Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

Bennett L. Ross
202.719.7524
BRoss@wileyrein.com

April 26, 2016

VIA ELECTRONIC MAIL

Senator Tim Ashe, Chair
Senate Committee on Finance
Vermont Senate
115 State Street
Montpelier, VT 05633

Dear Senator Ashe:

Our firm is regulatory counsel to Vermont Telephone Company, Inc. ("VTel"), which has asked that I express the company's concerns regarding H.870, a bill recently passed by the Vermont House of Representatives that proposes to make various amendments to Vermont telecommunications law. The bill is legally flawed in multiple respects.

Among the changes contemplated by H.870, the bill proposes to amend the process in 30 V.S.A. § 248a for obtaining from the Vermont Public Service Board ("Board") a certificate of public good for telecommunications facilities. As discussed in greater detail below, these proposed changes are inconsistent with federal law, specifically the Spectrum Act,[1] the Communications Act,[2] and the authoritative administrative decisions of the Federal Communications Commission ("FCC") interpreting these and other relevant federal statutes.[3] H.870 also proposes to amend 30 V.S.A. § 7515 pertaining to state universal service. As also discussed below, this proposed amendment is likewise inconsistent with state and federal law and also violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

---

[1] Pub. L. No. 112-96, § 6409(a), 126 Stat. 156, 232-33 (2012) (codified at 47 U.S.C. § 1455(a)).

[2] Pub. L. No. 73–416, 48 Stat. 1064 (codified at 47 U.S.C. § 151 et seq.).

[3] *See, e.g.*, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) ("*Infrastructure Order*"); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(7)(B)*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("*Shot Clock Order*").

Proposed Amendments to 30 V.S.A. § 248a

The proposed changes to the process for obtaining a certificate of public good threaten to inhibit the provision of wireless service and are inconsistent with federal law in at least three ways. *First*, H.870 proposes to establish new standards for findings that the Board must make before it can issue a certificate of public good. These standards are unduly burdensome and intrude on areas reserved to the Federal Government. By way of example and not limitation:

- Section 248a(c)(3)(B)(iv) purports to require applicants seeking to erect new support structures to demonstrate that collocation on an existing facility would "cause radio frequency interference that will materially impact the usefulness of other existing or permitted equipment at the existing or approved tower or facility and such interference cannot be mitigated at a reasonable cost." But state regulation of the technical and operational aspects of wireless service is preempted by federal law. As the Second Circuit has recognized, "Congress gave the FCC the exclusive authority to grant licenses to telecommunications providers and it intended the FCC to possess exclusive authority over technical matters related to radio broadcasting."[4] The FCC has promulgated various technical and operational standards for wireless telecommunications service and has made clear that state and local governments do not have the authority to establish or enforce their own standards or even enforce FCC standards for wireless service.[5] Consequently, no state or local government may enact *any* regulations pertaining to these matters, including regulations that purport to require

---

[4] *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 100 (2d Cir. 2010); *see also Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963) (recognizing that the FCC's control "over technical matters" is "clearly exclusive" of State and local regulation).

[5] *See, e.g.*, *Petition Of Cingular Wireless LLC For A Declaratory Ruling That Provisions Of The Anne Arundel County Zoning Ordinance Are Preempted As Impermissible Regulation Of Radio Frequency Interference Reserved Exclusively To The Federal Communications Commission*, Memorandum Opinion and Order, 18 FCC Rcd. 13126 (2003).

demonstration of non-interference. "States may not enter, in any respect, an area the Federal Government has reserved for itself."[6]

- Section 248a(c)(3)(A) would require applicants to provide propagation maps for every potential alternative solution to a proposed new support structure and to compare these maps with each other and the proposed new site. This is a significant new burden in terms of information that needs to be collected, analyzed, and provided, and would cause undue delay in the deployment of wireless facilities. It is also unnecessarily overbroad. It will be clear in many instances—for example, collocating on a facility at the far edge of a gap in coverage—that a potential alternative site will not be an adequate replacement for a proposed site. These requirements would only serve to raise the cost and delay the siting of wireless facilities.

- Section 248a(c)(3)(B) would require applicants to disprove affirmatively the suitability of potential collocation sites through the establishment of multiple burdensome criteria, including the unlawful radio frequency interference provision described above. The Communications Act prohibits regulations that "have the effect of prohibiting the provision of personal wireless services," and requires state and local authorities to substantiate any application denials with "substantial evidence."[7] Courts have routinely rejected attempts by state or local governments to shift these burdens onto wireless carriers through burdensome regulatory schemes and onerous application processes,[8] and Section 248a(c)(3)(B) would ensure that H.870 meets a similar fate.

---

6 *Arizona v. United States*, 132 S. Ct. 2492, 2502, (2012) (invalidating Arizona scheme designed to enforce federal immigration law).

7 47 U.S.C. § 332(c)(7)(i), (iii).

8 *See, e.g., T-Mobile Ne. LLC v. City Council of City of Newport News, Va.*, 674 F.3d 380, 387 (4th Cir. 2012) ("[W]e ask only whether the denial—not the application itself—is supported by substantial evidence."); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 52 (1st Cir. 2009) ("[T]here are limits on town zoning boards' ability to insist that carriers keep searching regardless of prior efforts to find locations or costs and resources spent.").

Second, H.870 proposes to lengthen the amount of time necessary for the Board to approve a wireless facility. Specifically, Section 248a(e) would extend from 45 days to 60 days the notice that must be provided "to legislative bodies and municipal and regional planning commissions in the communities in which the applicant proposes to construct or install facilities" "prior to filing an application for a certificate of public good."

