

A Guide to Evidentiary Hearings

Vermont Public Utility Commission



PUBLIC UTILITY COMMISSION

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Introduction

Many 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.¹ 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.² 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.³

Evidentiary hearings can be held in person or remotely. Remote hearings are typically held by videoconference, although there is an option to participate in remote hearings by phone. Tips for participating in remote hearings are included in the last section of this guide.

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

² To participate formally, you must first apply for (and receive) “intervenor” status. The case schedule usually includes a deadline for seeking intervention.

³ General information about the Commission is available in the separate document “A Citizen’s Guide to the Public Utility Commission” that is available at: www.puc.vermont.gov/document/citizen-guide-public-utility-commission.

Before the Hearing

A number of steps occur before an evidentiary hearing to help ensure a smooth and efficient hearing. 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 used by the parties to ask questions (cross-examining) about the prefiled testimony.
- The Hearing Officer⁴ 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.
- Witnesses must carefully review their own prefiled testimony and exhibits. If any corrections are needed, a witness must inform the party who is sponsoring that witness so that the party can file corrected versions of those documents before the hearing.
- All exhibits that a party plans to use during the hearing must be filed with the Commission before the hearing, including any exhibits to be used in cross-examining a witness. To file cross exhibits in ePUC, select “Add Cross Exhibit” from the “Select Action” menu in the case.
- If the Commission has granted a party’s request to file documents in hard copy (paper) instead of ePUC and that party intends to use any cross exhibits, that party must verify with Commission administrative staff before the hearing that the Commission has received the party’s cross exhibits and uploaded them on their behalf into ePUC. If the hearing is in person and the cross exhibits are not yet in ePUC, the party must bring to the hearing enough paper copies for all other parties and the Hearing Officer. These copies must be distributed before the hearing starts.

⁴ 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.

- Sometimes before the hearing, the parties will stipulate to (agree on) a list of prefiled testimony and exhibits that can be admitted into evidence without objection. In those instances, before the hearing, one party (usually the petitioner) will file a document that lists all the agreed-upon documents. This document is often referred to as an “exhibit list” even though it can also include prefiled testimony.
- When they testify, witnesses must have with them copies of their prefiled testimony, exhibits, and their responses to any discovery requests. During in-person hearings, witnesses should bring these documents with them to the witness stand.

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 by 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 often ask the parties to attend a prehearing meeting with Commission staff one-half hour before the evidentiary hearing to discuss any of the issues identified above so that the hearing can start without undue delay when the Commissioners arrive to the hearing.

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.⁵ If a party has an attorney, the attorney states 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.

⁵ A party’s representative speaks for that party during the hearing, including conducting cross-examination, arguing motions, etc.

Calling Witnesses and Admitting Prefiled Testimony and Exhibits

Prefiled testimony and exhibits are generally admitted into evidence in one of two ways: (1) by stipulation, if all parties agree on which documents should be admitted, or (2) on an individual witness-by-witness basis.

1. If the parties have stipulated to the documents that should be admitted, the Hearing Officer will usually admit the exhibit list and all documents included on that list into the evidentiary record after confirming the accuracy of the list and the absence of objections by the parties.
2. 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.”
3. Mr. Johnson would sit at the witness stand if the hearing is in person, or turn his camera on if the hearing is remote,⁶ 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).
4. 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?”
5. After the witness is sworn in, if his or her prefiled testimony and exhibits were not already admitted into the evidentiary record (for example, by stipulation), they must be admitted now. 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:

⁶ Tips for participating in remote hearings are included in the last section of this guide.

- 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 (or exhibit) of (witness name) dated (date of testimony)?
- Was this testimony (or exhibit) prepared by you or under your direct supervision?
- Do you have any changes to make to this document? **Note:** If a witness needs to make corrections to testimony or exhibits at an in-person 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 before the hearing), 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 an in-person 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 can 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 representative will then move for the admission of the witness's 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(D), objections to prefiled testimony and exhibits must be made at least 14 days before the hearing, unless the prefiled testimony or exhibits were filed fewer than 21 days before the hearing, in which case objections must be made within 7 days of the objected-to filing. 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 usually 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.⁷

⁷ As explained further in the Miscellaneous section later in this document, objections must be based on the Vermont Rules of Evidence.

6. 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 those 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 whether 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. All questions during redirect examination must relate directly to information that arose during the cross-examination. In other words, redirect examination is not a time to raise new issues that have not been previously discussed. 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.

After any redirect examination is completed, the Hearing Officer will “excuse” the witness. At an in-person hearing, the witness will then leave the witness stand. At a remote hearing, the witness will turn his or her camera off.

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 stage of the hearing. However, if issues are raised, such as through 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. The Commission must make findings on all the criteria applicable to that project; if an 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 form 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 by a specified deadline for the Commissioners to consider.⁸ Parties may also request to present oral argument to the Commissioners in response to the Hearing Officer's proposal for decision. The Commission then issues the final decision. In a case heard directly by the Commissioners, no initial proposal for decision is issued. Instead, the Commission issues its final order without that interim step.⁹

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

⁸ Parties' comments on a proposal for decision should not include new issues or arguments that were not raised in the filings before the Hearing Officer.

