House Committee on Energy and Technology
April 9, 2019
Testimony of James A. Dumont, Esq. on H.51, H.175 & H. 214

1. Overview

Thank you for allowing me to testify on H. 51, H.175 and H.214. I am testifying as a citizen of Vermont. Although my testimony will be based on my experience over the past 30 years representing citizens, ratepayers, environmental organizations and ratepayer advocacy organizations before the Vermont Public Utilities Commission and in the courts, none of my prior or present clients has approved of, authorized or paid for this testimony. I am providing this testimony as a citizen because I believe we must do everything we can to minimize climate change, and because Vermont could do a much better job than it is now doing to address this crisis.

I intend to summarize for you the process and standards which govern utility projects in Vermont, including the use of eminent domain. I will then explain how H. 51, H. 175 and H. 214 would change how fossil fuel projects would be addressed by the PUC and the courts in Vermont. I will address permit approval, eminent domain and whether these bills, if passed, would survive challenge in federal court. In a nutshell:

■Leakage of *natural gas (methane)* during extraction, transmission and distribution, produces *far worse impacts on our climate than the carbon dioxide produced by burning fuel oil.* Heating homes or generating electricity by burning natural gas, rather than oil, worsens our climate crisis. Each of these bills would help Vermont avoid increased use of *both* oil and natural gas. Halting one, but not the other, would not be progress.

■None of the bills would have any effect whatsoever on *interstate natural gas pipelines*, which are the single largest threat to Vermont's wetlands and rivers and the single most potent source of greenhouse gasses, of any project that might occur in Vermont. *Other* solutions that would address this threat *are* available to the legislature and, through rulemaking, to the Agency of Natural Resources.

■*H.51*, the fossil fuel infrastructure ban and ban on new natural gas facilities, is too narrowly drafted. The definition of "infrastructure" does not include generating stations, such as a facility that would burn oil or gas to generate electricity. Likewise, the definition already in statute of "natural gas facility" also excludes generating stations, so banning new natural gas facilities does not ban new natural gas generating stations. I propose language to broaden the definitions. If broadened, H. 51 would halt fossil fuel projects in Vermont other than interstate natural gas pipelines. If broadened, the bill also has better chances of surviving a federal court challenge.

■*H.175*, prohibiting use of eminent domain to take land for fossil fuel transportation or energy production facilities, is a narrowly focused bill that would have a major beneficial impact. Eminent domain is the sovereign power of the State of Vermont. The bill forbids use of that awesome power for a purpose that is against the interests of Vermonters – expanded use of fossil fuels. This bill seems unlikely to be struck down in court.

■*H.214* mandates that when deciding whether a natural gas project would serve the public good, the PUC must take into account the methane that leaks into the atmosphere during natural gas extraction and transmission. This leakage is why heating or generating power with natural gas is so destructive of the atmosphere. Existing statutory language already requires consideration of greenhouse gas impacts, but the bill mandates that the crucial facts of leakage be considered, and it adds important standards for the PUC to use when considering those facts. H.214 also requires consideration of out-of-state water quality impacts; PUC consideration of these purely out-of-state water impacts might not be upheld in court.

2. The Section 248 Certificate of Public Good Process and Standards

Section 248 of Title 30 requires a gas or oil pipeline, a high voltage electric line, or a fossil-fuel or nuclear electric generating facility to obtain a Certificate of Public Good (CPG) prior to construction. Detailed advance notice must be provided to affected towns and planning commissions. Detailed criteria are set forth.

The PUC and the Supreme Court have held that approval of a CPG pursuant to § 248 is "conceptual" and "legislative" in nature. It is unlike a traditional court or PUC dispute between opposing parties. The ultimate decision is that the PUC determines that "the public good" will be served. Because of the unusual conceptual, legislative nature of the approval, affected landowners *cannot* challenge an application on the grounds of its impacts on their own land or livelihood.

