agreement that does not allow for the copying and dissemination of the materials publicly. It may not be possible to comply with both the restrictions on obtaining materials and the stated requirement allowing copying of those materials. While the Commission supports the intent behind the proposed language, it respectfully suggests adding the words "unless prohibited by law or mandatory licensing agreement or other similar required contract" in (d)(2)(B).

Third, with respect to the language of subsection (d)(2)(C), the Commission is concerned about the extent of the exception provided by the language "unless the agency is prevented from providing such access by law." For example, if an agency is required to execute an agreement that allows public inspection but not public dissemination of incorporated materials, is that considered to be prohibited by law in the language as written? The Commission respectfully suggests that the same language suggested for (d)(2)(B) be added to (d)(2)(C) to clarify the extent of applicable restrictions on widespread public dissemination of materials subject to licensing or other similar agreements needed for accessing those materials. Because (d)(2)(C) recognizes the restrictions that may be imposed by

third parties on the ability of an agency to provide access to documents, we recommend, as stated above, that a similar limitation be included in (d)(2)(B). Finally, in (C), we do not see size as an issue in inspecting documents and suggest striking that limitation at the end of that subsection.

Suggested changes: Twice insert the word "or" in subsections (d)(2)(A) and (B) to avoid duplicative obligations; and include clarifying limitations in (d)(2)(B) and (C):

(A) Each filing states where copies of the incorporated code, standard, or rule are available in written or electronic form from the agency adopting the rule or the agency of the United States, this State, another state, or the organization or association originally issuing the code, standard, or rule; or

(B) A copy of the code, standard, or rule is readily available for public inspection and, unless prohibited by law or mandatory licensing agreement or other similar required contract, for copying in the principal office of the agency in the manner set forth in 1. V.S.A. § 316; or

(C) The incorporated code, standard, or rule is made available for free public access online unless the agency is prevented from providing such access by law, mandatory licensing agreement, or other similar required contract.

(The Government Operations Committee may also wish to consider whether the reference to the adopting agency is needed in subsection (d)(2)(A) because of the availability requirement in (d)(2)(B).)

§ 842. Review by Legislative Committee

Subsection (c), page 25:

As this language is currently written, a party challenging an agency's rule could seek to offer the Legislative Committee's action in evidence to support a claim that the rule is not valid. If a Court allowed admission of the substance of any action taken by that Committee, the members of the Committee could be called to testify at a deposition pursuant to Rules 30 and 45 of the Vermont Rules of Civil Procedure. We suggest adding language at the end of subsection (c) to serve as a counterpart to the current final sentence of this section, ensuring that Committee members' testimony cannot be compelled and that the sole effect of the Committee's action is to impose *on the agency* the burden of proving the validity of the rule.

Suggested change: Add a final sentence at the end of subsection (c) on page 25:

… The objection of the Committee shall not be admissible evidence in any proceeding other than to establish the fact of the objection, nor shall the existence of the objection or the reasons offered for the objection be considered probative in the court's determination of the validity of the rule.