⁹ If a party disagrees with the decision in the Commission's final order, it can file a motion for reconsideration of that decision within 28 days after the final order was issued. Motions for reconsideration should not include new issues that could have been raised previously in the case.

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 that was 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 on by reasonable people in their daily lives.

The Rules of Evidence can be found here:

www.lexisnexis.com/hottopics/vtstatutesconstcrules/ (click “Vermont Court Rules”)

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.¹⁰ 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. Most motions are filed in writing outside of the evidentiary hearing, but 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.

¹⁰ Hearsay and exceptions to it are defined in rules 801 through 807 of the Vermont Rules of Evidence.

Tips for Participating in Remote Evidentiary Hearings

The Commission uses GoToMeeting to conduct remote evidentiary hearings. Here are some tips to help you prepare for and participate in such a hearing.

Before the Hearing

- Prepare your space, keeping in mind that both your space and you will be on camera.
 - Official representatives for parties and *pro se* individuals who are representing themselves will be asked to be on camera the whole time (except during breaks).
 - Witnesses will be asked to be on camera while testifying and otherwise keep cameras off.
- Because you will be required to use screen sharing to share any documents you refer to while questioning witnesses, you should (1) close out of unnecessary applications so that others do not see your private notifications and (2) open up all the documents you plan to use before the hearing so that they are ready.
- If you have not used GoToMeeting before:
 - Download the app before the meeting, using the link in the hearing notice.
 - Take a look at GoToMeeting's Attendee Guide:
<http://support.goto.com/meeting/new-attendee-guide>

During the Hearing

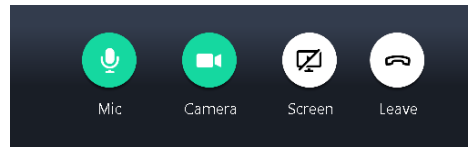
- Please mute your microphone unless you are speaking. This will minimize background noises, which can be very disruptive.
- If you have joined by phone, then, each time you begin talking, please identify yourself by name and affiliation for the court reporter.
- It is important for people to avoid talking over one another. However, if you have an objection, you must raise it at the moment the objection arises.
- During breaks in the hearing, please turn your camera off and mute your microphone.
- When you are questioning witnesses, you will be made the presenter in GoToMeeting. You should share any documents you refer to on your screen by

clicking the “share screen” icon. Alternatively, someone else from your firm or company may show the documents for you during your questioning. Verbally, please clearly identify the document you are showing for the court reporter. For example, “I’m showing Department-Cross-1.” When you are done with the document, please click “stop sharing screen.”

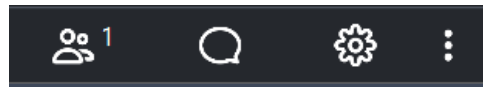
- To save time, when moving from page to page in a pdf document, instead of scrolling, you can use the shortcut “Ctrl-Shift-N.” Then enter the page number where you want to go.
- You are welcome to use GoToMeeting’s “chat” function to discuss any technical problems you may be having (such as with your audio or video). Do not type anything substantive about the case. Information in chat messages is not recorded and is not part of the transcript of the hearing. While GoToMeeting allows you to send private chat messages, the default is that chat messages are sent to all meeting attendees. Because of the potential to inadvertently send your chat to all meeting attendees, the Commission recommends that the chat function not be used to send private, substantive messages about the case to other parties. You must not, under any circumstances, send substantive private chats to any Commissioners or Commission staff.
- If you experience technical difficulties, try to rejoin the GoToMeeting or call in to the hearing using the GoToMeeting telephone number that was provided in the hearing notice.
 - If you are able to rejoin, let the Hearing Officer or Commissioner presiding over the hearing know so that he or she can summarize what happened and can revisit any questions on which an objection may have been allowed, including any admission of an exhibit.
 - If you are unable to call in or rejoin the GoToMeeting, notify the GoToMeeting platform manager immediately via email, or notify the Clerk of the Commission immediately via email or phone. The hearing will be paused until the issue is resolved.
- In general, if technical difficulties cannot be resolved within 30 minutes, the hearing will be rescheduled. Either the platform manager or the Clerk will send an email to all parties notifying them that the hearing will be rescheduled. A notice will also be posted in the case in ePUC.

Key GoToMeeting Controls

In the **bottom center of your screen** are the controls for muting/unmuting your microphone, turning your camera on and off, sharing your screen with other hearing attendees, and leaving the meeting.



In the **top right of your screen** are the controls for seeing the list of participants on the call, sending (or reading) a chat, and changing your camera and audio settings.



In the **top center of your screen** is the control for changing whom you view on your screen.