The attorneys' fees and expert witness costs that a landowner, citizen or pubic interest organization must spend in order to investigate and oppose a major § 248 application range from tens of thousands of dollars, at the low end, to well over $100,000. The PUC has denied some § 248 applications over the years.

Starting with the PUC's decision in 1990 in the Hydro-Quebec case, the PUC has considered the impacts of projects on greenhouse gasses. In that case, the flooding of enormous areas of sub-arctic land by massive new dams was predicted to release substantial quantities of greenhouse gases (largely methane), thus impairing *Vermont* interests. Similarly, these projects would have flooded nesting and staging habitat that is necessary for *Vermont* migratory waterfowl to survive during parts of their journeys. On the basis of the greenhouse gas and migratory waterfowl impacts that would be experienced in Vermont, the PUC restricted the size of the purchase to avoid triggering the construction of new dams. After the decision, § 248 was amended to explicitly include consideration of greenhouse gas impacts.

As of 2014 or 2015, based on work published initially by Cornell Professor Robert Howarth in 2011, a general consensus has emerged among scientists that methane leakage during gas extraction, transmission and distribution is significantly larger than previously known, that methane is a vastly more potent destroyer of the atmosphere than carbon dioxide, and that switching home heating or electricity generation from oil to natural gas worsens our climate crisis – and does so severely. We need to wean ourselves from both oil and gas.[1]

How out-of-state impacts, such as methane leakage in Pennsylvania or Ohio, may be considered in Vermont is an area of law that is uncertain and changing under the "dormant Commerce Clause" of the US Constitution, discussed in part 5 below.

3. *The Eminent Domain Process and the Limited Rights of Landowners*

Eminent domain is the legal power of the State of Vermont to take private property for a public use. Under our Constitution and statutes, private property is protected against this taking unless there is public need, and fair compensation is paid. In Vermont, as in every state, the legislature has delegated this power to utilities where needed to provide "public service" to the public.

In theory, a utility must prove public need before the utility takes away private property rights. But this is just in theory in Vermont.

The reality is that the utility takes private property, through eminent domain, without showing public need. This is because eminent domain does not commence until after a CPG has been issued, in issuing the CPG the PUC found "public good," and the PUC has ruled (*In re Grice*, Docket No. 7121, 7/21/06) that it would be "repetitious" and too time-consuming to require a utility to prove "need" in an eminent domain case because "public good" was already proven in the CPG case (which the affected landowner usually wasn't a participant in). Instead, in a condemnation case the utility must show only that the project is "reasonably necessary." In effect landowners defending against condemnation can only argue that their particular backyard or front-yard isn't really needed even though the project as a whole was already shown (in the CPG case) to be needed, or some variation on that theme.

Landowners can raise a challenge to the amount of compensation offered, but this often is impossible to do. Even if the landowner is only interested in obtaining fair payment (and does want to challenge the alleged "need"), the cost of hiring an expert appraiser and a lawyer exceeds the amount of compensation in most cases. The statutes do not require the utility to pay for attorneys' or appraisers' fees. Therefore, it is often impossible for landowners facing eminent domain to fight back against unfair compensation offered by a utility.

[1] For homeowners, cold-climate heat pumps, run off an electric grid that is not dominated by fossil fuel sources, have a much smaller greenhouse gas impact than either oil or gas furnaces.

No published or publicly available VT PUC or PSB decision -- other than one part of the *Grice* case -- has ever denied a Vermont electric, gas or other utility its requested condemnation rights. The *Grice* exception involved a high-voltage line. VELCO sought, and the PUC denied, authority to install an enlarged fiber optic line that VELCO would then rent out to commercial users, in addition to its high voltage line. The enlarged size and capacity of the fiber optic line had nothing to do with meeting electric reliability need (unlike the high voltage line itself and a smaller fiber optic line needed to monitor the high-voltage line). But the PUC's denial, as to the enlarged fiber optic line, was overturned by the Supreme Court.

In sum, Vermont's eminent domain process leaves landowners largely unprotected. H. 175 forbids use of that awesome power for a purpose that is against Vermont public policy – expanded use of fossil fuels.