This provision would make worse what already appears to be an end-run around certain timelines for wireless siting approvals established by federal law that are triggered by the filing of an application. The *Infrastructure Order*, which authoritatively interprets Section 6409(a) of the Spectrum Act, provides that certain qualifying applications must be approved within 60 days or be "deemed granted" by the operation of federal law.[9] Similarly, the *Shot Clock Order*, which authoritatively interprets Section 332(c)(7) of the Communications Act, establishes that applications which do not qualify under Section 6409(a) must presumptively be decided within 90 days (collocation applications) or 150 days (all other applications).[10] It is difficult to see how lengthening the amount of time necessary to get a wireless facility approved complies with the federal policy of eliminating "unreasonable delays in the personal wireless service facility siting process."[11]

Third, in numerous places H.870 proposes to strengthen the effect of the "substantial deference" paid by the Board to regional and local authorities.[12] The bill proposes to define "substantial deference" to mean that "the plans and recommendations [of regional and local authorities] are presumed correct, valid, and reasonable."[13] This definition is contrary to Section 332(c)(7) of the Communications Act, which does not create a presumption of correctness, but places on state and local authorities a "reason-giving obligation" to support their decisions with "substantial evidence."[14]

---

9 *See Montgomery Cty., Md. v. FCC*, 811 F.3d 121, 126 (4th Cir. 2015).

10 *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1867 (2013).

11 *Id.*

12 *See* §§ 283a(c)(2), (h)(1)-(2), 4412(8)(C).

13 § 283a(b)(5).

14 *T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 815 (2015) (interpreting 42 U.S.C. § 332(c)(7)(iii)).

Proposed Amendment to 30 V.S.A. § 7515

In addition to burdening wireless deployments by proposing to amend the process for obtaining a certificate of public good, H.870 proposes to allow the Board, based on the recommendation of the Commissioner of Public Service, to rescind a company's ability to receive universal service support or revoke its designation as a Vermont eligible telecommunications carrier designation if the "company or one of its affiliates has not provided adequate deployment information requested by the Director for Telecommunications and Connectivity under subsection 202(e)(c) of this title." This proposed amendment is legally unsustainable as well.

First, the proposed amendment would create a conflict with Vermont law by purporting to allow the Board to sanction a company for its failure to provide information requested under subsection 202(e)(c), even though that statute does not require companies to provide any information in response to a Board request. Rather, subsection 202(e)(c) expressly contemplates only the "voluntary disclosure of information regarding deployment of broadband, telecommunications facilities, or advanced metering information that is not publicly funded."[15] Instead of authorizing the Board to compel a company to provide information about its deployment activities and plans, subsection 202(e)(c) creates incentives for the voluntary disclosure of such information.[16]

At bottom, subsection 202(e)(c) gives a telecommunications service provider the right to refuse, for its own business reasons, to disclose deployment information to the Board. However, the proposed amendment would purport to authorize the Board to punish a telecommunications service provider for exercising that right – an obviously nonsensical legislative outcome.

Second, the bill would create a conflict with federal law by purporting to authorize the Board to seek information that it cannot lawfully obtain. Specifically, Congress

---

[15] 30 V.S.A. § 202(e)(c)(1) ("The Director may request from telecommunications service providers voluntary disclosure" of deployment information).

[16] 30 V.S.A. § 202(e)(c)(2) (authorizing the entry of a "nondisclosure agreement with respect to any voluntary disclosures" and permitting "voluntarily provided information" to be furnished to a "third party," which is authorized to disclose only "aggregated information" to the Director).

expressly preempted the regulation of rates of and market entry for mobile telephone service. Specifically, section 332(c)(3)(A) of the Communications Act states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[17] Federal preemption extends to state regulation of coverage areas and location of wireless facilities and infrastructure.[18]

Here, federal law prevents the Board from compelling a mobile telephone service provider to disclose deployment information.[19] It is irrelevant for preemption purposes that the bill purports to authorize the Board to extract mobile deployment information indirectly from an affiliate as a condition to receiving universal service support rather than directly from the mobile telephone service provider itself.[20]

Finally, the language that would authorize the Board to sanction a company for its failure to provide information requested under subsection 202(e)(c) also violates the Equal Protection Clause of the Fourteenth Amendment. Despite being drafted in general terms, it appears that the language is intended to target a single company—VTel. The Supreme Court has often "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for

---

17 47 U.S.C. § 332(c)(3)(A).

18 *See, e.g., Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000) (finding that claims related "to the number, placement and operation of the cellular towers and other infrastructure" are preempted by federal law because they "tread directly on the very areas reserved to the FCC").

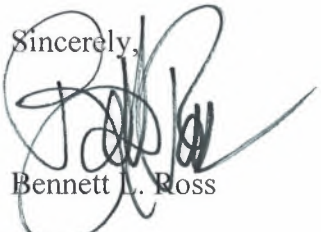
19 The Vermont Legislature apparently recognized as much in enacting 30 V.S.A. § 202(e)(c), which makes the disclosure of deployment information by any mobile telephone service provider entirely voluntary.

20 *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (preemption applies when "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks and alterations omitted).

the difference in treatment."[21] The provision of H.870 that makes information disclosures voluntary for the industry but mandatory for VTel cannot survive equal protection analysis because it is targeted at VTel and not reasonably related to the promotion of any legitimate government purpose.

For these reasons, VTel respectfully urges the Senate Finance Committee to reject H.870.

Sincerely,



Bennett L. Ross

BLR:rw

cc: Dr. Michel Guité

---

21 *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding plaintiff can allege an equal protection violation "by asserting that state action was motivated solely by a ' "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective" ' " and collecting cases).