4. *Interstate Natural Gas Pipelines – FERC Jurisdiction and Water Quality Certification*

Interstate natural gas pipelines are governed by the Natural Gas Act, which grants the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction – with one exception, § 401 Water Quality Certifications issued or denied by each affected state. A gas pipeline, e.g., from Pennsylvania through Vermont to Canada or Maine would fall outside PUC jurisdiction and would be controlled by the FERC process. No state statute or regulation can control that process.

NY and Connecticut, however, were able to protect their state's freshwater and marine resources against ill-conceived interstate gas pipelines in recent years by using their § 401 authority. Section 401 of the federal Clean Water Act prohibits issuance of any federal license, including a FERC permit for a natural gas pipeline, if the affected state has denied "Water Quality Certification" under § 401. NY and Connecticut denied § 401 certifications because pipeline proposals affected important marine and freshwater resources, and the pipeline companies had not demonstrated that alternative routing would have avoided or mitigated these impacts. The federal courts upheld NY's and Connecticut's decisions, because § 401 authority is not preempted by the Natural Gas Act.

Vermont, unfortunately, lacks the protections found in NY's and Connecticut's § 401 procedures. For example, in almost all cases the Vermont regulations do not require consideration of alternatives. Yet, consideration of alternatives lies at the heart of modern environmental review, and was the basis for NY's and Connecticut's decisions. VNRC, CLF and other organizations have petitioned the Agency of Natural Resources to commence rulemaking to address this problem. The legislature could fill this gap as well, but none of the bills under consideration would do so.

4. *The Dormant Commerce Clause*

The Commerce Clause of the Constitution (Article 1, § 8, clause 3) grants the Congress the authority to regulate interstate commerce. A state statute that discriminates against interstate commerce in favor of in-state commerce is usually a per se violation of this clause. A statute also will run afoul of the Commerce Clause if it imposes an undue burden on interstate commerce that

outweighs its local benefits – the so-called "Pike" test, referring to a 1970 US Supreme Court decision, *Pike v. Bruce Church, Inc.*

There is a third standard, one that has received relatively little judicial application. Under this standard, a statute that has the practical effect of exerting extraterritorial control over commerce that takes place wholly outside of the state's borders may be invalid.

The difficulty lies in determining what "control" means – and this could affect all three bills before this Committee. Some federal courts have held that state laws favoring or mandating clean power, such as renewable power or non-coal power, violate this standard, because they have the effect of controlling energy production in another state. Other courts have ruled that such mandates do not violate the Commerce Clause because there really is no control being exerted, and each state has the right to determine its own energy future.

Like the three proposed bills, the statutes at issue in those cases did not cite importation per se, but since every state (except Texas) lies in a multi-state regional power grid, the effect of all such statutes affected importation and therefore interstate commerce.

The U.S. Supreme Court has not yet weighed in on how to apply these standards to state statutes on clean power. The leading case, *Healy v Beer Inst.*, decided in 1989, involved a state statute regulating the in-state retail price of beer as compared to out-of-state retail pricing of beer – a case which does not readily translate to energy issues. Until the Supreme Court answers these questions, or until Congress acts to clarify this area, no lawyer can confidently predict how any proposed statute in this area, including each of the bills before the Committee, would fare.

6. *H.51 – Additional Language Is Needed*

H.51 bans new fossil fuel infrastructure. It also bars the PUC from issuing a CPG to a new "natural gas facility." The bill applies this prohibition to PUC, Act 250, ANR permitting and local zoning decisions.

I respectfully submit there are two major drafting errors in the bill.

First, the bill does not prohibit construction of new natural gas electric generating stations. The prohibition against issuing CPG's for a new "natural gas facility" does not accomplish this, because "*natural gas facility*" is defined in existing § 248 as constituting *only natural gas transmission lines*. Another part of § 248 requires a CPG for all electric generating stations, regardless of fuel source.

To remedy this omission, the bill should say "*natural gas facility or electric generation station that uses fossil fuel, such as natural gas or oil."*

Second, the definition of infrastructure is limited to facilities that transport fuel. A new natural-gas fired electric generating station or a new oil-fired electric generating station would fall outside the prohibition. The fix to § 248, suggested above, would not apply to Act 250, ANR or local zoning permits. It would apply only to the PUC.

Zoning and Act 250 – not the PUC and § 248 – govern gas *distribution* lines, unlike gas transmission lines. So it is not enough to change § 248.

If the definition of infrastructure remains unchanged and the reference to "natural gas facility" also remains unchanged, the effect would be to outlaw oil pipelines that cross Vermont to serve commerce in other states -- while allowing new oil or gas facilities to be constructed to generate electricity within Vermont.[2] I don't know of any reason to allow combustion of fossil fuels to generate power in Vermont but not allow transportation of such fuels.

This mismatch also would undermine the constitutionality of the statute. One could argue that the statute is not discriminatory, since both in-state and interstate oil pipelines are banned, but the *Pike* test does not depend on discrimination. It looks at effects. There would be an effect on interstate commerce. A judge would have to decide if the effect is undue.

If language were added to H.51 to include generating facilities, the bill would be stronger both in its effects and in its ability to withstand court challenge. H. 175 has the needed language. It defines infrastructure as including facilities or structures that would "produce electricity, heat or other energy using fossil fuel."

H.175 also contains language that would improve H.51 by excluding from the prohibition facilities or structures "necessary to more safely or more economically serve customers in an existing service territory."

7. *H.175 – Eminent Domain*

H.175 prohibits use of eminent domain for fossil fuel infrastructure, defined to include both pipelines and generating stations.

This approach has three advantages. First, it is narrow in scope and will affect only those projects that will require eminent domain.

Second, even though narrow in scope, it will cause the gas company to restrict its expansion to those projects which it can convince affected landowners to agree to, without the threat of condemnation. This means that any major expansion of gas in Vermont is unlikely.

Third, because this bill is limited to how the State uses *its* sovereign powers, it has a good chance of surviving a federal court challenge. Eminent domain is part of the sovereign powers of each state, like its power to adopt laws and its power to enforce its laws. Only one court case in US history has struck down, under the Commerce Clause, a legislative limitation on eminent domain powers, and that statute suffered from a defect H.175 does not contain. That statute pertained to railroad condemnation in South Dakota. It explicitly disallowed use of eminent domain unless in-state customers would be served by the rail facility. The court ruled this was

[2] Existing pipelines could be used to serve the new generating stations, because such pipelines already exist in parts of Vermont.

intentional discrimination against out of state rail users. The proposed bill disallows any use of eminent domain for fossil fuel facilities, regardless of who the users would be.

The Committee may find it important to learn that the intersection of the dormant Commerce Clause and climate change has recently been the subject of study in the academic community, and that law school professors who are experts on these issues have proposed exactly what this bill proposes. In "Energy and Eminent Domain," appearing in volume 104 of the Minnesota Law Review, Professors James Coleman and Alexandra Klass have written: "if a jurisdiction was particularly concerned about climate change, it might judge that fossil fuels no longer provide a public benefit" and therefore deny use of eminent domain for fossil fuel projects. The article notes that several states have already done so, for example, by denying use of eminent domain for oil pipelines.

8. *H.214 – Upstream Leakage and Water Quality Impacts*

H.214 mandates consideration of leakage of methane during natural gas extraction and transmission. Although § 248 already requires consideration of greenhouse gas impacts, the bill mandates that the crucial facts of leakage be considered, and it adds important standards for the PUC to use when considering those facts. This is a very significant improvement.

H.214 also requires consideration of out-of-state water quality impacts. None of these impacts are experienced in Vermont. This looks like an attempt to regulate conduct in other states. Under the *Healy v. Beer Inst.* analysis, PUC consideration of these purely out-of-state water impacts might not be upheld in court.

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